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Review paper

RESERVATIONS TO THE COUNCIL OF EUROPE CONVENTIONS, FOCUSING THE RESERVATIONS TO THE 1951 EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

The purpose of this article is to provide a systematic review of reservations in the Council of Europe Conventions and especially reservations to the Convention of Human Rights and Fundamental Freedoms. In the first part of this article the author analyzes preparatory work of states on articles about reservations to the Convention of Human Rights and other European Conventions. The second part focuses the case law of the European Court of Human Rights and application of the Convention in some major cases and legal standards of the European order. A comparative and critical review of case law in the European Court of Human rights is presented together with its decisions in the light of major legal norms in the national and international laws. Finally, the author investigates the influence of regional practice in the Council of Europe and survival of this system on the universal level in the international law. The author especially points out the importance of reservations to treaties in the modern international law, particularly in the ratification process of main universal normative treaties.

Key words: reservations, European order, European Court for Human Rights, leading cases.

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INTRODUCTION

Regional links among the European states have resulted in establishment of institutional structures in the form of several international organizations. The Council of Europe is one of them, where adoption of a large number of conventions has taken place promoting further community in terms of legal orders of the Member States. This the oldest European organization was founded as early as 1949 heralding close ties among the European states.[1] Under the umbrella of this organization over 150 conventions have been adopted that may be used to study their position to the reservations from the formal legal point of view, i.e. how the text of a treaty has regulated a particular issue, as well as behavior of the Member States, and in particular the position of the European Court of Human Rights and European Commission (while it was in place) in respect to the 1951 Convention on Human Rights.[2]

Although at first sight it may appear that primarily within the Council of Europe regional codification of the human rights issue has been accomplished, one may notice that it is more of a reflex of a universal trend and represents adoption of universal values of the international community. Namely, upon adoption of the Universal Declaration of Human Rights in 1948, development of regional systems for human rights protection ensued. Thus, at the beginning, the 1951 Convention was an instrument taking over and elaborating the basic human and political rights that had already been adopted as universal values.[3] The current ***diferentia specifica*** of the European system versus the universal one is the more effective system of human rights protection. The system has evolved developing some specific rules that do not apply to the universal system of

[1] The oldest European international institution, the Council of Europe, was established on 5 May 1949 in London when ten Ministers of Foreign Affairs signed the Statute. These were representatives of United Kingdom, France, Belgium, Norway, Holland, Italy, Luxemburg, Sweden, Denmark, Ireland. Soon after, on 3 August of the same year, the Statute of the Council of Europe cane into force when the seventh ratification instrument of the signatory state was deposited with the British government. At the very beginning of its operation, the organization dealt with economic affairs, as well, as stipulated in the Statute, but with establishment of the European Communities, in 1951 and 1958, the need for such activities was no longer present. Article 3 of the Statute defines the main functions of the organization: development of democracy, respect for human rights and rule of law.

[2] The Convention was amended many times, and so far 14 Protocols have come into force;

[3] The system subsequently developed and became more sophisticated;

law of treaties. This is particularly marked in the part relating to reservations[4] to international treaties. As to interpretations of whether a reservation is admissible, the jurisdiction is not strictly specified, but it may be derived as follows: „Jurisdiction for examination of validity of a reservation or interpretative declaration is not explicitly spelled out, but it appears to be recognized, as least an indirect jurisdiction in this issue."[5] Accordingly, as soon as the states recognized mandatory jurisdiction of the Court for violations of individual human rights, they have conceded to the jurisdiction of the Court in terms of reservations to the Convention. Thus, the jurisdiction for examination of admissibility of reservations and nature of the decision are derived indirectly, but represent most of internal practice in the organization. On the international level, the governing rule is that in absence of an explicit treaty provision on jurisdiction, only the Member States may decide, reciprocally, on the fate of a reservation and its possible legal effect to them. It is a compatibility test where the order of the Council of Europe, in addition to the Court, allows the Member States to influence the effect of a reservation, to a certain degree.

The importance of the issue of reservations for the Council of Europe was recognized in 1962 when the model of final provisions[6] including the reservations was adopted by the Council of Ministers of this organization. Thus, an intention to have an agreed position on the issues of the reservation rule within the Council of Europe was noted even then.

