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Reservations to Treaties: An Introduction

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This Symposium examines the International Law Commission's work on reservations, specifically its recently completed Guide to Practice on Reservations to Treaties.[1] The topic is very technical and the Guide itself gigantic, standing, together with its commentaries, at over 600 pages. The topic of reservations to treaties has been on the ILC's agenda since 1993; its Special Rapporteur, Professor Alain Pellet, produced 17 reports with many addenda and annexes. The ILC's work was so seemingly endless that it inspired (gentle and good-natured) parody.[2] But now it has indeed come to an end. It needs to be assessed, and the purpose of this Symposium is to initiate that debate.

The law of treaties with regard to reservations is, in our experience, one of the hardest areas of law to grasp, teach, or condense and simplify without loss of accuracy. The Guide will thus inevitably be of the greatest interest to those among us who deal with reservations regularly, for instance legal advisers in ministries of foreign affairs. The Guide will probably not be of fundamental importance to the work of practically every international lawyer out there. But this is not to say that its importance for the non-specialist should be underestimated; there are many lessons to be absorbed from the Guide and the process through which it was created.

In that regard, it is remarkable to see just how much the Guide elaborates on the reservations regime of the 1969 Vienna Convention on the Law of Treaties (VCLT). That regime, consisting of six short articles,[3] was certainly the product of its time. It was precipitated by the *Reservations to the Genocide Convention* Advisory Opinion of

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1 See the Report of the ILC on the Work of its 63rd session, General Assembly, Official Records, 66th Session, Supplement n° 10, Addendum 1, UN Doc. A/66/10/Add.1.

2 See O'Keefe, 'Once Upon a Time There was a Gap . . .', *EJIL: Talk!*, 8 Dec. 2010, available at: www.ejiltalk.org/once-upon-a-time-there-was-a-gap-%E2%80%A6/.

3 Arts 2(d) (definition of reservations), 19 (formulation of reservations), 20 (acceptance of and objections to reservations), 21 (effects of reservations and objections), 22 (withdrawal of reservations and objections), and 23 (procedure).

the International Court of Justice, in which the Court moved the law forward from a rigid system requiring unanimous acceptance of reservations by all treaty parties, to a more flexible one that would accommodate differences between states and facilitate as broad a membership of multilateral treaties as possible without sacrificing their object and purpose.[4] The VCLT codified the Court's innovation, adding a few more rules here or there, but the 50 years that have passed since have shown us just how far Vienna was from being a comprehensive regulatory framework for reservations.

This is where the Guide steps in, as essentially a Vienna-plus; nominally a non-binding instrument interpreting and elaborating on the VCLT, but in fact developing it further, filling the gaps, and building upon the wealth of actual post-Vienna treaty practice. There is a host of issues on which the VCLT was either rudimentary or silent, such as interpretative declarations, the timing of reservations, or the rather impenetrable notion of a treaty's object and purpose. For all of these and more, the Guide and its extensive commentaries will become the first port of call.

The Guide's perhaps most important contribution is its examination of the criteria for the validity of reservations and the consequences of invalid reservations. Here we not only have a meticulous analysis of a technical topic, but nothing short of an existential story of international law as a unified system as opposed to a set of fragmented sub-regimes. How so? When one reads Articles 19–22 VCLT, particularly in light of the ICJ's *Reservations to the Genocide Convention* opinion, one cannot avoid the impression that the process of determining whether a reservation was invalid as being contrary to the object and purpose of a treaty was meant to be more or less inter-subjective: each state should determine for itself whether a given reservation was compatible with the treaty's object and purpose, and if it was not it should make an objection to that effect.[5]

But such an inter-subjective approach looks remarkably unappealing from the perspective of major multilateral normative treaties, particularly in the human rights context.[6] The rights of individuals, so the reasoning among many human rights

[4] *Reservations to the Genocide Convention* [1951] ICJ Rep 15. See also Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *British Yrbk Int'lL* (1993) 245.

[5] See *Reservations to the Genocide Convention*, *supra* note 4, at 24:
'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.'

