



Centre on Human Rights  
for People with Disabilities

## **Legal Reports No. 1**

# **Legal position of Reservations to the UN Convention on the Rights of Persons with Disabilities**

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## Preface

This report by Dr Jean Allain, Reader in International Law in the School of Law, Queen's University Belfast, on the Legal position of Reservations to the UN Convention on the Rights of Persons with Disabilities is the first in a Series of Legal Reports being produced by the Centre on Human Rights for People with Disabilities.

These Reports are aimed at increasing understanding of

- the principles underlying;
- the implications of;
- possible methods of working with

legal means and instruments for the protection and promotion of the human rights of people with disabilities.

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# **The Legal Position of Reservations to the UN Convention on the Rights of Persons with Disabilities**

This legal position paper considers two issues:

- First, when can reservations to the UN Convention on the Rights of Persons with Disabilities be made and modified and;
- Second, what recourse is there where a reservation appears to be incompatible with the Convention.

## **Preliminary Items**

Before turning to the issues at hand, consider the following preliminary items:

- The manner in which treaties are to be interpreted is spelt out in Article 31 of the 1969 Vienna Convention on the Law of Treaties, which speaks of interpreting in good faith, in accordance with the ordinary meaning of the terms under consideration in their context and in light of the object and the purpose of the treaty.
- The terms ‘treaty’ and ‘convention’ are used in this brief (and generally in international law) interchangeably as it does not matter what an instrument is designated or called, as long as it is presented in written form and governed by international law.
- The 1969 Vienna Convention on the Law of Treaties – which sets out the rules governing legal instruments – defines a reservation at Article 2(d) as “a unilateral statement, however phrased or named, made by a State, when [consenting] to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

Reservations are a legal pronouncement by a State which enables it to exclude or modify a provision of a treaty, thus facilitating that State's ability to become party to a multilateral convention.

- Article 46 of the 2006 UN Convention on the Rights of Persons with Disabilities states that:
  1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted;
  2. Reservations may be withdrawn at any time.

### **Consent to the CRPD**

Ordinarily a reservation can only be made when a State (or intergovernmental organisation) consents to a treaty.

Where the UN Convention on the Rights of Persons with Disabilities (CRPD) is concerned:

- (i) State consent can take place in only two manners, either by ratification or by accession; while
- (ii) what is termed a 'Regional Integration Organization' can also consent in two ways, by 'formal confirmation' or by accession.

#### (i) State Consent

Ratification is the term ordinarily used to denote consent to be bound to a treaty by States which were involved in the negotiation of a treaty; while accession covers States which become Party after a convention comes into force.

However, where the CRPD is concerned, a State could ratify the Convention even if it did not take part in the negotiations as long as it has signed the Convention (the ability to sign the CRPD is open-ended).

Accession as per the CRPD is consent given by those States which have not signed the CRPD.<sup>1</sup>

Note that this nomenclature is of no great importance: whatever the terminology, a reservation can only be made when a State lays down, in written form, its consent to be bound by a treaty. A State does this by providing (re: depositing) a copy of its consent (re: its instrument of ratification or its instrument of accession) to the UN Secretary-General who is deemed by the CRPD to be its depository as the head of the Secretariat of the United Nations.<sup>2</sup>

#### (ii) Regional Integration Organizations

Somewhat innovative for the CRPD is that it allows for 'regional integration organizations' to consent to be bound by its provisions. The CRPD defines such an organization as:

an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depository of any substantial modification in the extent of their competence.<sup>3</sup>

As noted above, a Regional Integration Organization can consent in two manners.

First, it can bind itself to the CRPD by providing a written 'formal confirmation' if it is a signatory. While the European Community has yet

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<sup>1</sup> See Articles 42 and 43, 2006 UN Convention on the Rights of Persons with Disabilities.

<sup>2</sup> See Article 41, 2006 Convention on the Rights of Persons with Disabilities.

<sup>3</sup> Article 44(1), 2006 Convention on the Rights of Persons with Disabilities.

to consent by providing a formal confirmation, it did become a signatory to the Convention on 30 March 2007.

Second, accession for Regional Integration Organizations has the same meaning as for States; it denotes the consent given by Organizations which have not signed the CRPD.

## **1. Making or Modifying Reservations**

Turning to considering the making and modifying of a reservation. Article 19 of the Vienna Convention on the Law of Treaties states that “a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation”. The same would hold, for the CRPD with regard to Regional Integrated Organizations: that a reservation can only be made when consenting to be bound by the Convention.

