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Reservations to Treaties

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Reservations to Treaties

Sotirios-Ioannis Lekkas and Panos Merkouris

I. Introduction

A reservation to a treaty is a unilateral statement, however phrased or named, made by a State when entering a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application with respect to that State. Reservations are an important yet controversial tool in multilateral treaty-making. Admitting reservations can facilitate widespread endorsement of a multilateral treaty by enabling States to join, despite their concerns about specific issues. Yet, reservations can create tensions between parties of a multilateral treaty, as they can lead potentially to its fragmented, even unequal, application. In practice, reservations have proved particularly contentious in the context of human rights treaties. States entering human rights treaties have resorted to reservations presumably because these treaties are ‘inward-targeted’ and have potentially far-reaching implications in the States’ domestic sphere (Simma, 1998: 660; Higgins, 1989: 11). In turn, human rights courts and treaty bodies have approached reservations with trepidation often prioritising the treaty’s integrity over States’ concerns. Section II provides a brief overview of the evolution of the general international law regarding reservations to treaties. Section III then tackles the relevance of reservations in the context of human rights treaties.

II. The Permissibility and Legal Effects of Reservations

1. *Rules on Reservations and their Discontents*

Reservations to multilateral treaties have presented problems of ‘unusual—in fact, baffling—complexity’ (Lauterpacht, 1953: 124) eliciting the continuing reassessment and elaboration of the law pertaining to them. Early theory and practice suggested that a State making a reservation could only become a party to a multilateral treaty with the unanimous acceptance of the reservation by all other treaty parties, unless the treaty provided otherwise (Brierly, 1950: 224; McNair, 1986: 159-60). However, since the 1950s, a clear trend away from strict unanimity towards a presumption of acceptance emerged that solidified with the adoption of the → Vienna Convention of the Law of Treaties (VCLT) (Arts 19-23 VCLT). According to the VCLT, the default rule is that States are allowed to formulate reservations when entering a multilateral treaty, unless the treaty provides otherwise or the reservation is incompatible with the object and purpose of the treaty (Art 19 VCLT). In order for a reservation to be effective, at least one party needs to accept it (Art 20(4)(c) VCLT), unless the treaty provides otherwise or it is evident from the ‘limited number of the negotiating States and the object and purpose of a treaty’ that unanimous acceptance is required (Art 20(2) VCLT).

In the main, the parties do not need to explicitly accept the reservation for the reserving State to become a party with the benefit of its reservation, but they can react to it by formulating objections within a reasonable time, ie twelve months after the State is notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later (Art 20(5) VCLT). In this case, the provisions to which the reservation relates do not apply in the relations between the objecting and the reserving State to the extent of the reservation (Art 21(3) VCLT), unless the objecting State opposes the entry into force of the treaty in its relations with the reserving State, also known as ‘objection with maximum

effect'(Art 21(3) VCLT; Guideline 4.3.5 GPRT). Overall, the fundamental premise of the VCLT rules is that the parties are better placed to design rules on reservations which are appropriate for each treaty and safeguard their application.

However, the VCLT rules are not without ambiguities. Whilst the VCLT prohibits certain categories of reservations, it is silent about the legal consequences of impermissibility. What is more, the VCLT establishes a process that focuses on the reactions of individual parties without making clear whether this applies also to impermissible reservations. Besides, this process is premised upon the reciprocal denial of benefits on a bilateral basis which provides little incentive for State parties to object to reservations in some cases, most conspicuously, human rights or environmental treaties. As a result, from 1993 to 2011, the International Law Commission ('ILC') studied and expanded upon the law and practice of reservations. Although the 2011 ILC Guide to Practice ('GPRT') is not formally binding, it has received the commendation of the UN General Assembly (UNGA Resolutions 66/98 and 68/111) and does provide concrete guidance as to issues that have spun out of the interpretation of the VCLT rules.

2. *Grounds for Impermissibility of Reservations*

The law of treaties seeks to promote participation to multilateral treaties by allowing reservations as a default rule. At the same time, it anticipates situations where the formulation of reservations would constitute an abuse of that right. The most clear-cut case is where the treaty itself does not admit reservations (Art 19(a) VCLT; eg Art 120 ICC Statute; Art 309 UNCLOS). The VCLT further envisages the situation where 'the treaty provides that only specified reservations, which do not include the reservation in question, may be made' (Art 19(b) VCLT). Notably, a treaty may describe exhaustively which reservations are allowed (GPRT: 207; cf Art 57 ECHR). Less conspicuously, the interpretative principle of *inclusio unius est exclusio alterius* lends support to the argument that when a treaty authorises the formulation of specified reservations it implicitly prohibits all other reservations (DALT: 202 and 207; Fitzmaurice, 1956: 115). However, the GPRT seems to disfavour this interpretation (GPRT: 205-6). For instance, the → Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly provides for reservations with respect to Articles 20 and 30 but is otherwise silent on the permissibility of reservations (Arts 28 and 30(2)-(3) CAT). Whilst some States, including UK and USA, have asserted a right to formulate reservations apart from those expressly authorised, they are infrequent amongst the CAT parties (Sørensen and Dalton, 2004: 88-90).

