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LECTURE

"RESERVATIONS IN INTERNATIONAL TREATIES"

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It may occur that a State wishes to formulate a reservation when it does not want to be bound by one or more of the provisions of a treaty.

A reservation is a unilateral statement by which a State expresses the will not to comply with one or more clauses contained in an international agreement; it is therefore a statement of disengagement with respect to articles or paragraphs of the treaty.

The purpose of reservations is to facilitate the participation of States in international agreements by allowing the opportunity to exclude their consent to parts of the treaty, so that, as reserving States, they are only bound by provisions which are not related to the reservations.

Reservations may only be attached to multilateral treaties (between more than two States), because in bilateral treaties (between two States) content not agreed upon should simply be excluded, being not formed the *consensus in idem placitum*, which is essential for its birth.

In classical international law it was deemed that a reservation had to be in writing and specified in the agreement. The State could make the reservation in the course of negotiations or at the time of signature, in order to include it as an additional and final statement into the treaty signed by the plenipotentiaries.

Consequently, a preclusive limit existed for reservations, represented by the time of signature of the plenipotentiaries, so that the possibility to make reservations was to be restricted to the stage of drafting the text of the treaty, in deference to the principle of legal certainty.

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When the International Court of Justice was asked for an advisory opinion by the General Assembly of the United Nations (U.N.) in a case related to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (New York City, 9 December 1948) in which the reservations were made after such a deadline, it opened an age of greater flexibility on the methods and time within which a State could formulate a reservation[1].

In its opinion, the Court reiterated that, according to the practice of international law, reservations had to be attached to the treaties in the course of negotiations or, otherwise, at the time of signature and stated that the formulation of a late reservation is not an impediment to the entry into force of an agreement. Every treaty can restrict the use of reservations, establishing whether and which one of the articles or paragraphs can be subject to a reservation, but, in the absence of such restrictions, late reservations are to be authorised, unless they are incompatible with the object and purpose of the treaty.

The Court did not fail to point out some requirements for the validity of late reservations.

- First, the requirement of knowledge, namely, the need that notice of reservations shall be received by the other parties to the treaty by means of

[1] ICJ, *Reservations to the Convention on the Prevention and Punishment of the crime of Genocide*, opinion of 28 May 1951.

a unilateral statement duly communicated and added to the instrument of ratification.

- Secondly, the requirement of consent, whereby, being insufficient the mere knowledge of the reservations, their acceptance by all the contracting States is also essential.

Under this approach the reservation and the consent to the reservation had to be regarded as a special agreement established in derogation to the general agreement (the treaty), this special agreement was valid on the basis of the principle of freedom of form of treaties and it could however concern only particular and secondary clauses.

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The practice of international law has therefore postponed until the time of ratification the right of States to formulate reservations and this is also in order to allow a more effective role for national parliaments in the process of adoption of the treaties.

The opinion of the International Court of Justice and the corresponding practice were subsequently codified in Article 19 of the Vienna Convention on the law of treaties (concluded on 23 May 1969 and entered into force on 27 January 1980) and today they are considered to be rules of customary international law.

Such an article has accurately specified when a reservation is not permitted.

- First, when there is an express prohibition of the treaty, by reason of which none of its provisions may be excluded or modified by reservations.

- Secondly, when there is an express provision of the treaty, which establishes that only certain provisions are liable to be excluded or modified by reservations.

- Thirdly, even in the absence of an express prohibition of the treaty, when a reservation is incompatible with the object and purpose of the treaty.

The latter prohibition, in particular, should be understood in the sense that a reservation incompatible with the object and purpose of the treaty is a statement which purports to exclude or modify fundamental clauses of an international agreement, namely, clauses which characterise its overall scope.

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A reservation may be accepted by the other contracting States, expressly, by notifying the relevant statement to all the parties to the treaty or, as provided for in Article 20 of the Vienna Convention, by a configuration proceedings of tacit consent for no-objection.

The contracting States may raise objections to the late reservation within twelve months after they have been notified of it or have expressed their consent to be bound by the treaty, if it is subsequent to the reservation. Once this period of time has expired without objections, a reservation is considered to have been accepted by them.

It is clear that States may have an interest to raise objections if reservations are contrary to an express prohibition of the treaty or incompatible with the object and purpose of the treaty.

Despite the objection by a contracting State, the provision to which the reservation relates does not enter into force between the reserving State and the objecting State as long as the dispute is not settled (by way of the peaceful means of international dispute settlement). If they do not reach a solution on the point, the objection does not prevent the treaty, except for the part related to the reservation (Article 21 of the Convention), from entering into force between the State which has made the reservation and the objecting State, unless the latter is expressly opposed.

In this way, the useful effect of the participation of the reserving State in the international agreement is always ensured, at least until the dispute is

resolved as to whether the article or paragraph of the treaty may be related to a reservation.

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According to the most recent international case-law, when the invalidity of a reservation has been stated or it has been withdrawn, the relevant decision (arbitration award or judgment) or withdrawal will not affect participation in the treaty of the reserving State. In other words, the treaty is binding upon it *in toto* as if the reservation had never been made, in compliance with the well known principle *utile per inutile not vitiatur* (a valid agreement is not vitiated by an invalid agreement)[2].

On the contrary, when the validity of a reservation has been stated (whereby any previous objection drops and it is considered tacitly accepted even by the objecting State) or it has been accepted, the international agreement becomes one having variable geometry. Notably, it assumes a dual configuration depending on whether it refers to the State which has made the reservation and the other contracting States, including the objecting State, or to other contracting States *inter se*. Between the former the treaty enters into force except for the part related to the reservation, while between the latter the treaty takes legal effects in its entirety, that is to say, as originally signed by the plenipotentiaries.

As a consequence, the early harmony of the treaty breaks up, because explicit or tacit *consensus* on the reservation acts as a special *consensus* compared to that given, expressly, to the treaty as a whole by means of ratification (*lex specialis derogat generali*).

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[2] ECHR, *Belilos v. Switzerland*, judgment of 29 April 1988; *Weber v. Switzerland*, judgment of 22 May 1990; *Loizidou v. Turkey*, judgment of 23 March 1995; ICJ, *Spain v. Canada*, judgment of 4 December 1998; *Pakistan v. India*, judgment of 21 June 2000.

Regarding the admissibility of reservations which are formulated after the ratification of a treaty, international law practice seems positively disposed, provided that none of the contracting parties raises objections. The Vienna Convention does not devote any article to such reservations.

The practice of multilateral treaties concluded under the aegis of the United Nations is in the sense of admitting them, as long as none of the States raises objections within twelve months following their deposit with the Secretary General.

A reservation may be withdrawn by the interested States at any time (Article 22 of the Vienna Convention) on condition that the statement of withdrawal, in writing, is duly notified to all the contracting States. If the notification of withdrawal is not received in a timely manner, the reservation will have effects regardless of its acceptance.

As a result, the treaty, due to that reservation with variable geometry, will be consistently effective with respect to all the contracting States.