

Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations

Note: On 2 November 1994 the Committee adopted General Comment No. 24 (52) 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. The full text is reproduced in 15 HRLJ 464 (1994). The Governments of the United States and of the United Kingdom submitted observations to the Committee which are reproduced here.

Observations by the United States of America on General Comment No. 24 (52)

(full text)*

There can be no serious question about the propriety of the Committee's concern about the possible effect of excessively broad reservations on the general protection and promotion of the rights reflected in the Covenant, nor any reasonable doubt regarding the general desirability of reservations that are specific, transparent and subject to review with an eye to withdrawal when appropriate. General Comment No. 24, however, appears to go much too far. The United States would therefore like to set forth in summary fashion a number of observations concerning the General Comment as follows.

1. Role of the Committee

The last sentence of paragraph 11 states that "a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty".

This statement can be read to present the rather surprising assertion that it is contrary to the object and purpose of the Covenant not to accept the Committee's views on the interpretation of the Covenant. This would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.

In this respect, it is unnecessary for a State to reserve as to the Committee's power or interpretative competence since the Committee lacks the authority to render binding interpretations or judgments. The quoted sentence can, however, be read more naturally and narrowly in the context of the paragraph as a whole, to assert simply that a reservation may not be taken to the reporting requirement. This narrower view would be consistent with the clear intention of the Convention.

In this regard, the analysis in paragraphs 16-20, regarding which body has the legal authority to make determinations concerning the permissibility of specific

* Observations transmitted by letter dated 28 March 1995. UN Doc. A/50/40.

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reservations, if of considerably concern. Here the Committee appears to reject the established rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and in customary international law. The General Comment states, for example, that the established provisions of the Vienna Convention are “inappropriate to address the problem of reservations to human rights treaties ... [as to which] [t]he principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee’s competence under article 41”.

Moreover, the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any role in determining the meaning of the Covenant, which they drafted and joined, and of the extent to their treaty obligations. In its view, objections from other States Parties may not “specify a legal consequence” and States with genuine objections may not always voice them, so that “it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable”. Consequently, because “the operation of the classic rules on reservations is so inadequate for the Covenant, ... [i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant”.

The Committee’s position, while interesting, runs contrary to the Covenant scheme and international law.

2. Acceptability of reservations: governing legal principles

The question of the status of the Committee’s views is of some significance in light of the apparent lines of analysis concerning the permissibility of reservations in paragraphs 8-9. Those paragraphs reflect the view that reservations offending peremptory norms of international law would not be compatible with the object and purposes of the Covenant, nor may reservations be taken to Covenant provisions which represent customary international law.

It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations.

The proposition that nay reservation which contravenes a norm of customary international law is *per se* incompatible with the object and purpose of this or any other convention, however, is a much more significant and sweeping premise. It is, however, wholly unsupported by and is in fact contrary to international law. As recognized in the paragraph 10 analysis of non-derogable rights, an “object and purpose” analysis by its nature requires consideration of the particular treaty, right, and reservation in question.

With respect to the actual object and purpose of this Covenant, there appears to be a misunderstanding. The object and purpose was to protect human rights, with an understanding that there need not be immediate, universal implementation of all terms of the treaty. Paragraph 7 (which forms the basis for the analysis in para. 8 and subsequently) states that “each of the many articles, and indeed their interplay, secures the objectives of the Covenant”. The implied corollary is, of course, that any reservation to any substantive provision necessarily contravenes the Covenant’s object and purpose.

Such a position would, of course, wholly mistake the question of the object and purpose of the Covenant in so far as it bears on the permissibility of reservations. In fact,

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a primary object and purpose of the Covenant was to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required.

3. Specific reservations

The precise specification of what is contrary to customary international law, moreover, is a much more substantial question than indicated by the Comment. Even where a rule is generally established in customary international law, the exact contours and meaning of the customary law principle may need to be considered.

