Help

Is there any limit to what reservations can be allowed in the context of multilateral treaties? May any reservation be allowed provided at least one State party to the treaty does not object to it, or provided the objections do not emanate from a large number of States? Consider the Advisory Opinion delivered by the International Court of Justice on 28 May 1951. The Courts responds here to the request of the UN General Assembly, which sought its opinion on the implications of reservations filed by States acceding to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification, the General Assembly asked: "I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?". Consider the following excerpts (/c4x/LouvainX/Louv2.01x/asset/_Materials__Reservations_-_ICJ_Advisory_Opinion__Final_.pdf) from the Court's Opinion before returning to this problem.

THE ICJ'S GENOCIDE OPINION (4/4 points)

Now try to answer the following questions:

1. The key conclusion which the Court arrives at is 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."

Does this represent an evolution from the traditional view of reservations to multilateral treaties, in which reservations are allowed provided they do not meet with objections from the other States parties to the concerned instrument?

- (•) Yes ✔
- ( ) No

EXPLANATION

Yes, the Advisory Opinion represents a significant shift. The shift may be summarized by stating that we move from a *subjective* criterion to an *objective* standard. If we follow a purely *subjective* criterion, all that matters is the agreement of the States concerned, including both the State formulating the reservation and thus defining the limits of its consent to be bound, and the other States parties to the multilateral treaty, who agree, by refraining from expressing

objections, to the reserving State joining the treaty with the reservation: it is the back and forth between the expression of a reservation and potential objections that are raised in response that determine whether a reservation is acceptable. In contrast, the *objective* standard emphasizes whether the content of the reservation is such that it affects the object and purpose of the treaty, thus depriving the accession of the reserving State from much of its significance and undermining the integrity of the treaty. (More recently, the International Law Commission explained what is understood by a reservation being "incompatible with the object and purpose of the treaty": this will be the case, according to the ILC, where the reservation "affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the raison d'être of the treaty" (Guide to Practice on Reservations to Treaties, adopted at the 63rd session of the ILC (2011), para. 3.1.5.)).

2. If the Advisory Opinion does represent a shift in the regime of reservations, then what significance is attached, in the new approach favored by the Court, to the objections expressed by States?

- No significance: only objective criteria are to be considered in assessing whether a reservation is valid
- Much significance: what matters most is whether other states accept reservations
- Some significance: though compatibility with the object and purpose of the treaty is a crucial factor, the practice of states in accepting reservations remains relevant ✔

Help

EXPLANATION

While the Advisory Opinion defines the compatibility with the object and purpose of the treaty as the decisive element to assess the acceptability of the reservation, the regime of reservations still remains trapped in a system in which the only indicator of whether or not a reservation is indeed acceptable remains the reactions of other States parties to the multilateral instrument. In other terms, the system is a hybrid one: while an objective standard is put forward, the standard still depends for its implementation on how the other States assess the reservation that one State attaches to its accession to a treaty. This makes the system difficult to manage: objections to the reservation, it would seem, should only "count" to the extent that they are based on whether the reservation is or is not "objectively" compatible with the object and purpose of the treaty rather than, for instance, on political considerations. But what useful purpose, then, do they serve? Should this lead to conclude that reservations are unacceptable once they give rise to a large enough number of objections? Consider for instance the approach followed in the 1965 International Convention for the Elimination of All Forms of Racial Discrimination, which provides in article 20(2) that "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it".

3. What are the policy reasons that may explain the shift proposed by the International Court of Justice in its Advisory Opinion ? Is the solution put forward by the Court striking the right balance between competing policy considerations?

- The Court hoped to ensure that the Convention would have a universal scope
- The Court tried to restrict the rights of states to emit reservations altogether
- The court considered that it was required to preserve the integrity of the treaty given the subject-matter of the Genocide convention
- (•) The first and third options are correct ✔

EXPLANATION

As the Court explains itself, it was animated by two concerns: First, the 1948 Genocide Convention was "intended by the General Assembly and by the contracting parties to be definitely universal in scope", and aims therefore the at the broadest participation possible. Second however, the values embodied in the convention are of such importance that the integrity of the instrument should be preserved, and States should not be allowed to accede if the reservations they attach to their accession results in depriving it of all significance. Thus, while accepting the possibility of reservations, the Court attaches strict conditions to their acceptability, and seeks to guide States in how they frame their reservations as well as in whether and how they raise objections.

4. To which category of treaties, in the view of the Court, should the regime of reservations it proposes apply?

Help

- Human rights treaties
- Treaties punishing war crimes, crimes against humanity and other serious violations of humanitarian law
- Both options above,as they are central to human dignity
- (•) None of the above, the court's criteria are not clear ✔

EXPLANATION

The Court defines as follows the specific nature of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide: the Convention, it states, "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'etre 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." Is this criterion sufficiently precise? Is it sufficient to distinguish conventions of a "humanitarian" nature from other instruments of international law? If, for instance, an instrument were to be adopted providing for the exchange of information between States to combat trafficking in human beings, but including certain provisions protecting the right to privacy of individuals in the processing of their personal data, which of the two logics should apply: the classic logic of reciprocity in which the back and forth between the reserving State and the other parties to the instrument leads States to agree on certain reservations being attached to one State's accession to the instrument, or the "new" logic of such dialogue having to be guided by the object and purpose of the instrument?

Check Hide Answer(s)