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Objections to Treaty Reservations: A Comparative Approach to Decentralized Interpretation

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A Comparative Approach to Decentralized Interpretation

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Treaty practice is a central activity of states in international law, yet there is relatively little scholarship on how states differ in their approaches to treaties.[1] This chapter examines a particular aspect of treaty practice, namely the use of objections to reservations, as an example of the comparative international law project described by the editors in their introduction to this volume.[2] The practice of objections, it argues, occurs when states have divergent interpretation of treaty requirements, but also illustrates the differential propensity of states to push their particular views of the object and purpose of treaties. Objecting states are providing a kind of collective good among the treaty parties, serving to help advance normative goals on behalf of the group.

Objections to reservations is a topic on which there is scarce case law, limited doctrinal work, and virtually no empirical work.[3] Basic questions, including the

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1. For a prominent exception, *see* Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, *in* NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis et al. eds., 2005); *see also* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., 2010).

2. Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Conceptualizing Comparative International Law*, at 6 (this volume) (defining the practice of comparative international law as "identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law").

3. Limited empirical work includes M. De Pauw, *Women's Rights: From Bad to Worse? Assessing the Evolution of Incompatible Reservations to the CEDAW Convention*, 77 MERKOURIOS 51 (2013). An important article covering some of the same terrain as this chapter is Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002). *See also* Martin Scheinin, Reservations to the International Covenant on Civil and Political Rights and Its

legal effect of objections, remain unanswered. Simply put, we don't know what leads states to object to reservations, nor what the impacts of those objections are. This chapter starts to document the extent of the phenomenon in the context of human rights treaties. It focuses in particular on the International Covenant on Civil and Political Rights, one of the most prominent human rights treaties, and one that has a rich set of both reservations and objections.[4]

One methodological advantage of this focus on a single treaty is that it allows us to use a complete sample of a reservations and objections, providing leverage for understanding comparative treaty interpretation.[5] Another feature of this data is that it allows us to focus our comparative lens not on courts, but on national executives. Reservation practice is generally centered in the executive, although in some countries legislatures may play a role when they attach reservations, understandings, and declarations as a condition of ratification. Objections to reservations, on the other hand, are more narrowly concentrated in the executive, specifically in the legal departments of foreign ministries.[6] The objection is an interpretive act by executive officials, making assertions about the requirements of a treaty, typically about the incompatibility of a particular reservation.

The chapter first reviews the legal background on objections to reservations, and then provides a theory of which states are likely to engage in this form of bilateral activity within a multilateral scheme. It then provides descriptive and empirical analysis of objections to reservations to the International Covenant on Civil and Political Rights (ICCPR), along with some data on other prominent human rights treaties. Finally, the chapter speculates on doctrinal implications of the analysis. Treating objections to reservations as a form of decentralized interpretation has implications for monitoring and enforcement of treaty norms, as well as how we ought to structure the law of treaties. Objections are not simply expressive acts or one-off decisions, but should be encouraged as a way of making treaty regimes more robust.

I. WHY ARE OBJECTIONS NEEDED? LAW AND THEORY

Why do states object to reservations? To understand this, we must first understand reservations. We begin with a prototypical multilateral treaty negotiation. Several states get together to negotiate a treaty. One state wants to join the treaty, but has concerns about one particular provision—either because it does not think that it can get the treaty ratified at home, or because the provision would impose special

Optional Protocols—Reflections on State Practice (2004) (unpublished manuscript), http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0411i/martin%20scheinin-eng.doc.

4. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter ICCPR).

5. *See* Katerina Linos, *Methodological Guidance: How to Select and Develop Comparative International Law Case Studies* (this volume).

6. *See also* Ashley S. Deeks, *Intelligence Communities and International Law: A Comparative Approach* (this volume).

costs on the state. The other states would like that state to be inside the regime, but do not want to give in on the provision as a general matter. There are several options: (1) the other states could conclude the treaty among themselves, excluding the state in question; (2) they could allow an explicit carveout of the particular provision, making it explicitly inapplicable to the state in question; or (3) they could conclude the treaty, but allow states to make reservations of minor provisions.

The last option is the one that has been adopted in modern treaty law and practice, a decision that emphasizes breadth of participation over depth of obligation. Reservations are generally allowed so long as the treaty in question does not prohibit them, and the reservation is not "incompatible with the object and purpose of the treaty."[7] Reserving states must inform the other treaty parties of the reservation.[8] Reservations are then deposited along with the instrument of ratification with the depositary; this gives the other states parties the opportunity to object within one year of being informed.[9] An objection is an announcement by a state that it does not accept (fully or in part) a reservation made by another state; often they will be accompanied by a claim that the reservation violates the object and purpose of the treaty. As is evident, objections typically occur early in the formation of the treaty regime, after the instrument has been negotiated but during the process of ratification. [10] If no objection is lodged within the year, the state is deemed to have accepted the treaty reservation, and the reserving state is deemed to be a party to the treaty.

