L - Ms Nash Digest

United States Department of State

Washington, D.C. 20520

January 9, 1990

L/T Genocide Reservations (LHMRR.

Memorandum

To: L - Mike Young

From: L/T - John Crook JC

Subject: British Objection to U.S. Genocide Reservations

You asked about the legal consequences of the British objections to the U.S. reservations on Genocide.

Conclusion. Under the principles of customary international law followed by the United States, the result of HMG's objections is that:

(1) The United States has a treaty relationship under the Genocide Convention, as modified by the U.S. reservations, with all non-objecting parties other than the United Kingdom. (No other parties have objected to the U.S. reservations.)

(2) Article IX of the Genocide Convention does not apply between the United States and the United Kingdom.

(3) The nature of the bilateral treaty relationship under other articles of the Convention is less clear. A party objecting to a another state's reservation to a multilateral treaty can prevent a bilateral treaty relationship from coming into existence. However, the Vienna Convention and the current Restatement require that it do so explicitly, as the British have done in other cases. Absent explicit British action, the better argument is that U.S. and the U.K. have a limited treaty relationship under the Genocide Convention. It perhaps consists of those articles judged not to be significantly or directly affected by the U.S. reservation.

Background. The U.S. instrument of ratification to the Genocide Convention contained five understandings and two reservations. The British objected to both reservations. The reservations state:

(1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

The U.S. deposited its instrument on November 25, 1988. The U.N. notice was dated December 29, 1988. The British letter was dated December 22, 1989. Its timing was presumably driven by Article 20(5) of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Under Article 20(5), a state is considered to have accepted a reservation if it does not object to it within 12 months.

The British framed their objections to the two reservations in different terms:

> The Government of the United Kingdom have consistently stated that they are unable to accept reservations to Article IX. Accordingly, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom do not accept the first reservation entered by the United States of America.
>
> The Government of the United Kingdom object to the second reservation entered by the United States of America. It creates uncertainty as to the extent of the obligations which the Government of the United States is prepared to assume with regard to the Convention.

Relevant Rules - U.S. Practice. There have been contending viewpoints as to customary international law regarding the effect of objections to reservations to multilateral treaties. (The Vienna Convention formula is consistent with the U.S. view of customary law, but is not in force between the United States and the United Kingdom because the United States is not a party to the Convention.)

The United States has taken the position that, under customary international law, a party's objections to U.S. reservations to a multilateral treaty generally do not prevent the treaty from entering into force for the United States. The objections render the reservation ineffective between the United States and the objecting party. As a corollary, the article to which the reservation relates is regarded as not being in force between the United States and the objecting party. The objection thus in effect creates a hole in the bilateral treaty fabric. See, e.g., 14 Whiteman Digest 1095-98 (memorandum by Assistant Legal Adviser Bevans concerning effect of objections to U.S. reservations to 1955 Convention of the Postal Union of the Americas and Spain.)

This principle -- that an objection does not prevent the rest of the treaty from entering into force bilaterally -- is refelected in the Third Restatement of foreign relations law, at section 313(c)(ii):

> objection to a reservation by another contracting state does not preclude entry into force of the agreement between the reserving and accepting states unless a contrary intention is expressed by the objecting state.

Comment (b) explains that in case of such reservations, "the agreement would be in force between the objecting and reserving state - except as to the provisions to which the reservation relates - unless the objecting state clearly indicates otherwise." Id. (vol. 1) at 181.

Under these principles, HMG's objections to the U.S. reservations do not prevent the United States from having a treaty relationship with other parties under the Genocide Convention. The bilateral situation with the U.K. is more complex. There is no treaty relationship between the United States and the United Kingdom under Article IX. The bilateral effect of the British objection to the second U.S. reservation is less easy to state, since the second U.S. reservation might affect many articles of the Convention. However, the guarded language of the U.K. objection -- and the principle that an objecting state must act explicitly to prevent a treaty relationship -- indicate that there is some bilateral relationship. It perhaps consists of those articles judged (or to be judged by the parties?) as not significantly or directly affected by the U.S. reservation.

HMG's position concerning these principles is not clear. Sir Ian Sinclair's book on the Vienna Convention seems generally sympathetic to the U.S. approach:

> This is hitherto untested ground, but in principle there would appear to be no reason why an objection to a reservation may not produce this effect [i.e., the dropping away of articles to which the reservation relates], provided the treaty is of such a nature that separability of its provisions is a practicable proposition.