The 1950 Convention on Protection of Human Rights and Fundamental Freedoms contains a special provision relating to reservations in Article 57: "Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular

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[4] Reservation means a unilateral statement, 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; or to have all treaty not applicable in precisely specified cases. Reservations are codified in the 1969 Convention of Law on Treaties, but ever since 1993 the UN Commission for International Law ahs been actively compiling legal regulations referring to reservations on the universal level. So far, special rapporteur, Alan Pele submitted 14 reports. Regional practice of the Council of Europe was subject of particular attention of the Commission .

[5] Pierre – Henry Imbert, Reservations to the European Conventions on Human Rights before the Strasbourg Commission: The Temeltasch Case, *International and Comparative Law Quarterly*, Vo. 33, 1984, pp. 583;

[6] CM(62) 148;

provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article." Formulation of the article is of multifold interest. Namely, the Convention is one of the few that mentions reservations, in the first place. But as it does, the provision shall be applied as stipulated. Alternatively, residual rules on the universal level should be applied to reservations to international treaties.

On the other hand, it remains fairly unclear does the right to a reservation pertain only to provisions not in conformity with the local laws, since a brief statement of the law concerned is required? If the answer is yes, one may conclude that the concept of reservations to this Convention is too narrow. What about situations in which a state makes a reservation not because of legislative obstacles, but for geographic position or climate in its territory as rationale for inability to comply with treaty provisions? Strictly formally speaking, a state would not be allowed to make a reservation to the Convention. Besides, in practice, states may try to avoid compliance with a reservation provision by urgent adoption of a law preventing enforcement of the provision in that state once it becomes clear that an instrument to the 1950 Convention will be adopted. Formally and legally, pursuant to Article 64 of the Convention[7] the state would be proceeding correctly, but the motivation for doing so would be malicious.

In continuation of the same article it is stipulated that reservations of a general character shall not be permitted. This is somewhat superfluous, since these reservations are generally prohibited pursuant to provisions of the general international law. These are only some of imperfections of the formulation of Article 57 of the Convention. Point 2 of the same Article introduces some reality into the normative structure, since it requires explanation for the reservation within the context of an existing law that is an obstacle for implementation of the provision to which the reservation pertains. The practice of institutions of the Council of Europe has generated some special rules and own mechanisms to protect Conventions from state reservations. That is why the system of norms is an interesting subject to study.

Some other Conventions adopted within the Council of Europe contain better formulations of reservation-related provisions. Thus, the Convention

[7] It is the current Article 57;

on Peaceful Settlement of Disputes and Convention on Extradition (1957) grant broader leeway to the Member State that: "…(may) only make reservations which exclude from the application of this Convention disputes concerning particular cases or clearly specified subject matters, such as territorial status, …"[8] These conventions also allow for the possibility that "reservations need not always relate to the conflict of the treaty and domestic law."[9]

SPECIAL PRACTICE AND ESTABLISHMENT OF THE „ *EUROPEAN ORDER"* IN EXAMINATION OF A RESERVATION COMPLIANCE WITH THE SUBJECT MATTER AND PURPOSE OF A TREATY

Implementation of rules relating to reservations to the Convention on Human Rights helps develop standards that with time become binding. The court jurisprudence has greatly helped formulate legal rules. The practice resulted not only from the case law, but direct legal regulations, as well. Namely, the Vienna Convention[10] stipulates the possibility of special legal regimes that pertain to reservations to concrete treaties, as regulated under Article 64 of the European Convention (current Article 57). This does not mean, however, that direct transposition of legal rules from the regional to the universal level is possible, but that: "European Convention should be treated as a very specific exception."[11]

In order to fully understand the nature of the reservation-related norms in the Convention the preparatory activities should be reviewed. In the course of the Convention drafting, the first version did not contain any provision on reservations. Only at the "meeting of high representatives held in June 1950… United Kingdom proposed an article relating to reservations."[12] The

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[8] Articles 23 and 24;

[9] S. Spiliopoulou Akermark, Reservation Clauses in Treaties Concluded Within The Council of Europe, *ICLQ*, Vol. 48, 1999, pp. 488;

[10] This the reference to the Convention on the Law on Treaties, 1969;

[11] Pierre – Henry Imbert, *ibid.* , *ICLQ*, Vo. 33, 1984, pp. 585;

[12] Henry J. Bourguignon, The Belilos Case: New Light on Reservations to Multilatelar Treaties, 29 *Va. J. Int. L.*, 347, 1988-1989, pp. 357;

proposal was adopted and introduced in the Convention draft without any changes as Article 64 (now 57). However, in discussions before the Committee for Legal and Administrative Affairs of the Consultative Assembly[13] some criticism was heard and intentions to limit the right to reservation stating the explicit reason (precise citing of the law) for such move. Thus, the aforementioned provision on reservations was produced. It is fairly restrictive since the idea of the whole Convention is to establish a uniform order of human rights on the territory of Europe.

