

LEGAL IMPLICATIONS OF RESERVATION TO INTERNATIONAL TREATIES

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Abstract

The capacity of States to conclude treaties is the most important ground of their personalities. International Law recognizes that States may be able to become parties to treaties without accepting all of the provisions. Even though States excluded the legal effect of some provisions in the treaty, these States may become parties to the treaty with reservation clauses. States can adopt and apply the reservation, due to the increase in organizing countries and participation in treaties. Most international jurists said that reservations to international treaties are becoming more and more important at the present time. Reservations played an important role in the conclusion of treaties. In the law of treaties, the reservation process is a complex and difficult problem in the practice of States relating to concluding treaties. This research paper aims to understand the substances and the impact of reservations. This paper is a kind of doctrinal legal research, and it analyzes the statutory provisions, legal principles, and cases relating to reservation by using the qualitative method. States need to find out whether a treaty is serving the national interests of the State, to be aware of the treaty for verification, and to predict what may happen in the future as a result of the treaty. Moreover, States require knowing not only the objectives and principles but also the essence of each clause or provision before entering into a treaty. It is considered that these clauses or articles are consistent with the position of the State, not only the current situation, but also the long-term situation of the State. In order to achieve Goal 16 of the Sustainable Development Goals, this research expects to partly support strengthening the capacity of institutions and cooperating in international relations by concluding more treaties.

Keywords: *treaties, reservations, substances, national interest, international relations*

Introduction

The concept is deeply rooted in the basis of International Law, namely, the consent of States. A treaty is an international agreement concluded in written form between two or more States with their consent and is subject to International Law. Treaties define the international legal rights and obligations. And also, treaties have been used to end wars, settle disputes, and even establish new countries. Besides, the most important element of treaties is to ensure stability, reliability, and order in international relations. Treaties are the primary source of International Law. According to the doctrine of '*pacta sunt servanda*', the parties to a treaty are bound to observe its terms in good faith. Although, reservation is the process that intends to exclude the legal effect of some provisions in the treaty because these provisions are not implemented and are not suitable for the State's situation. The importance of the reservation is in expanding the scope of the treaty to include more from different ideological countries. When States are unable or unwilling to accept any responsibilities specified in a treaty, reservations are meant to provide flexibility within the system of treaty obligations. The principles of reservations develop to cooperate in international relations, to respond to the reality of international development, and to correspond with the political and legal requirements. In 2015, the United Nations established the Sustainable Development Goals. Among these goals, the official wording of Goal 16 is: 'for sustainable development, encourage inclusive and peaceful societies, ensure that everyone has access to justice, and establish inclusive, accountable, and efficient institutions at all levels.' Then, international conventions are the most important instruments for the peaceful

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coexistence of the States and create the prosperous lives of all mankind. Therefore, this research aims to participate more in international treaties, to develop the State level in the international community, and to ensure the prosperity and sustainability of the situation of State.

Material and Methods

This paper reviews and analyzes the legal concepts, procedures, and consequences relating to reservations in the conclusion of treaties, based on the relevant provisions of International Conventions and the views of some eminent jurists. For the research of this topic, this paper aims to analyze on the basis of qualitative methods. This paper has also focused on doctrinal legal research. It cites the appropriate solutions to the problems raised by the subject of reservations to treaties.

Findings

International treaties are the most important instruments for States to coexist peacefully and create prosperous lives for all mankind. States have the right to make a reservation on specific clauses or provisions of any treaty, but this reservation clause does not affect the essential elements and the general concept of the treaty. In the law of treaties, reservation is a good way for States to quickly ratify the treaties without delay. Before making a reservation to the treaties, States need to know the context of clauses or provisions of a treaty, to understand the substance of a treaty, and to consider their national interest. Besides, States can partially or completely withdraw their reservation clauses at any time if they can implement or observe the obligations of a treaty. So, the reservation process plays an essential part of the law of treaties.

Discussion

General Overview of the Concept of Reservation

The 1969 Vienna Convention on the Law of Treaties (VCLT) is a treaty concerning the treaties between States in the International Field. As a result of both codification and progressive development of international law, VCLT plays an important role. On 23 May 1969, it was adopted and opened to signature, and it entered into force on 27 January 1980. It has been ratified by 116 sovereign States as of January 2018. Myanmar ratified the VCLT on 16 September 1998. Article 2(1) (d) and Articles 19-23 of the VCLT are the relevant provisions of reservations to treaties.

