

Treaty making essay



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As agreements between States are made most notably by instrument of the treaty, a study of international law would be completely lacking without a discussion of treaties and reservations to treaties. Simply speaking, a treaty is an agreement between States, and as expected, agreement may not come easily. Making reservations to treaties is one method for States to show their disapproval for particular provisions.

The effects of reservations to multilateral treaties have evolved over the years, resulting in greater leeway in some respects but also in greater restrictions, as with human rights treaties. Once a State has made a reservation, the other parties must react. It is also up to States to determine and distinguish between interpretive declarations and actual reservations as the consequences are quite different for the two. Furthermore, *ius cogens* and fundamental changes in circumstances play a role in determining viability in treaty law.

Traditionally, as can be seen with the League of Nations in 1927, only reservations which were accepted by all the states which had signed on to a treaty were allowed. In 1932 the Pan-American Union pushed for a different slant for treaties ratified with reservations as yet unaccepted with the following stipulations: 1) the treaty would be regarded as in force between original signatories without the reservations, 2) in force between Governments which ratified it with reservations and States which accepted the reservations, and 3) not in force between a Government which had ratified the treaty with reservations and one that had not (Harris 790). The restrictive approach to reservations was modified when states made reservations to the 1948 Genocide Convention which contained no clauses

allowing such reservations (Shaw 644). The International Court of Justice's (ICJ's) Advisory Opinion on the Genocide case, in tune with the Pan-American Union's view, revolutionised the rules. The Court said that the goal of the Genocide Convention was to "protect individuals" not to "confer reciprocal rights on contracting states" (Malanczuk 136). Thus, the Court allowed a State to become party to the Convention as long as at least one other State agreed to the reservation, compatible with the object and purpose of the Convention.

If one party objected to another's reservation as incompatible with the object and purpose of the Convention, it had the right to consider the reserving state not a party to the Convention, and conversely, accepting the reservation as compatible with the object and purpose of the Convention allowed consideration of the reserving state as a party to the Convention. A signatory state's effective power of objecting to reservations has no legal validity unless it, itself, has ratified the treaty. Likewise, a state which has the ability to sign or accede, but has not, has no authority to object to reservations (Harris 791). The new rule of becoming party to a treaty with other States that accepted reservations as "compatible with object and purpose of the Convention" evolved. Compatibility is decided by the states one-on-one. As the Convention had been a product of majority votes and a spirit of cooperation and universality, the Court found reason for flexibility in terms of allowing reservations.

Since the goal of the Convention was humanitarian, the states' personal interests should have been cast aside in favor of a common interest. The 1969 Vienna Convention on the Law of Treaties confirmed these views (Shaw

645). The controversy behind reservations to treaties lies in the premise of the goal of treaties and whether reservations hinder those goals. The principle behind reservations is respect of state sovereignty. States should not have to agree to anything about which they may be uncertain. A treaty with half-hearted support is useless, for it is a treaty in face-value only.

For a treaty to be effective, it should have a sufficient number of states sign on to a majority of the provisions. Full support on all provisions is virtually impossible as states differ in their cultural, economic, and political backgrounds (Harris 791). For a few states to make reservations to treaties is more advisable than key states failing to become parties to multilateral treaties altogether (792). A balance must be struck between the “ integrity of a treaty” and the “ need to get as many States as possible on board” (804).

States decide between themselves which reservations are allowable and which are not or take the case to the ICJ. The Vienna Convention on the Law of Treaties 1969 defines the wheeling and dealing of treaty-making as a “ network of bilateral relationships” as each party must decide one-on-one whether or not to accept another’s reservation. Articles 19 to 23 of the Vienna Convention spell out the effects of reservations to multilateral treaties. Whether a state accepts or rejects a reservation settles the bilateral effect of that reservation between the reserving state and itself (Malanczuk 135). By the end of twelve months, silence is equal to consent. This creates a problem for small states that do not have manpower to analyse all reservation propositions. Article 20(4) of the Vienna Convention gives possibilities for a state to object to another state’s reservation.

Article 21 discusses the legal effects of objections to reservations. If a state objects to another state's reservation the reservation is effective only to the extent agreed upon between the two a. - 801). Unacceptable reservations simply lead to treaties in effect for the reserving state without the benefit of the reservation (802). The UK's practice is to deem a reserving state a party to a treaty only if the reservation is considered compatible with the object and purpose of the treaty.

Only if the party withdraws an incompatible reservation can it become a party to the treaty (803). On the other hand, the US is of the mind that each reservation and treaty deserves particular attention. One cannot automatically label a reservation seemingly at odds with customary international law as incompatible with the object and purpose of a treaty (Harris 804). The US' response to reservations to the Convention on the Territorial Sea and Contiguous Zone of 1958 was ambiguous in stating "conventions are considered by the United States to be in force between it and each of those States except that provisions to which such reservations are addressed shall apply only to the extent that they are not affected by those reservations" (Bowett 78). One could read this as the treaty applying wholly without effect from the reservations or as the treaty applying excluding those provisions to which reservations had been attached.