In terms of the current Article 57, the following requirements have to be met: 1. temporal; 2. citation of the law that is not in conformity with the Convention provision; 3. Reservations of a general character shall not be permitted; 4. Any reservation made under this article shall contain a brief statement of the law concerned. Clearly enough, these are requirements imposed by the Convention to make a reservation where one may draw a conclusion that "any shortcoming in fulfillment of these requirements stipulated in Article 57 of the Convention make the reservation null and void."[14] The Court may only find inconsistence of the statement with formal requirements stipulated in the Convention, i.e. the Court has to find the reservation made by a state inconsistent with provisions of Article 57.

The formal requirements stipulated in the Convention on Human Rights do not include the statute of limitations. Instead, duration of the reservation made should be stated, if possible. This is the case with some other Conventions in the Council of Europe, so that the following conclusion may not be drawn: "To make a reservation valid, its prospective duration should be specified."[15] A reservation may be valid even without specification of the time for which it is invoked, only under the condition that it fulfils all other formal requirements. One of them is that it has to be made at the time of ratification. The Council of Europe 1973 Convention on the Unification of Certain Points of Substantive Law on Patents for Invention stipulates that reservation may not be renewed for periods over 5 or 10 years, depending on the provision concerned. The Convention also introduces the automatic withdrawal of a reservation in case it has not been

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[13] Current Parliamentary Assembly.

[14] Jakšić, Aleksandar, *Evropska konvencija o ljudskim pravima*, Komentar, Centar za publikacije Pravnog fakulteta u Beogradu, 2006, p. 494.

[15] Jakšić, ibidem, p. 495.

withdrawn by the set term. Cases in which a state voluntarily limits its own reservation is another matter.

An example of a state voluntarily limiting its reservation is a case of Estonia that set its reservation to the Convention on Human Rights for a period of one year. At the time, they stated that "one year is sufficient to harmonize the local legislation sufficiently". Sometimes, states predict withdrawal of a reservation without stating the exact deadline. This is exemplified by the case of Malta that stated an obligation to withdraw its reservation to the Convention on the Elimination of All Forms of Discrimination against Women "as soon as possible".[16]

Thus, in a case of Austria v. Italy the European Commission concluded that "the general principle of reciprocity in the international law and rule specified in Article 21(1) of the Vienna Convention on Law on Treaties shall apply to the bilateral relations in multilateral treaties and shall not apply to obligations resulting from the European Convention on Human Rights."[17] The reason why the principle of reciprocity is not applied to these treaties is the legal nature of their norms that are „not established to be implemented as personal rights of states, but may be presented before the Commission and protected as a part of the public order of Europe."[18] This highlights the principle of protection and presence of an autonomous system for exercising the fundamental human rights that is in force even independently of individual states. Nevertheless, this is more of a two-instance system, since in the first instance a state is competent for protection of rights of all persons that are on its territory. The part relating to reservations and objective limitations implied in the term "European order" is more interesting, although at the time it has not been recognized that special legal system was emerging.

The term European order has been used in the ***Temeltasch*** case when the European Commission concluded that the 1950 Convention was adopted to: "… establish common European order of free and democratic Europe aimed at preservation of common political tradition, ideals of freedom and

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[16] Multilatelar Treaties deposited with the Secretary General, UN Publication, Sales No. E. 01, V5, vol. I, pp. 234;

[17] Austria v. Italy, Yearbook 4, 116 at page 140;

[18] *Ibidem.*

rule of law. Obligations undertaken by a state are essentially objective, under the protection established by the Convention."[19]

This special European order is established not only on the basis of the Convention on Human Rights, but is substantiated by all conventions adopted under the umbrella of this organization. The European order is particularly marked in respect to the Convention on Human Rights since it specifies the most effective mechanisms of protection.