Paragraph 8, however, asserts in a wholly conclusory fashion that a number of propositions are customary international law which, to speak plainly, are not. It cannot be established on the basis of practice or other authority, for example, that the mere expression (albeit deplorable) of national, racial or religious hatred (unaccompanied by any overt action or preparation) is prohibited by customary international law. The Committee seems to be suggesting here that the reservations which a large number of States Parties have submitted to article 20 are *per se* invalid. Similarly, while many are opposed to the death penalty in general and the juvenile death penalty in particular, the practice of States demonstrates that there is currently no blanket prohibition in customary international law. Such a cavalier approach to international law by itself would raise serious concerns about the methodology of the Committee as well as its authority.

Another point worthy of clarification is whether the Committee really intends that, in the many areas which it mentions in paragraphs 8-11, any reservation whatsoever is impermissible, or only those which wholly vitiate the right in question. At the end of paragraph 8, for example, it is suggested that while reservations to particular clauses or article 14 may be acceptable, a general reservation could not be taken to the article as a whole. Presumably, the same must also be true for many of the other subjects mentioned. For example, even where there is a reservation to article 20, one would not expect such a reservation to apply to advocacy of racial hatred which constitutes incitement to murder or other crime.

4. Domestic implementation

The discussion in paragraph 12, as it stands, is very likely to give rise to misunderstandings in at least two respects. The Committee here states, with regard to implementing the Covenant in domestic law, that such laws “may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level *will be needed to allow the Covenant rights to be enforceable at the local level*”. (Emphasis added).

First, this statement may be cited as an assertion that States Parties *must* allow suits in domestic courts based directly on the provisions of Covenant. Some countries do in fact have such a scheme of “self-executing” treaties. In other countries, however, existing domestic law already provides the substantive rights reflected in the Covenant as well as multiple possibilities for suit to enforce those rights. Where these existing rights and mechanisms are in fact adequate to the purposes of the Covenant, it seems most unlikely that the Committee intends to insist that the Covenant be directly actionable in court or that States must adopt legislation to implement the Covenant.

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As a general matter, deciding on the most appropriate means of domestic implementation of treaty obligations is, as indicated in article 40, left to the internal law and processes of each State Party.

Rather, the Committee may properly be concerned about the case in which a State has joined the Covenant but lacks any means under its domestic law by which Covenant rights may be enforced. The State could even have similar constitutional guarantees which are simply ignored or non-enforceable. Such an approach would not, of course, be consistent with the fundamental principle of *pacta sunt servanda*.

Second, paragraph 12 states that “[r]eservations often reveal a tendency of States not to want to change a particular law”. Some may view this statement as sweepingly critical of any reservation whatsoever which is made to conform to existing law. Of course, since this is the motive for a large majority of the reservations made by States in all cases, it is difficult to say that this is inappropriate in principle. Indeed, one might say that the more seriously a State Party takes into account the necessity of providing strictly for domestic implementation of its international obligations, the more likely it is that some reservations may be taken along these lines.

It appears that the Comment is not intended to make such a criticism, but rather is aimed at the particular category of “widely formulated reservations” which preserve complete freedom of action and render uncertain a State Party’s obligations as a whole, e.g., that the Covenant is generally subordinated to the full unspecified range of national law. This, of course, would be neither appropriate nor lawful. The same is not true, however, when by means of a discrete reservation, a State party declines for sufficient reasons to accept a particular provision of the Covenant in preference for existing domestic law.

5. Effect of invalidity of reservations

It seems unlikely that one can misunderstand the concluding point of this General Comment, in paragraph 18, that reservation which the Committee deems invalid “will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation”. Since this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some helpful clarification could be made.

The reservations contained in the United States instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole would be nullified.

Articles 20 and 21 of the Vienna Convention set forth the consequences of reservations and objections to them. Only two possibilities are provided. Either (i) the remained of the treaty comes into force between the parties in question or (ii) the treaty does not come into force at all between these parties. In accordance with article 20, paragraph 4 (c), the choice of these results is left to the objecting party. The Convention does not even contemplate the possibility that the full treaty might come into force for the reserving State.

The general view of the academic literature is that reservations are an essential part of a State’s consent to be bound. They cannot simply be erased. This reflects the

fundamental principle of the law of treaties: obligation is based on consent. A State which does not consent to a treaty is not bound by that treaty. A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it. It is regrettable that General Comment 24 appears to suggest to the contrary.

