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Reservation under Vienna Convention of Law of Treaties Aide or Impediment to Global Relations

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ABSTRACT

The main motive behind providing for reservation to treaties under the Vienna Convention was to substantially increase global participation in ratification of treaties in general and humanitarian treaties in particular. However, despite gaining certain degree of stability over the years, these provisions still suffer from various defects as they have rendered the uniform applicability of the treaties infructuous to a certain extent, and has been a matter of constant examination. In this article, the authors aim to examine the impact of the provisions for reservation under the Vienna Convention on Law of Treaties on global relations, while discussing the reasons for their inclusion in the Convention and focusing on their relevance in the 21st Century. In this regard, the authors extensively analyse various cases that have helped to establish the concept of reservation of treaties, especially in case of multilateral treaties, and instigated its development under international law.

I. INTRODUCTION

The concept of "Reservation to Treaties" enables a State to set out reservations to the terms of the treaty with respect to provisions that the state does not wish to ensue. This aspect has been covered under Articles 19-23 of the Vienna Convention on the Law of Treaties. Such formulation of treaties can be during any of the stages such as signing, ratification, approving or acceding to a treaty[3]. The reservation to treaties cannot be said to reduce the efficiency of the instrument as it ensures large participation, which is necessary to enable the wide applicability of rules under the treaty. The State that chooses to formulate a reservation might do it with respect to a few rules, while abiding by the others. Therefore, despite of weakened scope, the instrument finds applicability over states. This ensures a better global commitment to counter issues of mutual interest.

However, with the advent of globalisation, the world is more interconnected than ever, which makes one ponder if the efficiency of such concepts needs to be enhanced to meet the needs of world in the current age. An individual would be of the point of view that the law with respect

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[3] Vienna Convention on Law of Treaties art. 2(1)(d), Jan. 27, 1980, U.N.T.S

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to relation between states was to be regulated by a treaty and its provisions in this regard to be of such primary significance that the law encompassing the aspects of reservations would be vivid and certain. This has not, be that as it may, been the situation. The question of reservations to multilateral bargains has been one of the most dubious subjects in contemporary international law.[4]

This suggests that a State may wish to be part of an international agreement, whilst not wanting to comply with many provisions that would hamper its various commitments be it international or subject to rules of domestic law. Such a scenario could alter the course of formulation of numerous treaties, therefore the formulation of reservations helps the nations to enter the agreement, while protecting its own interests. In this regard Professor Bishop seems to have made an error, when he suggested that in "enormous part" the development of reservations has come about because of a sought after control of the ratification procedure. The Soviet Union and other East European States seem to have been more frequent to make reservations to multilateral settlements than the United States and other parliamentary democracies.[5]

II. NULLIFICATION OF RESERVATION: ARE RESERVING STATES STILL BOUND BY THE TREATY?

In this context, let us consider a scenario, whether if it is possible for a nation to be considered to have assented to a treaty when a reservation it had formed is nullified. The appropriate response may rest in the definition of the expression "reservation." Professor Bishop commenced his Hague addresses with the examination of definitions[6], however he didn't himself present any, he did in any case, stress upon the fact that the key premise as it persists is that no state shall be compelled under international law without it adhering its consent to the treaty. This is the beginning stage for the law of treaties, and similarly for our global principles concerning reservations.

During its 1962 meeting, The International Law Commission amended the definition suggested by Sir Humphrey implying that reservation signifies a one-sided articulation made by a State[7], whilst performing acts pertaining to formulation of a treaty such ratification, signing, accession etc., where it makes statements and assertions with the objective of exempting the application of a few articles of the agreement or treaty to the particular state. It leaves a layman to theorize whether the Commission in 1962 or the Vienna Conference on the Law of Treaties in the

[4] Mr. Alain Pellet, *Tenth Report on Reservations to Treaties*, 57th SESS. U.N. Doc. A/CN.4/558 (2005)
[5] Richard W. Edawards Jr., *Reservation to Treaties*, 10 Mich. Jour. Of Int. law, 364 (1989)
[6] Brunson Macchesney, *Professor Bishop's Contributions to International Law*, 74, Mich. Law Rev. 862, (1976)
[7] International Law Commission, Yearbook: Summary records of the fourteenth session, (1962).

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coming years comprehended or thought that a State may get confined to a treaty to which it had conceived a nullified reservation. In compliance with the above point, it was Derek Bowett, who was one of the initial figures to express his interpretation of the Vienna Convention stating that under the Vienna Convention, a nullified reservation shall not axiomatically imply that a nation's consent shall not be bound under the terms of the treaty[8].