In 1962 the Council of Ministers adopted the Model Final Clauses[20] that, ***inter alia***, refer to reservations, actually introducing rules in the system of reservations. The model stipulate complete freedom in making reservations (i.e. without limitations stipulated in Article 57 of the Convention), with logical requirements as to when a reservation may be made; moreover, obligation of partial and complete withdrawal of reservations and their relative effect are also stipulated. Such action of the Council of Europe expressed a progressive development at the time, since the 1969 Convention on Law on Treaties was not adopted at the time, making the clauses even more important. These clauses were formulated to be introduced into future treaties made under the umbrella of the Council of Europe. Nevertheless, in practice of the organization, adoption of these model clauses has not followed. Instead, their importance is more of a doctrinal and declaratory nature. Thus, various kinds of treaties are adopted within the Council of Europe: without provisions on reservation, some prohibiting any reservations, that allow them, that allow only some reservations. Most of treaties do not contain any provisions on reservations whatsoever. According to the 1988 data, out of 133 treaties 57 do not contain reservation –related clauses, while only 19 treaties contain general prohibition of any reservations, while 45 treaties allow only certain reservations.[21]

Any reservation to the 1950 Convention resorts to Article 57 thereof that the states adopted as a clause providing certain opportunity to make a reservation.

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[19] 5 EHRR 417, pp. 430.

[20] SM (62) 148, 1962.

[21] S. Spiliopoulou Akermark, *ibid.* , p. 491.

The European Court rightly concluded: "Contrary to conventional international treaties, the Convention establishes relationships among the Member States that exceed the reciprocal ones. Instead, it provides for a network of objective obligations that are, as specified in the preamble, protected by collective measures ."[22]

„However, the European Convention on Human Rights, in addition to being an international treaty, is important as the basis of the Constitution for Europe, and accordingly creates a completely new, objective, legal order in which the Member States do not make primary commitment to guarantee fulfillment of obligations to one another."[23]

Since the Council of Europe obviously paid great attention to the issue of reservations and created a specific and recognizable practice, some institutions of the organization pursue studies of this area of activity. The Committee for Legal Relations professionally deals with this issue, and a special body was established to focus reservations to international treaties only. In 1999 the Committee of Ministers adopted a recommendation[24] presenting models of response of states in situations when a reservation is deemed inadmissible. Model responses were divided into specific and non-specific reservations, where the first model is the one where a treaty because of the made reservation does not come into force between the reserving state and negotiator (i.e. reservation with maximum effect), while the second model of objection has a minimum effect (the treaty comes into force between the reserving state and negotiating party, while the reservation-related clause shall not come into force between the pertinent countries. Thus, the organization still takes into account responses of the Contracting States when the issue of reservation admissibility is concerned.

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[22] European Court of Human Rights, Ireland v. United Kingdom, Judgment of 18. 1. 1978., para 239.

[23] Jakšić, Aleksandar, *ibid.* , p. 493.

[24] Committee of Ministers, Recommendation No. R (99) 13 of the Committee of Ministers to Member States on Responses to inadmissible Reservations to International Treaties, 670th meeting of the Ministers Deputies.

EXEMPLARY CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Several cases tried before the European Court of Human Rights were milestones in the establishment of a specific European legal order in terms of reservations. Thus, „Owing to special nature of the European Convention of Human Rights, the Vienna Convention on Law on Treaties could hardly be an appropriate instrument for admissibility of reservation pursuant to Article 57 of the Convention. Quite the opposite, the controlling body of the Convention have developed special criteria for admissibility, validity and interpretation of certain reservations."25 The conclusion is fairly liberal, since legal rules laid down in the Vienna Convention are parts of general common law, and as such, applicable and applied by the Strasburg institutions. One may discuss the new practice only in terms of evaluation of state reservations and effects of such decision. The reservations law is much broader in current international community, which may be concluded on the basis of comprehensive studies of the International Law Commission. Institutions of the Council of Europe operate in such a way as to check formal criteria that a unilateral statement must fulfill to be considered a reservation. Even then, they resort to general rules of interpretation pertinent to the international law and check formal compliance of the statement with provision of Article 57 regulating admissibility of reservations. Nowadays, their competence in examination of reservations is not disputable, but it has been developed over time through a certain number of exemplary cases. Although the standard of the "European order" has been set, the relations relevant for the issue of reservations are still international. A state can hardly be denied the right to withdraw from a convention.