Under Article 2(1)(d), 'a reservation is a unilateral declaration, regardless of how it is worded or referred to, made by a State at the signing, ratification, acceptance, approval, or acceding to a treaty that aims to exclude or modify the legal significance of specific treaty provisions in their application to that State.'²

The three elements are essential in the above definition. They are form, time, and distinctive character. In regard to the form, a reservation is a 'unilateral statement'. It is external to the treaty provisions and is made by a State on its own. The second element is the temporal requirement of a reservation. Although a unilateral statement could be made at any time, it will only have the character of a reservation when it is made by the State at the time of expressing its consent to be bound by the treaty, i.e., when "signing, ratifying, accepting, approving or acceding to a treaty". Finally, the essence of a reservation lies not in its wording or nomenclature, but in

² Vienna Convention on the Law of Treaties 1969, art 2(1)(d).

the effect it intends to produce. The phrase "however phrased or named" indicates that the form or name of the statement is irrelevant and that its content and substance are decisive.³ The key element of a reservation is 'States purports to exclude or modify the legal effect of certain provisions of the treaty in their application'.⁴

In the International Law Commission's practice guide on reservations to treaties, a 'reservation is any unilateral declaration created by a State or international organization with the intention of reducing the obligations imposed by the treaty. The parties' intention to implement the obligations derived from the treaty in a different way, which the author of the statement deems equivalent to those specified by the treaty, will also be taken into consideration as a reservation made at the time of ratification, acceptance, approval, or accession'.⁵

Besides, in this guide, a State may make a reservation in order to change the legal effect of the treaty while maintaining the integrity of the internal law, but it does not affect the fundamental elements and the general concept of the treaty.⁶

The two or more States can agree to make the reservation, although a reservation is 'unilateral' in the sense that it has not been agreed by the negotiating States. A reservation may be distinguished from 'derogations'. Derogations are statements authorized by a treaty by which a party is able to exclude certain provisions in their application to it during a particular period, such as a public emergency.⁷

Reservations cannot be made in respect of custom, although there exists a similar mechanism for the exclusion of a customary rule's opposability by way of raising a persistent objection in the process of rule formation. There are divergent views on this question. In the North Sea Continental Shelf cases, the International Court of Justice (ICJ) seems to reject the possibility of making reservations to a customary rule of international law.⁸

In the General Comment No. 24(52) of the Human Rights Committee of the CCPR, described that 'provisions of the Covenant that present customary international law (and a fortiori when they have the character of peremptory norms) may not be subject to reservations'.⁹ This proposition is doubtful with respect to a rule of customary law (except *jus cogens*) which, by its very nature as *jus dispositivum*, is subject to modification by treaty law.¹⁰

Furthermore, in the context of the treaty, customary international rules are treaty provisions so long as they are mentioned in a treaty. In the field of treaty relations, they are operating as treaty rights and obligations and are subject to the rules relating to treaty interpretation and application. The legal effect and applicability of the treaty provision as a whole would be impacted by a reservation made regarding it. Where the rule in its customary form has been existed independently of the treaty provision, it would not affect the operation of the

³ Su Wei, (2023), "Reservation to Treaties and Some Practical Issues", *Asian Yearbook of International Law*, vol 7, Ko Swan Sik et al., eds. Kluwer Law International, p. 109.

⁴ Ibid, p. 110.

⁵ ILC (2011), "Guide to Practice on Reservations to Treaties", vol. II, Part Two, art 1.1.

⁶ Ibid, art 3.1.5.5.

⁷ Aust, Anthony (2000), *Modern Treaty Law and Practice*, Cambridge University Press, p.105.

⁸ Su Wei, (2023), "Reservation to Treaties and Some Practical Issues", *Asian Yearbook of International Law*, vol 7, Ko Swan Sik et al., eds. Kluwer Law International, p. 132.

⁹ Human Rights Committee of ICCPR, General Comment No.24 (52), 2 IHRR (1995) No. 1: 10- 15 at 11, Comment by M. NOWAK, 16 HRU (1995) 381.