While considering one end of the scenario, it can be said that, multilateral treaty might be agreed by the nations exclusively based on a condition, which is communicated in the form of a reservation. On the off chance that the formulated Determining the tenacious inquiry in the individual case is fundamentally a matter of understanding the structure of the nation's instrument. However, despite of such examination it may be difficult to come to a conclusion in this regard. The arrangement and parliamentary discussions regarding the consent and a response to such question as to whether it was significantly more vital for the State to be involved as a member to the treaty than saving the rights it had thought it had ensured with the formulation of reservation.

In the *Belilos case*[9], the matter concerning the issue of severability was posed before the European Court of Human Rights, as previously viewed, the Court decided that a declaration labelled "Interpretative Declaration" made by the nation of Switzerland in its framework that attested the "European Convention for the Protection of Human Rights and Fundamental Freedoms" can be inferred to as a reservation[10]. It was likewise decided by the tribunal that the reservation formulated by Switzerland was nullified as it did not comply with the prerequisites for Reservations stated under Article 64 of the EHRC[11]. The Tribunal at that point needed to determine whether Switzerland was bound by the European Human Rights Convention or whether its act of consent contained a clear condition that dismissed the assent with the outcome that Switzerland was not be a member nation to the treaty.

The matter discussed above has all the earmarks of being the first case, where a reservation had been declared as void by the International Court. This determination is even more noteworthy in light of the fact that the Court held Switzerland to be limited by an arrangement that had been endorsed by it with a nullified reservation. Under the given circumstances, it was deplorable that the Court did not not examine the legitimate establishment of its determination

[8] 1 The Vienna Convention on the Law of Treaties a Commentary 425 1827. (Olivier Corten and Pierre Klien 2011)
[9] Belilos v. Switzerland IHRL 76 (ECHR 1988) (hereinafter *Belilos case*)
[10] *Belilos case*
[11] Council of Europe, European Convention on Human Rights art. 64, 1996
[11] *Ibid*

on the severability issue in a more profound manner. The determination in this regard made by the court was in all likeliness a better decision. If under the given scenario, the Court had decided that the nation of Switzerland was not to be considered a member nation to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ensuing consequences would have been detrimental for the Human Rights system in the continent[12].

The United States of America and Panama agreed upon two treaties in 1977, namely the Panama Canal Treaty[13] and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal[14], in the US capital city of Washington. However, in order to attain ratification, the treaties were required to receive the consent of the Senate. In pursuance of the same, the Senate held comprehensive deliberations and the ensuing vote gave consent to approval. The treaties entered into force on 1st October, 1979.

There were certain modifications that had to be formulated for the approval instrument with respect to the treaty of Permanent Neutrality and Operation of the Panama Canal. These alterations were settled upon by Panama. These amendments were to establish preferential rights in favour of the United States as had not been stated in the earlier document and as a result it had to be followed in lines with the right to act in case of any circumstance that shall effect the movement of vessels.

After the establishment of alterations in the Treaty on Permanent Neutrality, the two nations participated in a change that enhanced the privileges of the United States and forced steady constraints on Panama and other nations. Conversely, the reservations formulated by the United States additionally extricated limitations forced by the two settlements on the United States. The nation of Panama did not protest against such measures but expressed understandings in regards with the impacts of those reservations.

The utilisation of the measures with respect to amendments and reservations regarding the two settlements show that these measures can be utilised to perform unmistakably differentiating jobs in the treaty making Process. These both aspects stand in contrast with one another, an alteration may lessen or extend the constraints under a settlement, while a reservation typically attempts to lessen the constraints on the state formulating such reservations. Therefore, it can be interpreted that such statements may not always amount to a reservation[15].

[12] *Belilos case*
[13] Panama Canal Treaty of 1977, U.S.- Pa. Sept.7, 1977 U.N.T.S. 1982
[14]Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, U.S.-Pa., Sept. 1977 UiO
[15] Richard W. Edawards Jr., *Reservation to Treaties*, 10 Mich. Jour. Of Int. law, 362 (1989)

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III. OBJECT AND PURPOSE TEST FOR RESERVATION OF TREATIES

Majority of the scholars and researchers were of the opinion that on the event of the treaty not establishing provisions for reservation, any reservation formulated shall have to be routed through all negotiating states in order to be a contracting party to the treaty. However, such an opinion was altered after the International Court of Justice looked into the legal consequences of the silence with respect to reservations under the Genocide Convention[16]. This assertion made by the court was significant in bringing about certainty to this aspect. The Court through the medium of its advisory opinion, established a system, which expresses that a negotiating party could become a member nation to the Convention, however, such participation shall be applicable with states that approved of such reservation, while the same shall not be the case for other states. Moreover, the Court apart from establishing the legal consequences, acknowledgements and issues regarding reservations also laid down a standard basis for assessing the legitimacy of reservations to the Genocide Convention to which States were to allude while defining reservations and during its decision as to whether approve or raise any objections regarding such reservations.