Before delving into objections, we should clarify why option 3 (allowing reservations) has been preferred over option 1 (multiple treaties among the treaty parties) or option 2 (an explicit carveout for one state). The answer in both cases is that it saves on transaction costs. Indeed, historically reservation practice evolved out of the classical scheme of unanimous consent over treaty provisions (option 1 above). Excluding a state, on the basis of a single provision it would not agree to, does not in any way preclude the formation of bilateral relations between that state and some of the others, absent the provision. So the excluded state could go to each of the various treaty parties, negotiate a treaty that is similar but without the single excluded provision. It would still get some of the treaty benefits, but with significant transaction costs in terms of multiple bilateral negotiations. The scheme of allowing a state to "reserve" was a way of avoiding these transaction costs, while shifting the burden onto states that did not accept the reservation.[11] Option 2, an ex ante carveout,

7. Vienna Convention on the Law of Treaties art. 19, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

8. *Id.*, art. 23.

9. *Id.*, art. 20.5.

10. They may occur before or after the treaty actually enters into force, depending on the time of the reservation.

11. Swaine argues that the Pan-American system used this scheme. Edward Swaine, *Treaty Reservations, in* THE OXFORD GUIDE TO TREATIES 277, 282 (Duncan Hollis ed., 2012). *See also* Edward Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006).

would also raise transaction costs in the context of complex multilateral schemes involving polycentric choices.

The scheme of allowing reservations was blessed by the International Court of Justice in the famous case *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.*[12] The Court considered whether reservations to the Genocide Convention were allowable, given that the Convention was silent on the matter. The Court allowed the reservations on the theory that human rights treaties required broad consent, and that reservations were worth it to obtain the desired universality. The Court famously limited reservations, though, to those that did not conflict with object and purpose of the treaty, language that was later incorporated into the Vienna Convention.[13] In other words, minor reservations were allowed, but core obligations could not be avoided. This created a need for interpretation as to what exactly constitutes the object and purpose of a treaty.

What is to prevent a state from gratuitously reserving core obligations? In the absence of a court of general jurisdiction to act as an authoritative interpreter, the possibility of divergent views is great. The interpretive "enforcers" of the object and purpose requirement were to be other states, which could object if an incompatible reservation was issued. Objections thus originate as a decentralized mechanism of monitoring treaty obligations in a scheme designed to maximize breadth but not depth. As we will describe below, there is likely to be an undersupply of this monitoring.

The legal effect of the objection depends in the first instance on the objecting state. The basic rule is that, unless the objecting state asserts that the entire treaty is not in force as between the two states in question, only the limitations contained in the reservation will not apply. As Article 21(3) of the Vienna Convention on the Law of Treaties puts it, "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation." But this is odd: the result in many cases may be the same that would obtain if no objection were filed, since the standard effect of *accepted* reservations is that the provision does not apply![14] The objector can also assert that the treaty has no force at all between the two states.[15] But, in the human rights context in particular, this is a weak remedy. As human rights treaties are largely concerned with *others'* performance of an objective set of standards for treatment of their own populations,

12. Advisory Opinion, 1951 I.C.J. 15 (May 28). The reservation of the United States was particularly controversial. The second reservation read "[t]hat nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

13. *See also* Vienna Convention on the Law of Treaties, *supra* note 7, art. 19(c).

14. *See* Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 PA. L. REV. 399, 438 (2000); see also the discussion in Goodman, *supra* note 3, at 531–35. Admittedly, this is not quite accurate when a reservation simply modifies a provision. In that case, objecting removes the provision entirely, whereas non-objections would lead to the reserved version applying.

15. Vienna Convention on the Law of Treaties, *supra* note 7, art 21(3).

asserting that the treaty has no application does little good to advance the object and purpose of the treaty.[16]

In many cases, the objector simply claims that the reservation violates the object and purpose, that the reservation is generally invalid, or that it hopes that the reserving state will withdraw the reservation. These can be seen as "fire alarm" claims that seek to mobilize other states to follow the particular interpretation that has been advanced. Here the objecting state is taking action to note that another state is undermining the treaty regime, in some sense engaging in a kind of monitoring and enforcement action.

