Qatar's Reservations to the ICCPR: Anything new under the VCLT Sun?

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On 21 May 2018, Qatar become the third country in the Gulf region to ratify the International Covenant on Civil and Political Rights (ICCPR). This followed Kuwait in 1996 and Bahrain in 2006. Qatar's ratification came with a long list of reservations and statements. That these reservations and statements have similarities to those of its two neighbors in the Gulf region may suggest that there was not much new in them. Yet, they are novel in two respects. First, they are the first ICCPR reservations and statements that can be assessed under the 'Vienna plus regime' adopted by the International Law Commission in 2011. There have been ICCPR ratifications post-2011, but none of these had reservations. Second, Qatar's reservations have attracted objections from 21 states – the largest number to date. As such, the case of Qatar also provides an opportunity to consider the extent to which the objecting states cohere with the guidelines provided by the ILC.

Qatar's reservations to the ICCPR

At the time it ratified the ICCPR Qatar entered two reservations. These are to Article 3 (equal rights of men and women to enjoy Covenant rights) and to Article 23 (4) (equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution).

The reservation to Article 3 indicates that the line of succession to the throne is governed by Article 8 of the Constitution of Qatar. The Constitution only permits male members of the royal family to be in the line of succession. Qatar justifies its reservation to Article 23(4) under a presumption of incompatibility with Islamic Sharia, which is the main source of legislation under the Qatari Constitution.

Qatar also entered five interpretive statements to the ICCPR. These concern the definition of inhuman and degrading punishment (Article 7), freedom to have or adopt a religion or belief (Article 18), the marriageable age for men and women (Article 23.2), the definition of trade unions (Article 22) and the protection of the rights of religious minorities (Article 27).

For the first three of these statements, Qatar indicated that its interpretations of Articles 7, 18 and 23 will be guided by Islamic Sharia and, in the case of any conflict, the Sharia will prevail. Concerning the definition of trade unions, Qatar stated that this will

be interpreted with reference to its labour law and national legislation. Qatar further stated that the protection of the rights of persons from religious minorities under Article 27 will be respected to the extent that 'they do not violate the rules of public order and public morals, the protection of public safe[t]y and public health, or the rights of and basic freedoms of others'.

ILC Guidelines, Vienna plus regime and Qatar's reservations

Completed following a long drafting process between 1993 and 2011, the ILC Guidelines provide for a reinstatement of the Vienna Convention on the Law of Treaties (VCLT) regime on reservations. In some aspects, it also seeks to progressively develop it. The ILC guidelines, amongst other things, offer guidance to distinguish between reservations and interpretive statements (1.3.1), a clear statement that reservations that are against the object and the purpose of a treaty are impermissible (3.1.c), guidance to determine the object and purpose of a treaty with the aim of assessing whether a reservation is impermissible (3.1.5.1- 3.1.5.6), and the powers of treaty bodies to make pronouncements of incompatibility and the possible legal consequences of such pronouncements (4.5.3.4).

In relation to Qatar's five interpretive statements, paragraph 1.3.1 of the Guidelines is pertinent. This states:

> To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.

With the exception of the statement on Article 27 on the protection of religious minorities, Qatar's statements all modify the legal effect of the specified provisions with reference to the Constitution, Islamic Sharia or domestic legislation. As such, they qualify as reservations. In the case of Article 27, Qatar indicates that persons from religious minorities have qualified rights under Article 27. The UN Human Rights Committee (HRC), in its General Comment 23 of 26 April 1994, also underlines the fact that rights under Article 27 are qualified rights. As such, the ordinary wording of this statement and UN HRC's own understanding of the normative structure of Article 27 are coherent. The statement therefore does not seem to modify the legal effects of Article 27 as such. It is, of course, still up to the HRC to assess whether Qatar meets its obligations under Article 27 of the Convention.

If at least the first four of the interpretive statements are, in fact, also reservations, how do we assess whether a total of six reservations are compatible with the object and purpose of the ICCPR and, by extension, whether they are objectively valid reservations under Article 18 (c) of the VCTL according to the ILC Guidelines?

The general principle stated in Article 19 of the VCTL and restated in Article 3.1.5 of the ILC Guidelines is that a reservation 'affecting an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty' is incompatible with the object and the purpose of the treaty and, therefore, invalid.

Yet, to determine what impairs the *raison d'être* of the treaty is a matter of interpretation in light of the text, context and subsequent practice. The ILC Guidelines offer some additional benchmarks to help interpreters by proposing that: a) vague or general reservations (3.5.1.2) and b) reservations to provisions concerning rights from which no derogation is permissible under any circumstances (3.1.5.4) should *prima facie* raise doubts about their compatibility with object and purpose. In addition, while the ILC Guidelines recognise that states may seek to safeguard the 'integrity of the specific rules of internal law' by entering reservations related to internal law, they may do this 'only insofar as it does not affect an essential element of the treaty nor its general tenour' (3.1.5.5). Furthermore, reservations to treaties containing numerous interdependent rights and obligations requires due regard to that 'interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty' (3.1.5.6).