However, the Vienna Convention notes that beyond the text of a treaty, the interpretation of a convention may take into consideration “relevant rules of international law”.<sup>4</sup> Such a general rule has developed within the United Nations system and was given concrete form by a Note Verbale of the UN Legal Counsel, in 2000.<sup>5</sup>

The current practice is for the UN Secretary-General to process reservations which are deposited after consent to be bound has been given by a State. This practice, as the UN Treaty Section Handbook notes, “is a situation where the Secretary-General’s practice deviates from the strict requirements of the Vienna Convention” that reservations only be made upon consent, not afterwards.<sup>6</sup>

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<sup>4</sup> See Article 31(3), 1969 Vienna Convention on the Law of Treaties.

<sup>5</sup> See United Nations, Note Verbal from the Legal Counsel (Modification of Reservations, 2000, Reference: LA 41 TR/221 (23-1) 4 April 2000.

<sup>6</sup> See Section 3.5.3, UN Treaty Section Handbook, available at: <http://untreaty.un.org/>.

With regard to the UN Convention on the Rights of Persons with Disabilities, it will be recalled that Article 46(2) states that ‘reservations may be withdrawn at any time’; what is important to note here is that as a result of this provision, new reservations, if they are deposited after consent to be bound has been given, can only be in conformity with the Convention if they withdraw in whole or in part a previous reservation.

In other words, new reservations which seek to exclude provisions of the CRPD which were not in the original reservation are prohibited. Further, reservations which seek to modify an original reservation would only be acceptable if it modified that original reservation in such a way to lessen its impact and give greater effect to the Convention. Thus, a modification of a reservation would have to withdraw, in whole or in part, that original reservation. Any modification of a reservation to the CRPD could not add further restrictions or limitations to that instrument, only diminish them.

This reading, in line with the object and purpose of the Convention, emerges from the tacit acceptance of reservations established by Article 46, and that Article’s express provision that reservations, once made may only be withdrawn.<sup>7</sup>

## **2. Incompatible Reservations**

The UN International Law Commission (ILC) has been considering the issue of reservations since 1995, primarily as a result of the fragmentation of international law as between general treaties and human rights treaties.

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<sup>7</sup> Note that Article 1 of the Convention on the Rights of Persons with Disabilities spells out the purpose of the Convention as, in part:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

If a State makes a reservation to a general multilateral treaty which defeats its object and purpose, the reservation is considered invalid, as is the State's consent to the overall treaty: thus the State is deemed not to be a party to the treaty.

This, however, is in contradistinction to human rights treaties like the CRPD, in which it has been recognised that where a reservation defeats the object and purpose of the treaty, the reservation remains invalid, while the State remains bound by the human rights treaty as without the reservations holding; that is: remaining bound to the treaty as a whole, even from those provisions which it had sought to exclude itself. This is known in the parlance of international law as 'severability': the treaty remains in force but the ill-founded reservation is severed.<sup>8</sup>

This notion of severability has been opposed by the United Kingdom, however the Chairs of the UN Treaty Bodies remain committed to the approach which was first outlined in General Comment 24 of the Human Rights Committee of the Covenant on Civil and Political Rights.<sup>9</sup> The Committee on the Rights of Persons with Disabilities, for its part, is unlikely to deviate from the established practice of other Treaty Bodies.

The fact that the UN General Assembly asked the ILC to consider the issue speaks to its contentious nature and its importance. The International Law Commission continues to work on the issue and has drafted guidelines, though some of its work has been adopted by the full Commission.

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<sup>8</sup> See for instance, Council of Europe, European Court of Human Rights, *Loizidou v Turkey*, 23 March 1995; and Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6, 4 November 1994.

<sup>9</sup> See Steiner, Alston and Goodman, *International Human Rights in Context: Law, Politics and Morals*, (3<sup>rd</sup> ed.), 2008, p. 1147.

## **Objections to Reservations**

It will be recalled that Article 46 of the 2006 UN Convention on the Rights of Persons with Disabilities states that reservations which are 'incompatible with the object and purpose of the present Convention shall not be permitted'.<sup>10</sup> As the International Court of Justice has stated, the object and purpose of conventions thus limits "both the freedom of making reservations and that of objecting to them".<sup>11</sup>

Only States can object to reservations (this holds for the CRPD, as the Convention does not contemplate the possibility of Regional Integration Organization opposing reservations).<sup>12</sup> If a State or a Regional Integration Organization enters a reservation, another State may object.

Under Article 20(5) of the Vienna Convention on the Law of Treaties, a State has twelve months to object from the date of the reservation, or from the date of the reserving State's consent to the treaty, whichever is comes later.