¹⁰ Ibid.

identical rule as a customary norm. When recognizing the emergence of a customary rule, it is important to consider any relevant factors, such as a reservation regarding a treaty clause that may have contributed to the formation of the customary rule.¹¹

Reservation in international law is a caveat to a State for accepting and concluding a treaty. Moreover, the reservation process is more useful for the extensive participation of States in multilateral treaties. Through more concluding treaties, International Law is more strengthened and binding force over States. So, reservation is one of the most important processes in concluding treaties.

Permissibility and Impermissibility of Reservations

According to Article 19 of the VCLT, ‘a State may make a reservation when signing, ratifying, accepting, approving, or acceding to a treaty, unless:

- (a) the treaty prohibits the reservation;
- (b) the treaty stipulates that only specified reservations, excluding the reservation in question, may be made; or
- (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.’¹²

In some cases, treaties specifically prohibit reservation. For example, Article 120 of the Rome Statute of the International Criminal Court, 1998, provides: ‘reservation may not be made to this Statute.’ Similarly, reservations are prohibited in many environmental treaties. Article 309 of the United Nations Convention on the Law of the Sea 1982 prohibits reservations to this Convention. Article 7 of the European Convention on the Place of Payment of Money Liabilities 1972 also prohibits any reservation.

The problem with inadmissible reservations happens more often in human rights treaties, although many reservations have been made by States to these treaties. Where the treaty prohibits reservation, it is difficult to distinguish whether the declaration attached to the instrument of ratification is a reservation or a mere interpretation. A reservation allows a State to participate in a multilateral treaty in which the State would otherwise be unwilling or unable to implement some provisions.¹³

In the International Law Commission’s practice guide on reservations to treaties, ‘a unilateral declaration made by a State or international organization party to a treaty with the intention of defining or clarifying the meaning or purpose of the treaty or its specific provisions is known as an interpretative declaration.’¹⁴

Unlike reservations, interpretative declarations do not purport to exclude or modify the legal effect of a treaty. An interpretative declaration aims to clarify the meaning of certain provisions of the treaty. Some treaties specifically provide for interpretative declarations.¹⁵ For example, a State may make declarations with a view to harmonizing its laws and regulations with

¹¹ Su Wei, (2023), “Reservation to Treaties and Some Practical Issues”, *Asian Yearbook of International Law*, vol 7, Ko Swan Sik et al., eds. Kluwer Law International, p. 133.

¹² Vienna Convention on the Law of Treaties 1969, art 19.

¹³ UN, Treaty Handbook (2013), “Prepared by the Treaty Section of the Office of Legal Affairs”, p.70.

¹⁴ ILC (2011), “Guide to Practice on Reservations to Treaties”, Vol. II, Part Two, art 1.2.

¹⁵ UN, Treaty Handbook (2013), “Prepared by the Treaty Section of the Office of Legal Affairs”, p.3.

the provisions of that convention, when signing, ratifying or acceding to the United Nations Convention on the Law of the Sea, 1982, it provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of the convention in their application to that State.¹⁶

In the *Belilos* case 1988, it explains how difficult and subjective it is to distinguish between a reservation and an interpretative declaration. When ratifying the European Convention on Human Rights (ECHR), Switzerland had made two 'reservations' and two 'interpretative declarations'.¹⁷ The applicant contended that the declaration could not be equated with a reservation and the European Commission also concluded that the declaration did not have the effect of a reservation in view of the wording and preparatory work of the declaration and of the fact that Switzerland had made both reservations and declarations at the same time in which case the latter could only exceptionally be equated with the former.¹⁸

In cases where the reservations have been prohibited in the treaty, States can choose from the other options that aim to avoid the full effect of the treaty. The objective of an interpretative declaration is often to establish an interpretation of the treaty that is consistent with the national law of the State concerned. A reservation seems to exclude or modify the legal effect of a treaty, and an interpretative declaration is to clarify the meaning of certain provisions or the entire treaty. Therefore, the distinction between a reservation and an interpretative declaration has been difficult to decide in State practice.

Some treaties described the specified reservations under Article 19(b). For example, the International Convention for the Suppression of the Financing of Terrorism 1999 stated in Article 24, and the Convention Relating to the Status of Refugees 1951 also described in Article 42.

