

1-1-1955

Reservations to Treaties: International Legal Implications

Morton Mendelsohn

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [International Law Commons](#)

Recommended Citation

Morton Mendelsohn, *Reservations to Treaties: International Legal Implications*, 4 Buff. L. Rev. 218 (1955).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol4/iss2/5>

This Note is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact law scholar@buffalo.edu.

NOTES AND COMMENTS

RESERVATIONS TO TREATIES: INTERNATIONAL LEGAL IMPLICATIONS

GENERAL PRINCIPLES

Questions concerning the legal effects of a reservation to an international compact have occupied the attention of writers in international law to an increasing degree during the present century. Much work has been done in codifying and analysing the procedures to be followed when a state, signatory to a treaty, wishes to declare that it will not be bound by a particular provision thereof.¹

Often the subject of the reservation is raised during negotiation of the treaty. Where it is then disposed of by an alteration of the terms of the instrument, no further action is necessary. But a state may raise an objection to a provision of a treaty already drafted by attaching a reservation to its signature, and recording it in a *procès-verbal*, or protocol of signatures; or, if the reservation is made after signature, by attaching it to the ratification. Finally, if the reserving state is not an original signatory, but wishes to accede to the treaty, it may attach the reservation to its accession.²

Definitions of a reservation are legion; one which has gained general recognition as authoritative appeared in the 1935 *Harvard Research in International Law*:

A "reservation"³ is a formal declaration by which a state, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which limit the effect of the treaty in so far as it may apply in the relations of that state with the other state or states which may be parties to the treaty.³

The term "reservation" has also been used as a synonym for "amendment";⁴ but these should be distinguished. An amendment comprises an alteration in the treaty itself; upon its acceptance by the contracting parties, it binds them all in their multi-

1. 1 OPPENHEIM, INTERNATIONAL LAW 821-822 (7th ed.-Lauterpacht, 1948); 2 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 519 (2d ed. 1945); 5 MOORE, DIGEST OF INTERNATIONAL LAW 201 (1906); *Harvard Research in International Law—Law of Treaties*, 29 AM. J. INT'L L. SUPP. 843-912 (1935), are among the basic works which have discussed the criteria and problems of reservations.

2. These procedures are outlined in 1 OPPENHEIM, *op. cit. supra* note 1, at 822.

3. *Harvard Research in International Law—Law of Treaties*, 29 AM. J. INT'L L. SUPP. 843 *et seq.* (1935). This definition has been quoted in 5 HACKWORTH, INTERNATIONAL LAW 101-102 (1943); and has been used in textbooks as well; e. g., BISHOP, INTERNATIONAL LAW 96-97 (1953).

4. 58 Cong. Rec. 3302 (1919); quoted in 5 HACKWORTH, *op. cit. supra* note 3, at 102-103.

NOTES AND COMMENTS

lateral relationships. But a reservation is unilateral in nature, and merely connotes that the *reserving state* will not be bound by a specific provision of the treaty. The fact that, traditionally, consent of all the contracting parties has been deemed necessary for a reservation to become effective may have resulted in some confusion between the two; and the reciprocal nature of most reservations undoubtedly has operated to obscure the important distinctions between a reservation and an amendment.

The reciprocal application of a reservation is not really analogous to the operation of an amendment, for while the other contracting parties may avail themselves of the terms of the reservation in a transaction to which the reserving state is a party (*i. e.*, may assert the immunity from normal operation of the treaty, just as the reserving state can), this is possible only *vis-à-vis* the reserving state itself. A state may not utilize the reservation in its relations with other non-reserving states.⁵

This general rule of reciprocity may be modified by a declaration by the reserving state that its reservation shall not apply in favor of any other state. Such a statement is thought to abrogate the reciprocal effect of a reservation, although the logical basis of this conclusion is not unassailable.⁶ As a practical matter, if the other signatories assent to this "reservation on a reservation", they will not later seek to take advantage of the reciprocal protection which otherwise would have been accorded them.