The European Court, and previously the Commission, based their competence for evaluation of admissibility of reservations to the Convention on Human Rights on Article 19. (to ensure the observance of the engagements undertaken), Article 45 (competence to interpret and apply the Convention) and Article 49 (where the Court shall decide on its own competence). Undoubtedly, the best know case is the Belilos case where Switzerland tried to defend its position initially before the

25 Jakšić, Aleksandar, ***ibid***. , 2006, p. 493.

Commission, and subsequently before the Court26. Nevertheless, there was a previous case when the Commission examined application of Article 64. (57) of the Convention. It was the case Temeltasch v. Switzerland,27 relating to a Turkish national charged with drug trafficking, but eventually released. Since he did not understand the language, he was assigned an interpreter; upon completion of the proceedings the court ordered him to reimburse the pertinent cost.28 The petition reached the Commission claiming that Switzerland breached Article 6, paragraph 3 of the Convention granting the right to free assistance of an interpreter if he cannot understand or speak the language used in court. Switzerland made a unilateral statement trying to limit the scope of this provision. Although they called it an interpretative declaration the Commission called ruled that it was a reservation. Accordingly, it examined its admissibility pursuant to Article 57. The Commission objected that Switzerland failed to state provision of the national law referred to in such declaration, as it is required pursuant to Article 64 of the Convention. Therefore, resorting to such declaration was inadmissible. „Such ruling of the Commission was the first departure form the rule of law that only states may assess validity of a reservation."29

Belilos v. Switzerland is the case named after the petitioner, Marlene Belilos, who claimed that her rights pursuant to the Convention on Human Rights were violated by the state authorities of Switzerland. She was fined by the police authorities for participation in unapproved demonstration with SFr 200. Upon her appeal, the higher police authority revised the fine into SFr 120. The primary reason for addressing the institutions of the Council of Europe was action of the Canton of Lausanne where upon decision of the executive power that petition to the court was admissible only in case of a legal matter. The following questions were presented to the Court: 1. Does the statement of Switzerland termed "interpretative declaration" equal "reservation" to the European Convention? 2. Is the Swiss declaration, if it is found to be a reservation, admissible pursuant to

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26 Belilos judgment, 132 Eur. Ct. H. R. (ser. A), 10 Eur. Human Rights Rep. 466 (1988).

27 Temeltasch v. Switzerland, 31 Eur. Comm. H. R. 120, 1982.

28 *Ibidem*, p. 141.

29 Korkelia, Konstantin, Korkelia, Konstantin, New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights, *EJIL*, 2002, Vol. 13, No. 2, p. 443.

the European Convention or not? 3. If the Swiss declaration is found to be inadmissible, what are the consequences? 4. Could the reservation be withdrawn from Switzerland approval of the Convention so that it is bound by the Convention as if the reservation has never been made?30 The case was initially tried before the Commission, and then before the Court as the second instance.

One of the main positions of the defense was that Switzerland only submitted an interpretative declaration to Article 6, whereby the purpose of the second instances in to protect the right as an act of control of executive bodies by the court.[31] This was the official interpretation of the Federal Court of Switzerland. Mrs Belilos tried to protect her interests all the way to the top authority levels in Switzerland. The opposing party claimed that it was an interpretative declaration that may not preclude application of paragraph 6 of Article 6, as Switzerland tried to do. In all, Switzerland filed 4 restrictive clauses, two that it termed reservations, and two interpretative declarations[32]. The Commission took the position that although this was an interpretative declaration, such interpretation would not be binding even for Switzerland in case of alternative interpretation by the Commission or Court.[33] This substantiated the competence of institutions of the Council of Europe to make a binding decision on reservations to the Convention.

Switzerland claimed that it was a reservation relieving the state from liability, although they initially called their statement interpretative declaration. The Commission concluded that even if it were a reservation it would not have been admissible pursuant to Article 57 of the Convention. The Commission substantiated the position stating that a declaration has "excessively general, unlimited scope."[34] Besides, the Commission found that statement of Switzerland did not refer to the law preventing

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[30] Belilos judgment, 132 Eur. Ct. H. R. (ser. A).

[31] Belilos judgment, para 29.

[32] Henry J. Bourguignon, The Belilos Case: New Light on Reservations to Multilatelar Treaties, 29 *Va. J. Int. L.*, 347, 1988-1989, pp. 348.

[33] Belilos v. Switzerland, Application No. 10328/83. Eur. Comm. H. R., report of 7 May 1986, para 102.

[34] *Ibidem*, at 29.

implementation of the provision."[35] Thus, rule stipulated in Article 57, paragraph 2 of the Convention was violated.