The Commission altered its view in the ensuing years. When the International Law Commission finished up the drafting of the Vienna Convention on the Law of Treaties, the object and purpose criterion had become applicable to all treaties with respect to its application of reservations. The Vienna Convention on the Law of Treaties which has established itself as the apex instrument regulating treaties, provides the basis of formulation of reservations under Article 19 of the Convention[17].

IV. RESERVATION TO MULTILATERAL TREATIES: IMPACT OF ACCEPTANCE AND OBJECTIONS

The Scholars who have discussed the issue of Treaty reservations have focused their attention on the procedure of approval and opposition to multilateral treaties reservations and the legal implications of such opposition. This was a matter of lively discussion when Professor Bishop gave his Hague lectures. At the point this was a subject of enthusiastic debate, the essential matter under consideration was whether ideas explained by the ICJ as it would see it in reservations to the Convention on Genocide[18] ought to be applied to multilateral arrangements

[16] *Overview of the Case*, ICJ on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, https://www.icj-cij.org/en/case/12

[17] Vienna Convention on Law of Treaties art. 19, Jan. 27, 1980, U.N.T.S.

[18] *Supra* note 14

for the most part.

A fundamental worry with respect to formulation of human rights agreements is to ensure global participation in order to make it universally applicable, while guaranteeing to maintain the sanctity of the settlement. In the event, that a party can ensure its participation in a multilateral arrangement with reservations that its commitments with the approval from of certain States and the objections of the remaining states, the consistency of the said commitments under the agreement the significance of its commitments might be debilitated. Considering the other aspect, in the event that one or a couple of States, by protesting a reservation that does not altogether undermine the commitments forced by the bargain, can keep a State from turning into a contracting state, such a circumstance shall deviate from the objective of attaining global participation.

The International Court of Justice as it is known established a standard criterion for examining whether a reservation is allowed or barred, when the arrangement is quiet regarding reservations. The test, as discussed by the author above, is whether the reservation complies with the objectives of the treaty. It is a matter of common understanding that there may be contrasts in the view among parties as to the use of that criteria to different reservations to the Genocide Convention, and the absence of a neutral body established under the agreement to ponder the inquiry, the International Court of Justice put forward a lot of standards that basically treat connections with respect to a multilateral settlement, where reservations are established as the grid for bilateral connections. The Court in pursuance of a vote urged the United Nations, General Assembly:

(a) A party can contemplate upon the fact that the reserving party is not a party to the agreement, if such a state raises issues over a reservation on the premise that such a reservation does comply with the aims and objectives of the Convention.

(b) Any State which put forwards reservation in its terms to be bound by a Convention shall be considered as party to the said convention, if the states accept that the reservation complies with the aims and objectives of the Convention.

In the year that followed, Sir Humphrey Waldock, the Special Rapporteur assigned with the responsibility of the drafting the Vienna Convention recommended the application of standards established by the The International Court of Justice with a few characterized exemptions to multilateral arrangements[19]. The proposition after articulating a few adjustments were acknowledged by the International Law Commission and subsequently in the main instrument,

[19] Richard W. Edawards Jr., *Reservation to Treaties*, 10 Mich. Jour. Of Int. law, 362 (1989)

The Vienna Convention on the Law of Treaties. The provisions in this respect are incorporated under Article 20 and Article 21 of the Convention. The rules that emerged out of the Genocide Convention are regarded residual in nature and other provisions take preference over them.

The three stated rules that take preference over them are[20], first, the treaty can establish its own guidelines. Under the premise of Article 20 of the Convention it can be understood that a reservation explicitly approved under an agreement must not necessarily require any ensuing acknowledgment by the other parties except if the terms of the agreement provide so. Secondly under clause two, it establishes an appropriate principle for arrangements to be negotiated by a predetermined number of limited States. Third, under clause three, it provides to assure the respectability of settlement agreements that establish the international organisation. However, in case of any situation that stands out of the jurisdiction of the three provisions, its applicability falls under clause four.

Article 21 establishes the legal consequences that arise out of the formulated reservation, which are formed in compliance with the terms laid under Article 19, moreover their approval complies with the terms under article 20[21].