States have frequently thought it necessary to expressly reserve their right to claim the advantage of reciprocity in the legal effect of a reservation,⁷ sometimes despite their announced view that reciprocity is automatic.⁸

Also to be distinguished from a reservation is a mere "statement of interpretation", which may accompany ratification or accession by a state. Such statements, usually embodied in a *procès-verbal*, have no binding effect. They operate merely to place on record a state's position with regard to a clause suscept-

5. If one state claims that another has violated a term of the treaty, the accused state can show that by reason of the reservation, the reserving state (not a party to this dispute) has made performance impossible. But this is thought to be the only instance when two non-reserving parties may be affected by the reservation of a third state. See, *Harvard Research in International Law*, *supra* note 3.

6. *Id.* at 869.

7. Wright, *The United States and the Permanent Court of International Justice*, INTERNATIONAL CONCILIATION, No. 232, at 341, 353; see, *e. g.*, PROTOCOL, CONVENTION ON CUSTOMS FORMALITIES (2 HUDSON, INTERNATIONAL LEGISLATION 1120); GENERAL TREATY OF INTER-AMERICAN ARBITRATION, ART. 8 (PROCEEDINGS OF THE INTERNATIONAL CONFERENCE OF AMERICAN STATES IN CONCILIATION AND ARBITRATION, WASHINGTON, D. C. at 666 (1929)).

8. Wright, *op. cit.* *supra* note 7, at 822.

ible of differing interpretations. Of course, if ratification or accession to the treaty is expressly conditioned upon acceptance of the proposed interpretation, it may properly be termed a reservation.

Finally, a reservation must be distinguished from a "conditional acceptance", which does not purport to limit the effect of the treaty, but usually provides that the acceptance shall not take effect until the occurrence of a specified event; usually, when certain other states have signified their acceptance or ratification of the treaty. Once effective, the acceptance is without reservation.

THE REQUIREMENT OF CONSENT

It is axiomatic that no state can be compelled to enter into an international treaty or convention. The formation of such agreements is purely voluntary. This principle emerges inevitably from the facts of the contemporary international legal order. It does not follow inexorably, however, that once having signified its intention to be bound by a treaty, a state may, without restriction, immunize itself against the operation of its substantive provisions. For a state to possess the power to bind others without binding itself would defeat the objects of international covenants, and undermine the implicit consideration advanced during negotiation. Clearly, most treaties, like contracts, are the product of bargaining in which each party steels itself to accept unwanted clauses in the expectation that the other fellow will do the same. A reservation involves "the refusal of an offer and the making of a fresh offer."⁹ Of course, the analogy between a private contract and a treaty cannot be pressed too far, but it is valuable for an understanding of the general view that a state may make reservations only where it can secure the consent, express or implied, of other parties to the instrument.¹⁰

That the required consent need not be formal is agreed. Sometimes consent is given in advance, during the conference preceding formation of the treaty. Thus, the parties may tacitly agree that a state which desires to make a reservation and declares its intention at the conference may renew the reservation when signing the treaty without waiting for the formalities of assent by the other parties.¹¹

Also, a treaty may contain express provisions concerning conditions under which reservations will be accepted; *e. g.*, Art. 67 of the International Sanitary Convention of 1933 provided:

9. 1 OPPENHEIM, *op. cit. supra* note 1, at 822.

10. *Ibid.*; McNAIR, *THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS* 105-111 (1938).

11. 1 OPPENHEIM, *op. cit. supra* note 1, at 822.

