**UNITED NATIONS**

**E**

# Economic and Social Council

Distr.
GENERAL

E/CN.4/Sub.2/2004/42
19 July 2004

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion and
Protection of Human Rights
Fifty-sixth session
Item 6 of the provisional agenda

## SPECIFIC HUMAN RIGHTS ISSUES

## Reservations to human rights treaties

## Final working paper submitted by Françoise Hampson 4* **

* This document is submitted late so as to include the most up-to-date information possible.

** The endnotes are reproduced as received, in the original language only.

GE.04-15419 (E) 220704

**Summary**

In considering this matter, there are two different relationships which need to be examined: that between a reserving State and another State party and that between a reserving State and the treaty monitoring mechanism. Generally speaking, the validity or effectiveness of a reservation is not decisive. When a State is exercising its monitoring functions, it can discuss any reservations with the State party. That is as true of valid reservations as arguably invalid ones. The issue of validity may become decisive when/if a treaty body is called upon to reach an opinion in an inter-State case or an individual application. Applying the normal rules of treaty law with regard to reservations as contained in the Vienna Convention on the Law of Treaties, a State is free to make any reservation not precluded by the terms of the treaty on condition that it is not incompatible with the object and purpose of the treaty. Applying those rules and the principle that a judicial or quasi-judicial body has the jurisdiction to determine whether or not it has jurisdiction, the human rights treaty bodies have the competence to determine whether or not a reservation is incompatible with the object and purpose of the treaty. The paper also considers the problems in determining whether a reservation is invalid and the consequences of such a determination.

**CONTENTS**

## Introduction

1. In its decision 1998/113, the Sub-Commission on the Promotion and Protection of Human Rights requested Françoise Hampson to prepare a working paper on the question of reservations to human rights treaties. A first working paper (E/CN.4/Sub.2/1999/28 and Corr.1) was submitted. In resolution 2001/17, the Sub-Commission entrusted Ms. Hampson with the task of preparing an extended working paper. The study was to avoid duplication with the work of the International Law Commission. At the fifty-third session of the Sub-Commission, Ms. Hampson submitted a document (E/CN.4/Sub.2/2002/34) which consisted of a chart of the actual reservations and declarations made to the six principal human rights treaties[1] and the reaction of other States. At the fifty-fifth session of the Sub-Commission, Ms. Hampson submitted an expanded working paper (E/CN.4/Sub.2/2003/WP.2).

2. In its decision 2003/114, the Sub-Commission requested Ms. Hampson to update her expanded working paper and to submit a final working paper to the Sub-Commission at its fifty-sixth session.

3. The present document is submitted in accordance with that request.

4. The first working paper referred to other developments in this area, notably general comment No. 24 of the Human Rights Committee (1994) and the comments in response of three States,[2] and the second report of the Special Rapporteur of the International Law Commission (ILC) on reservations to treaties (A/CN.4/477 and addenda and corrigenda). Since that date, the widespread recognition of a particular problem with reservations to human rights treaties has resulted in a variety of types of documentation:

(a) Further reports by the Special Rapporteur of ILC, notably the third (A/CN.4/491), fifth (A/CN.4/508), seventh (A/CN.4/526) and eighth reports (A/CN.4/535);

(b) Pronouncements by the Human Rights Committee in the context of both case law[3] and comments in relation to State party reports;

(c) A document of the Committee on the Elimination of Discrimination against Women on the practice of human rights treaty bodies concerning reservations (CEDAW/C/II/4);

(d) A compilation of the reservations to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (CERD/C/60/Rev.4);

(e) Academic analyses of the problem;[4]

(f) And other documents.[5]

5. In order to avoid duplication with the work of the Special Rapporteur of ILC, the focus in this report is on the application of the rules to the existing reservations to the seven principal human rights treaties, particularly in relation to the discharge of the responsibilities of the monitoring mechanisms.

## I. THE SUBMISSION OF RESERVATIONS TO HUMAN RIGHTS TREATIES

6. Whilst the Vienna Convention on the Law of Treaties is not retroactive, articles 19-22, which deal with the making of reservations and the effects thereof, are generally accepted as the starting point in any discussion.[6] Nothing in the Vienna Convention suggests that a special regime applies to human rights treaties or to a particular type of treaty which type includes human rights treaties.[7]

7. It is sometimes suggested that there need to be two types of rules; those governing purely consensual treaties and those dealing with obligations of a normative character.[8] There is no evidence of such a distinction in the rules themselves. It has also been suggested that such a distinction applies to the application of the rules (as opposed to the rules themselves), but that is a matter of dispute.

### Can a State formulate a "reservation" to a human rights treaty?

8. Article 19 of the Vienna Convention provides that, upon signature or ratification, a State may formulate a reservation if it is expressly envisaged in the treaty[9] or if the treaty is silent with regard to reservations,[10] and on condition that the reservation is not incompatible with the object and purposes of the treaty. In practice, the biggest difficulty concerns the compatibility of a reservation with the object and purpose of the treaty.

### Characterization of a statement as a reservation

9. States sometimes themselves characterize the statements made at signature or ratification as a reservation, declaration, statement of understanding, etc. (see E/CN.4/Sub.2/2002/34). An issue may arise as to whether that characterization is decisive as to the nature of the statement or whether other High Contracting Parties and/or the monitoring body may take issue with the characterization.[11]

10. In other situations, a statement may not be characterized at all, in which case at least an initial determination, perhaps pending clarification by the signing/ratifying State, will need to be made by other High Contracting Parties and/or the monitoring mechanism.

11. These questions raise general issues with regard to the law on reservations, which are being dealt with by the Special Rapporteur of ILC.

### Possible incompatibility between the "reservation" and the object and purpose of the treaty - the legal nature of an invalid reservation

12. It has been argued that a "reservation" that is incompatible with the object and purpose of a treaty is not a reservation at all.[12] It is therefore unaffected by articles 20-22 of the Vienna Convention which deal with the opposability of a valid reservation to other High Contracting Parties. This is of very considerable potential importance in the case of human rights treaties on account of the unusually high proportion of reservations to which objection has been taken on grounds of incompatibility.[13] The practice of States in relation to the types of "reservations" made and the types of objections thereto appears to be significantly different from the case with regard to other, non-humanitarian, treaties.