The phrase 'object and purpose' of a treaty has become noted in the law of treaties, since the advisory opinion in the *Reservation Case*. It has been played as the primary factor for the validity of a reservation. It appears to be an objective yardstick, as every treaty would have its object and purpose. But it is seldom that a treaty has clear provisions on its object and purpose. In actuality, the concept is so abstract that it can hardly be considered objective. The identification of the object and purpose is the outcome of subjective activities by States parties, even though its sources may be objective. These activities include the parties' appreciation and evaluation of the facts, including the agreed-upon treaty text, the background of treaty negotiation, and the preparatory work that has led to the conclusion of the treaty.¹⁹

For example, due to Burundi's reservation to the 1973 Convention on Crimes against Internationally Protected Persons being incompatible with the OP, Italy, Israel, and the United Kingdom objected, preventing the establishment of treaty relations.²⁰ In another case, however, eleven European States objected to the United States' second reservation to the Covenant on Civil and Political Rights (CCPR), clearly stating that the reservation is incompatible with the object and purpose of the Covenant or with the specific article in question. However, their

¹⁶ United Nations Convention on the Law of the Sea 1982, art 310.

¹⁷ *Belilos v. Switzerland* (1988), 88 ILR 657-658.

¹⁸ *Ibid*, 663-665.

¹⁹ Su Wei, (2023), "Reservation to Treaties and Some Practical Issues", *Asian Yearbook of International Law*, vol 7, Ko Swan Sik et al., eds. Kluwer Law International, p. 109.

²⁰ Multilateral Treaties deposited with the Secretary-General, status as at 31 December 1994, at 696-697.

objections did not constitute an obstacle to the entry into force of the Covenant between the United States and these European States.²¹

In any event, reservations that are compatible with the object and purpose of the treaty are void under Article 19 of the VCLT. Therefore, States can make a reservation to a treaty if not only the treaty allows a reservation but also the reservation clause complies with the legal provisions.

Acceptance and Objection of Reservations

Article 20 of the Vienna Convention 1969 is the provision regarding acceptance of and objection to reservations. The Convention system of acceptance and objection can, therefore, be summed up like this. When a State makes a reservation to a treaty, the other States can make the following four points:

- (a) Express acceptance: they may expressly declare that they accept the reservation;
- (b) Implied acceptance: they do not make any objection, and after the period of 12 months, they are presumed to have accepted the reservation;
- (c) Mere objection: they just make an objection without any further statement; or
- (d) Objection plus a further statement that the treaty shall not enter into force between the reserving and the objecting State.²²

Moreover, the procedures for making the reservation under Article 23 of the Vienna Convention 1969 are;

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case, the reservation shall be deemed as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. Any objection to a reservation or the withdrawal of a reservation must be made in writing.²³

In the case of the depositary, the Secretary-General circulates such modifications and grants the States concerned a specific period within which to object to them. In the absence of any objection, the Secretary-General accepts the modification in deposit. In the past, the Secretary-General's practice as depositary had been to stipulate 90 days as the period within which the States concerned could object to such a modification. However, since the modification of a reservation could involve complex issues of law and policy, the Secretary-General decided that this period was inadequate. As a result, on 4 April 2000, the Secretary-General advised that

²¹ Ibid, at 131-134.

²² Abdul Ghafur Hamid @ Khin Maung Sein (2011), *Public International Law: A Practical Approach*, 3rd edition, Sweet & Maxwell Asia, p.193.

²³ Vienna Convention on the Law of Treaties 1969, art 23.

the time provided for objections to modifications would be 12 months from the date of the depositary notification containing the modification.²⁴

If a State makes a reservation in any provision of a treaty, it needs to do a written expression of its intentions. The secretariat will publish the relevant documents to other member States. After twelve months later, that reservation will bind on the Reservation State if other members do not take any objection to its reservation. It means that a reservation will be effective on members when the other parties accept it.²⁵

Because a State is attempting to modify the terms of the treaty by expressing to be bound by it subject to a reservation, reservations raise an important question of principle. Therefore, the traditional view was that for reservations to be effective, all the contracting States had to accept them.²⁶

In the advisory opinion on the Reservation to the Genocide Convention, the court established the “compatibility” test after refusing to follow the traditional view. The court ruled that, unless the treaty expressly states otherwise or it is incompatible with its object and purpose, a reservation may be made.²⁷