NOTES AND COMMENTS

The signature of the present Convention shall not be accompanied by any reservation which has not previously been approved by the High Contracting Parties who are already signatories. Moreover, ratifications or accessions cannot be accepted if they are accompanied by reservations which have not previously been approved by all the countries participating in the Convention.¹²

A treaty may expressly preclude reservations; *e. g.*, Art. 1 of the Covenant of the League of Nations. Also, it has been concluded that draft Labor Conventions adopted by the Conference of the International Labor Organization are intrinsically incapable of being ratified subject to reservations. In its report to the Council of the League of Nations, the Committee for the Progressive Codification of International Law added the following general statement:

In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.¹³

Consent has been implied from the failure to object to a proposed reservation. Where the parties to a multilateral treaty, aware of the existence of the reservation, neither assent nor dissent expressly, it is thought that the lapse of a reasonable time would permit an inference that the parties had assented, and the signature, ratification or accession would become effective with the reservation.¹⁴ It has been suggested, however, that the mere failure to object does not indicate acquiescence on the part of states which have already ratified the treaty, although subsequent accessions would imply acceptance of known pre-existing reservations.¹⁵ Hackworth also states the view that where some of the parties have assented to a reservation, but others have signified objections thereto, some treaties may be susceptible of limited application despite the fact that not all the signatories have ratified; while if a treaty expressly requires ratification by all the signatories, or a specified number of them, it could not become operative if the reservation were not accepted by a sufficient number of signatories.¹⁶

12. U. S. Treaty Ser., No. 19 (Dep't State 1935).

13. PUBLICATIONS OF THE LEAGUE OF NATIONS, 1927 V. 16. The report of the Committee, together with a resolution on the subject, was adopted by the League Council on June 17, 1927. The entire report and resolution is also found in McNAIR, *op. cit. supra* note 10, at 107-111.

14. McNAIR, *op. cit. supra* note 10, at 106.

15. 5 HACKWORTH, INTERNATIONAL LAW, 130-131 (1943).

16. *Ibid.*

At this point it may be apropos to define the terms "signatory", "accession" and "ratification". A signatory is any state which has, by its authorized representatives, indicated its assent to a treaty and its willingness to be bound by it; but the assent is not complete until the constitutional process of ratification is concluded. An accession is an act of adherence to a treaty that has been ratified by the required number of signatories, but remains open for other states to become parties.

Treaties often contain a provision that they shall not become operative until the ratifications of a given number of signatories are deposited. When the required number of ratifications are completed, the treaty has been ratified in the international-law sense of the word. Individual acts of acceptance by the parties are ratifications in the constitutional sense, in that they are the product of the domestic constitutional processes of each state.

It has been suggested that a nation may bind itself internationally by mere signature without the constitutionally required act of ratification, in the absence of a special requirement to the contrary in the treaty.¹⁷ But this statement has been criticized as "too sweeping."¹⁸ Oppenheim suggests that whether a treaty requires constitutional ratification by the parties depends on the contents of the compact. If the subject matter constitutionally requires ratification, the treaty cannot become operative unless the acceptances are based on domestic acts of ratification, which are usually parliamentary in nature.

In the 1935 *Harvard Research in International Law*, it was stated:

A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude a treaty; however, a State may be responsible for an injury resulting to another state from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty.¹⁹

Even this considerably diluted view of the ability of a state to bind itself despite constitutional limitations is open to doubt. The argument that a state may be liable to those who "reasonably rely" on its representatives, seems to be based on analogy from

17. Fitzmaurice, *Do Treaties Need Ratification?* 15 BRITISH YEARBOOK OF INTERNATIONAL LAW 113-137 (1934).

18. 1 OPPENHEIM, *op. cit. supra* note 1, at 816.

19. *Harvard Research in International Law*, *supra* note 2 at 653, 992. *Accord:* McNair, *Constitutional Limitations Upon the Treaty-Making Power*, in ARNOLD, TREATY-MAKING PROCEDURE 6 (1933). McNair states that there is "considerable authority" for the view that international law imputes to a state an agreement made on its behalf by its representatives, without regard for constitutional limitations. LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS 38 *et seq.* (1938).