13. The International Court of Justice (ICJ), in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1950-1951), stated that:

> "a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention *if the reservation is compatible with the object and purpose of the Convention*"[14] (emphasis added).

14. The Vienna Convention on the Law of Treaties, which in this respect represents the detailed working out of the ICJ Advisory Opinion, states:

> "Article 19. Formulation of reservations
>
> "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 (emphasis added).

15. Both the Advisory Opinion and the Treaty provision imply that if the reservation is not so compatible, it is not capable of being accepted. Article 19, in dealing only with the obligations of the State formulating the reservation, prohibits a State from formulating a "reservation" that is incompatible with the object and purposes of the treaty. If such a "reservation" cannot even be formulated, it cannot be open to another State to accept such a "reservation". Compatibility with the object and purposes of the treaty is, to that extent, constitutive of the statement being a valid reservation for the purposes of articles 19-23 of the Vienna Convention. In that case, there are only two possibilities: the State either does not become a party to the Convention at all or it becomes a party without the benefit of the "reservation".

16. Just such an approach was adopted by several States to reservations regarded as incompatible with the object and purpose of humanitarian treaties, the Geneva Conventions of 1949. The United Kingdom declared at ratification with regard to reservations to articles 12 and 85 of the Third Geneva Convention and article 45 of the Fourth Geneva Convention made by Albania, the Byelorussian Soviet Socialist Republic, Bulgaria, China, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics that:

> "… whilst they regard all the above-mentioned states as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those states as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates".

17. In 1975, the United Kingdom objected in similar terms to similar reservations made by the Provisional Revolutionary Government of the Republic of South Viet Nam, the Republic of Guinea-Bissau, the German Democratic Republic and the Democratic Republic of Viet Nam. In 1985, the United Kingdom similarly objected to Angola's reservation to article 85 of the Third Geneva Convention. Australia and New Zealand objected at ratification in similar terms to the United Kingdom to the reservations of 9 of the 10 States in the original list (not including China). At ratification, the United States made a statement rejecting the reservations, except to paragraph 2 of article 68 of the Fourth Geneva Convention, which other States had made but stating that:

> "… the United States accepts treaty relations with all parties [to the Conventions] except as to the changes proposed by such reservations."[15]

The United Kingdom ratified the Geneva Conventions on 23 September 1957, Australia on 14 October 1958, New Zealand on 2 May 1959 and the United States on 2 August 1955. In other words, the ratifications post-dated the Advisory Opinion of ICJ. Some of the United Kingdom reservations post-dated the adoption of the Vienna Convention. In all these cases, the objecting States in effect severed the objectionable statement.

18. Whilst this approach would avoid a variety of practical difficulties, it is not without problems. First, there is no mechanism for determining upon receipt of the statement that it is incompatible and therefore not a reservation. It is therefore initially for other High Contracting Parties to indicate that they regard it as not a reservation. Where one State indicates that it does not accept the statement as a valid reservation, what are the implications for (i) States which object to the "reservation" as being incompatible with the object and purpose but which regard the treaty as having entered into force between themselves and the ratifying State[16] and (ii) States which do not comment on the reservation and (iii) the ratifying State which asserts that the statement is a reservation and is compatible with the object and purpose of the treaty? It is not clear what constitutes a decisive determination of the question. General comments and concluding observations of a treaty body are not binding on a State party. Neither are the conclusions of the Human Rights Committee acting under the Optional Protocol to the International Covenant on Civil and Political Rights. It is submitted, nevertheless, that the conclusion of the treaty body, whilst not binding, will have considerable persuasive force, not least because it is likely to reach similar conclusions with regard to similar reservations by other parties. The issue of the role of the monitoring bodies will be discussed further below.

19. Second, under the Vienna Convention, States have to indicate within a defined period if they wish to object to a reservation. Silence beyond that limit indicates consent. If that principle only applies to a valid reservation and if a "reservation" incompatible with the object and purpose of a treaty is not a valid reservation, are there any time limits for a State to indicate that it regards a "reservation" as invalid? If not, it will not be possible to determine whether silence indicates acceptance of the reservation or objection to the "reservation" on grounds of incompatibility. Whilst many States which object to a reservation to a human rights treaty do so in terms which suggest that they are working within the parameters of articles 20-22 of the Vienna Convention,[17] for example by specifying the effect of their objection on treaty relations between the parties, this may be simply a way of protecting their own interests.

20. The response of States to reservations made to the six principal human rights treaties will be considered further below. In this context, it is sufficient to note that there have been many objections based on the alleged incompatibility of the reservation with the object and purpose of the treaty. In certain such cases the objecting State has specified that the treaty nonetheless enters into force between itself and the party making the reservation. In other cases, the objecting State has not specified the effect. If it is the case that a State is not free to accept a statement incompatible with the objects and purposes of a treaty as a reservation, then those States that state that the treaty nevertheless enters into force between themselves and the reserving States must mean that no effect is to be given to the statement. In other words, the so-called "reservation" is to be severed. In certain cases, this effect has been spelt out by the objecting State.[18]

## II. THE RESPONSE OF OTHER HIGH CONTRACTING PARTIES

21. When a High Contracting Party receives notification of a ratification of a human rights treaty accompanied by reservations, that party has to characterize the statement, determine whether, if it is a reservation, it is compatible with the object and purpose of the treaty and decide what consequences should flow from its determination.