Some states, particularly Nordic countries, have asserted a right to object in a way that retains full effect of the treaty as originally negotiated, essentially saying the reservation is severable and void, and that the full treaty applies as between the two parties.[17] This approach is more consistent with the idea of objections as decentralized enforcement than is the standard approach, which essentially disincentivizes objections. That is, the objecting states' actions under severability will have the effect of maximizing the applicability of the treaty norms. But this approach is not accepted by all states.

As Swaine summarizes, the whole regime of the Vienna Convention is decentralized: "individual states propose reservations, individual states accept or object to reservations, and individual states determine what results from these exchanges, subject to the rules they have agreed to in the convention."[18] This scheme, codified in the Vienna Convention on the Law of Treaties, allows ample opportunities for strategic behavior. A state can negotiate the general provisions of a treaty in a way that maximizes its benefits, then reserve provisions that impose costs on it, while still gaining most of the benefits of the scheme of cooperation. Such a state will be able to do so absent a strong objection that asserts the reservation is incompatible with the object and purpose of the treaty; even this will have little concrete impact unless other states join the objection, and assert that the treaty still applies.

As mentioned above, the human rights context raises distinct difficulties for the general scheme. In, say, a multilateral trade treaty, objecting states might deny the reserving states the benefits under the treaty if they find that the reservation is invalid. But what precisely does this mean in a context in which the beneficiaries of the treaty are found wholly within the borders of the reserving state? For an objector to say that the reserving state is not a party to the treaty is to say the citizens of the reserver are not protected by the treaty's human rights provisions. It is this problem that the Nordic approach, asserting that the treaty is still in force, is designed to address.[19]

16. *See generally* Goodman, *supra* note 3. To be sure, if one adopts the "commitment" perspective as to why states adopt human rights treaties, there may be costs imposed on the reserving state by being excluded from the regime. *See* Andrew Moravcsik, *The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

17. Swaine, *Treaty Reservations*, *supra* note 11, at 294; *see also* Goodman, *supra* note 3, at 547.

18. Swaine, *Treaty Reservations*, *supra* note 11, at 298.

19. This is consistent with the idea that Nordic countries are norm entrepreneurs in the area of human rights. *See* Christine Ingebritsen, *Norm Entrepreneurs: Scandinavia's Role in World Politics*, 37 COOPERATION & CONFLICT 11 (2002).

One comes away from this analysis with the feeling that there is little incentive for states to bear the costs of objecting; indeed, the International Court of Justice (ICJ) itself, in the *Case concerning Armed Activities on the Territory of the Congo*, has asserted that states do not frequently object to others' reservations.[20] No wonder, perhaps, that multilateral treaties are relatively weak instruments, and why the most recent schemes of global cooperation are moving away from this form. The Rome Statute famously deviates from the standard model by disallowing reservations; more broadly, multilateral treaties in general may be a thing of the past.[21] If reservations law favors breadth over depth, then proponents of deeper obligations may be trying to find alternative modalities of cooperation.

It is interesting to note that regimes with centralized interpretive bodies tend to prefer to minimize reservations, instead of relying on the decentralized mechanism of objections. The Human Rights Committee, the centralized monitor of the ICCPR, takes the view that human rights treaties do not allow incompatible reservations, and that they are severable, leaving the treaty intact even as to the reserving party.[22] The International Law Commission approach seems to follow this logic in that it presumes that reserving states desire to be subject to the treaty, even if the reservation is objected to, unless the state expressed otherwise.[23] The Human Rights Committee has also asserted that it has competence to evaluate whether a reservation was incompatible with the object and purpose of the treaty. These assertions drew sharp rebuke from powerful states. Whatever one thinks of the Human Rights Committee, its proposal makes sense from the perspective of incentivizing enforcement. Centralized enforcement of the object and purpose requirement has a distinct advantage over decentralized enforcement.

Another scheme with centralized enforcement is the European Convention on Human Rights. In one prominent case, the European Court of Human Rights (ECtHR) found that reservations were severable. When Switzerland sought to enter into the Convention while reserving Article 6 (which provides for a right to a fair trial), the ECHR rejected the reservation by Switzerland as invalid and found that the country remained bound by the treaty, even though no state had objected to the reservation at the time that it was made.[24] As with the position of the Human

20. 2006 I.C.J. 31, 65–71 (Feb. 3) (joint separate opinion of Judges Higgins, Kooijmans, Eleraby, Owada, and Simma).

21. *See* AJIL Unbound, *The End of Treaties? An Online Agora,* http://www.asil.org/blogs/ajil-unbound.

22. Hum. Rts. Comm., General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

23. The Guide to Practice on Reservations to Treaties was finalized by the International Law Commission in 2011. U.N. Doc. A/66/10/Add. 1. Guideline 4.5.3 says that "The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty."

24. Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A), at para. 47 (1987) ("The [Swiss] Government derived an additional argument from the fact that there had been no reaction from the Secretary

Rights Committee, it was the centralized interpreter that played the role of ensuring the validity of reservations.

Conversely, this suggests that when there is no centralized interpreter, it will be the decentralized community of states parties, with their potentially diverse approaches to interpreting the treaty document, that play the major role in policing overly broad reservations from the treaty obligations. This creates a collective action problem among the states parties.

II. WHY OBJECT?

What might lead a state to bear the costs of advancing the goals of human rights treaties by objecting to incompatible reservations? Consider three sets of factors: those related to the objecting state itself, those related to the relationship between the reserving state and the potential objector, and those characteristics of the particular reservation.

We begin with state-level factors. An initial point is that objecting may be politically costlier than reserving. Reserving increases a state's degrees of freedom, and so has concentrated benefits, whereas the costs of the state's reduced obligations are diffused broadly onto other treaty parties. Crafting a reservation takes some effort, possibly in the form of coordination between an executive and a legislature. But it remains the case that the state as a whole may benefit from the reservation.

In contrast, objecting has concentrated costs, but diffused benefits, if indeed it is conceptualized as a means of enhancing compliance with the purpose of the regime. The concentrated costs of objections come in several forms. First, objecting states must spend resources to monitor reservations. Second, there may be political costs. The reserving state is likely to be frustrated with the objection and may contest the objector's interpretation of the treaty; in extreme cases it may even retaliate in some form. This might lead states to be reluctant to object.[25]

If objecting is costly, we might expect it to be a characteristic of richer states, as well as those with large legal departments in the foreign ministry.[26] It will also be more desirable for states and governments that can obtain domestic political benefits from enforcement. In the human rights context, richer, democratic states are likelier to have a policy of promoting human rights abroad, and thus bear the costs of objecting. The countries for which this is especially true are those that specifically seek to use human rights *law* as opposed to other policy tools (such as military intervention or economic pressure) to advance human rights.

General of the Council of Europe or from the States Parties to the Convention.... The Swiss Government inferred that it could in good faith take the declaration as having been tacitly accepted for the purposes of Article 64. The Court does not agree with that analysis. The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment..."). *Compare* Temeltasch v. Switzerland, App. No. 9116/80, 31 Eur. Comm'n H.R. Dec. & Rep. 120 (1982) (upholding reservations).

25. Goodman, *supra* note 3, at 537.

26. *Id.*

The decision to object is also likely to depend on the relationship between the reserver and potential objector. If the reservation generates negative externalities toward particular other states, we would expect those states to be likelier to object. On the other hand, this source of pressure may be mitigated if the states have dense relations. After all, an objection can be seen as a challenge to a particular state, potentially generating counterattacks. One might expect neighbors, for example, to be more vulnerable and so therefore prefer to free-ride on enforcement activity of other states, if the objection would be perceived as a challenge by the reserver.

In the human rights context, we have already stipulated that there are few negative externalities produced by reservation, in the sense that reduced protection in the reserving state doesn't really harm others' citizens. So no particular state is especially likely to be willing to pay the costs of objecting unless it itself gets some domestic political benefits from doing so. However, we can predict that some states will be particularly *unlikely* to enforce. Those states with denser interactions with the reserver will be more vulnerable to counterattacks, and so less likely to bear the costs of objecting. We might think that geographic and cultural distance between two states will be positively correlated with objections, and that close links will be negatively correlated.

It is also quite likely that the decision to object depends very much on the nature of the reservation. Reservations that are seen as narrowly tailored, good faith efforts to participate in the treaty regime are probably less likely to generate objections than are those that are broadly formulated, and seen to be pretextual. We predict that broader reservations designed to escape obligation will more frequently generate objections than narrower ones.

III. CHARACTERISTICS OF OBJECTIONS: THE ICCPR AS A CASE STUDY

This section provides some descriptive data on objections, focusing initially on the ICCPR as a way of getting a handle on the underlying dynamics. An objection is obviously conditional on the prior existence of a reservation, and we are fortunate that some good recent work has been done on reservations. Eric Neumayer shows that reservations are more common in human rights law than in other areas of law, and are more likely to be adopted by democracies than autocracies.[27] However, in her study of human rights, Beth Simmons finds that democracies are *less* likely to enter reservations.[28] She finds that Muslim countries, common law countries, and those that have the rule of law tend to submit more reservations, likely for diverse reasons. Examining reservations to the ICCPR, Daniel Hill argues that reservations are more likely when (1) domestic legal constraints are significant, and (2) domestic

27. Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397 (2007); *see also* JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 127–29 (2005) (showing reservations to the ICCPR).

28. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS 98–103 (2009).

standards are lax compared with the international agreement, so that international law implies a larger adjustment in behavior.[29] Reservations are thus tied to domestic enforcement.

There is also some suggestion in the literature that states object to reservations less often in the human rights context than in others, though this has not been thoroughly tested.[30] Simmons asserts that objections to human rights treaties are rare.[31] Leblanc, writing on the Convention of the Rights of the Child, concurs "Few states are inclined to object to reservations made by others, even when they seriously undermine the integrity of the convention's provisions."[32] And as noted above, some judges of the ICJ have asserted that objections were rare.[33]

To explore objections practice, we first examine data from the ICCPR. The ICCPR, adopted in 1966 and in force from 1976, has 168 states parties at this writing, and the ratification process has generated numerous reservations. Indeed, a cursory examination of the ICCPR belies the claim that reservations are rare. Out of 168 state parties, some 42 (more than 25 percent) have reserved one or more provisions, with an average of 2.9 articles reserved. A total of 116 individual reservations have been filed, to which 47 different objections have been filed by 29 countries. This suggests that some are willing to bear the costs, and that objecting is more common than heretofore recognized.

Note that the ICCPR is hardly exceptional in this regard. We also analyze the six other major human rights treaties with broadest participation: the Conventions on Discrimination against Women (CEDAW), the Rights of the Child (CRC), the Elimination of Racial Discrimination (CERD), Torture (CAT), Disabilities, and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As Appendix B shows, the other major human rights treaties all have significant numbers of states parties making reservations, ranging from 54 for CEDAW and the CRC, to 41 for the CERD, 29 for the CAT, and 27 each for the ICESCR and the Disabilities Convention. While not every reservation generated objections, each of the treaties had objections by more than a dozen different states parties. These ranged from 26 objections for the CAT, 20 for CEDAW, 18 for the CERD, 16 for the Disabilities Convention, 12 for the ICESCR, and 10 for the CRC. Objecting is clearly not rare behavior.

29. Daniel W. Hill, Jr., *Avoiding Obligation: Reservations to Human Rights Treaties*, 60 J. CONFLICT RES. 1129 (2016).

30. Swaine, *Treaty Reservations*, *supra* note 11, at 297.

31. SIMMONS, *supra* note 28, at 98 ("a very small number of countries take on this policing role").

32. Lawrence J. Leblanc, *Reservations to the Convention on the Rights of the Child*, 4 INT'L J. CHILDREN'S RIGHTS 357, 379 (1996).

33. *Case Concerning Armed Activities on the Territory of the Congo*, 2006 I.C.J. 31, 65–71 (Feb. 3) (joint separate opinion of Judges Higgins, Kooijmans, Eleraby, Owada, and Simma).

A. What Do States Reserve?

In theory, states can reserve for a variety of reasons. Some states might reserve because they have a sincere desire to comply with the treaty, but face significant capacity constraints in implementing it. Obviously some rights provisions are easier to implement than others. Delivering on a right to universal public education requires a massive bureaucratic effort and significant expense; delivering on a right to free speech, on the other hand, simply requires the government to refrain from passing censorship laws. Appendix A lists the ICCPR articles most reserved. By far the most common articles referred to are those concerning the judicial process, which might be seen as recognition that punishment practices vary, but also that reform of the criminal justice process is complex.

Another reason that states may reserve is because of a desire to avoid large portions of the treaty in the event of conflict. Certain states, including the United States and many Muslim countries, put aspects of their domestic legal order above international obligations. Muslim countries frequently make reservations related to sharia and Islamic law, and the United States often objects to treaties on the grounds that it not be required to undertake any behavior incompatible with its own Constitution. In the ICCPR context, the United States has reserved the right to allow freedom of speech that violates Article 20's prohibition against hate speech, and to apply punishments consistent with its own Constitution, even if these violate the ICCPR. Both of these types of reservations, based on sharia law and the domestic constitution, seem to be motivated by a desire to avoid additional legal constraints beyond what is required by the domestic legal order.

Appendix B, column 1 lists the 42 states that have filed reservations to the ICCPR, as of 2013, and the propensity of reserving states to generate objections. (Appendix B also provides a fuller list for all seven human rights treaties examined here.) Table 11.1 lists the bases that states give for their objections. Even a cursory glance shows that the reservations that are presumably grounded in avoiding obligation are far more likely to generate objections than others. The reserving states that have generated the most objections are all Muslim countries: Pakistan, the Maldives, Mauritania, and Bahrain. Other than these countries, only the US reservations have generated double digit objections. Pakistan's ICCPR reservation was in some sense the perfect storm: it asserts "that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the sharia laws."[34] As Table 11.1 shows, the most controversial reservations, likeliest to provoke objections, are those based on sharia law or the domestic constitution.