NOTES AND COMMENTS

the law of Agency. Indeed, Fitzmaurice bases the view on the theory that no state may be presumed to know the intricacies of foreign constitutional processes, and therefore, states are justified in relying on agents of other states.²⁰ But certainly the state whose representatives are thought to bind it without the aid of its constitution is not an *undisclosed* principal; and so long as the constitution and laws of a state are published and available it would appear rather myopic to argue that State *A* need not be aware of State *B*'s constitution.

This very question has received consideration by the United Nations. In a report on its Second Session, the International Law Commission observed that ". . . precise knowledge of constitutional provisions of other countries is essential to those who in any country are engaged in negotiating treaties."²¹

The result of this report was the publication by the United Nations of a slim volume titled: '*Laws and Practices Concerning the Conclusion of Treaties*,'²² in which relevant constitutional texts and other information concerning national laws and practices regarding the conclusion of treaties were compiled. Surely it is now more difficult to plead ignorance of constitutional provisions of other states. It would appear, therefore, that constitutional ratification is now a practical prerequisite to acceptance of an international treaty obligation, even if this were not always true in the past.

Despite conflicting views as to the necessity and legal effect of ratification in the constitutional sense, the authorities appear to have been in remarkable unanimity on the fundamental proposition that a reservation could not become operative until it received the consent of the other contracting parties. Analysis of a number of reservations indicated that in every instance the parties implicitly accepted the above principle.²³ At least one other study followed this, and arrived at the same conclusion.²⁴

THE AMERICAN RESERVATION

Such was the state of international law, therefore, when, in 1946, the United States acceded to Article 36 of the Statute

20. Fitzmaurice, *loc. cit. supra* note 17.

21. *Report on the Second Session of the International Law Commission to the General Assembly of the United Nations*, U. N. GEN. ASSEMBLY OFF. REC., 5th Sess., Supp. No. 12, A/1316, p. 10.

22. U. N. LEGISLATIVE SERIES, St/Leg/Ser. B/3 (1953).

23. Malkin, *Reservations to Multilateral Conventions*, 7 BRITISH YEARBOOK OF INTERNATIONAL LAW 141-162 (1926). See also, Wright, *Amendments and Reservations to the Treaty*, 4 MINN. L. REV. 14 *et seq.* (1919-20).

24. Hudson, *Reservations to Multipartite International Instruments*, 32 AM. J. INT'L L. 330-335 (1938).

BUFFALO LAW REVIEW

of the International Court of Justice, conferring compulsory jurisdiction on the court for the adjudication of international disputes to which the United States is a party. The American acceptance of the "Optional Clause" was significant for at least two reasons:

1. It marked the first time that the United States had signified its assent to the sweeping jurisdictional terms of the Statute. For under the Optional Clause of its predecessor, the Permanent Court of International Justice, which contained substantially identical provisions, the United States twice attempted to accede. Each time its acceptance was hedged about with reservations which effectively curbed the possible impact of the Court on American interests; but despite the protection offered by the reservations to the proposed accessions, they twice failed of unqualified approval.²⁵ Thus, the 1946 acceptance, adopted by a resounding 62-2 vote in the Senate, was hailed as a great advance in the peripatetic quest for an international juridical order.²⁶

2. The American acceptance was significant also for another, less auspicious, reason: it contained a reservation (among others) which by its terms appeared to some observers to sweep away the jurisdiction it apparently had conferred on the Court. This was the famous "domestic jurisdiction" reservation:

. . . such declaration shall not apply to . . . (c) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States . . .²⁷

The Charter of the United Nations explicitly exempts domestic questions from international jurisdiction, both political and legal:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the member to submit such matters to settlement under the present Charter . . .²⁸

Indeed, it has been an axiom of international law for centuries that international law cannot intervene or exercise any jurisdiction over matters which are essentially domestic in nature, and which impinge upon the sovereignty of a state. Despite this

25. For the history of both failures, see 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 142-143; *id.*, Vol. 6, 72-75 (1943).