The Court considered that a State could not be bound by a reservation to which it had not given its consent, with regard to the implications of the reservation in relations between States. Therefore, every State was free to decide for itself whether or not the State that created the reservation was a party to the Convention.²⁸ Even though some States object to its reservation, the effectiveness of the treaty cannot be nullified between reserving and objecting States except for the reservation clauses. Without the consent of objecting States, the treaty is not able to bind them.²⁹

The objecting States have a right to exclude from the effectiveness of reservation clauses between them.³⁰

In the case of the Anglo-French Continental Shelf Case 1979, France made declarations with regard to Article 6 of the 1958 Geneva Convention of the Continental Shelf. The United Kingdom objected to French declarations with respect to Article 6. In that case, the court concluded that all French declarations are indeed constituted as reservations. The court noted that in order to constitute a reservation, it was not required to show that a statement in question modified the actual terms of the treaty; it is sufficient to show that the French third reservation to article 6 purposes to modify the legal effect of certain provisions in their application to the Reservation State. The court concluded that the words used in the French declaration did have such an effect.³¹

²⁴ UN, Treaty Handbook (2013), “Prepared by the Treaty Section of the Office of Legal Affairs”, pp. 15-16.

²⁵ Henriken, Anders (2019), *International Law*, 2nd edition, Oxford University Press, p.52.

²⁶ Abdul Ghafur Hamid @ Khin Maung Sein (2011), *Public International Law: A Practical Approach*, 3rd edition, Sweet & Maxwell Asia, p.191.

²⁷ Ibid.

²⁸ Reports of Judgments, Advisory Opinion and Orders, Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, (ICJ May 28, 1951).

²⁹ Ibid.

³⁰ Henriken, Anders (2019), *International Law*, 2nd ed, Oxford University Press, p.52.

³¹ Boyle, A. E. (1980), *The Law of Treaties and the Anglo-French Continental Shelf Arbitration*, 29 ICLQ, p 498.

The fact that Article 6 is not applicable as between the Parties to extend that it is excluded by the French reservations does not mean that there are no legal rules to govern the delimitation of the boundary in areas where the reservation operates.³²

However, many States have not expressed their objection. When States make objections, the treaty is not in force between them and the reserving State, but the treaty is in force on the reserving State, except for the reservation clause. Then, these objections cannot influence the reserving State to eventually accept all the provisions in the treaty.

Withdrawal of Reservations and Objections

It has the right to withdraw reservations and objections at any time, unless the treaty in question specifies otherwise. It is not necessary to have the consent of the objecting State or the parties who have accepted the reservation in order to withdraw. Since the purpose of a reservation is to modify or exclude a clause from a treaty for the benefit of the reserving State and to the detriment of the treaty's integrity, the withdrawal of the reservation which will restore the integrity of the treaty would be very much in line with the interests of the original accepting party, and thus its consent should not be required.³³

Regarding to the withdrawal of reservations and of objections to reservations, the provision is described in Article 22 of VCLT. They are;

1. A reservation may be withdrawn at any time, unless the treaty specifies otherwise, and the approval of a State that has accepted the reservation is not necessary for its withdrawal.
2. An objection to a reservation may be withdrawn at any time, unless the treaty specifies otherwise.
3. Unless otherwise specified in the treaty, or it is otherwise agreed:
 - (a) the withdrawal of a reservation only takes effect with regard to another contracting State after that State has received notice of it;
 - (b) the withdrawal of an objection to a reservation only takes effect after the State that created the reservation has received notice of it.³⁴

Withdrawal of reservations and objections to reservations is specifically provided in Article 22 of the Vienna Convention. According to Article 23(4), withdrawal must be in writing in order to prevent the conduct of abandoning a reservation or objection. The requirement of writing certainly makes it easier to specify the point in time at which the withdrawal takes effect, and that is the time of notification to the objecting or the reserving party, as the case may be. No consent is needed on either side. Naturally, the original text of the treaty is restored when a reservation is withdrawn.³⁵

³² Anglo-French Continental Shelf Case (1979) I 8. ILM 397.

³³ Su Wei, (2023), "Reservation to Treaties and Some Practical Issues", *Asian Yearbook of International Law*, vol 7, Ko Swan Sik et al., eds. Kluwer Law International, p. 109.

³⁴ Vienna Convention on the Law of Treaties 1969, art 22.