Sometimes, reservations are clustered by region. For example, the Nordic countries of Denmark, Finland, Iceland, Norway, and Sweden all submitted similar reservations to articles 10 (rights regarding persons in detention), 14 (rights regarding the judicial process) and 20 (prohibiting propaganda for war or racial/religious hatred).

34. Reservation of Pakistan. The reservations and objections to the ICCPR cited in this chapter may be found on its treaty status page on the UN Treaty Collection website, http://treaties.un.org.

Table 11.1. Bases of Reservation to ICCPR

Basis	#	# objected to	p*objection
Domestic Constitution	27	18	.67
Domestic Practices	67	19	.28
Sharia	8	8	1.00
Implementation Problems	7	1	.14
Others	7	1	.14
TOTAL	**116**	**47**	**.41**

Table 11.2. Rank Ordering of Top Ten Objecting Countries: ICCPR and All Treaties

Rank	Objecting country	ICCPR objections	Objecting country	Total for seven treaty regimes
1	Netherlands	13	Netherlands	63
2	Sweden	9	Sweden	52
3	Germany	9	Germany	48
4	Finland	7	Finland	40
5	Portugal	7	Norway	35
6	France	6	Portugal	30
7	Ireland	5	Austria	23
8	Italy	4	France	19
9	Portugal	4	Ireland	17
10	Austria	3	Denmark	15
10	Denmark	3	Italy	15

B. Who Objects and Why?

Our core concern is to understand the characteristics of the countries that choose to bear the costs of enforcement of the ICCPR regime, through making objections. We can get some leverage by placing the ICCPR objections in the context of other treaty regimes, and so produce an indicator of the total number of objections issued across the seven major human rights treaty regimes listed earlier (including the ICCPR). The ICCPR objections are correlated with the total for the other six at a level of .86, so objecting in one regime seems to predict objecting to another.

As Table 11.2 demonstrates, the top objectors tend to be a small set of European countries, with the four Nordic countries and the Netherlands playing a major role. Outside of North America and Australia, the only non-European countries to ever

object to a reservation for any treaty are Mexico, Mongolia, Pakistan, and Uruguay, each of which filed one objection to an ICCPR reservation.[35]

States that frequently object have invested in capacity for monitoring and enforcement. One indicator is the institutionalization of the foreign affairs department. Objecting countries with a separate human rights division in their foreign ministries have objected to an average of 4.5 reservations; those which do not have a separate division objected to an average of 1.3.[36] While causality is uncertain, the correlation seems consistent with our view that objection is costly, and that it is a practice centered in legal departments, rather than the legislature or some other location in the state.

States differ in the form of their objections. Some seem to offer alternative interpretations of the reservation, perhaps allowing the objecting state to try to constrain the implementation of the reservation down the road. Germany seems to be particularly likely to use objections in this way, as four out of its nine objections fit the bill. As mentioned earlier, the Nordic countries consistently declare that the reserving country "does not benefit from the reservation," while the Netherlands consistently declares that the reservation is "inadmissible," or "shall not be permitted."[37] Sweden declares some reservations to be "null and void." It is most common to use the "object and purpose" formulation when making an objection, but sometimes states use the opportunity to make other points about the reservation. Other states simply file objections without elaboration. Mexico's objection to Bahrain's reservation fits this bill. Table 11.3 lists some of the bases of objection in the context of the ICCPR.[38]

We thus have some indication of the factors that seem to predict objection: wealth, democracy, and most likely some capacity in the foreign ministry. Let us look at the other end of the equation: What states' reservations have generated the most objections? Is there anything about the relationship among the reserving and objecting countries that predicts objection? Table 11.4, on the next page, provides a list of the countries whose reservations have generated the most objections, both for the ICCPR and the entire set of seven treaties. Most of the countries in both lists are majority Muslim countries, and many of the most controversial reservations implicate Islam.

35. Mexico objected to Bahrain's reservation that "The Government of the Kingdom of Bahrain interprets the Provisions of Article 3, (18) and (23) as not affecting in any way the prescriptions of the Islamic Shariah." Pakistan objected to India's reservation to Article 9(5) (right to compensation for victims of unlawful arrest or detention). Mongolia objected to the Khmer Rouge government's assertion of authority to sign the ICCPR. Uruguay objected to Pakistan's assertion that the Human Rights Committee could not request information from it. While the other countries listed had only one total objection, Mexico was a prolific objector in the CEDAW regime in addition to its ICCPR objections.

