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If a treaty is silent on the right of a contracting party to make reservations, then according to Article 19 of the Vienna Convention on the Law of Treaties (VCLT), the principal consideration is the compatibility of the reservation in question with the object and purpose of the treaty. Much ink has already been spilled on this regulation. This post, however, proposes a succinct typology of reservations regarding the object and purpose of treaties, before delving into the way in which international humanitarian law (IHL) fits into it.

Category I: Reservations Incompatible with the Concept of a Treaty

Some reservations are not incompatible with the object and purpose of a particular treaty. In fact, some reservations are incompatible with the very idea of a treaty relationship. This is the case when domestic law becomes the parameter for the application of a convention, when value systems become the parameter for the application of a convention, and when reservations are contrary to *jus cogens*.

Domestic Law as the Parameter for a Convention's Application

If a State is unable to immediately amend domestic law provisions to bring them into conformity with a treaty, these provisions may be the reason for formulating one or more reservations. However, the State must then communicate the precise text of these reserved domestic law provisions, so that the contracting parties know the material scope of the reservation.

Conversely, general reservations relating to "domestic law" without any additional clarification are not compatible with a treaty relationship. This is because the reserving State may amend its domestic law at any time. If the latter had primacy, the State would have assumed no real obligation under the treaty, but at most merely a "potestative" obligation applicable at its free will; such a legal position does not correspond to an obligation. Therefore, such a reservation clashes head-on with the cardinal principles of treaty law, namely *pacta sunt servanda* under Article 26 of the VCLT and the primacy of international law over domestic law in inter-State relations pursuant to Article 27.

Relevant examples include Kuwait's reservation to the 1966 International Covenant on Civil and Political Rights (ICCPR) according to which the convention would apply "within the limits prescribed by Kuwaiti law." Likewise, Syria made a reservation relating to "Syrian Arab legislation" in the context of the 1989 Convention on the Rights of the Child. Domestic reservations can also sometimes invoke religious laws, as in the case of Israel in the context of Article 23 of the ICCPR regarding the freedom to marry.

Value Systems as the Parameter for a Convention's Application

For similar reasons, vague and general reservations, which do not allow for a grasp of the scope of the commitments incurred, are contrary to the object and purpose of any treaty. They contravene the cardinal principle of *pacta sunt servanda* (VCLT, art. 26), and therefore the binding nature of treaties. For example, Djibouti inserted the following reservation to the Convention on the Rights of the Child: "Djibouti does not consider itself bound by provisions or articles incompatible with its religion and traditional values." The same is true of the numerous so-called "sharia" reservations, reserving non-uniform interpretations of Islamic law.

Reservations Contrary to Jus Cogens

Under general precepts of international law, as articulated in Article 53 of the VCLT, legal acts contrary to peremptory norms (or treaties contrary to these norms) are void. Reservations are legal acts. They are therefore invalid if they contradict a peremptory norm.

Admittedly, from a certain point of view, the reservation only affects treaty law. It cannot affect customary international law parallel to the treaty text. It would therefore be possible to say that such a reservation could be admissible, given that it would not be able to exclude the application of the peremptory customary norm. However, if the reservation were valid, the organs seized under the treaty's dispute settlement clauses would not be

able to apply the reserved provision. This is generally considered inappropriate in the case where the provision falls under peremptory law. This is even more true if we admit that there may be peremptory provisions of a purely conventional nature.

Category II: Reservations Incompatible with the Essential Provisions of a Treaty

It is often quite difficult to determine whether a reservation is incompatible with the object and purpose of a text. However, it is possible to distinguish between easy and hard cases. Most international lawyers would agree with the following examples.

The following are clearly incompatible with the object and purpose of the treaty: (1) reservations to Article 2(4) of the UN Charter permitting the use of force in a broader manner than allowed under that treaty; (2) in the 1982 UN Convention on the Law of the Sea, if reservations were not excluded (art. 309), any reservation on the non-appropriation of the deep seabed (art. 137) and its status as common heritage (art. 136) would be inadmissible; (3) in the 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I), any reservation excluding the cardinal principle of distinction between military objectives and civilian persons/objects (art. 48), which is the heart of the protection of civilians against the effects of attack, would be inadmissible.