³⁵ Bowett, D.W. (1976-1977), *Reservation to Non-restricted Multilateral Treaties*, 48 BYIL, p.87.

For example, Germany withdrew the reservation to the Convention on the Rights of the Child in 2011. The reservation excluded children without German citizenship or legal residency status from protection by the CRC.³⁶

The following table describes Myanmar made ratification or accession to international treaties and reservations to these treaties.

Treaty Description	Treaty Name	Ratification Date, Accession(a), Succession Date	Reservation (r), Declaration (d)	Withdrawal of Reservation Date
Convention on the Prevention and Punishment of the Crime of Genocide, 1948	-	14 March 1956	Article 6 (r), Article 8 (r)	-
Convention on the Rights of the Child, 1989	CRC	15 July 1991 (a)	Article 15 (r), Article 37 (r)	19 Oct 1993
Convention on the Elimination of All Forms of Discrimination against Women, 1979	CEDAW	22 July 1997 (a)	Article 29 (r)	-
Convention on the Rights of Persons with Disabilities, 2006	CRPD	07 Dec 2011 (a)	-	-
Optional Protocol to the Convention on the Rights of the Child on the sale of children Prostitution and Child Pornography, 2000	CRC-OP-SC	16 Jan 2012 (a)	-	-
International Covenant on Economic, Social and Cultural Rights, 1966	CESCR	06 Oct 2017	Article 1 (d)	-
Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in armed conflict, 2000	CRC-OP-AC	27 Sep 2019	Article 3(2) (d)	-

Source: Own Collection from United Nations Treaty Collection website (as of November 2024).

These are arranged in chronological order based on accession date.

The reserving State can withdraw its reservations partially or completely in a certain situation if a State can implement the obligations of a treaty in its territory. Nevertheless, States have to comply with the principles of the VCLT regarding the validity of reservations.

³⁶ United Nations Treaty Collection, *Convention on the Rights of the Child 1989* (Web page) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4>.

Legal Effects of Reservations

In regard to ‘the legal effects of reservations and of objections to reservations, the provisions are mentioned in Article 21 of VCLT. They are;

1. A reservation established with regard to another party under articles 19, 20, and 23:
 - (a) modifies the treaty provisions to which the reservation relates to the extent of the reservation for the reserving State in its relations with that other party; and
 - (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
3. When a State objecting to a reservation has not obstructed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.’

The application of the so-called “principle of reciprocity” in Article 21(1) (b) can be found in the Libyan People’s Bureau Incident. Libya made a reservation to the Vienna Convention on Diplomatic Relations 1961, permitting it to open a diplomatic bag when it had strong doubts as to the legitimacy of its contents. That reservation was not objected by the UK. According to Article 21(1)(b), the obligation in the Vienna Convention not to open another State’s diplomatic bag was modified to the extent of the reservation and by virtue of the principle of reciprocity, both Libya and the UK are able to rely on that reservation. Thus in the Libyan Peoples Bureau Incident, the UK contended that it could open the Libyan diplomatic bags if it had strong doubts as to their contents.³⁷

The essence of Article 21(3) is that “the reservation is effective”. Thus, it appears to be more favourable to the reserving State. That is why, if it cannot accept any reservation made by that other State, it should not merely object but explicitly state that the treaty shall not be enforceable between the two of them.³⁸

‘Regarding the validity of a reservation, a State needs to register a treaty after ratifying or acceding to the United Nations’ Secretariat.’³⁹ Where the Secretary-General, as depositary, accepts a reservation after the deposit of the instrument of ratification, acceptance, approval, or accession that meets all the necessary requirements, the Secretary-General circulates the text of the reservation to all the States concerned. The Secretary-General accepts the reservation in deposit if any State does not inform the Secretary-General that it does not wish him to consider the reservation to have been accepted for deposit.⁴⁰

If States want to change the legal effect of the treaty by making a reservation. In that case, this reservation clause does not affect the essential elements and the general concept of the treaty. Treaties should include clauses relating to the permissible or impermissible nature of the

³⁷ Abdul Ghafur Hamid @ Khin Maung Sein (2011), *Public International Law: A Practical Approach*, 3rd edition, Sweet & Maxwell Asia, p.194.

³⁸ Ibid, p.195.

