
Book Reviews

Ziemele, Ineta (ed.), **Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation.**

Leiden/Boston: Martinus Nijhoff Publishers, 2004. Pp. 319. €159. ISBN 9004140646

This volume, edited by Ineta Ziemele, contains valuable 'insider' articles on the practices of monitoring bodies in relation to reservations to the most important international conventions on human rights (Part I) as well as commendable contributions on certain related topics (Part II). The primary theme of the book, however, relates to the question of whether the reservations regime of the 1969 Vienna Convention on the Law of Treaties (VCLT) is appropriate to the peculiarities of human rights treaties. As is commonly known, this is also a concern of the International Law Commission (ILC). Thus the book usefully republishes the Second Report of the ILC's Special Rapporteur on Reservations to Treaties, Alain Pellet.

Human rights treaties are not reciprocal in nature; that is to say, they are not a mere exchange of mutual obligations. Rather, they constitute instruments for the protection of individuals by ensuring their enjoyment of rights and freedoms. Moreover, participant states assume obligations *erga omnes partes*. Given these features, commentators believe that the Vienna regime is unsuitable for human rights treaties,¹ particularly as regards its rules on permissibility and the legal effect of reservations.² Article (60)5 VLCT is often

considered to be the sole concession to human rights values, although other VCLT rules (like denunciation, interpretations and succession to treaty norms) might further the same values. Furthermore, one may query whether a fragmentation of the law of treaties is even desirable.³ International practice does not seem to have achieved a sufficient level of homogeneity to foresee the formation of a 'new' customary law for human rights treaties.

Take, for instance, the permissibility regime of the VCLT. In the context of this regime it is common to find contrasting legal opinions. Whereas there seems to be some consensus on the 'object and purpose test' (Article 19 lit. c) being flexible enough for reservations to human rights treaties, there is no uniform approach as to 'general reservations' to conventional rights or to reservations to rules from which the parties cannot derogate even in times of public emergency. In accordance with the interest of preserving the most basic rights of a treaty, a solution could be to consider both of the above-mentioned reservations as incompatible with the object and purpose of the treaty.⁴ Another view, however, has been taken by the Human Rights Committee (HRC). In its General Comment No. 24, the HRC stated that the no-derogation clause does

'Reservations to Human Rights Treaties-Some Recent Developments', in G. Hafner *et al.* (eds), *Liber Amicorum Seidl-Hohenveldern* (1998), at 678.

³ A. Pellet, 'L'unité ou la fragmentation du système juridique international?', in SFDI, *supra* note 1, at 297-298.

⁴ This solution is discussed in this volume by Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: An Unresolved Issue of (No) New Developments?', 30, and by Seibert-Fohr, 'The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties', 197.

¹ See, e.g., SFDI, *La protection des droits de l'homme et l'évolution du droit international, Colloque de Strasbourg* (1998), *passim*.

² T. Meron, 'International Law in the Age of Human Rights', 301 *RdC* (2003), at 228 *et seq*; Simma,

not automatically entail the inadmissibility of a reservation, the reserving state having the ‘heavy onus to justify’ reservations to non-derogable rights.⁵ Since there is not even sufficient consensus to consider that reservations to the most fundamental rights provided for by non-derogable norms of a treaty are incompatible with the ‘object and purpose test’, the existence of a customary rule is highly doubtful.

Another contentious issue is the making of reservations to provisions of a treaty representing peremptory rules of general international law. Despite the strong position against this kind of reservation endorsed by General Comment No. 24,⁶ a glance at the practice shows that no consensus on this point has been established, as indeed Eckart Klein notes in his contribution to the volume⁷ (see also Ulf Linderfalk’s rather peculiar position on the matter⁸). To say the least, a reservation to a treaty provision reflecting a customary rule of *jus cogens* obviously cannot have the effect of freeing the reserving state from having to comply with the customary rule (the same could be said with regard to treaty provisions codifying a non-peremptory customary rule). That reservation, however, may have other purposes, which do not necessarily appear to be illegitimate. For instance, it may seek to restrict the competence of the body responsible for monitoring the compliance of the reserving State with the reserved clause, as Klein suggests, or it may serve to exclude the possibility of being bound in the event that a subsequent norm of general international law having the same character modifies that clause.

⁵ See 3 ILM [1995], at 839 *et seq.*

⁶ *Ibid.*, at para. 8.

⁷ Klein, ‘A Comment on the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law’, in I. Ziemele, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), 61.

