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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WITH THE SUB-COMMISSION HAS BEEN OR MAY BE CONCERNED

Reservations to human rights treaties

Working paper submitted by Ms. Françoise Hampson
pursuant to Sub-Commission decision 1998/113

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Introduction

1. At its fiftieth session, the Sub-Commission, in decision 1998/113 entitled “Reservations to human rights treaties”, recalling the letter from the Chairman of the Committee on the Elimination of Racial Discrimination addressed to the Chairman of the forty-eighth session of the Sub-Commission (E/CN.4/Sub.2/1997/31, annex), the concerns about reservations expressed by the Committee on the Elimination of Discrimination against Women, the report of the Secretary-General on the views of the six human rights treaty bodies on the Preliminary Conclusions of the International Law Commission (E/CN.4/Sub.2/1998/25) and the Vienna Declaration and Programme of Action, which emphasized the need to limit the number and scope of reservations to human rights treaties, decided to request Ms. Françoise Hampson to prepare, without financial implications, a working paper on the question of reservations to human rights treaties, to be considered by the Sub-Commission at its fifty-first session.

2. In addition to the documents referred to above, the issue has been dealt with by the Human Rights Committee, established under the International Covenant on Civil and Political Rights, in General Comment No. 24 on 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 (CCPR/C/21/Rev.1/Add.6, 11 November 1994), which has attracted critical comments by the United States of America, the United Kingdom of Great Britain and Northern Ireland and France, and by the Special Rapporteur of the International Law Commission, Alain Pellet, in his second report on reservations to treaties (A/CN.4/477/Add.1, 13 June 1996), which deals expressly with reservations to human rights treaties.

3. The function of this working paper is simply to introduce some of the relevant issues. It is not possible within the constraints of such a paper either to explore the issues in any depth or to give references to all sources. Ms. Hampson wishes to thank Ms. Basak Cali and Ms. Maria Logotheti for research assistance with the paper and the International Federation of Human Rights Leagues (FIDH) for the results of its research amongst its constituent organizations.

Issues

4. Many ratifications of human rights treaties are accompanied by reservations. Certain treaties are more affected than others, the Convention on the Elimination of Discrimination against Women being a notable example. The types of reservations vary enormously. A significant proportion concern monitoring and/or procedural provisions under the particular treaty, rather than reservations to the substantive norms. Reservations which concern substantive norms also take a variety of forms. Some assert the non-acceptance of a particular provision. Others accept part or whole of the treaty insofar as consistent with an independent body of law, such as Islamic law or the particular State’s domestic law. (An analysis of reservations to certain human rights treaties is provided in annex 1.) Certain statements take the form of interpretative declarations or may not indicate whether the reserving State understands them to be interpretative declarations or reservations. That then becomes a matter of construction.

5. Stated baldly, the principal issues appear to be:

(a) Is there a special feature of human rights treaties which means that a special regime applies to reservations to human rights treaties, either on account of the special legal character of the treaties themselves or because reservations to such treaties need to be treated in a special way? If so, what is the special regime applicable to reservations to human rights treaties?

(b) If not, what is the general regime applicable to reservations to human rights treaties?

(c) In applying the relevant and appropriate reservations regime in practice to a particular reservation, are there special characteristics of human rights treaties which may be relevant to the interpretation of a reservation?

(d) In the case of a treaty which establishes a judicial or quasi-judicial enforcement or monitoring body, who determines the validity of a reservation, the contracting States and/or that body?

(e) What is the effect of the view of an enforcement or monitoring body that a reservation is invalid on the reserving State’s ratification and on other parties?

6. There appears to be some measure of shared understanding, if not agreement, with regard to the first four issues, subject to differences of nuance and emphasis. There is, however, a marked divergence of view with regard to the final issue. The issues will be examined in turn.

(a) Unique character of human rights treaties

7. It has sometimes been suggested that human rights treaties have a unique legal character or status, affecting the legal regime applicable to reservations to such treaties. The first difficulty with this hypothesis is that of delimiting what constitute human rights treaties. It would then be necessary to find a characteristic which they have in common and which is not shared by other treaties. One argument is that human rights treaties are “objective” in character, which appears to be similar to the claim that they are unilateral undertakings made by States and not subject to the normal rules on reciprocity. Subject to the definitional problem referred to above as to what constitutes a human rights treaty, there may be exceptions to such an alleged principle. Furthermore, other commitments would appear to share this characteristic. The nature of the content of human rights treaties may have a significant impact on the interpretation of their provisions and of any reservations but that concerns the issues addressed under (c) below, rather than the claim that human rights treaties are, as a matter of law, in a special category.