³⁹ Charter of the United Nations 1945, art 102.

⁴⁰ UN, Treaty Handbook (2013), “Prepared by the Treaty Section of the Office of Legal Affairs”, p.12.

reservation, and they should also clearly describe the important concept of the treaty that justifies the reservation.

Some Issues relation to Reservations

Reservations may be made to any treaty, including bilateral treaties and multilateral treaties, through a theoretical approach. Reservations in bilateral treaties are practically meaningless since they would be interpreted as a lack of agreement on the matter at hand. A reservation to a bilateral treaty, according to the International Law Commission, has no issues because it essentially amounts to a new proposal that reopens the two States' negotiations over the terms of the agreement.⁴¹

The traditional rules on reservations to multilateral treaties were developed based on the idea that a treaty is similar to a contract in the municipal legal system, where the terms can only be modified with the consent of the parties. Therefore, a reservation of a State can be assimilated to an offer that needs to be accepted by all contracting parties in order for it to produce legal effect.⁴²

For instance, the reservation States of the Islamic, which may interfere with public order in those countries with secular law, which is based on the principle of equality between people of men are alike, and who all have equal rights and duties regardless of their religions, beliefs, or colors. Nowadays, international conferences or organizations are used to conclude treaties, and some of the texts contained in those treaties may be in violation. Where the treaty provides for equal inheritance provisions between men and women, this is incompatible with the provisions contained in the tolerant Islamic law.⁴³ Furthermore, the Latin American countries made reservations to the treaties if the treaties are organized to secure the protection of their sovereign rights.⁴⁴ So, States can make a reservation as a unilateral statement when signing, ratifying, accepting, approving, or acceding to a treaty in accordance with the provisions of international conventions. Then, reservation to the treaty shall not be prohibited according to the above causes.

Regarding Article 19(c) of the VCLT, regarding the compatibility test and its objectivity, the convention is silent. Consequently, the parties will have to evaluate this matter since there are no clear standards by which the compatibility test of the reservation with the object and purpose of the treaty will be made.⁴⁵

States have a chance to make a reservation on specific clauses or provisions of any treaty if it conforms with the provisions of the VCLT. However, they need to know the context of clauses or provisions of a treaty before making any reservation. Regarding the contextual matters, the ICJ delivered a judgment on the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide between the Republic of The Gambia and the Republic of the Union of Myanmar.

⁴¹ Su Wei, (2023), "Reservation to Treaties and Some Practical Issues", *Asian Yearbook of International Law*, vol 7, Ko Swan Sik et al., eds. Kluwer Law International, p.109.

⁴² Ibid.

⁴³ Dr. Abdul- Jaleel Ismael Hasan, Dr. Mohammed Qahtan Farhan, Dr. Mohanad Qasim Zghair, (March, 2020), "The Scope of Reservations to International Treaties", *Palarch's Journal of Archaeology of Egypt/Egyptology* vol.17 (03), ISSN 1567-214x, pp 2725-2735.

⁴⁴ Ibid.

⁴⁵ Fjorda Shquarri (March 2015), "Reservation to Treaties, Prohibited Reservations and some Unsolved Issued Related to Them", *Mediterranean Journal of Social Science*, vol. 6(2).

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted on 9 December 1948 and entered into force on 12 January 1951. Myanmar ratified this Convention on 14 March 1956 with reservations on Articles VI and VIII. The reservation clauses are;⁴⁶

- (1) With reference to Article VI, the Union of Burma (later the Myanmar) makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of Jurisdiction or as giving foreign Courts and tribunals jurisdictions over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.
- (2) With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union.⁴⁷

The full provision of the article VI of the Convention on the Prevention and Punishment of the Crime of Genocide are 'persons charged with genocide or any of the other acts listed in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

Article VIII of this Convention provides 'any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate to prevent and suppress acts of genocide or any of the other acts listed in article III.'

In the "Gambia V. Myanmar case, The Gambia applied a case to the ICJ that is Myanmar had breached Articles I, III, IV, and V of the Genocide Convention. Conversely, Myanmar raised four preliminary objections to the jurisdiction of the Court and admissibility of the Application on 20 January 2021. In brief, these objections are:

- (1) whether the Gambia is the "real applicant" in this case;
- (2) the Gambia's standing to bring the case before the Court;
- (3) the Myanmar's reservation to article VIII of the Genocide Convention and
- (4) existence of a dispute between the parties.