[6] Ironically, however, some human rights treaties refer *expressis verbis* to such an inter-subjective approach – e.g., Art. 20(2) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides 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.' See the critical remarks by A. Cassese, 'A New Reservation Clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)', in *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), at 266–304.

lawyers went, should not depend on the existence of objections, *vel non*, by third states, especially when reciprocity of state obligations has little place in the human rights context and when, for a variety of reasons, states routinely fail to object to reservations even when there are perfectly good reasons to do so. While objections to reservations would be probative, they could not be dispositive. It would indeed primarily be for courts or treaty bodies to determine whether a reservation is compatible with the object and purpose of the human rights treaty, while the consequence of invalidity would normally be not only the nullity of the reservation, but also its severability, so that the reserving state would remain bound by the human rights treaty without the benefit of its reservation.[7] Human rights protection would thus always be maximized.

Many governments were less than pleased with what they saw as a power-grab by human rights bodies and a usurpation of their sovereign prerogatives. The ILC, being the bastion of international law orthodoxy, was no more pleased, nor was Alain Pellet as its Special Rapporteur. How could international law survive as a coherent, unified system if more of its branches followed the human rights example and asserted that because they were *special* they needed special rules, rather than the outdated Vienna framework. If that was true for human rights, why would it not be true for trade, the environment, or whatever other topic people became strongly devoted to. Fragmentation beckoned, and it needed to be resisted.

Professor Pellet and the ILC thus could not accept the 'human rights are special' argument. It was not just *wrong*; it was *nonsensical,* as the then Special Rapporteur puts it even today in his symposium piece.[8] No true *international* lawyer, even a gentle, human rights-loving one, could accept its basic ideological premise. The impasse was seemingly insurmountable.

But time went by, and it was not wasted, but used for reflection and dialogue between the 'generalists' and the 'human rightists', including a series of meetings organized in Geneva between the ILC and human rights treaty bodies. Rather than harden, their respective positions evolved. While from the generalist perspective the speciality claim could never be accepted, there was still room for compromise. Perhaps it was the general regime itself that could be so interpreted – or adjusted – to accommodate the concerns of the other side, and this time not just for the benefit of human rights. And so we have now the Guide, in which Pellet so very cleverly succeeded in reconciling positions that before seemed irreconcilable. He and the ILC did so by making a series of crucial conceptual moves.

First, according to the Guide, Article 19 VCLT should be regarded as laying down *objective* criteria for the validity of reservations. Secondly, Articles 20–23 VCLT deal with only those reservations which are objectively valid under Article 19; they do not mention or pertain to reservations which are in fact invalid.[9] Thirdly, while states may object

[7] On all these points see the Human Rights Committee's General Comment No. 24, CCPR/C/21/Rev.1/Add. 6.

[8] Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur', in this issue, at 1061.

[9] See Section 3 of the Guide and commentary.

to reservations that they consider invalid, this is merely persuasive evidence of invalidity.[10] In fact, objections have real legal effect only if they are made against reservations which *are* objectively valid; the objecting state may object for any reason whatsoever, simply because it does not want to accept the modified treaty bargain that the reserving state is offering.[11] Fourthly, while the VCLT does not say what are the consequences of an invalid reservation, the only sensible option is to accept that such a reservation is null and void.[12] Fifthly, however, saying that an invalid reservation is a nullity does not resolve the issue of the reserving state's status as a party to the treaty. That will depend on the intention of the reserving state, which has a choice – either stay on as a party to the treaty without the benefit of the invalid reservation, or say that it no longer considers itself bound by the treaty. In the absence of a clearly expressed position in this regard, there is a rebuttable presumption that the reserving state intends to remain a party.[13]

