

Tratados III

Tratados para la comunidad internacional como un todo: derechos humanos, derecho del mar, derecho ecológico

- Reservations to the conventions on the prevention and punishment of the crime of genocide 1951 ICJ
- Efecto de las reservas sobre la entrada en vigencia de la Convención Americana sobre Derechos Humanos, (artículos 74,75), Opinión Consultiva OC-2/82
- Belilos v Switzerland 1986 ECHR
- Loizidou v Turkey 1995 ECHR
- Kennedy v Trinidad and Tobago Communication 845/1999

Reservations to the conventions on the prevention and punishment of the crime of genocide 1951 ICJ

- La Asamblea General preguntó:

En el caso de la Convención de Genocidio

I. ¿Puede un Estado reservante ser considerado parte de la Convención, si la reserva es objetada por unas partes pero no por otras?

II. ¿Cuál es el efecto de la reserva entre el Estado reservante y

a) Las partes que objetaron

b) Aquellas que aceptaron la reserva?

III. ¿Cuál es el efecto legal de la objeción a la reserva por

a) Un Estado firmante pero que no ha ratificado la Convención

b) Un Estado que puede firmar o accede pero que aún no lo ha hecho?

Reservas y objeciones

- La **reserva** es el acto unilateral por el que una parte manifiesta, respecto a la conclusión de un Tratado Internacional, su propósito de excluir o modificar alguna obligación derivado del mismo. Su fundamento se encuentra en el principio de libre consentimiento.
- la **objeción** es una declaración unilateral hecha por un Estado como reacción ante una reserva a un tratado formulada por otro Estado, por la que el Estado objetor se propone excluir o modificar los efectos jurídicos de la reserva, o excluir la aplicación del tratado en su conjunto, en sus relaciones con el Estado autor de la reserva
- La Convención de Genocidio fue aprobada por unanimidad y no tiene una sección dedicada a reservas

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- (10) 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.

Reservations to the conventions on the prevention and punishment of the crime of genocide 1951 ICJ

- (12) The solution of these problems must be found in the special characteristics of the Genocide Convention... 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"
- 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**. [*jus cogens*] 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.

Reservations to the conventions on the prevention and punishment of the crime of genocide 1951 ICJ

- 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 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... The object and purpose of the Convention thus **limit** both the **freedom** of making reservations and that of objecting to them

Efecto de las reservas sobre la entrada en vigencia de la Convención Americana sobre Derechos Humanos

La Comisión Interamericana de Derechos Humanos solicitó la presente opinión a la CIADH:

¿Desde qué momento se entiende que un Estado es parte de la Convención Americana sobre Derechos Humanos cuando ha ratificado o se ha adherido a dicha Convención con una o más reservas?

Efecto de las reservas sobre la entrada en vigencia de la Convención Americana sobre Derechos Humanos

Se deduce ... que el artículo 75 permite que los Estados ratifiquen o se adhieran a la Convención con cualquier reserva que ellos quieran hacer, siempre y cuando ésta no sea "*incompatible con el objeto y fin*" de la misma el objeto y fin de la Convención no son el intercambio recíproco de derechos entre un número limitado de Estados, sino la protección de los derechos de todos los seres humanos en América, independientemente de su nacionalidad

Efecto de las reservas sobre la entrada en vigencia de la Convención Americana sobre Derechos Humanos

29. los tratados ... sobre derechos humanos... no son tratados multilaterales de tipo tradicional, concluidos en función de un intercambio recíproco de derechos, para el beneficio mutuo de los Estados contratantes. Su **objeto y fin** son la protección de los derechos fundamentales de los seres humanos, independientemente de su nacionalidad, tanto frente a su propio Estado como frente a los otros Estados contratantes. Al aprobar estos tratados ... los Estados **se someten** a un orden legal dentro del cual ellos, por el bien común, **asumen** varias obligaciones, no en relación con otros Estados, sino hacia los individuos bajo su jurisdicción {**orden público común**}

Belilos v Switzerland 1986 ECHR

La policía de Lausanne
multó a la señora
Marlène Belilos por
violar las leyes
municipales al
participar en una
manifestación el 4 de
abril de 1981 la cual
tuvo lugar sin haber
sido autorizada
anticipadamente



Belilos v Switzerland 1986 ECHR

- Belilos pidió a la Policía que quitara la multa y ésta en su revisión no lo hizo. El tribunal cantonal señaló que solo tenía poder de revisar la legalidad pero no entrar al fondo del asunto.
- Belilos se quejó de que no fue juzgada por un tribunal independiente e imparcial según lo dispone el artículo 6 § 1 (art. 6-1) de la Convención Europea de Derechos Humanos que tuviera jurisdicción para determinar tanto el derecho como los hechos.