After that, the Commission and Switzerland initiated proceedings before the Court. The Court took a position that it was a reservation, and then elaborated whether such reservation was admissible pursuant to Article 57 of the Convention on Human Rights.[36] The Court found that such reservation to Article 6, made as early as 1974, i.e. 12 years previously, was inadmissible by the mentioned Convention. Switzerland defended its position by the well-known standpoint of Judge Lauterpaht[37] in the Interhendel case[38] that if the reservation is null and void, the ratification of the treaty shall also be null and void. They also referred to the basic principle of law on treaties, i.e. ***pacta sunt servanda***. Substantiating the reasons for declaration, Switzerland stated that that the unilateral declaration resulted from existing differences in legal orders of its cantons. Therefore, the declaration resulted from intention to protect the internal order specific due to the complex internal organization, substantially different from that of other Contracting States. Preparatory activities for ratification of the Convention suggested that although the unilateral statement referring to Article 6 (1) was called a declaratory interpretation, it was initially termed a reservation. Eventually, in the course of the proceedings, Switzerland itself admitted that all declaratory interpretations of the Convention were actually reservations.[39]

The Court dismissed all objections of the state and ruled that then unilateral declaration was null and void, and that Article 6 was fully binding. The case will be remembered as the first one in the history of international law where a court ruled that a reservation of a country is null and void, and that the country remained a member to the treaty as a whole. It was a precedent in establishment of a special system of legal reservations

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[35] *Ibidem*, at 29.

[36] For legal analysis, see: Cameron, Horn, Reservations to the European Convention on Human Rights: The Belilos Case, 33 GYIL, 1990, p. 96.

[37] The reason is inaccurately referenced, since it elaborated the issue of reservations to Article 36 para 2 of the Statutes of the International Court of Justice, and not reservations in the sense elaborated in this paper.

[38] ICJ Reports, Interhandel Case, 1959.

[39] Memorial of the Swiss. Government, Belilos Case, 132 Eur. Ct. H. R. (ser. A), 1988, p. 19.

on the territory of Europe and served as the basis for development of subsequent reservations to treaties on human rights, better known as the theory of withdrawal. In this case, the court also highlighted the importance of objective order of human rights in Europe and its implementation in all members on the territory. The court noted that it is aimed at individuals directly, which is a special exception from the previous practice present in the international law.

Switzerland grounded its position on the unquestionable statement that the declaration was not contested. To be quite fair, it could not have been contested because it was termed an interpretative declaration, although it was actually a reservation. In the context of time for objection, Prof. Imbert stated that statutes of limitation for objection was introduced to substantiate legal certainty, and that after expiry of 12 months legality, i.e. admissibility of such unilateral statement / declaration could not be considered. He said that "once a reservation is accepted, explicitly or implicitly by all Contracting States, it may not be questioned by either Contracting States, Commission or the European Court any longer."[40] This reasoning is not without merits, since it introduces certainty in the concept of a reservation, and neither of the Contracting States may resort to not being acquainted with the unilateral declaration in question, since the 12-month statute of limitation starts from the moment of receiving such information[41]. Both the Court and Commission took a completely different standpoint, i.e. that "The silence of the receiving party and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.."[42] The Court considered the statement of Switzerland and concluded that it was actually a general reservation that was not admissible pursuant to Article 64, and that no internal law was referenced as the reason for such declaration.[43] Based on these conclusions,

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[40] Imbert, Reservations to the European Convention of Human Rights Before the Strasbourg Commission: the Temeltasch Case, 33 I. C. L. Q., 1984, 558, 589 – 90.

[41] Prof. Imbert reasoned correctly: To tell this state several years later, after the declaration was submitted, that the protection is no longer enjoyed since the reservation was found to be inadmissible may provoke a reaction or do even worse, it may jeopardize the whole system to this Convention… so that the supervisory bodies risk to weaken their position and reputation." Imbert, ibidem, 558, 589 – 90.

[42] Belilos judgement, para 47.