A more general category worthy of mention is that of derogations from the commonly accepted customary standard in a codification treaty. It is certain that a treaty can derogate from customary international law under the rule of *lex specialis*. Therefore, it is unclear why a reservation could not do the same. However, it is also possible that a treaty codifying customary international law aims to unify the law within a treaty area. If this is the case, reservations are incompatible with the treaty's object and purpose. Thus, in the 1961 Vienna Convention on Diplomatic Relations, some States reserved the right to open diplomatic bags on grounds of suspicion. Several other States raised objections, mentioning the goal of unifying regulations by aligning them with customary international law. Most often, when unification of the law is sought, the treaty in question will prohibit reservations through an express provision.

Two examples may illustrate harder cases. First, could a reservation excluding the jurisdiction of the International Court of Justice (ICJ) be contrary to a treaty's object and purpose, for example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide? It is possible to argue both ways. On the one hand, it is possible to say that the heart of the Genocide Convention lies in the substantive provisions preventing and suppressing genocide and that the jurisdictional clause is merely incidental, concerning dispute settlement (i.e. procedure).

On the other hand, it is possible to say that the Genocide Convention sought not to be a mere scrap of paper and that the sanction permitted by the jurisdictional clause is essential to the achievement of its purpose. In the *Armed Activities* case, the ICJ ultimately sided with the first point of view, admitting the compatibility of the reservation with the object and purpose of the Convention, but some judges have questioned the Court's somewhat short reasoning in this regard.

Second, when ratifying the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the German Democratic Republic (GDR) inserted the following declaration into the text: “The German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic.” The Directorate of Public International Law of the Swiss Ministry of Foreign Affairs questioned whether such a reservation was compatible with the object and purpose of the Convention. It denied this on the basis of the following recital,

If several States make reservations similar to that of the GDR, the financing of the Committee will prove precarious, which will jeopardize the achievement of the aim of the Convention, which is, in particular through the activities of the Committee, to encourage respect for a fundamentally important human right and to increase the effectiveness of the fight against torture worldwide.

This line of argument moves in an uncertain interpretative space.

Generally speaking, Category I makes it easier to assert the incompatibility of a reservation with the object and purpose of a treaty than Category II.

What is the Position under IHL?

Let us now take the categories discussed and look at the way IHL treaties fit into them.

The examples from Category I highlighted above call for no special comments. Applicable to all treaties whatsoever, they also apply to IHL treaties. Such sweeping reservations, however, are not generally seen in the context of IHL treaties.

As is well known, commentators consider that most humanitarian norms in our subject area are of a peremptory nature. This is said to be so on account of many arguments, the most decisive being perhaps that the norms of IHL are a sort of minimal layer of protection directed against the falling back into bestial barbarism: a law of necessity, designed for emergency situations, and condensing the most fundamental protections. This stance puts IHL in a different position from most other areas of international law. Whereas in the latter the dispositive ordinary rules are by large prevailing, in IHL the situation would be reversed, with the bulk of the rules being peremptory. Obviously, there remains the necessity to determine which rules are of humanitarian nature and thus partake in the peremptory regime.

There is another general specificity of IHL, at least for “Geneva law” rules concerning protected persons. As is well known, the clauses contained in Articles 6/6/6/7 of Geneva Conventions I to IV allow the parties to the Conventions to conclude special agreements to implement the conventional duties or to fill gaps in protection. These require the parties not to conclude special agreements lowering the rights of the protected persons (i.e., derogating from the protections enshrined in the norms of the Geneva Conventions).

The relevant article reads as follows, “No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.”