I. Sinclair, The Vienna Convention on the Law of Treaties (second ed. 1984) 68 (hereinafter "Sinclair").

Historical Background. There has been much conflicting opinion concerning the effects of objections to reservations to multilateral treaties. The Genocide Convention provided the focal point for much of the debate. There have been three major schools of thought. Under the traditional ("League of Nations" or "unanimity") view, any party's objection to a reservation rendered the attempted ratification ineffective. Thus, under the traditional rule, all existing parties had to consent to all reservations. The rule ensured the integrity of the treaty text, but at the cost of discouraging wider adherence.

In the 1920's and 1930's, the American States developed a different practice (the "Pan American Rule"). This followed from the notion that a reservation was an inherent right of sovereignty which should not be discouraged. Under this rule, it was possible to have a web of different treaty relationships among the parties to a multilateral:

- The treaty was in force unaltered among states that became parties without reservations.

- It was in force in amended form among states making reservations and those states accepting the reservations.

- It was not in force among states that made reservations and existing parties that did not accept those reservations.

Many states made reservations to the Genocide Convention, creating uncertainty as to which states the Secretary General (the depositary) should count in determining when the Convention entered into force. The U.S. and U.K. generally supported the traditional view. The Soviet Union and Poland contended that the requirement of unanimity interfered with the inherent right of States to make reservations.

The General Assembly sought guidance to resolve the dispute from both the IJC and the ILC. It got different answers. In its 1951 advisory opinion (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (Advisory Opinion of May 28)), the Court (by 7 votes to 5, Judge Hackworth in the majority, Lord McNair dissenting) rejected the traditional rule and articulated a new one in the context of the Genocide Convention. The Court judged that it was the "object and purpose" of the negotiators "that as many States as possible should participate" in the Genocide Convention, id. at 24, and that the unanimity rule was not a customary rule of international law. Id. The Court held that:

- a state that has made a reservation accepted by some (but not all) prior parties is a party to the Genocide Convention, as amended by the reservation, if the reservation is compatible with the Convention's object and purpose.

- That if a State objects to a reservation it considers incompatible with the object and purpose of the convention, it can consider the reserving state not a party.

Eminent writers and the International Law Commission were not persuaded. The ILC reported back to the General Assembly soon after the ICJ's advisory opinion, supporting the traditional rule and criticizing the ICJ's object and purpose test. See Sinclair at 58-59.

The ILC returned to the problem as it sought to codify the law of treaties, work that was the precursor of the Vienna Convention on the Law of Treaties. The Commission changed course with the appointment of Sir Humphrey Waldock as special rapporteur. It recommended a system that moved away from the traditional rule, and that melded the ICJ's "object and purpose" test with elements of the Latin American system. Id. at 59-61. As amended and adopted in the Vienna Convention, the relevant rules are as follows.

Article 19 of the VCLT provides that a state may formulate a reservation when it acts to become a party to a treaty unless:

- the reservation is prohibited by the treaty,

- the treaty permits only specified reservations and the attempted reservation does not qualify, or

- the reservation is "incompatible with the object and purpose of the treaty."

(The second principle was applied in 1988 by the European Court of Human Rights to invalidate a Swiss "interpretive declaration" to the European Human Rights Convention, the first time an international court has held a reservation invalid. Bourguignon, "The Belilos Case: New Light on Reservations to Multilateral Treaties," 29 Va. J. Int'l L. 347 (1989).)

The VCLT then prescribes three different rules governing the effect of reservations:

The Traditional Rule in Special Cases. Under Article 17(2), "when it appears" from the limited number of parties and from the object and purpose that application of the treaty in its entirety is "an essential condition" of each party's consent to be bound, all must consent to any reservation. (The Advisory Opinion in the Genocide case establishes that the Genocide Convention is not such a treaty.)

International Organization. Under Article 17(2), where the treaty creates an international organization, the organization must consent to a reservation.

In other cases, unless the treaty otherwise provides, the VCLT reflects U.S. practice. Article 20(4) states:

In cases not falling under the preceeding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state . . . .

> (b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving state unless a contrary intention is definititely expressed by the objecting state.

HMG has followed the rule of 20(4)(b). In other cases, it has objected expressly when it wished to prevent a treaty relationship with another state whose reservations it found unacceptable. Thus, in 1972, regarding Syria's reservations to the Vienna Convention on the Law of Treaties, HMG stated:

> The United Kingdom objects to the reservation entered by the Government of Syria . . . and does not accept the entry into force of the Convention as between the united Kingdom and Syria.

United Nations, Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1988 792. In 1977, HMG blocked the entry into force of the Vienna Convention between itself and Tunisia in similar terms. Id.

In the circumstances, given the principle that an objecting state must act explicitly to prevent a bilateral treaty relationship from coming into being, and HMG's past practice in other cases, the better argument is that there is a partial treaty relationship between the United States and the United Kingdom under the Genocide Convention.

Concurrence: L:Bob Dalton
WANG 4938T