Regardless of the specific treaty provisions, a State cannot formulate reservations that are incompatible with the object and purpose of the treaty (*Genocide Advisory Opinion; Armed Activities in the Territory of the Congo (New Application: 2002)*; Art 19(c) VCLT; Guideline 3.1.3-3.1.4 GPRT). This constitutes the 'fundamental criterion' for the permissibility of reservations, but also the most difficult to define (GPRT: 211). The GPRT's input rests on the clarification of two points. First, a reservation's permissibility depends on objective criteria, not on the subjective reactions of the parties (Milanovic and Sicilianos, 2013: 1057). Hence, the ILC opined that a reservation is impermissible if it 'affects an essential element of the treaty that is necessary to its general tenor, in such a way as to impair the *raison d'être* of the treaty' (Guideline 3.1.5 GPRT). This determination relies on basic principles of treaty interpretation (Guideline 3.1.5.1 GPRT). Second, this 'object and purpose' criterion applies to all treaties regardless of the specialty of their subject matter (Milanovic and Sicilianos, 2013: 1057). Thus, the ILC suggests that 'vague or general reservations' would be presumably impermissible to

the extent that they are not amenable to an assessment of compatibility with the object and purpose of the treaty (Guideline 3.1.5.2 GPRT). Furthermore, it lists specific *indicia* for assessing the essential character of the element to which the reservation relates according to general characteristics. These include whether the reservation relates to provisions that stipulate peremptory norms (GPRT, 223-4), or non-derogable (Guideline 3.1.5.4 GPRT) or interdependent rights and obligations (Guideline 3.1.5.6 GPRT). Whilst these criteria have been fleshed out principally from the practice of human rights bodies, such features appear in treaties governing diverse fields of international law such as the law of armed conflict, international environmental law, and the law of arms control.

3. *Legal Effects of Impermissible Reservations*

The notable blind spot of the VCLT rules on reservations are the consequences of impermissibility. Permissible reservations can modify or exclude certain provisions of a treaty with respect to the reserving State. Objections to these reservations do not change this situation, but allow objecting States the right to oppose the entry into force of the entire treaty in their relations with the reserving State. Early pronouncements of the → International Court of Justice (ICJ) lend support to the argument that the same procedure applies with respect to impermissible reservations producing the same effects (*Genocide Advisory Opinion*, 24). The key clarification introduced by the ILC is that impermissible reservations are null and void, devoid of any legal effect (Guideline 4.5.1 GPRT). Acceptance or objections by other parties is inconsequential; it only has a declaratory or evidentiary value attesting or denying the existence of the conditions of permissibility (Guideline 3.3.3 GPRT). This is especially crucial in the context of objections with ‘super-maximum’. Such objections, mainly a European practice, formulated primarily by Nordic States and influenced by the 1999 Recommendation of the Council of Europe (CoE) (CoE, 1999), attempt to create an irrebuttable solution, that could have the effect to bind a State to ‘contractual obligations it does not consider suitable’ (Tomuschat, 1967: 466). However, the ILC stressed that the GPRT Guidelines were by no means an approval of such objections.

That said, the invalidity of impermissible reservations does not settle automatically the position of the reserving State with respect to the treaty (Pellet, 2010: 30-9). This issue was also discussed extensively in *Interhandel* and *Certain Norwegian Loans*, albeit in the different context of Art 36(2) ICJ Statute declarations. Various solutions have been proposed to resolve this quandary, however, since these are closely tied to the practice of human rights courts and treaty bodies, they are analysed in Section III.3.

III. The Relevance of Reservations Regarding Human Rights Treaties

1. *Reservations to Human Rights Treaties*

Not all human rights treaties have provisions detailing which reservations are permissible. Out of the nine core international human rights instruments

- two have no provision on reservations (→ International Covenant on Civil and Political Rights (ICCPR) and → International Covenant on Economic, Social and Cultural Rights (ICESCR));
- two allow for reservations with respect to dispute settlement (→ International Convention for the Protection of All Persons from Enforced Disappearance (CED), Art

42(2)) and the competence of the Committee (Arts 28(2) and 30(2) CAT), although they are silent on other reservations;

- and five have a provision, echoing the VCLT, prohibiting reservations incompatible with the treaty's object and purpose (→ International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art 20; → Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art 28; → Convention on the Rights of the Child (CRC), Art 51(2); → Convention on the Rights of Persons with Disabilities (CRPD), Art 46(1); → International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Art 91(2)).