The standard enunciated in the last part of Article 21 was presumably not law of customary nature at the hour of the Vienna Conference on the Law of Treaties. However, it is certain that Article 21(3) switched the assumption expressed in the International Law Commission's draft. Every guideline expressed in Article 21 seems, by all accounts, to be customary principles in the current age. Ordinarily, an issue raised to a reservation has the impact expressed by the questioning State in the case of bilateral relations of the state formulating and objecting reservations. In the event that the State raising issues does not view itself in treaty relations with the reserving party and the expresses the same explicitly, such a circumstance shall conclude the matter.

In the absenteeism of an expressed intent from the Party raising issues, that it does not see any pertinent relations with the reserving party, the issues raised forestalls the arrangements in the treaty, that extends its application to establish relations between the two contracting parties. The standard, as has been expressed under Article 21(3) of the Vienna Convention had been used by the Court of Arbitration while dealing with the Continental Shelf case.

V. RELEVANCE IN THE CURRENT AGE

The main focus of this research work to analyse the application of the Convention in the 21st

[20] Vienna Convention on Law of Treaties art. 20, Jan. 27, 1980, U.N.T.S.
[21] Vienna Convention on Law of Treaties art. 21, Jan. 27, 1980, U.N.T.S.

century, therefore it becomes to analyse the aspect of reservation in this regard. The law on treaty reservation has become certain especially in reference to the time, when Professor Bishop conveyed his Hague addresses. The point is not one of exuberant discussion as it once seemed to be. The provisions and laws in this aspect have been strengthened by the Vienna Convention on the Law of Treaties, however this does not mean that the Convention has made these rules rigid, rather it enables its progressive development.

It can be said that the rules with respect to reservations have developed overtime and their applicability is now more certain and standardised than it was in the earlier days. Despite of the Convention ensuring large global participation in agreements it does hamper the efficiency of the application of the instrument to a certain degree. The application of this rule that enables a state to enter into agreement, while protecting its interest demonstrates how this provision is more inclined towards appeasement rather than ensuring concrete solution. A large global participation does enhance the global significance of a treaty but it cannot be the criteria of finding solution to global problems. Let us take into consideration the Paris Agreement, where the problems of climate change that is under consideration is a matter of urgent global concern, enabling a nation to enter into such an agreement might defeat the main purpose that it was established for. Many nations may not agree to reduce the emissions to the level that would hamper its development. Therefore, the treaty shall prioritise efficient application.

The practicality involved in formulation of treaties portray otherwise. The international law is more advisory than enforceable in its approach. Therefore, taking into consideration this fact it becomes difficult to ensure global participation as the nations are bound to protect their personal interests. The concept of reservation helps to ensure such participation and enhances the global significance of the given instrument.

VI. CONCLUSION

The author through the means of this article describes the provisions regarding the concept of formulation of reservations. This concept has evolved over the years and is currently an established rule under international law having been codified under the Vienna Convention on the Law of Treaties. This article has discussed its application with reference to the Continental Shelf case and other international treaties formulated by states, such as the the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. Moreover, the inclusion of this concept by the International Law Commission and the events thereof have also been discussed by the author in this article.

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The practicality involved in formulation of treaties portray otherwise. The international law is more advisory than enforceable in its approach. Therefore, taking into consideration this fact it becomes difficult to ensure global participation as the nations are bound to protect their personal interests. The concept of reservation helps to ensure such participation and enhances the global significance of the given instrument. In pursuance of the above, it can be stated that the concept of reservations attracts different opinions and interests and its application have both enhanced and hampered the scope of the treaty.

In the age of globalisation, there is a need to ensure development of terms under International Law to ensure efficient application and better implementation of provisions and rules laid down in that respect. The world is more inter connected than ever and is posed with problems that have global impact and significance, thus requires coordinated action and cooperative development. These matters are regulated by the formulation of treaties, taking into light the concept of reservation to treaties, it can be alleged that it reduces the scope of the treaty as it enables a country to not agree to a treaty entirely or in parts and because of these existing reservations under the claim of sovereignty, these states hamper the application of the instrument to find concrete steps to tackle an issue and rather encourages consensus oriented attitudes so as to acknowledge the reservation and accommodate all the interests of all parties in terms of matter being negotiated under the treaty.

Therefore, it can be concluded that although the concept of reservation under the Vienna Convention helps to enhance its scope in terms of global participation, which is necessary in its own sense, the age of globalisation calls for review in order to strengthen the terms to ensure

[22] The Paris Agreement, Dec.12, 2015, UNFCCC

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more efficient applicability.

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