22. The alleged special nature of human rights undertakings might have an effect on the consequences flowing from ratification,[19] but there is no evidence that any such special nature is thought to have an effect on the assumption of treaty obligations. In order to be bound by the provisions of a human rights treaty, the State must ratify it, in other words must express its consent to be bound. That consent may be qualified in various ways. Consent may not be qualified by a "reservation" which is incompatible with the object and purpose of a treaty. If consent is in any way qualified, other High Contracting Parties must determine whether they consent to that qualification. They are free to reject any qualification not expressly provided for in the treaty. They are not restricted to rejecting a qualification solely on the grounds that it conflicts with the object and purpose of the treaty.[20]

23. It would be possible to adopt a rule requiring the consent of all other High Contracting Parties to a reservation**.** That, however, was expressly rejected by the International Court of Justice[21] and the States that negotiated the Vienna Convention. Furthermore, States that have objected to particular reservations to human rights treaties have never suggested that the reservation was invalid unless accepted by all the other Parties.

24. If there is no requirement of unanimity, each State must decide for itself whether to accept a ratification qualified by a reservation. At that point, it again becomes relevant to know whether an invalid "reservation" is a reservation at all. If not, other Parties may not be free to accept it. That could be seen as a product of the principle of *pacta sunt servanda*, or good faith. A party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the objects and purposes of the treaty.

25. If, on the other hand, an allegedly invalid reservation is to retain its character as a reservation until other Parties indicate whether or not it is regarded as invalid, then those Parties must make that determination.

26. A number of States appear to have become increasingly frustrated by the uncertainty generated when other States fail to react to a "reservation" which they believe to be incompatible with the object and purpose of the treaty, which has resulted in what the Special Rapporteur of ILC calls a reservation dialogue. Silence may mean that the other States believe the reservation to be compatible or it may mean that they do not think that they have to react to what is not a valid reservation at all. The fact that a significant number of States have reacted undermines any claim that silence indicates rejection of the validity of a "reservation". The Vienna Convention regime favours the reserving State. The only tool in the hands of the objecting State is its ability to deny the entry into force of the treaty between itself and the reserving State. That result is the opposite of what it seeks; ratification without the offending reservation. States have tried various devices to achieve that object.[22]

27. The Vienna Convention regime results in the fragmentation of the treaty commitment. A reservation that some States object to on the grounds that it is incompatible with the objects and purposes of the treaty may appear to be accepted, expressly or through silence, by others. A question which ought to have only one answer (whether a reservation is incompatible with the object and purpose of a treaty) appears to receive a variety of answers. Most of these questions arise in relation to any multilateral normative treaty. They are being addressed by the Special Rapporteur of ILC.

28. Two factors make the position under human rights treaties slightly different. The first is the role of the treaty bodies. The question of the compatibility of a reservation with the object and purpose of a treaty is not solely a matter for the parties *inter se* (see further below). In order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and objections. It is apparent from the charts[23] that there is a wide range of State practice. Certain patterns are discernible. In examining reservations to which an objection has been made, a significant proportion of the objections have been made relatively recently. That is particularly striking where a recent reservation appears to be very similar to an earlier reservation made by a different State but to which no objection was taken. That suggests that States may only have begun to monitor reservations fairly systematically relatively recently. That is further confirmed, in the case of European Union or Council of Europe States, by the special arrangements those States have put in place to monitor reservations.[24] The significance of such a pattern is that some reservations to which no objection was made at the time might in fact be regarded now by certain States as incompatible with the objects and purposes of the treaty. When examining the compatibility of a reservation to which no States have made an objection, monitoring mechanisms could usefully examine similar reservations made more recently, to determine whether States have objected to the latter.

29. A second pattern is linked to the first. It concerns the very different number and types of reservations made to different treaties and the very different number of objections. CEDAW and the Convention on the Rights of the Child (CRC) have attracted both a large number of reservations and reservations of a very general type [25] and a significant number of objections. ICERD has attracted a large number of reservations but far fewer objections. The reservations to ICERD were typically made well before the reservations to the other two. The pattern with the International Covenant on Civil and Political Rights (ICCPR) is more varied, perhaps owing in part to the slower ratification pattern. The implication for ICERD is that, had the reservations been made more recently, more States might have objected on grounds of incompatibility with

the object and purpose.[26] In the case of CEDAW, the Convention has attracted reservations from States that did not make similar reservations to analogous provisions in other treaties, notably the Covenants. Since the reservation to CEDAW cannot have the effect of modifying the State's obligations under the Covenant, the question arises of whether the Committee on the Elimination of Discrimination against Women can disregard such a reservation.[27] The order in which the ratifications were made would not appear to affect the situation.

30. A third pattern concerns the States that have objected to reservations. The overwhelming majority of such objections come from States in the Western European and Others Group. They do not only come from EU or Council of Europe States but also from other States in the Group. In the majority of cases, more than one State has objected, and in some cases several States. There are also isolated examples of only one State in the group objecting. Outside the Western Group, there are isolated cases of objection from the Eastern European Group (the Czech Republic and Slovakia). As members of the Council of Europe, and in some cases now of EU, these States are clearly linked to the Western Group. Outside these two groups, the only objectors appear to be Saudi Arabia[28] and Mexico, the latter having made a significant number of objections.[29] A possible explanation for this pattern is that the members of the Western Group may be better placed, in terms of resources, to scrutinize the reservations of other Parties. Furthermore, as States that often ratified the instruments relatively early, they were in a position to object to the reservations of a new party. That may, however, only be part of the explanation. Members of the Group of eight (G-8) not in the Western Group might be thought to have the necessary resources. There are various possible implications of this pattern for the monitoring bodies. The body might wish, when evaluating the evidence of State practice, to consider how many States objected as a proportion of those that have ever objected. That would involve making no assumption at all regarding the views of non-objecting States. To take into account the views of non-objectors means assuming that silence signifies that a reservation is compatible. Since States are only obliged to indicate their view if they wish to object to a reservation and there appears to be no general obligation to object to incompatible reservations, it would seem unwise to attribute any particular meaning to silence, beyond the possible opposability of the reservation to the silent party.[30] Some other approach would appear to be preferable.[31]

31. A final pattern concerns the States to whose reservations an objection has been made. It is more common for objections to be made to certain types of reservations than for the objections to concern particular States. That said, since certain States routinely rely on the type of reservation to which objection is made, the same States do appear repeatedly in a list of those whose reservations attract objections. What is striking, however, is that objection is taken not only to reservations made by particular groups of States. A significant number of objections have been made by members of the Western Group to reservations made by other members of the Western Group.