A general reference to Islamic Sharia or domestic legislation raises questions of vagueness. In Bahrain's reservations to Articles 18 and 23, for example, the HRC emphasized the vague nature of the reference to Islamic Sharia and indicated that these may be against the object and the purpose of the ICCPR. Qatar's reservations to articles 2(a) and 16(1) (a), (c) and (f) of CEDAW with reference to Islamic Sharia have also been deemed incompatible with the object and purpose of the Convention by its monitoring body. The reservation on the definition of trade unions is also vague.

All of Qatar's reservations relate to internal law, whether that be the Constitution, Islamic Sharia (which is recognised as the main source of all legislation under Article 1 of the Qatari Constitution) or specific domestic laws, such as the labor law. Under ILC guidelines, references to internal law in a reservation may be admissible only if they are compatible with the object and purpose of the treaty. This requires assessing the importance of a particular right for the overall object and purpose of the ICCPR. Subjecting ICCPR obligations to Sharia on matters of equality in marriage and freedom to adopt a religion or belief undermines protections against discrimination, a provision that is an essential element of the treaty. In cases of workers' rights, the Qatari labor law has wide ranging restrictions as to who can unionise and how union activity can be carried out. It leaves, in particular, the majority of the workforce in Qatar, who are foreign workers, outside of the scope of union activity (although there have been some improvements leading up to the FIFA World Cup in 2022). These features of the domestic labor law, too, raise compatibility problems with the prohibition of discrimination.

Qatar's interpretive statement on the prohibition of torture and other forms of cruel, inhuman or degrading treatment falls under the category of Guideline 3.1.5.4 due to the absolute and non-derogable status of Article 7 of the ICCPR. The Committee against Torture has already called for the withdrawal of a similar reservation entered by Qatar to the Convention against Torture and asked Qatar to recognise the absolute and non-derogable nature of the prohibition against torture.

The assessment above leaves the reservation made to Article 3 in terms of the royal line of succession as the only one that does not raise *prima facie* compatibility concerns with the object and purpose of ICCPR. This is due the limited and highly specific scope of this reservation and its focus. Yet, states may still object to this even if it may be a valid reservation. However, it is worth noting that the UN HRC did not previously criticize similar reservations made by Liechtenstein and Monaco on grounds of object and purpose incompatibility.

In conclusion, it may be submitted that Qatar has in fact entered six reservations to the ICCPR, and five of these raise significant concerns as to their validity under the ILC Guidelines.

Has the 'Vienna plus' regime influenced the practice of objecting states?

The twelve-month period for objections ran out on 21 May 2019. Twenty-one states (Austria, Belgium, Canada, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Romania, Moldova, Poland, Portugal, Switzerland, Sweden and the United Kingdom) submitted objections to Qatar's reservations and statements in this time period. A record number. These objections are accessible via the public UN Treaty Collection depository.

Reasons for objections

Of the 21 objecting states, 20 of them, with the exception of the United Kingdom objected to the reservations and statements of Qatar because they assessed them to be incompatible with the object and the purpose of the ICCPR. The United Kingdom objected to the reservations on the grounds that they are vague and general, but did not assess them as invalid.

Language such as 'inadmissible' (Canada, Hungary), 'not permitted' (Estonia, Finland, Germany, Ireland, Portugal, the Netherlands), 'impermissible' (Greece, Latvia) and 'incompatible' (Moldova, Romania) is used. Greece, Italy and Portugal also pointed out that the impermissibility of reservations that are against the object and purpose of treaties is not merely a matter of Article 19 (c) of the VCTL, but is also part of customary international law.

When assessing on what grounds the reservations or statements are incompatible with the object and the purpose of the ICCPR, objecting states frequently invoke, in line with the ILC Guidelines, the vague, general and indeterminate nature of the content of reservations. They also assess the provisions that Qatar entered reservations to as being

essential elements of the ICCPR.

The wording used in some of the objections, however, also goes beyond the ILC Guidelines and offers new grounds. In this respect, three types of new reasoning are worth noting. First, some states indicate that the reservations made by Qatar 'raise doubts as to the commitment of Qatar to the object and purpose of the treaty' (i.e. Finland), or 'raise doubts as to the extent it fulfills its obligations' (i.e. Italy) or 'cast[s] doubt as to the commitment of the reserving state' (Ireland).

Second, and unlike the compromise wording in ILC Guideline (3.1.5.5) concerning the permissibility of the use of internal law so long as it does not upset the essential elements of the treaty, some objecting states take a much stronger stance concerning the use of domestic law as a ground for reservation. Some states go beyond Article 19 of the VCLT (Poland, Romania, Belgium) and assert that reservations with reference to domestic law contravenes Article 27 of the VCLT, even though traditionally one would think Article 27 to be relevant after a treaty enters into force, not when entering reservations. A significant number of other states emphasize that the ICCPR requires states to align their domestic laws with it and, therefore, domestic law cannot be the basis of a reservation. Alongside similar lines, the Netherlands and Poland, for example, argue that the Qatari reservations are designed to 'deprive the provisions of the Covenant their legal effect'.