8. Even if human rights treaties are not, as such, in a special legal category, it might nevertheless be possible that a special regime was applicable specifically to reservations to such treaties. Such an argument is, however, weakened if human rights treaties are not themselves seen as

being in a special category. The evidence of the Advisory Opinion of the International Court of Justice in the case on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports 1951), the travaux préparatoires of the 1969 Vienna Convention on the Law of Treaties and the Convention itself suggest that the formula set out in article 19 of the Convention was seen as being of general applicability. There is no evidence that it was envisaged that it would not apply to a particular type or class of treaty. Article 19 of the Vienna Convention provides:

> "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
>
> (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

It would therefore appear that there is no special legal regime applicable to reservations to human rights treaties on account either of the legal character of the treaties themselves or of reservations to them.

(b) What is the legal regime applicable to reservations to human rights treaties?

9. The legal regime applicable to reservations to human rights treaties would appear to be that contained in article 19 of the Vienna Convention, quoted above. That is to say that a treaty may prohibit a specific reservation or all reservations. If it does not do so, reservations are permitted provided that they are compatible with the objects and purposes of the treaty.

10. This gives rise to a wide range of difficulties in practice. Some of them will be examined under (d) and (e) below. Here, attention will be drawn to just one problem with this approach to reservations. Article 20 of the Vienna Convention details four effects which may flow from a reservation. Three relate to specific situations: where the treaty expressly authorizes the reservation; where the application of the treaty in its entirety is an essential condition of the consent of each State to be bound; and where the treaty is a constituent instrument of an international organization. The residual provision is found in article 20, paragraph 5. In cases other than the three situations described, a State is deemed to accept a reservation if it does not raise an objection within 12 months after notification of the reservation. When one considers the number of multilateral treaties to which many States are party and the number of potential other parties, it would be surprising if States were meticulous in examining the reservations of other States in order to indicate a view. Silence seems to be a common response. It would seem unlikely to be usually the result of conscious deliberation on the part of other high contracting parties. This is not invalidated by the fact that, occasionally, States do react and object to the reservations of

other States, as certain States did to some of the reservations of the United States to the International Covenant on Civil and Political Rights. Given that there is no legal requirement that States examine every reservation with a view to determining whether it is compatible with the objects and purposes of the treaty, it would appear unwise to assume that silence on that score means that they think that the reservation is compatible.

11. A further complication arises where one or a few States object to the reservation on that ground. Again, in the absence of a legal requirement to comment, it would seem unwise to assume that all other States accept the reservation. The criterion invoked by the objecting State(s) appears, however, to be objective in character. A State does not have to give reasons for objecting to a reservation. If a group of States simply stated that they did not accept a particular reservation, whilst others accepted it, there would be no particular difficulty. It is hard to see, however, how a reservation can be simultaneously compatible and incompatible with the objects and purposes of the treaty. There is no doubt that objecting States can reject the *opposability* of the reservation to themselves but, in making this particular claim, they are challenging its *validity*. This problem is only exacerbated where the treaty creates an enforcement or monitoring mechanism (see (d) and (e) below).

(f) <u>In applying the reservations regime to a particular reservation, are there special characteristics of human rights treaties which have an impact on the interpretation of the reservation</u>?

12. Human rights treaty texts appear to be dynamic documents whose interpretation evolves over time. States have, generally, accepted the views of enforcement and monitoring bodies when the latter have applied a human rights norm to a situation or phenomenon which did not exist when the text was adapted and which was not within the contemplation of the parties. Priority appears to be given to a teleological interpretation of human rights provisions and to a desire to make the norms effective.

13. In addition, human rights norms do not exist in a legal vacuum. One of the objects of the Charter of the United Nations is the promotion of human rights and there has been increasing recognition of the link between respect for human rights and the fundamental goal of any international legal order, that of maintaining international peace and security. Human rights norms do not merely express moral values but those values are essential to international society. They are constitutive of an international legal order. This results in an overlap between moral values and legal principles because the object and purpose of a human rights norm is, ultimately, the maintenance of international peace and security.

14. For this reason, where a reservation to a treaty takes the form of rejection of a human rights norm, as opposed to an interpretation of its scope, it is perhaps more likely to be found incompatible with the objects and purposes of this treaty than are reservations to other treaties. A reservation which seeks to interpret the human rights provisions in conformity with an independent body of law may fall in the middle of the spectrum. Whilst it may appear to be interpreting the scope of the human rights norm, it is subjecting it to a different legal order, often either domestic or

religious. There is no necessary identity of interest between those legal orders and the promotion of an international legal order. Where the State's objection is not to the norm but to its immediate application, difficult questions may arise, particularly if the reservation is interpreted quite some time after first being made.