32. The evidence of State practice and the implications to be drawn from it need to be evaluated by each of the treaty bodies independently. It would be useful if they then ensured that the other treaty bodies received the results of such a study. A consistent approach to the implications of State practice, even if the practice itself varies between different treaties, would be highly desirable for the coherent development of international human rights law.[32]

33. The second factor which makes human rights law somewhat unusual is the effect given, or more accurately not given, to reservations in inter-State dispute settlement. This is a matter of opposability and not of severance. The only practice exists at the regional level, since the Human Rights Committee has yet to exercise its jurisdiction under article 41 of the Covenant. Normally, a State is able to rely on the reservation of the opposing party to the dispute, on the basis of reciprocity.[33] In a case brought by France, Norway, Denmark, Sweden and the Netherlands against Turkey (9940-9944/82), Turkey sought to rely on the French reservation to article 15 of the European Convention on Human Rights, claiming that the case gave rise to a consideration of issues that would be covered by the reservation. The European Commission on Human Rights did not consider it necessary to rule on the validity of the reservation. The Commission stated that,

> "… the general principle of reciprocity in international law and the rule, stated in article 21 (1) of the Vienna Convention on the Law of Treaties, concerning bilateral relations under a multilateral treaty do not apply to the obligations under the European Convention on Human Rights which are 'essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves' (*Austria v. Italy*, *Yearbook 4*, 116 at p. 140) … The Commission further recalls that the enforcement machinery provided for in the Convention is founded upon the system of a 'collective guarantee by the High Contracting Parties of the rights and freedoms set forth in the Convention' and that a High Contracting Party, when referring an alleged breach of the Convention to the Commission under article 24, 'is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe' (*Austria v. Italy* loc cit)."[34]

34. The Special Rapporteur of ILC, in the specific context of severance of an invalid reservation, has suggested that the case law of the European Court of Human Rights should be viewed as a form of regional customary law, not having an impact on the customary law on reservations generally.[35]

35. It is submitted that the issue requires further consideration. The European Court of Human Rights, far from claiming to be developing a form of regional customary law, repeatedly stresses that it takes into account all relevant international law, including the Vienna Convention, whilst also remaining mindful of the special character of the Convention as a human rights treaty.[36] The Court is not mindful of the special character of the Convention as a European treaty, nor yet as a European human rights treaty. It refers to the special character of human rights treaties generally. This special character does not generally lead to the applicability of different rules, particularly in the case of the Vienna Convention, but may affect the application of the usual rules. The preoccupation with the need to give practical effect to the Convention, for example, results in the application of the exhaustion of domestic remedies rule in a less formalistic manner than is the case in other types of tribunals. The reason given by the European Court - the special character of human rights treaties - is equally applicable to international

human rights treaties generally. The reasoning of the Commission in rejecting reciprocal reliance on reservations appears to be based on the presumed intention of the parties to give effect to their undertakings. In the case of a human rights treaty, that gives rise to a different result than in the case of other treaties, not of such a character.

## III. THE REACTION OF THE MONITORING MECHANISMS

36. A variety of issues arise in relation to the powers and functions of a monitoring mechanism, confronted with one or more reservations. Some of them are analogous to those which arise between High Contracting Parties *inter se*, but others are not. The relevant articles of the Vienna Convention do not make express provision for this situation. The issues include:

(a) The authority, if any, of a monitoring mechanism to reach a decision with regard to the validity of a reservation;

(b) The characterization of a statement as a reservation, declaration, statement of understanding, etc.;

(c) How a monitoring mechanism is to determine whether a reservation is incompatible with the object and purpose of the treaty;

(d) The effect of a finding that a reservation is incompatible with the objects and purposes of a treaty.

### Authority to reach a decision with regard to the validity of a reservation

37. A valid reservation affects the scope of the reserving State's commitment. It therefore also affects the scope of the jurisdiction of the monitoring mechanism, whichever of its functions it is exercising. A judicial or quasi-judicial body has an inherent jurisdiction to determine the scope of its jurisdiction. The monitoring body must, therefore, have inherent authority to determine:

(a) Whether a statement is a reservation or not; and

(b) If so, whether it is a valid reservation; and

(c) To give effect to a conclusion with regard to validity.

38. It has been suggested that monitoring mechanisms do not have the authority to "determine" anything, since their findings are not legally binding. It is submitted that this is to confuse two separate issues. The first question is the scope of its authority to reach conclusions with regard to the substance. The second question is the binding character of the conclusions with regard to the substance. The fact that the conclusions of a monitoring body with regard to the substance are not legally binding does not mean that findings with regard to jurisdiction are not binding. It would, for example, be *ultra vires* the power of a monitoring body to exercise an authority which it does not have, even with the consent of the State in question.

39. By virtue of the principle of *pacta sunt servanda*, the States parties have to take seriously the findings of a monitoring body set up for the purpose, even if they are not strictly binding. This is particularly true in the case of inter-State disputes and individual complaints. The views of a monitoring mechanism are decisive in the sense that there is no appeal against them to another body.

40. A more difficult question is the significance, if any, of the view taken on the validity of a reservation by a monitoring body for other States parties. A variety of issues arise including:

(a) The impact on another State party with an identically or similarly worded reservation;

(b) The impact on other parties where a monitoring body has found a reservation to be invalid; and

(c) No State party has objected to the reservation; or

(d) Only certain States parties have objected to it;

(e) The effect of a finding that a reservation is valid on a State party which had objected to the reservation on grounds of alleged incompatibility with the object and purpose.