⁸ See Linderfalk, ‘Reservations to Treaties and Norms of Jus Cogens – A Comment on Human Rights Committee General Comment No. 24’, in Ziemele, *supra* note 7, at 213 *et seq.*

More generally, there is a crucial question which clashes with the book’s primary theme, the so-called ‘severability doctrine’. According to this doctrine, an invalid reservation to human rights treaties should be considered as not having been formulated at all. This approach was adopted by the well-settled jurisprudence of the European Court of Human Rights.⁹ It was also endorsed in principle in 1994 by the HRC,¹⁰ although the Committee did not refer to severability when it subsequently considered the invalid US reservations to Articles 6 and 7 of the Covenant.¹¹

The major obstacle to severability, perhaps underestimated by some of the contributors to the book, is as follows: How can that doctrine and the principle of consent that governs the law of treaties be reconciled?¹² A treaty provision is a source of law which produces a rule of conduct and therefore a corresponding obligation to comply, provided that there is agreement on the content of that provision. As the ICJ held in the Advisory Opinion on *Reservations to the Genocide Convention*, ‘It is well established that in its treaty relations a State cannot be bound without its consent’.¹³ The reserving state disagreed with the reserved treaty provision. It expressed the intention to

⁹ See Polakiewicz, ‘Collective Responsibility and Reservations in a Common European Human Rights Area’, in Ziemele, *supra* note 7, at 95 *et seq.*

¹⁰ Pellet, *supra* note 3, at para. 20.

¹¹ See Scheinin, ‘Reservations by States under the International Covenant on Civil and Political Rights and Its Optional Protocols, and the Practice of the Human Rights Committee’, in Ziemele, *supra* note 7, at 47; the author specifies that ‘the Committee invited the State party to reconsider its reservations’, which seems quite a cautious attitude in comparison with the severability doctrine.

¹² The following reasoning is developed in my publications on the topic: see Baratta, ‘Le riserve incompatibili con l’art. 64 della Convenzione europea dei diritti dell’uomo’, LXXV *Rivista di diritto internazionale* (1992), at 289 *et seq.* and R. Baratta, *Gli effetti delle riserve ai trattati* (1999), at 83 *et seq.*

¹³ Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion, 28 May 1951, *ICJ Reports* (1951) 15, at 21.

reserve, regardless of the fact that the reservation was formulated in an invalid or irregular manner. In short, the theory that treats invalid reservations as not being made at all appears flawed in its implication that it imposes duties on the reserving state in the clear absence of consent that was never, in fact, tendered.

The 'severability doctrine' circumvents that obstacle by ascribing a presumed intent to be part of the human rights treaty, regardless of the will expressed upon the invalid reservation.¹⁴ This line of reasoning amounts to a *fiction juris* which appears difficult to reconcile with the principle of consent, unless the reserving state withdraws the invalid reservation or decides to conform with the reserved clauses in its concrete action, i.e. by acquiescence. It remains to be seen whether the reserved clauses are binding for the reserving state because of the assumption that an invalid reservation must be disregarded (as suggested by the severability doctrine) or, more appropriately, because the reservation has been withdrawn or the state has chosen acquiescence. In principle, an impermissible reservation may even have the result that the reserving state does not become a party to the convention if it does not comply with requirements provided for in it. This solution has been advocated when interpreting Article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination, as pointed out by Morten Kjaerum in his contribution.¹⁵

In any case, the attitudes of monitoring bodies which apply the severability doctrine seem to confirm, at least indirectly, the pervasive influence of the consent principle in that they assume a presumed intention to be bound by the treaty. Even the presence of a monitoring body set up to deal with cases of violations of human rights protected by a particular convention does not imply that a state which

made an invalid reservation is compelled to observe the reserved provisions. It may be that a treaty body may ascertain the legality of a reservation – and this is not necessarily wishful thinking when that power is explicitly attributed or may be construed as inherent.¹⁶ However, the issue of the effects flowing from the invalidity of a reservation does not depend on the competence of a conventional court or body as much as on general international law.

In fact, the VLCT leaves to non-reserving states the onus of reacting by objection when a reservation is deemed inconsistent with the object and purpose of a treaty.¹⁷ This is the point which is considered inadequate in preserving human rights values since, in the end, it tends to favour the reserving state. Yet the VLCT regime is founded on the consent principle. In this sense, the contradiction between the severability doctrine and the Vienna Convention seems real and difficult to reconcile.¹⁸ Even the *ordre public* dimension¹⁹ or the normative conception of human rights treaties do little to overshadow the importance of the consent principle. At this time, considering invalid reservations to human rights treaties as not being formulated at all does not appear to be supported by state practice. Suffice it to note the reactions of the US, UK and French governments to General Comment No. 24: they simply opposed the idea of severing inadmissible reservations from consent to be bound by the Covenant. In this context, perhaps a more realistic approach would have

¹⁴ A. Pellet, Second Report on Reservations to Treaties, UNGA, Distr., General, A/CN.4/477/Add. 1, 13 June 1996, ILC, 48th Session, Geneva, 6 May–26 July 1996, paras. 142, 229–230.