Grounds for the UK's objection to Syria's reservations to provisions on dispute settlement in the Vienna Convention on the Law of Treaties are debateable, as they could have been considered either impermissible or incompatible with the object and purpose of the Treaty. Permissible objections may be objectionable to other parties but unopposable (80). What

are the criteria by which to judge the permissibility of a reservation?

Permissibility is legally judged by the terms of the treaty. First, one must identify whether a statement is actually a reservation or an interpretive declaration.

Secondly, is it a reservation to the article for which it claims to be and not a reservation to an article which does not allow reservations? An example to illustrate this practice is the French reservation to the Continental Shelf Convention "to exclude the equidistant principle where the boundary is prolonged beyond the 200-metre isobath" (Bowett 73). This could be read as circumvention around the outer-limit of the shelf to which Article I of the Convention did not allow reservations. Does the reservation aim to modify rules for the treaty at hand or for another treaty or rule of customary international law? Rules of customary international law should be applicable to all States; therefore, a State cannot try to make a reservation relating to one. Lastly, the reservation must be compatible with the object and purpose of the treaty.

Opposability only becomes an issue if the reservation is deemed permissible. A State can accept or object to the reservation, object only to the reservation but not the treaty coming into force, or object to both the reservation and the treaty entering into force between itself and the reserving party (Bowett 88). Article 19 of the Vienna Convention generally allows the permissibility of reservations except when expressly or impliedly prohibited or when incompatible with the object and purpose of the treaty. If a reservation is incompatible with the object and purpose of the treaty but can be severed, then it should be considered a nullity; however, if it is not severable, then

the State's ratification or accession to the treaty should be nullified (89).

There is a trend with human rights treaties to sever reservations so the provisions in question apply fully to the reserving state. General Comment Number 24 on Reservations to the International Covenant on Civil and Political Rights declared the Vienna Convention inapplicable to human rights treaties.

While the Covenant does not outlaw or expressly permit any type of reservations, Article 19(3) still applies - that the reservation must be compatible with peremptory norms and the object and purpose of the treaty (Harris 798). Reservations against the spirit of human rights must be struck out of the treaty. For instance, the prohibition of torture and "arbitrary deprivation of life" fall under *ius cogens* and cannot be surrendered. These peremptory norms and non-derogable rights must be respected for a rule of law to be upheld (799).

Thus, states bear a heavy burden to prove reservations. States that must decide whether or not to accept reservations should take all reservations as a whole into account, and take care that they are still accepting the Covenant, not simply a "limited number of human rights obligations" (802). General Comment 24 appears to be at odds with the principle of state sovereignty - that states have the authority to give their consent to what they choose. In *Loizidou v. Turkey*, the Court found the territorial restrictions in Turkey's declarations under Articles 25 and 46 impermissible. Since the Convention was a human rights treaty, the reservations were severable, requiring Turkey to accept jurisdiction by the Commission and Court (Shaw 648).

Article 64 of European Convention on Human Rights (1950) is an example of a treaty provision prohibiting certain kind of resolutions. In *Belilos v. Switzerland*, Belilos alleged an unfair trial according to Article 6 of the European Convention on Human Rights which Switzerland had made an interpretive declaration to, which it also claimed was a reservation under Article 64 of the Convention. The ICJ was to decide whether the interpretive declaration to Article 6 was really a reservation. The Swiss Government claimed the lack of reaction from the Secretary General of the Council of Europe and other parties to the Convention equalled acceptance.

The ICJ rejected this claim by emphasising the Convention's institutions' authority to decide. In order to examine the "substantive content" of the declaration, the Court examined Switzerland's original intentions through *travaux préparatoires*, preparatory documents, finding the intent to make a formal reservation but reluctance to be answerable to the courts (Harris 795). The Court found the Swiss reservation invalid because of its "general character." Since Article 64 of the Convention prohibited reservations of a general character and required a statement of law in force to vouch for the reservation, the reservation was severed, and Switzerland was still considered bound by the treaty (Shaw 644). Had the Court found the reservation vital to Switzerland's acceptance of the treaty, the reservation would not have been severed and the Swiss ratification would have been invalidated (Harris 797). The case shows the content constituting a reservation cannot hide behind another name; its intent will be revealed.

The controversy surrounding whether Switzerland had made a reservation or an interpretive declaration is a common issue that surfaces. The distinction

must be made between interpretive declarations and reservations. The difference lies in the intent of the statement. If a declaration serves only to clarify a State's position on its interpretation of the provision for all parties, it is rightly labelled a declaration; if, however, it intends to modify the treaty's terms, it may very well be a reservation. Bowett 70).