41. Strictly speaking, a monitoring body is only dealing with the situation before it. There is no doctrine of binding precedent. Nevertheless, the monitoring bodies do and ought to strive for intellectual coherence and consistency. This makes it very probable that very similar reservations will be treated in a similar way. States are already well aware of that. It may be necessary for monitoring bodies to allow interventions by third States in individual or inter-State proceedings, the outcome of which is likely to affect them. This already happens before the European Court of Human Rights.[37]

42. The second issue is at first sight problematic. The finding that a reservation is incompatible with the object and purpose of the treaty might be thought to require other contracting parties to take a position. Any subsequent objection to the reservation by a contracting party might fall outside the time limits in the Vienna Convention, if they are applicable, unless the reservation was regarded as void *ab initio*. In fact, it would appear that non-objecting States do not need to take action. In any case affecting the reserving State, that State will not be able to rely on the reservation. It would be difficult for the Human Rights Committee to allow even a non-objecting State to accept an invalid reservation.

43. The third situation does not appear to give rise to any problems. As already indicated, a High Contracting Party can object to a reservation not provided for in the treaty on any grounds. It is free to maintain its objection but that objection will have to have been communicated within the time limits of the Vienna Convention.

**The characterization of a statement**

44. A monitoring mechanism may wish to take up with a State the characterization of a statement where that is unclear or open to dispute. The jurisdiction of a monitoring mechanism to determine the validity of a reservation must logically extend to the characterization of a

statement as a reservation. In practice, that is not likely to be problematic. If the State intended the statement to be a reservation but it is characterized differently, no problem will arise if there is no incompatibility. If the State claimed the text was something other than a reservation but the Committee disagrees, it will be up to the State to change the text more accurately to reflect its intention. In characterizing the statement, the monitoring body would apply the principles set out in the reports of the Special Rapporteur of ILC. The application might be affected by the particular context.[38]

**How a monitoring mechanism is to determine that a reservation is incompatible with the objects and purposes of a treaty**

45. The monitoring body will analyse the reservation applying the principles contained in the Vienna Convention. An indication of their approach is to be found in any comments on reservations, as in the case of general comment No. 24 of the Human Rights Committee and its case law involving reservations, such as the *Rawle Kennedy* case.[39]

46. *The context.* The object and purpose of a human rights treaty are functions of (i) the objects and purposes of human rights law and (ii) the object and purpose of putting an obligation into a treaty.[40] It has been recognized by States, the General Assembly and the Security Council[41] that widespread and systematic human rights violations may threaten international peace and security. One function of the promotion and protection of human rights and the implementation of human rights law is therefore the avoidance of threats to international peace and security. This function has affected the form of human rights law.

47. Unlike many other treaties, human rights treaties represent unilateral undertakings made by a collection of States.[42] All other States have an interest in a State's respect for human rights law. It is not principally a question of a particular or bilateral interest. This distinguishes human rights law from the general law of State responsibility, in which particular interest is more common than general interest. If human rights law were essentially bilateral, it would not have been necessary to develop a special body of rules and procedures. The development of the law of State responsibility would probably have met the need. It is by virtue of this special character of human rights law that monitoring has assumed such importance. Whilst the possibility of inter-State complaints is left open, the principal way of ensuring compliance is through monitoring. The monitoring bodies are, in a sense, representing the interests of all States when they exercise their functions.

48. The context may include the position the State has taken with regard to other human rights treaties. The seven principal human rights treaties are increasingly seen as constituting a coherent whole. When a treaty body is seeking to determine whether a State's reservation is compatible with the particular treaty, can it take into account the existence or non-existence of reservations by that State to very similar provisions in other human rights treaties?[43]

49. *The content*. Three characteristics of the content of human rights law may have an impact on the applicability of the compatibility test:

(a) The relationship between separate articles and the whole treaty;

(b) The alleged *ius cogens* character of at least some norms;

(c) The distinction between derogable and non-derogable rights.

50. *The relationship between separate articles and the whole treaty*. Whilst reservations may affect more than one provision in a treaty, they are often drafted with express reference to one particular article. According to the Vienna Convention, the compatibility of the reservation has to be determined by reference to the treaty as a whole and not by reference to the norm in the particular article. The difficulty in the case of human rights law is that the object is not the acceptance of a large number of separate obligations. Rather, there is a single goal (respect, protection and promotion of human rights) which is to be achieved by adherence to a large number of separate provisions.[44] A reservation to one provision may therefore be incompatible with the object and purpose of the treaty.

51. *Alleged ius cogens character*. If any human rights norms are of *ius cogens* character, this would be of significance to the determination of the compatibility of a reservation to the norm. No reservation to the norm itself would be valid. This is in contrast to the situation with regard to treaty provisions which are also norms of customary international law. In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion.[45]

52. *Distinction between derogable and non-derogable rights*. At least some human rights treaties make express provision for situations in which a State may modify the scope of some of its obligations. It might be thought that non-derogable rights were necessarily non-reservable. This appears to be an oversimplification. A right may be non-derogable, on account of its character as a fundamental pillar of human rights law or else because no emergency could ever give rise to the need to modify the right or because it is not capable of being restricted. Furthermore, a reservation may be taken not to the essence of the norm but to a possible application of it. Where a principle is non-derogable, an account of its character as a fundamental pillar or where it is the non-derogable core of a potentially derogable right, any reservation to the principle, as opposed to a particular application of the principle, would be likely to be incompatible with the object and purpose of the treaty as a whole.

53. *Actual reservations made to human rights treaties*. The problems that arise in practice for monitoring mechanisms concern the interaction between the characteristics of the content of human rights law and the actual reservations made by States parties.[46] Whilst individual features of the rules, the reservations and the context may not be unique to human rights law, the interplay between these elements does appear to give rise to patterns that are unique to human rights law.