26. Wilcox, *The United States Accepts Compulsory Jurisdiction*, 40 AM. J. INT'L L. 699-719 (1946).

27. Senate Resolution 196, 79th Cong., 2d Sess.

28. U. N. CHARTER, Art. 2 §7.

NOTES AND COMMENTS

apparently clear-cut rule of law, the United States Senate found it necessary to insist upon the reservation mentioned above.

An exemption of domestic questions from the jurisdiction of the Court would appear *prima facie* to be nothing more than a reaffirmation of existing law. To this extent it would be, although unnecessary, fully consonant with the purposes of the Court. In fact, the United States would not have been the first state to spell out in its acceptance the exclusion of domestic questions from international legal jurisdiction.²⁹

However, no other state had ever reserved to itself the right to decide whether a dispute was "domestic." In this respect the American reservation was singular, for by an assertion that a given matter lies within the domestic jurisdiction of the United States, this country could denude the Court of jurisdiction.³⁰

This last provision has been the subject of protracted, though scholarly, debate. It has been pointed out that the reservation is in contradiction of the express terms of Article 36, Par. 6 of the Statute, which states: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Also, it has been observed that the reservation constitutes a "bad example"; and that it deprives the Court of an essential element of judicial authority, for the competence of a court to decide whether it has jurisdiction of the subject-matter is deemed to be one of the foundations of any effective judicial institution, domestic or international. Finally, the unwisdom of the American reservation has been indicated by the fact that, having regard for the general principle of reciprocal applicability of reservations, the United States might someday find its way to the Court as a claimant barred by the other party to a dispute, asserting the protection of the American reservation, and announcing that the dispute was essentially a domestic question. In view of this country's history as primarily a claimant state before international tribunals, this last point is not lacking in cogency.³¹

29. Of the forty-five members accepting the compulsory jurisdiction of the old Permanent Court, some fifteen inserted reservations concerning domestic matters. See Wilcox, *op. cit. supra* note 26, at 711; and, Williams, *The Optional Clause*, 11 BRITISH YEARBOOK OF INTERNATIONAL LAW 63-80 (1930), for a discussion of the British reservation on domestic questions.

30. The Permanent Court of International Justice ruled on five cases involving attacks on its jurisdiction. In two of them it ruled that jurisdiction was lacking, in two others that it was present, and in the fifth case it ruled that the objection was "well-founded." As Wilcox points out (*op. cit. supra* note 26, at 711): ". . . in each case the Court and not the states decided the issue . . ." See, HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942, 477-481.

31. These arguments are stated in Preuss, *The International Court of Justice, The Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720-736 (1946); and in Wilcox, *op. cit. supra* note 26, *passim*.

Defenders of the reservation have pointed out that the definition of the term "domestic questions" or words of similar import changes with the times; and that what would have been considered as a purely domestic matter in earlier years is often thought of today as a problem fraught with international ramifications. This constant alteration of the concept of domestic questions is thought to be almost a mathematical function of modern technological and cultural advances. In these circumstances, it is argued, the United States can scarcely be blamed for asserting its desire to insulate itself from the possible future decisions and viewpoints in international law which could narrow the concept of domesticity even further, and thus erode the principle of national sovereignty. It is further suggested that although the United States reservation contains sweeping terms, in practice political considerations would preclude us from acting peremptorily in invoking the reservation.³²

In any event, the discordant views described above did not prevent the American accession, complete with reservations, from being duly deposited, without audible objection from other states. Today the United States is a formal party to the Optional Clause.

THE COMPATIBILITY TEST

In 1951, the International Court of Justice delivered an advisory opinion on the question of legal effects of proposed reservations to the Genocide Convention.³³ As will be shown below, this opinion, and the views reflected by its critics, raise the question, quite apart from any considerations of political wisdom and usage, whether the American reservation may not have legal implications far greater than those hitherto suggested.