36. Jessica Chow, Why Object? An Analysis of the Practice of Objections-to-Reservations in the International Covenant on Civil and Political Rights (ICCPR) (2014) (unpublished master's thesis, University of Chicago).

37. *Id.*

38. *Id.*

Table 11.3. Rank Ordering of the Basis of Objections in the ICCPR

Basis of Objection	Total # of times this reason has been utilized (out of 116 objections)
Violates object and purpose of treaty	92
Reservation is unclear and does not clarify the extent to which the state considers itself bound by treaty obligations/therefore reassess doubt about the country's commitment	87
Convention specifically prohibits derogation (from specific articles)	31
International treaty law prohibits invoking of domestic law for failure to comply with treaty	30
Reservations were submitted to essential articles which are of great importance to the ICCPR	7
Behavior may constitute a precedent that might have considerable effects at the international level	2

Table 11.4. Rank Ordering of Countries with Most Objected-to Reservations

	ICCPR objections received		Total objections over seven treaties	
Rank	Country	ICCPR Objections	Country	Total Objections
1	Pakistan	26	Pakistan	59
2	Maldives	18	UAE	28
3	Bahrain	14	Bahrain	23
4	USA	11	Saudi Arabia	23
5	Mauritania	10	Thailand	23
6	Botswana	9	Turkey	21
7	Laos	6	Syria	20
8	Turkey	6	Mauritania	19
9	Kuwait	4	Laos	18
10	Korea, South	3	Maldives	18
11	Algeria	2	Iran	16
11	Trinidad and Tobago	2	Malaysia	16
			Qatar	16

This is especially true when one moves from the ICCPR context to the treaties that touch most heavily on family law: CRC and CEDAW. Appendix B shows just how controversial these treaties are, in the sense of generating a good deal of reservations and objections thereto.

Combined with the earlier findings, we can say that there seems to be something relational going on that predicts objection. Reserving states that emphasize sovereign particularity, such as the United States, trigger objections, but it also seems that much of objections practice is part of an intense contest between two universalisms: international human rights law and Islam. In carving out limits to general treaties on the basis of Islam, reserving states have induced European countries to reassert the universality of human rights law. This contest, while taking place in the terrain of international treaty practice, reflects much deeper comparative divergence in the understanding of the purposes of international law.

IV. CONCLUSION

Far from being rare, objections to treaty reservations are very common, at least in the human rights treaties examined here. We have argued that the intensive activity among states in making reservations and issuing objections reflects different approaches to treaty interpretation, particularly over how broadly to read the object and purpose of human rights treaties. Given the background legal limitations on reservations, reserving states are implicitly interpreting human rights treaties to require less of states parties, whereas objecting states are reading the object and purpose requirement broadly.

Objections may also reflect very different ideas as to the purpose of treaties: one country could be using treaties to signal to a domestic audience, while others seek genuine constraint at the international level. These divergent purposes may inform different treaty practices.

It has often been asserted that international human rights law, as embodied in the ICCPR, involves cheap talk among states.[39] Yet, as a matter of comparative international law, this is too broad a statement. We have argued that objecting to treaty reservations is costly, and we thus expect states to free-ride. Yet, there are a small number of states that do repeatedly object to treaty reservations. Repeat objectors are all found in Europe, and concentrated in the northern latitudes. This reflects a different approach to international law than, say, majority Muslim countries that make sharia law-based objections. The objecting states have helped overcome a free-riding problem that might lead to a kind of race to the bottom in terms of obligation, with each state maximizing its degree of interpretive freedom at the expense of the regime as a whole. Their behavior is designed, it seems, to police the "cheap talk" quality of international human rights law.

39. Eric Posner, The Twilight of Human Rights Law (2015); Goldsmith & Posner, *supra* note 27.

APPENDIX A

RANK ORDERING OF ICCPR ARTICLES, BY NUMBER OF RESERVATIONS SUBMITTED[40]

	Articles	Total reservations	No. of reservations that received at least 1 objection
Art 14	Rights regarding how a person must be treated by the judicial process	25	4
Art 10	Rights regarding judicial process	15	3
Art 20	Prohibits propaganda for war or racial/religious hatred	13	2
Art 12	Rights for movement into, out of, and within a state	7	3
Art 25	Right to political participation	6	2
Art 19	Freedom of expression	5	1
Art 22	Freedom of association	5	2
Art 9	Right to liberty and physical security	4	2
Art 13	Rights regarding movement out of a state	4	1
Art 3	Universality of rights	3	3
Art 7	Freedom from torture	3	3
Art 23	Rights pertaining to marriage	3	2
Art 26	Equality of persons before the law	3	1
Art 4	Provisions pertaining to derogation	2	1
Art 6	Protection of life	2	2
Art 11	Rights regarding imprisonment	2	1
Art 18	Freedom of religion	2	2
Art 21	Right to peaceful assembly	2	1
Art 1	Right to self-determination	1	1
Art 2	Universality of rights	1	1
Art 15	Prohibits retrospective criminal punishment	1	1
Art 17	Right to privacy	1	0
Art 24	Rights pertaining to children	1	0
Art 27	Group rights protecting a community of individuals	1	1