15. The evolving interpretation of human rights treaties opens the possibility that an originally valid reservation may become invalid. It is not clear how other high contracting parties may indicate new objections to a reservation of which they have had more than 12 months' notice, the time period stipulated in article 20, paragraph 5 of the Vienna Convention.

16. Given the relationship between human rights norms and the maintenance of international peace and security, there is a very real possibility that a provision will be interpreted as having a particular legal character, with consequences for the validity of a reservation. It is not that human rights treaties have a special character per se but that particular provisions may have a greater than usual likelihood of being found, in substance, to have a special character.

17. The three issues most likely to arise in this context are, first, the claim that the human rights provision represents ius cogens; second, that being non-derogable in character, a norm has a higher status than customary international law and, third, that the norm represents customary law. The first two claims, if substantiated, may adversely affect the likelihood that a reservation will be found compatible with the objects and purposes of such a provision. It is much less clear that such a consequence may flow from finding that a human rights treaty norm corresponds to a norm of customary international law. States may well accept the customary status of a norm without being obliged to accept it as part of a treaty obligation.

18. It is open to argument whether the fact that violation of a human rights treaty norm is, independently of the treaty, subject to universal or international criminal jurisdiction should affect the validity of a reservation to the human rights norm. Whilst the two instances represent different types of legal liability and have, usually, different types of defendants as a matter of common sense, some connection between the two types of liability is likely to operate in practice. It would be strange that a State agent could be indicted for a crime against humanity before the international criminal court or the domestic courts of any State but that the State on whose behalf he acted could enter a valid reservation to the corresponding human rights treaty norm.

19. It seems clear that, even if human rights treaties do not have a special character per se, nevertheless the subject matter of at least some human rights law and its object and purpose make it more than usually likely that reservations to the norms themselves will be found to be incompatible with the object and purpose of the treaty.

(g) Where a treaty establishes an enforcement/monitoring body, who determines the validity of a reservation?

20. It does not appear to be disputed that enforcement/monitoring bodies have the authority to determine what comes within their competence. That must, logically, include the authority to determine the validity of a reservation which would affect the *scope* of their competence or jurisdiction. It appears to be an inherent feature of the type of authority which they are given. It should be emphasized that this refers only to the *validity* of the reservation and not to the effects of an invalid reservation (see (e) below).

21. That still leaves the question whether enforcement/monitoring bodies have the *sole* authority to determine the validity of a reservation, where a State has a reservation to a particular provision and no other State has objected. The conclusion of the enforcement/monitoring body that the reservation is invalid will, in practice, be of considerable significance in the bilateral relations between the reserving State and the body. If other States not merely failed to object but positively indicated their acceptance of the reservation, this collective view would no doubt be regarded as important by the enforcement/monitoring body, but it would not be binding upon it.

22. A problem could potentially arise where the enforcement/monitoring body accepts the validity of a reservation to which at least some States have objected. For most purposes involving the bilateral relations between the reserving State and the body, the view of the body would appear to be decisive. The problem could, however, arise where the body was called upon to address an inter-State component between the reserving State and an objecting State.

(h) The effect of the view of the enforcement/monitoring body that a reservation is invalid

23. This section does not address the issue of *whether* a reservation is invalid but the *effects* of such a determination. It is only concerned with situations in which the enforcement/monitoring body is of that view, rather than other States. It is necessary to consider the effects on the ratification of the reserving State and also on other parties. The effects of a finding that a reservation is invalid may vary according to whether it is a specific reservation to a particular provision or whether objection is taken to a *type* of reservation (for example, one which subjects the interpretation of the treaty norm to Islamic law or domestic law, or one which leaves it to the State to determine the characterization of a situation as an emergency or whether it has any national minorities in its jurisdiction). In practice, the latter objection may be generally more sensitive.

24. Whilst the 1969 Vienna Convention on the Law of Treaties deals with the effects of objections to reservations by other States parties, it does not address the consequences of a finding of invalidity by an enforcement/monitoring body established under a particular treaty.

(i) The enforcement/monitoring body

25. The options theoretically available to the body are:

(i) Severance of the invalid reservation or any invalid application of the reservation, leaving the ratification, including any other reservations, intact. The other reservations may subsequently be found to be invalid. Such an approach has been adopted most notably by the European Court of Human Rights. It would appear to assume that the reservation was not a precondition for the ratification. In some cases, however, the reservation may have been required by the domestic legislative as a condition for its consent to ratification.

(ii) To decide that the invalid reservation taints the whole ratification. That would presumably require the enforcement/monitoring body to ask the State what it proposed to do about the reservation found to be invalid.