As the third preliminary, it explored that the court did not have jurisdiction in this case. Since Myanmar made reservations on Articles VI and VIII of the Genocide Convention, the Court could not have any authority to accept and settle Gambia's proposed case. One of the reasons is that Myanmar excluded the jurisdiction of the court or tribunal of the Union and of foreign countries relating to any case of genocide or acts which are mentioned in Article III of the Genocide Convention.⁴⁸

Another reason is the term of the competent organs of the UN that was provided in Article VIII. When Myanmar made a reservation on Article VIII, it removed the prerogative of the ICJ, which is one of the UN organs. In addition, it proposed considering the intention of the State when it made a reservation to this Convention.

⁴⁶ Convention on the Prevention and Punishment of the Crime of Genocide, (December 9, 1948).

⁴⁷ Ibid.

⁴⁸ Application of the Court on the Prevention and punishment of the Crime of Genocide, (The Gambia V Myanmar) (ICJ July 22, 2022).

In short, the International Court of Justice (ICJ) delivered its judgment on the preliminary objections of Myanmar on 22 July 2022. The ICJ expressed that Myanmar made the reservation on Articles VI and VIII but did not reserve Article IX when it ratified to the Genocide Convention. In the case of *Gambia V. Myanmar*, the Court referred to Article IX of the Genocide Convention for its jurisdiction. Article IX provided that any party to the dispute can bring the case before the Court regarding the breach of obligations in this Convention. Moreover, the ICJ interpreted the term of competent organs that was provided in Article VIII. Under the UN charter, the ICJ is one of the competent organs, but its functions are not the same as the functions of competent organs under Article VIII of the Genocide Convention. So, the Court concluded that it has jurisdiction over the alleged case of the Gambia under Article IX based on contextual clauses.⁴⁹

This fact is considered to be due to the need to make reservations at the time of ratifying the treaty, and the substance and contextual clauses may not be considered carefully. So, this case should be considered as good evidence in the future. States should clearly state their intention when making reservations to treaties, and only then will their stance and purpose be strong.

Conclusion

Treaties play an important role in getting common agreements between member States and in promoting international cooperation. The most important fact is that States need to implement and observe the treaties in good faith. If States conclude more treaties, they can develop more in various fields, promote the cooperation of international relations, and become friendlier and loving between themselves. Reservation is a good way for States that may belong to different legal systems to expand participation in the treaty. Reservation is a caveat to a State's acceptance of a treaty. A reservation allows a state to exclude or modify the legal effect of specific treaty provisions that it finds unsuitable. Reservation aims to ensure a wider participation of the States even if they do not accept all the treaty's provisions. The role of reservations is becoming a key for members of treaties to protect the interests of the people. By making a reservation, states get privileges from the treaty because they can exclude any provisions of a treaty that do not apply or are not implemented in their territories. States have a chance to make reservations on specific clauses or provisions of any treaty, but this reservation clause does not affect the essential elements and purposes of the treaty. In considering what rule on reservations to formulate, States need to take into account the national interest and the substance of the treaty, in particular, the core elements of an international instrument. In addition, they need to know the context of clauses or provisions of a treaty and to understand the substance of a treaty before making any reservation. When a state is able and willing to fulfill or comply with the treaty's commitments, it may at any time withdraw all or part of its reservations. Treaties should include clauses relating to the permissible or impermissible nature of the reservation, and then they should also clearly describe the important concept of the treaty for making the reservation. If possible, reservation clauses should be permitted in treaties. As a result, States should know the scope and processes of reservation in a treaty; they will reduce the possible issues in relation to reservation, and they will conclude treaties without hesitation or delay.

⁴⁹Ibid.

Acknowledgements

Firstly, I would like to express my deepest gratitude to Dr Thida Aung, Professor and Head, Department of Law, University of Mandalay, for her permission and guidance. My sincere thanks go to the esteemed Professors Dr Daw Than Nwe and Dr Thwin Pa Pa for their constant encouragement. I am particularly indebted to Dr Tin Moe Lwin and Dr Nan Thet Mon for their precious guidance and suggestions. I would like to mention my special thanks to everyone who was involved in various ways during this work.

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