As a result of reservations which had been proposed to the Genocide Convention by several countries, to which objections had been raised, the Secretary-General of the United Nations called the attention of the General Assembly to the problem of determining what were the legal effects of these reservations, and the status of their authors as parties to the Convention. In his memorandum to the Assembly, the Secretary-General embraced generally the dominant view that:

32. Wilcox, *op. cit. supra* note 26, at 709 *et seq.*; also see generally on the question of changing concepts of domestic questions, Brierly, *Matters of Domestic Jurisdiction*, 6 BRITISH YEARBOOK OF INTERNATIONAL LAW 8-19 (1925); and Fenwick, *The Scope of Domestic Questions in International Law*, 19 AM. J. INT'L L. 143-147 (1925).

33. I. C. J. Reports 15 (1951); 45 AM. J. INT'L L. 579 (1951).

NOTES AND COMMENTS

A state may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all states which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all states which have heretofore ratified or acceded.³⁴

The Secretary-General felt that this practice accorded with the procedure followed by the League of Nations, and that it was consonant with usual international practice. While the consent of mere signatories could not be required, that of nations which had ratified or acceded to the convention was a prerequisite for validation of a reserving state's acceptance.

As the memorandum pointed out, this is in sharp contrast to the practice of the Pan-American Union and the Organization of American States, under which the objection of a party does not prevent the reserving state from becoming a party, with the only juridical consequence of rejection being that the convention does not enter into force as between the reserving and the rejecting state. Thus, as between non-reserving states, the convention's terms obtain with full force and effect. As between the reserving state and those which have accepted the reservation, the convention operates as modified by the reservation; and as between the reserving state and those which refused to accept the reservation, the convention is not in force.³⁵

The Secretary-General refused to adopt the "compromise" position of the Organization of American States, however, and except for restricting the right of objection to states which have ratified or acceded to the treaty, the position of the Secretary-General remained squarely in favor of the requirement of consent.

In a memorandum annexed to the report, the United Kingdom delegation observed that:

. . . An international convention is an integral whole and must be accepted or not accepted as a whole. It cannot be accepted in part. Derogations may exceptionally be permitted to meet the special circumstances of particular countries, provided they receive the consent of the other interested parties, but no state can claim a right to make such reservations unilaterally, or accept those parts of a convention which suit it while excluding those parts it disagrees with or does not feel it can carry out.³⁶

34. Memorandum of Sept. 20, 1950. (UN Document A/1372)

35. See, Sanders, *Reservations to Multilateral Treaties Made in the Act of Ratification or Adherence*, 33 AM. J. INTL L. 488, 490 (1939).

36. *Loc. cit. supra* note 34.

BUFFALO LAW REVIEW

Other nations objected, however, on the ground that under the strict rule of consent the objection of a nation to a relatively minor reservation could operate as a veto power, precluding the reserving state from becoming a party to the convention.

Finally the matter was forwarded to the International Court of Justice for an advisory opinion, and to the International Law Commission for study. On May 28, 1951, the Court rendered its advisory opinion, and by seven votes to five rejected the strict principle of consent in favor of a set of rules partly reminiscent of the Pan-American Union practice, but with significant departures as well:

(1) . . . a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention . . .

(2) . . . if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention; . . . if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

(3) . . . an objection to a reservation made by a signatory State which has not yet ratified the Convention can have . . . legal effect . . . only on ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State; . . . an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.³⁷

The Court recognized the principle of unanimous consent as well-accepted, but cited the practice of the Organization of American States as indicating the need for "flexibility" in the operation of the rule. It characterized its new position as a compromise between the requirement of consent, which is a guarantee that no state may unilaterally frustrate the purposes of a convention by a far-reaching reservation, and the need for universal acceptance of the Genocide Convention. Great emphasis was laid on the stated "universality" of the Convention, and of the United Nations. The compromise, therefore, was that a reservation to which objection was addressed would become effective

37. *Supra* note 33.