(iii) To call into question whether there is, in fact, a valid ratification. This is only likely to arise with very general and/or sweeping reservations. Whilst the body has the authority to determine the validity of a reservation, it is much less clear that it has the authority to determine whether a purported instrument of ratification can properly be characterized as an instrument of ratification. This would also raise the general policy question of whether it is better to have as many parties as possible to a human rights treaty, even with reservations, or whether it is more important to protect the integrity of the treaty.

(j) The effect on the reserving State

26. The key issue is whether the reserving State has any say in the consequences flowing from a finding by the enforcement/monitoring body that its reservation is invalid or whether, at least in the case of bilateral relations with the body, the consequences are determined exclusively by that body.

(k) The effect on other high contracting parties

27. The issue for other high contracting parties is whether they are bound by the finding of the enforcement/monitoring body in their bilateral relations with the reserving State under the treaty. Some such bodies (for example, the Inter-American Court of Human Rights and the European Court of Human Rights) have the authority to deliver binding judgements, but they are binding only on the respondent Government. Whilst the majority of enforcement/monitoring bodies cannot take binding decisions with regard to compliance, there would have been little point in creating them if their views were not to be regarded as, at the very least, very highly persuasive.

28. Where the reservation in question is one which has also been made by other States, the view of the body will put both those States and other contracting parties on notice that a similar view is likely to be taken of the reservations of the other States. The enforcement/monitoring bodies seek to develop a consistent interpretation of the human rights treaty texts. This principle would apply not only to similar reservations, but where the *effects* of what is, at first sight, a different reservation are similar.

29. An additional difficulty, in suggesting that the view of the enforcement/monitoring body as to invalidity has an effect on other contracting parties, is that the period of 12 months in which, under the Vienna Convention on the Law of Treaties, they can object to a reservation may have elapsed. The period starts to run after notice of the reservation. It might appear to be straining the interpretation of the Vienna Convention on the Law of Treaties to suggest that the time only started to run after notification of the invalidity of the reservation.

30. What has attracted most criticism from the three States which formally commented on the Human Rights Committee's General Comment No. 24 and from the Special Rapporteur of the International Law Commission is the view that the enforcement/monitoring body can determine for *itself* that the invalid reservation can simply be severed. This, in effect, ignores the invalid reservation and suggests that the body, rather than the reserving State, can determine whether the reservation was an essential condition of the State's ratification. The reasons why the three States objected to this approach vary slightly, at least in emphasis. It is recognized, at least by the Special Rapporteur of the International Law Commission, that the regional human rights enforcement bodies may be an exception.

Conclusion and recommendations

31. It is clear that reservations to human rights treaties pose quite particular difficulties, partly attributable to the fact that the Vienna Convention on the Law of Treaties did not contemplate the possibility of independent enforcement/monitoring bodies taking a view on the validity of reservations. That competence, however, necessarily flows from their functions. The subject matter of human rights treaties, especially but not only non-derogable provisions, also contributes significantly to the nature and scale of the problem.

32. The majority of studies to date have examined reservations to human rights treaties either as part of the general issue of reservations to treaties or else from the standpoint of a particular body monitoring a particular treaty.

33. What is lacking is a detailed and substantive examination of the reservations themselves, across different human rights treaties. There is a need for a comprehensive review to be carried out in cooperation with the enforcement/monitoring mechanisms and States and with the assistance of NGOs. Such a study should gather together reservations and interpretative declarations on human rights treaty norms by norm, by treaty and by State. States and NGOs should be asked to assist by commenting on the provisions of domestic law which make or made the reservation necessary, if it is necessary.

States should be asked whether they envisage removing the domestic impediment to withdrawing the reservation in due course and, where relevant, whether they regard a statement as an interpretative declaration or a reservation. They could also be asked what their choice would be between remaining a party to the human rights treaty without each reservation or denouncing the treaty, notwithstanding the political consequences.

34. Such a study would have financial implications. The person undertaking the study would require research assistance, probably two full-time assistants to ensure comprehensive coverage. There would also be the costs of communicating with States and other bodies for the information referred to above.

35. The current debate appears to have reached an impasse. Practical and constructive ways forward are most likely to emerge from the type of detailed study described. There is no reason to suggest that they could emerge in any other way. The Sub-Commission is therefore invited to recommend to the Commission on Human Rights at its next session that such a study be carried out.

Annex*

TABLES AND FIGURES SHOWING RESERVATIONS TO
HUMAN RIGHTS TREATIES AND PERCENTAGES OF
NORMATIVE AND PROCEDURAL RESERVATIONS

* The annex is reproduced as received, in the language of submission only.