54. *General and specific reservations*. Certain reservations are framed in general terms and do not refer to particular treaty provisions. Others make a single type of objection to several identified treaty provisions. Yet others explain precisely how they purport to modify which particular part of an identified treaty provision. It is likely to be especially difficult for a

monitoring mechanism to determine the precise scope of application of a general reservation. Such precision is necessary for the monitoring mechanisms to determine the compatibility of the reservation with the object and purpose of a treaty. Where a reservation is expressed in vague terms or where a reservation does not indicate to which treaty provisions it applies, it would be helpful if this were one of the areas of discussion between the monitoring mechanism and the State party. This is, in fact, generally the case. The outcome of such a discussion, including possibly revised wording of the reservation, should be included in the concluding observations. In that way the agreement will not be forgotten, when the State party submits a subsequent periodic report, even if the composition of the Committee is very different.

55. *Reservations to procedural provisions or substantive provisions*. Many human rights treaties contain a variety of mechanisms which may apply by virtue of ratification, by a declaration opting in or a reservation opting out of a provision. In the case of the last two, express provision will be made in the treaty. It might be tempting to assume that a reservation to a procedural provision is more likely to be compatible with the object and purpose of a human rights treaty than a reservation to a substantive provision. This would appear to be misguided. There would be little point in a State accepting a substantive obligation if it rejected every form of accountability provided for by the treaty. It would therefore appear that a reservation rejecting completely the role of the monitoring committee would be incompatible with the object and purpose of the treaty.

56. *What the reservation purports to do*. It is difficult to generalize about what actual reservations to human rights treaties seek to do but certain features do recur:

(a) Make the obligation subject to conformity with something outside the treaty:

(i) Religious doctrine;

(ii) Domestic law, including the constitution or domestic customs;

(b) Accept the norm itself but not insofar as it conflicts with a particular provision or feature of domestic law.

Given the nature of a treaty as an obligation subject to international law, it is not open to a monitoring mechanism to interpret the terms of a human rights treaty by reference to anything other than international law. This is also the basis of the obligation between the States parties inter se. They are free to agree between themselves on more onerous obligations or the application of some other rule of treaty interpretation but which cannot affect the monitoring mechanism under the original treaty. A further objection to the first type of reservation is that there is likely to be disagreement as to the content of the proposed alternative canon of interpretation. Different adherents of the same religious group might well disagree as to the meaning of a particular doctrine or its application in a particular situation. Similar problems arise where there is a general reference to domestic law, whether it be domestic law generally, the constitution or domestic customs. States may be making use of such reservations on account of other provisions in the Vienna Convention, notably article 27.[47] It should not be forgotten that in ratifying an international treaty, States are assuming an international obligation. They are not giving an international undertaking to apply their domestic law. Yet a further objection is that the alternative canon of interpretation may vary over time. In some cases a reservation may refer

expressly not only to current but also to future domestic law. If the reference to future law was confined to future law which restricted the scope of the reservation, it would at least not exacerbate the problem. There is usually no such guarantee. Not only the monitoring mechanism but other States parties are being asked to sign a blank cheque. A general reservation subjecting a treaty as a whole to a religious law or to domestic law is likely to be found incompatible with the object and purpose of the treaty.

57. *The effects of a decision that a reservation is incompatible*. It would be surprising if a human rights body were expected to give effect to a reservation which it had found to be incompatible with the object and purpose of a treaty. The actual impact of such a finding will depend on the function which the human rights body is exercising.

58. *Monitoring*. When exercising its monitoring function, no immediate result will follow from an actual or implied view that a reservation is incompatible. The human rights body in practice opens a dialogue with the State regarding the offending reservation. It seeks the withdrawal of the reservation or its modification. Most of the work of the monitoring bodies, and in some cases all their work, consists in examining State party reports, together with the State party concerned.

59. *Inter-State disputes*. Whilst the possibility exists, there is no precedent for the exercise of such a function at the international level. This is in contrast to the position at the regional level. Similar considerations would appear to arise as in the case of individual complaints.

60. *Individual complaints*. This is a complex legal question, made more difficult by the existence of a relatively settled line of case law in a regional human rights body, the European Court of Human Rights, and the decision of the Human Rights Committee, in the case of *Rawle Kennedy v. Trinidad and Tobago*.[48] Whilst one may debate whether or not the reservation was incompatible,[49] it is submitted that it is clear that the monitoring body had the competence to reach such a decision and it would seem logical that the body could then give effect to its decision. The result is the application of the treaty without the reservation, whether that is called "severance" or disguised by the use of some other phrase, such as non-application.

61. However, States are not obliged to ratify treaties. Making the reservation might genuinely have been the prerequisite for the State's ratification. At least in cases brought under the Optional Protocol and where the reservation in question affects the applicability of the Protocol, the State is free to denounce the Protocol, as happened in the case of Trinidad and Tobago. That raises the question of whether "severance" is only possible where the State is free to denounce the treaty. A second question is the status of the State as a contracting party after such severance but where the State has not indicated its response. The fact that the State could denounce the treaty might suggest that, where it has not done so, it remains bound. In other words, the State's participation in the treaty is not suspended pending its taking a position.

62. The position may well be different where a State is not free to denounce the treaty to which it had attached an incompatible reservation. One such example concerns the International Covenant on Civil and Political Rights.[50] Should a situation arise in which the Human Rights Committee denies any effect to an incompatible reservation to the Covenant which, for the State, was a prerequisite for ratification, it is not clear how the deadlock would be resolved. The State may wish to remove itself as a party, but the Human Rights Committee has determined that a

State which has ratified the Covenant cannot denounce it or withdraw from it. One possibility might be that the incompatible reservation tainted the whole ratification, so that the State has, in fact, never been a party to the Covenant. Such an approach would, however, be difficult to reconcile with general comment No. 26.

## IV. DEVELOPMENTS SINCE THE FIFTY-FIFTH SESSION OF THE SUB-COMMISSION

### Meeting between members of the Sub-Commission and members of the International Law Commission

63. At the initiative of ILC, certain members of the Sub-Commission met with members of the Commission, including the Special Rapporteur on reservations to treaties (Mr. Alain Pellet), on 7 August 2003. ILC also met with members of the treaty bodies. The meeting allowed for a very useful exchange of views. It is to be hoped that such meetings can be arranged in the future, wherever the Sub-Commission and ILC have overlapping interests.