[43] Belilos Case, 132 Eur. Ct. H. R., on 26.

the Court finally ruled that the reservation of Switzerland was not admissible. "This was a precedent where an international court decided that a reservation of a country was inadmissible."[44]

On the basis of Swiss actions, the Court interpreted two intentions expressed by Switzerland (intention to ratify the Convention and intention to make a reservation) and prioritized the intention for the State to be bound by the Convention.[45] After the judgment was passed, Switzerland experienced a stormy voting in the Council of States where the proposal for withdrawal from the European Convention on Human Rights fell short of one vote. This only illustrates the power of resistance by the European states to implementation of the doctrine of withdrawal.[46]

Nevertheless, actions of the Commission and Court were not justified for many reasons. One, maybe the most important one, was proposed by Imbert, and it relates to the statutes of limitations for an objection that should be binding for the Community institutions. In the case of Switzerland, the final court judgment was passed 12 years after the unilateral declarations were submitted. All this may lead to legal uncertainty. Namely, it may be inferred that during all that period they did not know the scope of rights and duties of Switzerland as a member of the organization. Why had not the bodies and institutions performed their competences over the period, but started doing that after such a long time? How can states behave like members of an organization if practically retroactively, i.e. after a period of 12 months (which is a generally accepted statute of limitations in international law to accept a reservation) has been exceeded several times, somebody proclaims their activities illegal and void, drawing conclusions of pertinent liability and indemnification. In doing to the bodies not only fail to help, but they tear down the existing concept and organizational structure.

If they want to exercise their competence that is not questionable pursuant to the legal regulations of the Council of Europe, under current conditions the Court of Europe should abide by the 12-month term for examination of

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[44] Korkelia, Konstantin, *ibid.* , pp. 444;

[45] See: Korkelia, Konstantin, *ibid.* , pp. 466;

[46] See: Schabas, William, Reservations to the Convention of the Rights of the Child, Human Rights Quarterly, Vol. 18, 1996, pp. 479, Sucharipa – Behrmann, The Legal Effects of Reservations to Multilatelar Treaties, Austrian Review of International and European Law, 1996, Vol. 1, pp. 80;

a reservation. The requirements stipulated in Article 57 of the Convention are not applicable on their own, although they appear clear and precise. Whether a reservation is of a general nature, and when the requirement of brief statement of the law concerned is fulfilled and when not, should be ruled by the Court and Contracting States, as well as others within the set 12-month term. This is fully compliant with the legal nature of a reservation that as a unilateral legal act does not have legal effect, but only illustrates an intention of a Contracting State to limit the effect of a provision of the treaty to itself. Will this happen, and in respect to which Contracting State does not, generally depends not so much on such state, but on other Contracting States. In this particular case, it also depends on the Court, since nothing can prevent a state to file a maximum objection to a reservation although the Court keeps silent in respect thereof. Thus, in spite of unquestionable role of the Court and special orders of the norms, states also play an important role. How would the Court implement a prohibition if a state objects to a reservation made by another state?

One of the main arguments substantiating the position of the Court is that "Germany, United Kingdom or, say, Denmark, have little or no interest in objecting to such declaration of Switzerland that limits the right to trial to residents of Switzerland."[47] There are very convincing arguments that the situation is completely different. Namely, there is a high chance that in implementation of the Convention violation of the right to fair trail will affect citizens of neighboring countries that commute to and from Switzerland on a daily basis. It is assumed that this would be sufficient reason for their resident countries to predict such situations and protect them by possible objections. Besides, the Contracting States, pursuant to the Convention itself, shall make sure to implement it and make sure that other Contracting States comply with the treaty provisions. Argumentation that "the system of acceptance and objections is operational only in an atmosphere of reciprocal rights and duties stipulated in traditional commercial multilateral contracts ..."[48] is simply not right. There are very many new treaties that do not cover economic issues, but still stipulate the use of reservations. Besides, the Convention on Fundamental Rights and Liberties also regulates the issue of reservations, i.e. stipulates the

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[47] Henry J. Bourguignon, The Belilos Case: New Light on Reservations to Multilatelar Treaties, 29 *Va. J. Int. L.*, 347, 1988-1989, p. 368.

[48] *Ibidem*, p. 368.

possibility of their use, and this Convention undoubtedly is not a commercial contract.

FINAL CONSIDERATIONS

In spite of all shortcomings associated with Court reasoning in the Belilos case, this decision has become a precedent not only in the case law of this Court, but is referred to in general international law, as well. It has given a strong impetus to the positions that evaluation of admissibility of a reservation must be objectified and that consequences of reservation making are null and void. After this case before the European Court for Human Rights several more cases dealt with reservations of the Member States and all of them referred to the Belilos case as an example in which unquestionable and unequivocal foundations were made for admissibility of a reservation, the manner in which it may be made, timeframe in which it could be done, and most importantly, legal procedures resulting from the Court judgment. That is why this case is a precedent.