Table: Reasons for Object and Purpose Incompatibility

Reference to vague and general wording	Reference to certain provisions as essential elements of the ICCPR	Reference to intention to doubt Qatar's commitment to the ICCPR	Reference to Article 27 of the VCTL, the duty of states to align their domestic law under the ICCPR to give the ICCPR its legal effect
Austria	Austria (Article 3 of ICCPR))	Belgium	Austria
Belgium		Czech Republic	Belgium
Canada		Estonia	Canada
Czech Republic	Canada	Finland	Finland
Germany		Germany	The Netherlands
Greece	Latvia (Articles 3 and 23(4) of ICCPR)	Hungary	Poland

Ireland	Ireland	Portugal	
Romania	Italy	Romania	
Switzerland	Norway	Switzerland	
Sweden	Moldova (Articles 3,7, 18(2),22,23(2) and 24(4) of the ICCPR)	Portugal	Sweden
UK (without making an assessment on object and purpose incompatibility)	Norway	Sweden	
		Switzerland	

Yet, when it comes to the application of these grounds to the reservations at hand, there is divergence amongst the objecting states. The first point of divergence concerns whether the statement concerning Article 27 of the ICCPR is in fact a reservation. Six of the twenty-one objectors (Canada, Ireland, Hungary, Sweden, Poland and the UK) assess the statement entered with respect to Article 27 as a reservation modifying the legal effects of the ICCPR. Fifteen do not do so. Norway is unsure. It points to the difficulty in distinguishing whether the statement was made in good faith or not, noting that:

> If this statement is to be understood as a mere reference to Article 18 (3) of the Covenant, the statement is acceptable to the Government of the Kingdom of Norway. However, if the statement is meant to make the application of Article 27 subject to specific national rules, which are not further specified, this statement also lacks the necessary clarity and raises doubt as to the full commitment of the Government of the State of Qatar to the object and purpose of the Covenant.

The treatment of the reservation that Qatar made to Article 3 of the ICCPR stands out as the second point of divergence. Romania, the United Kingdom, the Czech Republic and Austria are the only four states that do not raise any objections to this reservation. A high number of seventeen objectors assess it as incompatible with the object and the purpose of ICCPR. States objecting to reservations concerning male succession to the throne is a novel development amongst the ICCPR state parties. For example, countries such as Sweden, Germany, Belgium, or Finland did not make objections with respect to either Monaco or Liechtenstein who entered similar reservations to the ICCPR in the past. This may mean that the views of these countries on gender equality and succession in monarchies have evolved over time.

Legal consequences of objections

Despite all the objections raised by states to the reservations of Qatar, this does not preclude the coming into force of the treaty between Qatar and themselves. Of the twenty one states, however, eight states, namely, Austria, Czech Republic, Finland, Hungary, Latvia, Moldova, Switzerland, Sweden go a step further and explicitly indicate that because these reservations were against the object and purpose of the treaty, the treaty should come into force between Qatar and themselves, in its entirety, without the benefit of the reservations. They therefore treat the reservations they object to as severable.

Anything new under the VCTL sun?

My analysis shows that there are indeed new developments. First, the objecting states, with the exception of the UK, align with the ILC Guidelines by employing the concept of objectively impermissible reservations in their assessments. Second, states use vagueness and essential elements of a treaty as important benchmarks when assessing impermissible reservations. Yet, the objections of a significant number of states also go beyond the ILC Guidelines evidencing some new state practice here. First is the language, which express doubts about Qatar's 'full commitment' to the treaty. This is a novel development. Second, many states reject the use of domestic laws as a valid basis for reservations and place a much higher emphasis on the duty of states to align their domestic laws with the ICCPR.

The objections of the 21 states to the reservations and statements of Qatar are not in and of themselves an indication of the objective invalidity of Qatar's reservations under international law. Twenty-one is a record high number of objections on grounds of incompatibility with object and purpose, but we must bear in mind that ICCPR has 173 state parties. Whilst there is some significant convergence amongst the objectors as to which reservations are against the object and purpose of the ICCPR, disagreements also remain.

In this respect, the ILC has introduced a new guideline and recommended that 'if a treaty monitoring body expresses the view that a reservation is invalid and the reserving State intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment' (4.5.3.4).

The ILC thus proposes that the HRC takes up the question of invalid reservations. The first report of Qatar to the HRC is due on 21 August 2019 and a review date of the report is yet to be set. This first review will be a testing ground for recommendation 4.5.3.4. Given that treaty body discussions with a state take place in the form of a dialogue and the concluding observations are non-binding, it remains to be seen whether the HRC will follow the approach proposed by the ILC, including the setting up of time limits. If it indeed does express a view on the invalidity of the reservations and statements of Qatar, it can rely on the support of at least twenty-one states' assessments on impermissibility as persuasive authority. Yet, the HRC will also have to address the

divergence between the positions of states with respect to whether the statement concerning Article 27 is indeed a reservation, and whether male succession to the throne is against the object and purpose of the ICCPR.

Qatar's response or lack thereof is also worth waiting for, all the more so because the ICCPR does not expressly allow for denunciation. The ball is now in the HRC's and Qatar's court.