Belilos v Switzerland 1986 ECHR

- Suiza había hecho una **declaración interpretativa** cuando ratificó la convención
- ‘The Swiss Federal Council considers that the guarantee of fair trial ... is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities’

Belilos v Switzerland 1986 ECHR

- La declaración interpretativa es una reserva, pero es invalida porque no cumple con el artículo 64 de la Convención
- A party may relieve its courts of the responsibility for prosecuting minor offences. It was compatible with art 6(1) that this duty devolved upon administrative authority, so long as the interested person could appeal to a tribunal affording the safeguards of art 6(1). In the case Tribunal could not determine questions of facts

Loizidou v Turkey 1995 ECHR

- República turca del norte de Chipre
- En 1974, Turquía realiza la Operación Attila

MEDITERRANEAN SEA



Loizidou v Turkey 1995 ECHR

- ‘Turkey declares to accept the competence of the E Commission of HR subject: allegations only concerned to acts within the boundaries of the Turkish territory and in respect of facts subsequent to 1987’.
- Greece opposed to this declaration
- Turkey contended that deprivation of property is a direct result of an instantaneous act

Loizidou v Turkey 1995 ECHR

- 1978 'unlike I treaties of the classical kind the convention comprises more than mere reciprocal engagements. It creates over and above a network of bilateral undertakings, objective obligations'
- Convention is a living instrument that cannot be interpreted solely in accordance with the intentions of their authors as expressed more than 40 years ago
- If substantive or territorial restriction were permissible it would diminishes the effectiveness of the convention as a constitutional instrument of **European Public order**.

Loizidou v Turkey 1995 ECHR

- Power to make reservation is limited.
- Turkey alleged that if reservations were declared invalid, as they were essential to its consent, then Turkey would be out the convention. Court notes that in reservation art 25 it was Turkey intention to accept right of individual petition and this intention must prevail.

Loizidou v Turkey 1995 ECHR

- In the issue of severability of the invalid parts of Turkey's declarations Turkey must have been aware of the consistent practice of the parties under 25 & 46 to accept unconditionally the competence of the Commission and Court.
- And the fact that against such practices submitted her declarations is evidence of her wiliness to run the risk that some clauses would be declared invalid without



Kennedy vs Trinidad y Tobago

1987 A murder was committed, Kennedy was sentenced to death. Claimant alleged to be victim of violations International Covenant on Civil and Political Rights. He was not informed of charges until 5 days after his arrest, there were delays in proceedings, and death penalty was imposed irrespective of circumstances.

Kennedy v Trinidad and Tobago

- 26 May 1998, Trinidad denounced the optional protocol of ICCPR and the same day She re-acceded with a reservation 'Trinidad re-accedes to the OP to the ICCPR with a reservation to art 1 to the effect that the HR Committee shall not be competent to receive and consider communication relating to any prisoner who is under sentence of death in respect of matters relating to his prosecution, detention, conviction, sentence, or the carrying out of the death sentence'
- The protocol does not govern the permissibility of reservations. 19 VCLT a **reservation** can be made as long as it is compatible with the object and purpose.

Kennedy v Trinidad and Tobago

- It is a general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be the Committee not the State party to determine the validity of the reservation
- In general Comment 24 (1994) the Committee stated: ‘... A reservation to an obligation of a State to respect a right contained in the Covenant made under the 1st protocol, when it has not previously been made in respect to the same rights under the covenant, does not affect the State’s duty to comply with its substantive obligation’
- The present reservation (1998) was made after the publication of the GC 24 (1994). The committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than is enjoyed by the rest of the population. This runs contrary to the Convention.