CERD merits particular mention, as Article 20 renders impermissible a reservation if it inhibits the operation of any of the bodies established by that Convention. In fact, CERD creates an irrebuttable presumption that a reservation is incompatible or inhibitive 'if at least two thirds of the States Parties to this Convention object to it'.

Out of the regional human rights instruments neither the → African Charter on Human and Peoples' Rights (AfCHPR), nor the → African Charter on the Rights and Welfare of the Child have any provision devoted to reservations, while the → American Convention on Human Rights (ACHR) directly refers to the VCLT (Art 75 ACHR). Finally, certain rights of the → the European Convention on Human Rights (ECHR) are non-derogable, while Article 57 provides that a State may make a reservation 'to the extent that any law then in force in its territory is not in conformity with the provision'. Under the same article, reservations of a general character are impermissible.

2. *Assessment of Permissibility of Reservations by Treaty Bodies and International Courts*

Dispute settlement or treaty monitoring bodies can assess the permissibility of reservations to the extent necessary for discharging their competences (Guideline 3.2.1 GPRT). For example, the Human Rights Committee (HRCtee) as provided in General Comment No 24 and in *Rawle Kennedy*, the ECtHR in *Belilos* and *Loizidou*, and the IACtHR in *Hilaire* have all determined reservations as impermissible. However, other human rights treaty bodies, such as the CEDAW Committee, although having expressed concerns regarding certain reservations, have refrained from declaring them impermissible (Salem, 2020: para. 22). In fact, the UN Secretary-General has expressed the view that the CEDAW Committee 'does not have the power to decide the incompatibility of reservations' (ECOSOC, 1996: para. 7), although Guideline 3.2.1 GRPT; Giegerich, 2010: para. 35). However, even if such an opinion is not binding, it may still carry a significant interpretative *gravitas*.

3. *Impermissible Reservations in Human Rights Treaties*

3.1. Approaches to Impermissible Reservations

The VCLT does not provide an answer as to the legal effect of impermissible reservations. Legal theory and practice have been dominated by two approaches, which mainly function on the basis of a presumption, a positive and a negative one. A positive presumption, ie that a State's consent is not affected by the invalidity of the impermissible reservation and thus remains bound by the treaty without benefitting from the reservation. This has become widely

known as the ‘severability doctrine/approach’ The negative presumption, contrarily, considers that the invalidity of the reservation poisons the consent to be bound of the State as a whole, and thus the State is not bound by the treaty (GPRT Guideline 4.5.3 Commentary; Simma and Hernández, 2011; Pellet and Müller, 2011; Gaja, 2008; de Frouville, 2004: 385-9; Coulée, 2004; Staff, 2018; McCall-Smith 2014; Moloney, 2004; Klabbers, 2000; Greig, 1995; Redgwell, 1993; Bowett, 1976).

Although the negative presumption seems in line with the principle of consent, in reality the positive presumption is in the ILC’s view equally if not more so in line with that principle as it respects the consent not only of the reserving State, but also of all the other contracting States (GPRT Guideline 4.5.3 Commentary, paras. 35-7). According to Simma and Hernández, there are a number of reasons that lend credence to the appropriateness of the severability doctrine in the case of human rights treaties: transparency; the nature of human rights treaties, the nature of consent, the facilitation of the task of the monitoring bodies and/or adjudicators, and the removal of human rights treaties ‘from the grip of the bilateralist paradigm’ (Simma and Hernández, 2011: 81-4).

3.2. (Quasi-)Judicial Practice on Impermissible Reservations

In a series of cases in the 1980s and 1990s, such as *Temeltasch*, *Belilos*, *Chrysostomos* and *Loizidou*, the European Commission and the ECtHR developed what Simma dubbed the ‘Strasbourg approach’, essentially an application of the severability doctrine (Simma, 1998: 670-1; Cohen-Jonathan, 1996: 940). Both the HRCttee in *Rawle Kennedy*, and the IACtHR in *Hilaire* have adopted solutions consistent with this approach. Of import is also General Comment No 24, where the HRCttee opined that the ‘normal consequence of an unacceptable reservation is not that the [ICCPR] will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable’ (General Comment No 24, para. 18).