As Article 20(4)(b) of the Vienna Convention notes:

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 States unless a contrary intention is definitely expressed by the objecting State.

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<sup>10</sup> Note that a reservation which would violate a jus cogens norms would, ipso facto, be invalid and thus be considered severed from the Convention on the Rights of Persons with Disabilities. Such reservations would necessarily be incompatible with the object and purpose of the Convention.

<sup>11</sup> See United Nations, International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1950, p. 14

<sup>12</sup> See Article 44(3), 2006 UN Convention on the Rights of Persons with Disabilities which is silent on Regional Integrated Organization and reservations.

Thus, the default position is that the objection as between the two States exists and the States are considered to be party to the treaty, unless the State which objects expressly declares it considers that, as far as it is concerned, the two States do not have a relationship under the treaty; in other words: that where these two States are concerned no bilateral relationship based on the treaty exists.

If the objecting State is willing to accept a relationship between itself and the reserving State, the legal effect of the reservation is that remains valid. In essence, the reserving State wins.<sup>13</sup>

### **State Recourse for Incompatible Reservations**

The International Law Commission has gone beyond the bare bones of the Vienna Convention which says, at Article 19(c), that a State may formulate a reservation unless “the reservation is incompatible with the object and purpose of the treaty”. It has done so in its Draft Guidelines on Reservations to Treaties by formulating the following provision:

Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its

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<sup>13</sup> The relevant provision is Article 21(3) of the Vienna Convention on the Law of Treaties, which reads:

When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

The current Special Rapporteur, in his 2007 report, considers this provision to be “neither very logical nor satisfactory”. See United Nations, General Assembly, International Law Commission, Report on the work of its fifty-ninth session (7 May to 5 June and 9 July to 10 August 2007), UN Doc A/62/10, p. 20.

general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.<sup>14</sup>

The ILC Guidelines on Reservations to Treaties also speak specifically to reservations to human rights treaties:

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.<sup>15</sup>

In cases where a reservation is deemed to be incompatible with the object and purpose of the treaty, the International Law Commission has adopted the following Guideline for dealing with issues which arise with regard to 'manifestly invalid' reservations and the procedures to follow. The ILC understands 'manifestly invalid' reservations' to be those emanating from Article 19 of the Vienna Convention including Article 19(c): those "incompatible with the object and purpose of the treaty".

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<sup>14</sup> See Guideline 3.1.5, United Nations, General Assembly, International Law Commission, Report on the work of its fifty-ninth session (7 May to 5 June and 9 July to 10 August 2007), UN Doc A/62/10, at Chapter IV – Reservations to Treaties, p. 64.

The Draft Guidelines also offer the means of determining the object and purpose by recourse to the rules of treaty interpretation, that is: "in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties". See Guideline 3.1.6., *id.*

<sup>15</sup> See Guideline 3.1.12, *id.*, p. 65.

## **Procedure in case of manifestly invalid reservations**

Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation<sup>16</sup>.

## **NGO Response to Incompatible Reservations**

Time is of the essence when a reservation which looks to defeat the object and purpose is made, as you have one year to speak up. Recourse - if a State enters a reservation which may be incompatible with the object and purpose of the treaty would first be to the Treaty Section of the United Nations and the UN Secretary-General, as Depositor, to bring to their attention the possibility of a reservation being at variance with the Convention on the Rights of Persons with Disabilities.

Following the Guidelines, those seeking to show that a reservation is 'incompatible with the object and purpose of the treaty' would need to show that the reservation to this human rights treaty is incompatible with:

- 1) Indivisibility of the rights in the treaty;
- 2) The interdependence of the rights in the treaty;

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<sup>16</sup> United Nations, General Assembly, International Law Commission, Reservations To Treaties: Titles and texts of the draft guidelines adopted by the Drafting Committee on 23 and 24 May 2006, Fifty-eighth session, UN Doc A/CN.4/L.685, 24 May 2006, p. 3.

- 3) The interrelatedness of the rights in the treaty;
- 4) The importance of the provision to the general thrust (read: object and purpose of the treaty); and
- 5) The gravity of the impact of the reservation on the treaty.

Beyond referral to the UN Treaty Section and the UN Depositor, it would be worthwhile to draw the attention of States party to the Convention to such reservations, asking them to contact the UN Secretariat and requesting action on such a manifestly invalid reservation.

Finally, it would then be best to inform the reserving State of your actions as it places that State on notice that there is an issue with the reservation which has been brought to the attention of the UN Secretary-General and States Parties to the UN Convention on the Rights of Persons with Disabilities.

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