The UN Human Rights Committee General Comment on Reservations specifies that a statement is a reservation if and only if it aims to exclude or modify a provision. In the UK-France Continental Shelf Case, the UK claimed France's third reservation to the Geneva Convention on the Continental Shelf regarding the "nonapplicability of principles of equidistance in areas of special circumstances as defined by the French government" was an interpretive declaration, not a reservation. The Arbitral Tribunal found France to have imposed explicit stipulations regarding the special circumstances" and delimitation areas which other States had to accept (Shaw 643). Thus, since France did have the intent to carve out its own legal effect for Article 6, it was indeed a reservation. Article 6 was neither wholly applicable nor inapplicable but inapplicable between the two countries to the extent of the reservation (646). *Ius cogens* and fundamental changes of circumstances are often slippery grounds for determining the operation of treaties.

A fundamental change of circumstances is often cited as reason for terminating suspending, or withdrawing from a treaty. The term *rebus sic stantibus* illustrates the condition of a treaty remaining in force as long as the circumstances remain identical to the time of conclusion of the treaty (Malanczuk 144). Today, it only applies to special cases, the principle having undergone modern-day consideration. The danger in *rebus sic stantibus* is <https://assignbuster.com/treaty-making-essay/>

that circumstances are always changing, and thus the principle may be invoked facetiously, for states could easily use it to escape unwanted treaty obligations. The modern approach is to “ admit existence of the doctrine but severely restrict its scope” (Shaw 670).

Article 62 of the Vienna Convention allows for termination or withdrawal from a treaty if the circumstances were essential for consent by parties to be bound, if consent to the treaty was heavily dependent on those original circumstances, or if the change of circumstances has greatly altered the present obligation (if the burden of obligation is quite different than previously agreed upon under the former circumstances). A fundamental change of circumstances cannot be regarded as grounds for terminating or withdrawing from a treaty if the treaty establishes a boundary or if the fundamental change is a result of one party breaching the treaty. A fundamental change in circumstances can be used to suspend operations of a treaty if it can be used to terminate or withdraw from a treaty (Harris 845). Law Commission (ILC) distinguishes between “ impossibility of performance” and a fundamental change of circumstances as grounds for terminating treaties (846). In the Anglo-Icelandic Fisheries case, Iceland claimed that the reduced amount of cod and increased exploitation of its seas was a fundamental change in circumstances, authorising the termination of the 1961 exchange of notes between the UK and itself which allowed both parties to refer disputes concerning Iceland extending its fishing zone to the ICJ (Harris 847). The UK challenged Iceland increasing its zone from twelve to two hundred miles.

The UK protested, according to Article 65 and 66 of the Vienna Convention, that Iceland did not have the authority to call off the treaty unilaterally but could only ask for termination and then go to the courts if the call was denied (848). The Court questioned whether the change was fundamental to both parties, as contained in Article 62. The issue in this case was Iceland's obligation to answer to the ICJ's jurisdiction. The jurisdictional obligation did not appear to change substantially following Iceland's claim of change in circumstances. Article 53 of the Vienna Convention voids a treaty if it conflicts with *ius cogens*, " a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having same character" (Harris 835).

Article 64 voids and terminates treaties which conflict with a new peremptory norm of general international law (Malanczuk 145). There are issues with the validity of *ius cogens* since " even the most general rules still fall short of being universal" (Harris 835). The whole idea of *ius cogens* is still relatively new as international law is under continuous development. How exactly Article 53 works out is left up to state practice and the judgements of the courts. What has been reconciled with the principle of *ius cogens* is those treaties considering unlawful use of force contrary to the Charter; criminal acts; and other acts such as slavery, piracy and genocide. The ILC did not list rules of *ius cogens*, for it did not want to limit the principle as it is a living, breathing idea.

Eastern European and developing countries are more apt to void treaties on account of *ius cogens* violation; however, Western European countries are wary of such *de lege ferenda*, for such grounds for invalidation can be very

vague. Judges with such wide discretion would be more involved in legislation than in adjudication (836). Regarding customary international law in human rights, what is considered to be *ius cogens* and customary international law are beginning to overlap (837). Treaty-making is a sensitive process where great care must be taken to appease all parties as much as possible. Allowing States to make reservations to specific provisions of treaties is key to attracting support with the most satisfied parties possible. Though multilateral treaties are agreements among more than two parties, the fundamental agreement still lies between two parties.

Thus, a treaty can become quite a complicated affair with some provisions holding true between two States, while not being in effect between another two, and other States being in complete accord with the entire treaty. The ability for human rights treaties to nullify reservations gives them a unique authority encroaching upon state sovereignty. *Ius cogens* ensures basic rights are respected, and fundamental changes in circumstances require one to re-evaluate treaty law to determine whether the terms of a treaty are in tune with the current norms of the times and whether responsibility has changed with new developments. Treaties are living entities as they represent concurrence between States.

Reservations and acknowledgement of *ius cogens* and *rebus sic stantibus* contribute to the success of a multilateral treaty.