Whether this is *really* the Vienna regime, 'Vienna-plus', or something else entirely will, we imagine, be the object of some debate. But what seems to be beyond debate is that the Guide's approach to the invalidity of reservation accommodates most of the human rights-inspired critique of Vienna without giving any ground to the idea of speciality. This is a general regime applying to all treaties, but it still moves from the inter-subjective approach in which state objections are paramount, it treats invalid reservations as a nullity, and it allows them to be severed. Yet they can be severed only if the reserving state does not actively oppose its continued status as a party to the treaty. The Guide even acknowledges that human rights bodies have the competence to assess the validity of reservations, but that this does not empower them to do more than they otherwise could, i.e., it would not suddenly make the Human Rights Committee's views binding or formally equal to a judgment of the European Court of Human Rights.[14] The Guide further strengthens the presumption that the reserving state intends to remain a party to the treaty without the benefit of its invalid reservation by indicating that the state should make its intentions known within a year of a treaty body expressing its views that the reservation is invalid.[15] From silence, which would probably be more common than active opposition, one could infer acquiescence in the reservation's demise.

This is, in short, a remarkable compromise. What remains to be seen, however, is whether the actors on all sides of the debate will be willing to go along with it. As with the Guide as a whole, only time will tell whether it will ultimately prove to be successful – in our view, there is ample reason to be optimistic.

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The Symposium begins with a general presentation by Special Rapporteur Alain Pellet, giving a clear (and often critical) picture of the process followed within the

[10] Guideline 4.5.2.
[11] Guideline 4.3.
[12] Guideline 4.5.1.
[13] Guideline 4.5.3.
[14] Guideline 3.2.1. For an extensive analysis of the relevant practice see K.L. McCall-Smith, 'Reservations and the Determinative Function of the Human Rights Treaty Bodies', 54 *German Yrbk Int'l L* (2012) 521.
[15] Guideline 4.5.3.4.

Commission, focusing both on its more orthodox aspects and on the specificities (and novelties) of the instrument adopted. The Special Rapporteur then gives us his own views on the main issues, the solutions adopted and any deadlocks within the Commission in respect of each Part of the Guide. He deals *inter alia* with the questions of the validity and invalidity of reservations, politically controversial cases such as general 'sharia' reservations, and the establishment of reservations. In short, the piece presents and defends the general conceptual framework and innovations of the Guide.

Sir Michael Wood, a member of the ILC who was very active on the issue of reservations, examines the institutional aspects of the Guide: the role of depositaries (regretting that the Guide to Practice does not take a more progressive stance in this respect); assessment of validity of reservations by dispute settlement and treaty monitoring bodies (giving his own view about this highly debated issue); the series of nine conclusions on the 'reservations dialogue' (appearing as an annex to the Guidelines); and finally the ILC recommendation to the UN General Assembly on mechanisms of assistance in relation to reservations (an innovative idea largely inspired by the relevant practice of the Council of Europe).

Judge Ineta Ziemele of the European Court of Human Rights and Lasma Liede, a lawyer in the Court's Registry, examine in detail a topic that we have already touched upon, i.e., reservations to human rights treaties. They focus on the specific characteristics of such treaties, on the approach adopted mainly by the European Court, but also by other universal and regional human rights bodies, before examining in some detail the response of the ILC throughout its work on the Guide, and how, rather than being confrontational, it ultimately adopted a conciliatory approach.

Last but not least, Daniel Müller, researcher at the CEDIN and assistant to the Special Rapporteur in his work on reservations, skilfully analyses a technical but also very practical topic: reservations and time. He focuses on premature and late formulations of reservations as well as on premature and late formulation of objections. Müller thus explains how the Guide tries to put 'some order into the chaos and the uncertainties resulting from the Vienna regime.' He regrets the 'absolute position' of the ILC to exclude all reservations formulated prematurely, while praising the Commission for adopting a more flexible stance in respect of late reservations. He also examines the so-called 'pre-emptive objections' (in fact a negotiation tool), while admitting that a late objection cannot unmake consent expressed or assumed according to the terms of the Vienna Convention.

We hope the contributions that follow will shed light on the debates that took place and the solutions adopted over almost two decades of work by the ILC. We are sure that they will be read for many years to come, and would like warmly to thank the contributors for their participation.