¹⁵ Kjaerum, 'Approaches to Reservations by the Committee on the Elimination of Racial Discrimination', in Ziemele, *supra* note 7, 69.

¹⁶ This question deserves careful handling since it may be admitted that a treaty body cannot in principle exceed its mandate without amending the treaty (see Melander, 'Reservations to Human Rights Treaties – Setting the Stage: Wishful Thinking or Prospects for Development', in Ziemele, *supra* note 7, at XXV).

¹⁷ Contra the classic article of Bowett, 'Reservations to Non-Restricted Multilateral Treaties', 48 *BYbIL* (1976–1977) 67, at 88.

¹⁸ See Scheinin, *supra* note 11, at 43 *et seq.*

¹⁹ See the commendable contribution of Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations', in Ziemele, *supra* note 7, at 149 *et seq.*

been better for the course of human rights.²⁰ Moreover, it is questionable whether the ‘Strasbourg approach’ prevails even among European countries; neither Recommendation 1233 (1993) on reservations made by Member States to the Council of Europe, adopted by the Assembly on 1 October 1993, nor the document approved in 1995 by the Chief Legal Advisers of some European States point in that direction.²¹

Nevertheless, given that states are at liberty when shaping the content of a treaty, there is nothing to prevent the inclusion of an explicit provision providing that an irregular reservation should be disregarded. By the same token, there is no reason why the subsequent practice of the conventional bodies and the parties should not establish a corresponding norm, as seemingly happened in the case of the ECHR,²² although such a special rule should carefully be ascertained on a case-by-case basis. This perspective would not amount to fragmenting the law of treaties, whose flexibility leaves sufficient room for a possible reconciliation.

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Ouguergouz, Fatsah. ***The African Charter on Human and Peoples’ Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa.*** The Hague/London/New York: Martinus Nijhoff Publishers, 2003. Pp. xlvii/1016. €298. ISBN 9041120610

This volume, originally published in French in 1993 and now updated and expanded, provides a comprehensive and systematic analysis of the substantive content and institutional framework of the African Charter on Human and

Peoples’ Rights. It does this with a determined and consistent view to revealing the Charter’s true spirit by illustrating its unique features, its legal contribution, and the actual and potential role it can play in the protection of human rights in Africa.

Dr Ouguergouz’s analysis of the legal scope of states parties’ undertakings is methodically supported by reference to the universal and regional human rights systems as well as to principles of general international law where appropriate. In many instances, several textual interpretations are canvassed as the author reasons in favour of ascribing a particular meaning to what are often vague or tersely worded provisions. Whether one agrees with the interpretation ultimately adopted or not, Ouguergouz’s reasoned analysis is a welcome contribution to a field of scholarship in which few studies of comparable depth have been undertaken and for which there is a paucity of interpretative guidance from the system’s supervisory organs, the African Commission on Human and Peoples’ Rights and the more recently established African Court on Human and Peoples’ Rights. The Charter’s potential role can thus be viewed in terms of its largely undefined and untested legal scope and the protective impact it is hoped to have for individual and peoples’ rights on the continent.

The book’s introductory chapter sets the tone in which the rest of the work is to be understood: the true spirit of the African Charter can only be revealed as a complement to its universal equivalent rather than in opposition to it. It is made clear from the start that the singularity of the African approach will be couched in terms of its consistency with the universal standard that inspired it. In the author’s view, if cultural relativism has any meaning for African countries, its expression is to be found in the Charter’s three principal innovations: the rights of solidarity, the duties of the individual, and the designation of ‘people’ as a legal subject. The reasoning behind the inclusion of these features is explained by the process in which the Charter was developed and by the particular philosophy which guided its drafting. The philosophy

²⁰ See C. Tomuschat, *Human Rights. Between Idealism and Realism* (2003), at 162.

²¹ Baratta, ‘Should Invalid Reservations to Human Rights Treaties Be Disregarded?’, 11 *EJIL* (2000), at 416 *et seq.*

²² See Baratta, *supra* note 12.