

INTERNATIONAL HUMAN RIGHTS
LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL

related to: section 1, sub-section 4, unit 2: Law of reservations

International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951):

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention ...

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which

must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: 'While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.'

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations

to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.