NOTES AND COMMENTS

only if it were "compatible" with the convention; and this was to be determined by each objecting state unilaterally.

Several months later, the International Law Commission reported that the United Nations Secretariat was following substantially the dominant practice in requiring consent before a reservation would be permitted.³⁸ In fact, the Commission suggested that the consent rule should be even more stringent, in that consent of mere signatories should be required as well, except where a substantial time has elapsed since signature, indicating that the state has no intention of ratifying.

The Commission noted that while it was desirable that conventions should enjoy the widest possible acceptance, ". . . it may often be more important to maintain the integrity of a Convention than to aim, at any price, at the widest possible acceptance of it."³⁹

In substance, therefore, the Commission's report was in agreement with the minority of the Court in finding the consent requirement to be valuable and necessary.

One of the problems raised by the Commission report is that of determining when the text of a convention must be maintained intact, and when it may be diluted by means of reservations in order to secure wider acceptance. In other words, at what point does it become necessary to insist upon the consent of other parties as a guarantee of the integrity and purposes of the convention?⁴⁰

The view adopted by the majority of the Court in the Genocide opinion was that the reserving state may be regarded as a party to the Convention despite objection if the reservation is "compatible" with the object and purpose of the Convention. In principle, this would seem to be a valid criterion.

However, the "compatibility" test would be difficult to apply. According to the Court, the objecting party would determine whether a proposed reservation was compatible with the purposes of the treaty. This practice might well lend itself to a condition of near-anarchy in international law, with conflicting positions as to which states are parties, and to what extent, and *vis-à-vis* what

38. U. N. GEN. ASSEMBLY, OFF. REC., 6th Sess., Supp. No. 9. (A/1858); 45 AM. J. INT'L L. 103 (1951).

39. *Ibid.*

40. Fenwick, *Reservations to Multilateral Conventions: The Report of the International Law Commission*, 46 AM. J. INT'L L. 119-123 (1952).

BUFFALO LAW REVIEW

other states, with the result that no determination of the effect of a treaty could safely be undertaken.

It has been suggested that the legal Committee of the General Assembly might be entrusted with the power to decide whether a disputed reservation was compatible with the terms of a treaty, with the proviso that despite a finding of compatibility, the decision would not affect those states which maintain their opposition to the reservation.⁴¹ It is doubtful, however, that a state would be prepared to abdicate to the Legal Committee the power to determine the compatibility of reservations to conventions to which it is a party, especially in view of the historic position that consent of the parties is a prerequisite to validation of the reservation. If states were to permit such an agency to have the power to determine the compatibility of reservations, however, it could result in decisions on these questions being made with closer reference to the strictly legal problems involved, and, with appropriate safeguards, could permit the successful application of the compatibility test on an objective, rather than a subjective level.

In any event, the decision of the Court represents the highest judicial statement on the subject. While the Court is not bound by a doctrine of stare decisis, and was quick to point out that: ". . . The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case . . .",⁴² its opinion must inevitably be a persuasive force in the future, to the Court as well as to all members of the international community. Furthermore, the Court did remark that the questions posed were "abstract in character," and that the Court sought its replies "in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions."⁴³ This being so, its possible effect on the legal significance of the American reservation to the Optional Clause should not be disregarded.

It is true that formal objections to the U. S. reservation have not been forthcoming; but in view of the divergence of opinions as to whether and under what circumstances mere silence connotes consent,⁴⁴ it would seem that a party to the Statute might not be deemed *ipso facto* to have waived its objection solely because it has not yet raised it. Particularly is this true when the sweeping nature of the American reservation is taken into account.

41. *Ibid.*

42. *Supra* note 33; 45 AM. J. INT'L L. at 586.

43. *Ibid.*

44. *Supra* note 15.