40. Chow, *supra* note 36.

APPENDIX B

OBJECTIONS RECEIVED TO RESERVATIONS

KEY: 0 indicates a reservation without objections; * indicates that reservation was withdrawn after objection.

Reserving Country	ICCPR	ICESCR	CEDAW	CRC	CAT	CERD	Conv. on Disabilities	TOTAL
Pakistan	26	4	6		23			59
Afghanistan				0	0	0		0
Algeria	2	2	3	0				7
Andorra				1				1
Antigua Barbuda						0		0
Argentina				0				0
Australia	1		0	0		0	0	1
Austria	0		0	0	0	0		0
Azerbaijan							1	1
Bahamas	0	0	0	0		0		0
Bahrain	14	0	9		0	0		23
Bangladesh	0	3	4	2	4			13
Barbados	0	0				0		0
Belgium	0	0		0		0	0	0
Belize	0							0
Botswana	9			3	3			15
Brazil			0*					0
Brunei			0	7				7

Bulgaria						0		0
Canada				0			0	0
Chile					0			0
China		3	0	0	0	0		3
Colombia				0				0
Congo	1							1
Cook Islands				0				0
Croatia				0				0
Cuba		0	0	0	0	0		0
Cyprus							0	0
Denmark	0	0		0				0
Ecuador				0	0			0
Egypt		0	4			0	0	4
El Salvador			0				7	7
Equatorial Guinea					0	0		0
Ethiopia			0					0
Finland	0							0
France	0	0	0	0	0	0	0	0
Gambia	0							0
Germany			0		0			0
Greece							0	0
Grenada						1		1

(*Continued*)

Reserving Country	ICCPR	ICESCR	CEDAW	CRC	CAT	CERD	Conv. on Disabilities	TOTAL
Guyana	0					0		0
Hungary						0		0
Iceland	0			0				0
India	1	4	1	0		0		6
Indonesia			0		0	0		0
Iran				7			9	16
Iraq			4	0		0		4
Ireland	0	0	0			0		0
Israel	0		0		0	0	0	0
Italy						0		0
Jamaica			0*			0		0
Japan		0		0		0	0	0
Jordan			1	2				3
Kiribati				3				3
Korea, North			9					9
Korea, South	3		7			0	1	11
Kuwait	4	6	4			0	0	14
Laos	6				12			18
Lebanon			3			0		3
Lesotho			2					2
Libya			6			0		6
Liechtenstein	0			1				1
Lithuania							0	0

Luxembourg	0		2	0				2
Madagascar		0				0		0
Malaysia				8			8	16
Maldives	18			0				18
Mali				0				0
Malta	0	0				0	0	0
Mauritania	10		9	0	0			19
Mauritius			0*					0
Mexico	0	0	0					0
Micronesia			3				0	3
Monaco	0	0	0	0	0	0	0	0
Mongolia						0		0
Morocco			1	0	0	0		1
Mozambique						0		0
Nepal						0		0
Netherlands	0		0	0	0		0	0
New Zealand	0	0	0	0	0			0
Niger			4					4
Norway	0	0					0	0
Oman			0	5				5
Papua New Guinea						0		0
Poland				0		0	0	0

(Continued)

Reserving Country	ICCPR	ICESCR	CEDAW	CRC	CAT	CERD	Conv. on Disabilities	TOTAL
Qatar				7	9			16
Samoa				0				0
Saudi Arabia			9	6	0	8		23
Singapore			3	7			1	11
Spain			0	0				0
Sweden	0	0						0
Switzerland	0		0	0				0
Syria			14	6	0		0	20
Thailand	1	0	4	1	9	4	4	23
Trinidad and Tobago	2	0	0					2
Tunisia				0	0			0
Turkey	6	6	3	3	0	3		21
UAE			14	2	12			28
United Kingdom	0	0	0	0			0	0
Uruguay				0				0
USA	11				3			14
Venezuela	0		0	0			0	0
Vietnam			0		0			0
Yemen			0			13		13
TREATY TOTAL	116	27	54	54	29	41	27	478