Observations by the United Kingdom on General Comment No. 24

(full text)*

1. The United Kingdom is of course aware that the General Comments adopted by the Committee are not legally binding. They nevertheless command great respect, given the eminence of the Committee and the status of the International Covenant on Civil and Political Rights. The issue dealt with in General Comment No. 24 (52) (reservations to the Covenant) is one of great importance, both in respect of the development of the Covenant and the Committee's role under it and in its wider ramifications. The United Kingdom is therefore grateful for the opportunity provided under article 40(5) of the Covenant to submit to the Committee certain observations on the General Comment.

2. These will be divided into four parts: the legal regime regulating reservations to the Covenant; the criteria for assessing compatibility with the object and purpose of the Covenant; the power to determine compatibility with the object and purpose; the legal effect of an incompatible reservation.

The Legal regime regulating reservations to the Covenant

3. The United Kingdom shares the Committee's concern that the integrity of the Covenant's treaty regime should not be undermined by too extensive a practice of reservations formulated by States on becoming Party to them. The United Kingdom agrees also that individual reservations may on occasion be so widely drawn as to cast doubt on whether their maintenance is compatible with being Party to the Covenant. Regrettable though it may be, such situation is not materially different from that obtaining in other areas of international relations, and would not provide a justification for a different legal regime to regulate reservations to human rights treaties. To create such a special regime by amendment of the Covenant would be a major task. To do so as part of the development of general international law would, all other considerations aside, be undesirable if the effect was to fragment this aspect of the law of treaties which is currently under study by the International Law Commission.

4. The modern law of reservations to multilateral treaties moreover owes its origin to the Advisory Opinion of the International Court of Justice of 28 May 1951 on Reservations to the Genocide Convention. The Genocide Convention is itself (in the Committee's phrase) a human rights treaty concluded for the benefit of persons within the jurisdiction of the States Parties to it. As the International Court observed, the

* Observations transmitted by letter dated 21 July 1995. UN Doc. A/50/40.

Genocide Convention is of a type in which “the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d’être* of the Convention”. It was in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations. The United Kingdom does not accordingly believe that rules different from those foreshadowed by the International Court and in due course embodied in the Vienna Convention on the Law of Treaties are required to enable the international community to cope with reservations to human rights treaties. The correct approach is rather to apply the general rules relating to reservations laid down in the Vienna Convention in a manner which takes full account of the particular characteristics of the treaty in question.

5. The argument that the existing rules of international law are inadequate to cope with human rights treaties rests in any case, as the United Kingdom sees it, on a mistaken assumption. The Committee says in paragraph 17 that the Vienna Convention’s provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations in human rights treaties. This is because such treaties “are not a web of inter-State exchanges of mutual obligations” and because “[t]he principle of reciprocity has no place”. The United Kingdom does not find this to be an adequate account, for various reasons. In the first place, it is not the basis on which the International Court of Justice approached the Genocide Convention (paragraph 3 above). In the second place, it is not the view taken by other authoritative bodies, such as the European Court of Human Rights, which held in 1978¹ that the European Convention on Human Rights “comprises *more than* mere reciprocal engagements between Contracting States. It creates *over and above a network of mutual bilateral understandings*, objective obligations which in the words of the preamble benefit from a “collective enforcement” (emphasis added).² In the third place, both the faculty under article 41 of the Covenant for bringing inter-State complaints and the widespread practice of States in invoking the Covenant as against other States Parties in respect of the treatment of individuals show that in a very real and practical sense even the substantive provisions of the Covenant are indeed regarded as creating “a network of mutual bilateral undertakings”. Finally, it must be assumed that, in respect of reservations which are clearly *compatible with* the object and purpose of the Covenant, the Committee accepts that States Parties exercise the rights and functions assigned to them by the Vienna Convention. If so, it is not easy to discover a logical ground for ruling out these rights and functions for other reservations, including those where there is at least a reasonable measure of doubt as to whether the reservation is or is not compatible with the object and purpose of the Covenant. Given therefore that the bilateral rights and general interests of other Parties are, as indicated, directly affected, the United Kingdom regards it as a self-evident proposition that the reaction of those Parties to a reservation formulated by one of them is of direct significance both in law and in practice. In short, the legal effect of any particular reservation to a human rights treaty is an amalgam of the terms of the treaty and the terms and import of the reservation, in the light of the reactions to it by the other treaty Parties and in the light of course of any authoritative third-party procedure that may be applicable.