64. The members of ILC indicated an evolution of their views since the Special Rapporteur first dealt with the particular problem of reservations to human rights treaties in his reports. The Special Rapporteur was in broad agreement with the conclusions in the Sub-Commission working paper, although he disagreed with some of the reasoning. He indicated that, in his report to the fifty-sixth session of ILC in 2004, he would be returning to the question of reservations to human rights treaties. In future reports, he would consider generally the issue of the incompatibility of a reservation with the object and purpose of a treaty and the consequences of such a finding, including in relation to, but not limited to, human rights treaties. His 2004 report is not yet available.

### Report of the third inter-committee meeting of human rights treaty bodies

65. On 21 and 22 June 2004, there took place the third inter-committee meeting of the human rights treaty bodies. Two relevant issues were raised. First, in the context of the exercise of their monitoring functions, they agreed that treaty bodies could request the withdrawal of reservations to the treaty in question. A treaty body can discuss the withdrawal of a reservation, even where the reservation is clearly compatible with the object and purpose of the treaty. Where the reservation is arguably incompatible, it is submitted that the treaty body should engage in such discussions.

66. Second, even though not all treaty bodies are confronted with the need to determine the validity of reservations, they stressed that it would be useful if they adopted a common approach. To that end, it was proposed that the Secretariat should prepare a report (including a table showing all reservations made to the core human rights treaties and the nature of the provisions covered) with a view to establishing a working group, consisting of a representative of each committee, to consider this report and report to the next inter-committee meeting.

67. It will be recalled that, at the fifty-third session of the Sub-Commission, such a chart was produced (E/CN.4/Sub.2/2002/34). It is hoped that the Secretariat will make use of those charts and will simply update them with regard to the first six treaties and include reservations and declarations to the seventh, the International Convention on the Protection of the Rights of All

Migrant Workers and Members of Their Families, and any response to them. It is important that such a chart be kept up to date and that there also be a compilation of any observations made by a treaty body, in whatever context, with regard to reservations. Those observations should be shared with all the other treaty bodies.

## V. CONCLUSIONS AND RECOMMENDATIONS

### Conclusions

68. **There are two different relationships which need to be considered: that between a reserving State and another State party and that between a reserving State and the treaty monitoring mechanism.**

69. **Generally speaking, the validity or effectiveness of a reservation is not decisive. When a State is exercising its monitoring functions, it can discuss any reservations with the State party. That is as true of valid reservations as arguably invalid ones. In order to facilitate that task and to achieve a common, if not identical, approach, treaty bodies need complete and up-to-date information on declarations and reservations made to all the principal human rights treaties, the reaction of other contracting parties to those reservations and observations, in any context, of other human rights bodies to the question of reservations. The issue of validity may become decisive when/if a treaty body is called upon to reach an opinion in an inter-State case or an individual application.**

70. **A State is free to make any reservation not precluded by the terms of the treaty on condition that it is not incompatible with the object and purpose of the treaty.**

71. **Applying the normal rules of treaty law with regard to reservations as contained in the Vienna Convention on the Law of Treaties and the principle that a judicial or quasi-judicial body has the jurisdiction to determine whether or not it has jurisdiction, the human rights treaty bodies have the competence to determine whether or not a reservation is incompatible with the object and purpose of the treaty.**

### Recommendations

72. **The Sub-Commission should suspend any further consideration of the question of reservations to human rights treaties, pending the publication of the next report of the Special Rapporteur of ILC on reservations to treaties and, in particular, his examination of how to determine whether a reservation is compatible with the objects and purposes of a human rights treaty and the consequences of such a finding.**

73. **The final working paper should be forwarded to the Committee on the Elimination of Racial Discrimination, which originally asked for the study, other treaty bodies and the International Law Commission.**

## Notes

[1] This was before the entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families on 1 July 2003.

[2] France (see A/51/40), the United States of America (see A/50/40, vol. 1) and the United Kingdom of Great Britain and Northern Ireland (see A/50/40).

[3] Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago* (CCPR/C/67/D/845/1999), decision adopted on 2 November 1999.

[4] C. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment 24", 46 *International and Comparative Law Quarterly* (1997) 390; B. Simma, "Reservations to Human Rights Treaties: Some Recent Developments", in Hafner et al., *Liber Amicorum Professor Seidl-Hohenweldern* (Kluwer Law International, 1998, pp. 659-680; R. Baratta, "Should Invalid Reservations to Human Rights Treaties be Disregarded?", 11 *European Journal of International Law* (2000) 413; M. Craven, "Legal Differentiation and the Concept of Human Rights Treaty in International Law", 11 *European Journal of International Law* (2000) 489; J. Klabbers, "Accepting the Unacceptable? A Nordic Approach to Reservations to Multilateral Treaties", 69 *Nordic Journal of International Law* (2000) 179.

[5] E.g. follow-up action and conclusions and recommendations of the sixth meeting of persons chairing the human rights treaty bodies, report of the Secretary-General (HRI/MC/1996/2), especially paras. 11-15 on intergovernmental expressions of concern.

[6] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, entry into force 27 January 1980 in accordance with its article 84, para. 1.

[7] Article 60, paragraph 5, however, does provide an exception to the usual rules in the case of the effects of a material breach of treaties of a humanitarian character.

[8] McNair, "The Functions and Differing Legal Character of Treaties", 11 *British Yearbook of International Law* (1930) 100; R. Higgins, "Human Rights: Some Questions of Integrity", 52 *Michigan Law Review* (1989) 1; see also the discussion of this issue in the second report on the reservations to treaties (A/CN.4/477).

[9] See for example, article 20 of the Convention against Torture; article 2, paragraph 1, of the Second Optional Protocol to the International Covenant on Civil and Political Rights and general comment No. 24, para. 15.

[10] Human rights treaties are generally silent on this issue.