NOTES AND COMMENTS

If the United States reservation is genuinely subject to the criticisms raised by legal writers,⁴⁵ it would appear that the unilateral exemption from the compulsory jurisdiction of the Court is fundamentally incompatible with the purposes of the Statute. Certainly the very existence of the reservation has the effect of reducing the prestige and effectiveness of the Court, and its interposition would effectively deny to the Court the jurisdiction which it was intended would be conferred by acceptance of the Optional Clause.

Furthermore, the Statute of the Court may present a stronger case for the operation of the compatibility test than did the Genocide Convention. For the Convention, as was pointed out by the Court, was intended primarily as a universal affirmation of ideals and principles embodied therein. A reservation to one or another of its clauses, therefore, should not preclude acceptance by the reserving state, for the aim of the Convention is, basically, universal application. While the effect of a given reservation might be to weaken the force of the Convention, it can be argued that this result is more than balanced by the practical goal of securing the widest possible acceptance of the aims of the Convention generally.

The Statute of the Court, however, is of a different character. Although its widespread acceptance throughout the international community is greatly to be desired, it is clear that in yielding to the jurisdiction of the Court a state is not merely pronouncing its approval of a humane and universal ideal, but is actually yielding something of its own sovereignty and entering into a clear-cut and binding legal commitment which could be of far-reaching significance. That is, the Statute is in a sense a contractual, not a law-making treaty.⁴⁶ It follows, therefore, that the acceptance must be effective or it is nugatory; *i. e.*, that the prestige and purposes of the Statute ought to be maintained, even at the risk of restricting the universality of its acceptance. Accordingly, a reservation which is incompatible with the Statute could be considered as precluding the reserving state from becoming a party thereto.

If the above arguments are sound, it would appear that the American reservation may have "tough sledding" ahead, should it be raised in any future litigation involving the United States. If the Court adheres to and refines its pronouncement of the "com-

45. See, *e. g.*, *supra* note 31.

46. Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94 *et seq.* (1929).

patibility" test in the Genocide opinion, the result may well be that discussions of the United States reservation will no longer deal with its wisdom or practicality, but rather, will be centered around the question whether the reservation itself is not legally invalid; or at least, whether the United States could not be open to serious attack on this score, should we at some future date attempt to invoke its protection.

Morton Mendelsohn

JURISDICTION AND FREE SPEECH PROBLEMS IN PEACEFUL PICKETING

The law of peaceful picketing, especially in view of the latest set of decisions handed down by the United States Supreme Court and the New York Court of Appeals, presents an unusual array of problems. The most important of these are the most basic: what can be done about peaceful picketing, and who can do it? An attempt will be made here to answer these questions, with special reference to the latest important cases: *Wood v. O'Grady*¹ for the "what", *Garner v. Teamsters*² and *Construction Workers v. Laburnum*³ for the "by whom". By way of establishing landmarks, it can be said that the first problem is largely tied up with First and Fourteenth Amendment freedom of speech and Section 7 of the Taft-Hartley Act, while the second involves such concepts as federal pre-emption and the jurisdictional criteria of the National Labor Relations Board.

Concerning the conduct that may be restrained, the Supreme Court has defined its conception of picketing in about a dozen cases decided in the past fifteen years. After a few early cases in which picketing was thought to be equatable with speech,⁴ it was decided that picketing was really a complex activity, and that speech was only one of numerous elements involved.⁵ However, since speech is to a large extent a protected activity, it is necessary to treat picketing with some deference, usually by attempting in some way to balance the respective interests of management, labor and the general public. If, for example, a statute is so broadly drawn as to outlaw all picketing, thereby favoring management too highly over labor and the public, that statute is in-

1. *Wood v. O'Grady*, 307 N. Y. 532; 122 N. E. 2d 386 (1954).

2. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U. S. 485 (1953).

3. *United Construction Workers Affiliated with United Mine Workers of America v. Laburnum Construction Corporation*, 347 U. S. 656 (1954).

4. *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Carlson v. California*, 310 U. S. 106 (1940).

5. *Infra* notes 8-26.