¹ *Ireland v. United Kingdom*.

² Series A, no. 25, p. 90, para. 239.

The criteria for assessing compatibility with the object and purpose of the Covenant

6. The United Kingdom shares the Committee's view that an automatic identification between non-derogability and compatibility with the object and purpose is too simplistic. Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing. The United Kingdom is likewise of one mind with the Committee that multifaceted treaties like the Covenants pose considerable problems over the ascertainment of their object and purpose. The problem is one common to all lengthy treaties containing numerous provisions of coordinate status with one another.

7. The United Kingdom is however less convinced by the argument that, because human rights treaties are for the benefit of individuals, provisions in the Covenant that represent customary international law may not be the subject of reservations. It is doubtful whether such a proposition represents existing customary international law; it is not a view shared by most commentators, and States have not expressly objected to reservations on this ground. In the United Kingdom's view, there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law. Such a distinction is inherent in the Committee's recognition that reservations to articles that guarantee customary international law rights are permitted provided that the right is not deprived of its basic purpose.

8. For broadly similar reasons, the United Kingdom does not wholly share the Committee's concern over reservations which exclude the acceptance of obligations which would require changes in national law to ensure compliance with them. The Committee's comments that "no real international rights or obligations have thus been accepted" and that "all the essential elements of the Covenant guarantees have been removed" miss the fact that States Parties, even while entering such reservations, do at least accept the Committee's supervision, through the reporting system, of those Covenant rights guaranteed by their national law.

The power to determine compatibility with the object and purpose

9. The United Kingdom shares the Committee's view as to the seriousness of the issue of compatibility of reservations with the object and purpose of the treaty in question. It does not however believe that this is the central issue in the law and practice of reservations to multilateral conventions. The vast majority of reservations are in practice dealt with satisfactorily through the operation of the normal rules in the Vienna Convention, it being borne in mind that another Contracting State always has the right formally to object even to a reservation which is undoubtedly admissible (except in the special case of a reservation expressly permitted by the treaty). The question of compatibility with the object and purpose is confined to a small number of extreme cases.

10. It is clear however that a legal regime of reservations that depends to any extent on the general criterion of compatibility with the object and purpose of a treaty as a whole will be uncertain in its operation in the absence of an objective method of determining whether the criterion is satisfied. The availability of binding third-party procedures could be of great importance in this respect, as the International Law

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Commission itself recognized at the outset. This state of affairs inevitably raises a serious question as to the proper role which the Committee itself may play, to which the Committee has given serious consideration at pp. 6-7 of the General Comment.

11. The United Kingdom shares the analysis that the Committee must necessarily be able to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant. Thus, the Committee might find itself unable in particular cases to deliver a report under the special powers conferred upon it by article 41 of the First Optional Protocol, except on the basis of a view as to the impact of a given reservation. Similarly, the Committee might, according to the circumstances, find it appropriate to form or express its view on a reservation for the purpose of questioning a State Party in its reports under article 40 or for the purpose of reporting its own conclusions. Paragraph 20 of the General Comment, however, uses the verb “determine” in connection with the Committee’s functions towards the status of reservations, and does so moreover in the context of its *dictum* that the task in question is inappropriate for the States Parties. This would appear to have implications which calls for comment.

12. Without wishing to take a final view on the matter, the United Kingdom would make the following points:

(a) Even if it were the case (as the General Comment argues but the United Kingdom doubts; see paragraphs 3-5 above) that the law on reservations is inappropriate to address the problem of reservations to human rights treaties, this would not of itself give rise to a competence or power in the Committee except to the extent provided for in the Covenant: any new competence could only be created by amendment to the Covenant, and would then be exercisable on such terms as were laid down;

(b) No conclusion as to the status or consequences of a particular reservation could be properly *determinative* unless it were binding not only on the reserving State Party but on all the Parties to the Covenant, which would in turn automatically presuppose that the Parties had undertaken in proper form a prior legal obligation to accept it;

(c) There is a qualitative distinction between decisions judicially arrived at after full legal argument and determinations made without the benefit of a judicial process.