[11] E.g. general comment No. 24, para. 3 and the objection by Germany to the reservation by Algeria to article 8 of the International Covenant on Economic, Social and Cultural Rights.

[12] Observations of the United Kingdom on general comment No. 24, op. cit. at note 2.

[13] E/CN.4/Sub.2/2002/34; of the 492 objections made to reservations to the six treaties 370 (75 per cent) refer expressly to incompatibility with the object and purpose of the treaty and 118 (24 per cent) refer indirectly to incompatibility (e.g. the objecting State will interpret the statement in such a way as to be compatible with the objects and purpose of the treaty).

[14] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Report 1951,* p. 23, para. 10.

[15] Roberts and Guelff, *Documents on the Laws of War,* 3rd ed., pp. 363-368.

[16] This is a common pattern with regard to objections to reservations to human rights treaties, see E/CN.4/Sub.2/2002/34.

[17] E.g. they specify that, notwithstanding their objection, the treaty is to enter into force between themselves and the reserving State; see ibid.

[18] See, for example, certain Swedish objections to human rights treaties, ibid.; see also eighth report on the reservation to treaties (A/CN.4/535).

[19] If the obligations are characterized as obligations *erga omnes* or obligations of an objective character or as binding unilateral undertakings, this might affect the ability of the State to rely on another State's reservation or to act in violation of the obligations where no other party is adversely affected by the violation; see further below.

[20] Observations by the United Kingdom on general comment No. 24, op. cit. at note 2. States use forms of objections such as "national legislation is not contradicting the treaty", "reservation is unnecessary", "reservations cast doubts on the commitment of the reserving State", "reservation will be interpreted as not limiting the obligations of the reserving State". See E/CN.4/Sub.2/2002/34.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] See, Recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe on responses to inadmissible reservations to international treaties; document prepared by the Secretariat Directorate of Legal Affairs of the Council of Europe for the Ad hoc Committee of Legal Advisers on Public International Law (CAHDI) on practical issues regarding reservations to international treaties, CAHDI report of 3 May 2000, appendix 4, item 10.5; see also, L. Magnusson, "Elements of Nordic Practice 1997: The Nordic Countries in Co-ordination" 67 *Nordic Journal of International Law* (1998), p. 350.

[25] See further below.

[26] It might be possible for CERD to contact all the States parties to ask them whether, if each of the reservations had been made now, they would have objected on grounds of incompatibility. Any such opinions might not be binding on the parties *inter se*, if the time limits in the Vienna Convention are regarded as applicable.

[27] See para. 48 below.

[28] Saudi Arabia objected to a reservation to the Convention on the Rights of the Child made by Oman.

[29] Mexico has objected to 14 reservations.

[30] The European Commission of Human Rights stated that, owing to the objective character of human rights obligations, a State could not rely, in an inter-State application, on a reservation made by one of the applicant governments; *Norway, Sweden, Denmark, the Netherlands and France v. Turkey*, European Commission of Human Rights, Application No. 9940-9944/82 (joined), decision on admissibility of 6 December 1983, 35 *Decisions and Reports* (1984) 143. The decision enabled the Commission to avoid ruling on the compatibility of the French reservation with the object and purpose of the European Convention on Human Rights; see further below.

[31] Clearly any State that has made a reservation very similar to the one being examined can be assumed to think that the reservation is compatible with the object and purpose of the treaty.

[32] See section IV below.

[33] Case of Certain Norwegian Loans, ICJ, 6 July 1957, *France v. Norway*.

[34] 35 *Decisions and Reports* 143, at paras. 39-40.

[35] *Report of the International Law Commission on the work of its forty-ninth session, Official Records of the General Assembly Fifty-second Session, Supplement No. 10* (A/52/10), para 84.

[36] *Bankovic and others v. Belgium and 16 other NATO States*, 52207/99, admissibility decision of 12 December 2001, paras. 55-57.

[37] E.g. *Bäck v. Finland* (37598/97); in April 2003 the Governments of Norway, the Netherlands, Sweden and the United Kingdom were given leave to take part in the proceedings as third parties; Press Release 332, 19 June 2003.

[38] There may be a temptation for a monitoring mechanism to interpret a statement which, if it were a reservation, would be invalid as incompatible as merely as a declaration, on the grounds that the State, in consenting to be bound by a human rights treaty, would not intend to negate that consent by an invalid reservation. Certain States appear to take such an approach; see E/CN.4/Sub.2/2002/34. Reserving States are likely to object to this approach.

[39] See supra note 3.

[40] Supra note 14.

[41] For example, more recently Security Council resolution 1318 of 7 September 2000 on ensuring the effective role for the Security Council in the maintenance of international peace and security, particularly in Africa; Security Council resolution 1366 of 30 August 2001 on the role of the Security Council in the prevention of armed conflict.

[42] Human rights law involves the assumption of obligations towards people within the State's jurisdiction enforced through a system of collective guarantee, rather than subjective and reciprocal rights for and between the contracting parties; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* (9940-9944/82), paras. 39-41.

[43] This is a particular problem in relation to certain States' reservations to CEDAW, which have no equivalent in the ratification of the ICCPR; see E/CN.4/Sub.2/2002/34. In order to begin to identify the range of issues involved, let alone deal with them, it is essential that the treaty bodies have as much relevant information as possible.

[44] See also general comment No. 24.

[45] Another distinction is that the concept of the persistent objector would appear to be inapplicable to rules of *ius cogens* but it might be relevant in relation to customary human rights norms.

[46] See E/CN.4/Sub.2/2002/34.

[47] Article 27 of the Vienna Convention states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". By attempting to make its internal law part of its international obligation, a State may circumvent article 27.

[48] Supra note 3. The decision of the Human Rights Committee post-dates the report of the Special Rapporteur of ILC in which he argued that the severance principle was, at most, regional customary law in Europe.

[49] Ibid., dissenting opinions of the four members of the Human Rights Committee.

[50] General comment No. 26; contrast the International Convention on the Elimination of All Forms of Racial Discrimination.

- - - - -