To a certain degree, the issue of a reservation to Conventions within the Council of Europe, and in particular to the Convention on Human Rights is not so important as it used to be. Namely, almost all European Countries are already members of this organization and because of ***ratione temporis*** requirement, i.e. that reservations should be made on the occasion of ratification of a treaty, there is not much room for their possible implementation. Another reason may be the case law of the Court which would unquestionably have a deterrent effect on a party that considers making a reservation. Nevertheless, this issue has not completely lost its significance, although this may appear to be the case. Namely, since the Court has passed judgments retroactively on several occasions, sometimes much beyond the 12-month deadline after a reservation was made, one cannot rule out the possibility that even today, if the practical need arises, the Court pronounces nullity of already made reservations. Besides, this is even more important in the light of the fact that states tend to make interpretative declarations that are essentially reservations, which was exactly the judgment of the Court in the Swiss case. There are still a substantial number of reservations in place, which may not be overlooked, but they are mostly time-bound.

On the universal international level of human rights protection and in operations of the Commission for International Law, some attempts were made when codification of the law on reservations was discussed, to elevate the rules from the regional European level to the international one.[49] The Commentary 24[50] of the Human Rights Committee, a body established pursuant to the 1977 Covenant on Civil and Political Rights is well known in this respect. Advocates of the theory call it the withdrawal theory. Nevertheless, not even all European countries agree with such set of norms in relation to reservations; they deny it on the international level, since it is not stipulated in the treaty. Therefore, it is quite true that: „Although France and United Kingdom participate in the system on the regional level where the Commission and Court for Human Rights have applied the withdrawal theory (no longer), not even once have these states suggested that the system may be applied to the Covenant on Civil and Political Rights, so that one may conclude that there is an essential difference between the European Convention on Human Rights and Covenant on Civil and Political Rights.“[51] Thus, positions of respectable states that participate in both systems are such that they deny the possibility of transfer of the principles and legal rule from the regional to the universal level and they find it legally unacceptable. “It is quite clear, therefore, that the Committee entered controversial grounds when they adopted such a radical approach (withdrawal theory in Commentary 24) even if it is in line with position of European institutions in Strasburg.“[52]

Therefore, it may be concluded that a parallel existence of different rules in relation to reservations on the regional and universal levels is possible, and that the case law of the European Court for Human Rights, although imperfect in some aspects, is still operationally functional in spite of the lack of powers for examination of admissibility of reservation to the subject matter and objective of the Convention of Human Rights.

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[49] As illustrated in the case of Trinidad and Tobago before the Human Rights Committee, see Rawle Kennedy v. Trinidad and Tobago, Communication No. 845/1999, CCPR/C/67/D/845/1999;

[50] General Comment No 24(52) - General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declaration under article 41 of the Covenant;

[51] Korkelia, Konstantin, ***ibid.*** , No. 2, pp. 463;

[52] Ghandi, Pr., The Human Rights Committee and Reservations to the Optional Protocol, Canterbury L. Rev., 2001 – 2002, Vol. 8, pp. 32;

REZERVE UZ KONVENCIJE SAVETA EVROPE SA POSEBNIM OSVRTOM NA REZERVE UZ EVROPSKU KONVENCIJU O LJUDSKIM PRAVIMA IZ 1951. GODINE

Sažetak

Ovaj rad se bavi istraživanjem pitanja rezervi u sistemu konvencija koje su zaključene u Savetu Evrope, a naročito pitanjem rezervi na Konvenciju o pravima čoveka. Na početku su analizirani pripremni radovi na usvajanju pravila koja se odnose na formulisanje rezervi na Konvenciju o pravima čoveka, ali i pravila iz drugih evropekih konvencija. Zatim je analizirana praksa Evropskog suda za ljudska prava prilikom procene dopustivosti rezerve sa predmetom i ciljem Konvencije preko određenih upečatljivih slučajeva, i uspostavljanje standarda „evropski poredak". Potom je iznet kritički osvrt na rad Evropskog suda na ljudska prava i analizirana je opravdanost odluka suda sa stanovišta načela pravne sigurnosti, zabrane retroaktivnosti i s obzirom na drugačiji sistem pravnih pravila koji egzistira na univerzalnom nivou. Na kraju su izneta neka osnovna viđenja budućeg razvoja pravila i prakse u okviru Saveta Evrope, ali i opstanak drugačijeg paralelnog sistema normi na univerzalnom nivou.

Ključne reči: rezerve, evropski poredak, Evropski Sud za prava čoveka, najvažniji slučajevi pred sudom;