The above should not give the wrong impression that these bodies have adopted the severability approach in an unqualified manner. For instance, General Comment No 24 refers to severability as the ‘normal’ consequence, but not as the ‘only’ one, leaving open the possibility of ‘abnormal’ consequences occurring, without, however, offering guidance as to when that would be the case. Furthermore, several States (eg France, UK and USA) formulated objections to General Comment No 24’s approach (Giegerich, 2010: para. 39). While when the HRCttee applied it in *Rawle Kennedy*, four members felt the need to dissent. Other human rights treaty bodies, such as the CERD and CEDAW Committees have opted for the softer approach of entering into dialogue with the reserving States (Giegerich, 2010: para. 40; CERD, 2003), an approach that also received the ILC’s stamp of approval.

If one looks closely at the relevant jurisprudence, it becomes evident that human rights courts have applied a nuanced approach, whereby they attempt to reconstruct the reserving State’s intention without, however, relying blindly on mere formal declarations (Schabas, 1995: 322). In doing so, they have had recourse to a number of factors, eg the position of the State (*Belilos*, para. 60); it knowingly running the risk of the reservation being impermissible (*Loizidou*, para. 95); the content and context of the provision to which the reservation relates, the special nature and ‘object and purpose’ of human rights treaties (*Belilos*, para. 93; *Hilaire*, paras. 93-4), as well as the State’s subsequent practice, its position on similar provisions of *in pari materia* treaties and the reaction of other States (GPRT Guideline 4.5.3 Commentary, paras. 45-6).

This nuanced approach was supported in the Inter-Committee Meetings of the human rights treaty bodies and the Meetings of the Chairpersons of these bodies. There it was acknowledged that there was no need for a separate reservations regime for human rights treaties. The existing regime sufficed as long as it was applied in ‘an appropriate and suitably adapted manner’ (Pellet, 2009: para. 27; cf Simma and Hernández, 2011: 62, 68; Giegerich, 2010). It was further highlighted that despite growing support for the severability approach, this was not an ‘automatic conclusion ... but only a presumption’ (UN, 2005: para. 37). In fact, in their view the correct solution was determined by the intention of the State at the time it entered its reservation, with a rebuttable presumption that a State would prefer to remain a party to the treaty. In order for that presumption to be reversed a ‘contrary intention [had to be] incontrovertibly established’ (UN, 2007: para. 18; UN, 2006: para. 16(7)). The Sixth Committee as well, despite disagreements as to which presumption should be opted for, was also of the view that the intention of the reserving State was the ‘key criterion’ (GPRT Guideline 4.5.3 Commentary, paras. 20-1).

3.3. The ILC’s Approach

In the end the ILC qualified the ‘reserving State’s intention’ as the key criterion. For reasons of legal certainty, it opted for a *rebuttable positive presumption* in Guideline 4.5.3, although it intentionally omitted the term ‘incontrovertibly’, as it appeared to set too strict of a criterion (GPRT Guideline 4.5.3 Commentary, para. 31). It also cautioned that such a rebuttable presumption was by no means an approval of objections with ‘super-maximum’ effect.

Furthermore, the ILC envisaged this approach to be applicable to all treaties irrespective of their nature. This is not to say that this was designed to be the final word on the issue of impermissible reservations. The ILC was keenly aware that this presumption is not customary law but rather a ‘cautious progressive development of international law’ (GPRT Guideline 4.5.3 Commentary, para. 49; Baratta 2000).

IV. Conclusion

Formulating reservations is crucial in treaty-making. It can entice States to join a treaty, but also lead to a kaleidoscope of different versions of treaty obligations. Human rights treaties are no exception to this. Despite voices to the contrary, the ILC opined that no special regime of reservations for human rights treaties was required. This notwithstanding a critical issue was and remains that of the legal effect of impermissible reservations. Should a State remain bound by the treaty without benefitting from the impermissible reservation (severability approach) or does the reservation’s voidness poison the State’s consent as a whole? Although in human rights jurisprudence there seems to be a tendency for the severability approach, this is by no means an automatic or irrebuttable application. Rather, it is the reserving State’s intention that is the key criterion for resolving the riddle of impermissible reservations.

In Guideline 4.5.3, in order to promote legal certainty and strike a middle ground between a theory of ‘integral’ consent and that of the ‘super-maximum’ effect of severability, the ILC opted for a rebuttable positive presumption, ie that a State would be bound by the treaty as a whole, unless a contrary intention was shown. This, however, as the ILC candidly admitted is not customary law but rather a ‘cautious progressive development of international law’. Only time will tell whether Guideline 4.5.3 meets with the approval of States and international organs and matures into customary law.

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