If bilateral or multilateral legal acts must not impinge on the rights of protected persons, the most manifest interpretation would be that unilateral acts even more so cannot lead to the same result. That would mean that reservations to the Geneva Conventions’ protections are contrary to Articles 6/6/6/7 applied by analogy, or simply contrary to the object and purpose of these Conventions. Once more, the precise scope of application of these non-derogation provisions needs to be properly ascertained. As the text of the provisions shows, they refer only to “protected persons” and their rights. This means that the non-derogation they stipulate shall extend only to “Geneva law” provisions stipulating the rights of protected persons. Because the two Additional Protocols of 1977 are part of the Geneva Conventions, Article 6/6/6/7 applies to them, but only to the extent they regulate Geneva law issues turning on protected persons. The “Hague law” rules contained in the Protocols, notably those in AP I, are thus not covered. Indeed, a series of reservations has been made to those provisions.

There are also reservations to the Geneva Conventions. Some do not relate directly to the rights of protected persons, but rather to protecting powers. Most reservations do not go to the core of protected persons rights. When they seem to do so, some States (for example Germany or the United Kingdom) have objected to reservations incompatible in their eyes with the object and purpose of the Geneva Conventions.

Some “reservations” seem rather more like declarations despite their title. An example is the “reservation” of Suriname according to which “Surinam[e] reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.” Because Article 68(2) of Geneva Convention IV makes no reference to the law of the occupied territory in this context, Suriname’s purported reservation cannot modify the provision. In other words, Suriname did not make a unilateral statement whereby it purported to “exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” (VCLT, art. 2).

In summary, there are two specificities of IHL in this context: (1) the extent to which it may incorporate peremptory rules, which are averse to reservations; and (2) the non-derogation clause under the special agreement provisions of the Geneva Conventions, which carve out protected persons law from the reach of reservations.

Under Category II, there remains mainly the “Hague law” to be considered (putting aside here the question of reprisals and its effects). There are treaties which largely exclude reservations by an express clause, and in this case no separate enquiry into the object and purpose is necessary. Thus, Article XXII of the 1993 Chemical Weapons Convention

excludes reservations to the treaty but allows them, subject to the object and purpose test, to the annexes. As for cases of silence of the convention on the issue of reservations, we find once again easy and harder cases.

In the easy cases there are the main principles or pillars of the law on the conduct of hostilities. Thus, no reservations would be allowed to Article 22 of the Hague Regulations or Articles 35 or 48 of AP I. These relate respectively to the principle of limitation of means and methods, and the elementary principle of distinction. The same can be said of the protection against indiscriminate attacks under Article 51, paragraphs 4 and 5, of AP I.

An example of a harder case occurs in the context of Article 23(g) of the Hague Regulations, which states: "[It is forbidden] to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." A reservation by State X could purport to ease the exception clause by replacing the words "imperatively demanded …" by a sentence such as, "unless such destruction or seizure is made to ease the military operations."

The original text of the Regulations is more restrictive, demanding imperative reasons; State X wants to be able to rely on the mere "easing" of military action. Is such a reservation contrary to the object and purpose of the Hague Regulations (as viewed today)? Different lines of argument are possible, according to the weight one wants to accord to private property, whose legal value would in any case be significantly lower than the protection of life and limb. One could say that the modern law of treaties is based on the admissibility of reservations and that thus in case of doubt the reservation must be considered compatible with the object and purpose and therefore valid (presumption of validity). However that may be, the analysis under this rubric would have once more to be made on a case-by-case basis.

Concluding Thoughts

The main contents of this short post can be summarized as follows: (1) IHL treaties have the specificity of a more significant range of peremptory norms and the explicit non-derogation clauses in the Geneva Conventions; (2) there is a degree of difference between "Geneva" and "Hague" law in our context, the adversity of the first to reservations being greater than the one of the second; (3) there is no practice of sweeping reservations generally contrary to treaty commitments in IHL, unlike in human rights treaties; (4) conversely, there are in IHL as elsewhere easy and hard cases, the first in the context of the main principles of IHL (inadmissibility of reservations), the second in the realm of specific provisions (case-by-case arguments). Overall, an analysis of the admissibility of reservations under the lens of the object and purpose test must be made for each singular provision.

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