UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

General Comments - Government Responses

CCPR A/50/40 (1995)

Annex VI

Observations of States parties under article 40, paragraph 5, of the Covenant*

Observations on General Comment No. 24 (52), 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

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B. United Kingdom of Great Britain and Northern Ireland b/

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 determined 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 a 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.

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* The present annex is being published as received, without formal editing.

b/ Observations transmitted by letter dated 21 July 1995.

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 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 to 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 (para. 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 1978 c/ that at 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). d/ 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

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c/ Ireland v. United Kingdom.

d/ Series A, No. 25, p. 90, para. 239.

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.

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 for 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 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 pages 6 and 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 or 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 if its dictum that the task in question is inappropriate for the States Parties. This would appear to have implications which call 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 paras. 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.

The legal effect of an incompatible reservation

13. The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (see para. 9 above). It is questionable however whether they were intended also to cover reservations which are inadmissible in limine. For example, it seems highly improbably that

a reservation expressly prohibited by the treaty (the case in art. 19 (a) of the Vienna Convention) is open to acceptance by another Contracting State. And if so, there is no clear reason why the same should not apply to the other cases enumerated in article 19, including incompatibility with the object and purpose under 19 (c). The Genocide Convention Advisory Opinion did indeed deal directly with the matter, by stating that acceptance of a reservation as being compatible with the object and purpose entitles a party to consider the reserving State to be party to the treaty. In the converse case (i.e. the case where the reservation is not compatible with the object and purpose) the Court states plainly, "that State cannot be regarded as being a party to the Convention".e/ This is the approach which the United Kingdom has consistently followed in its own treaty practice.

14. The general comment suggests, per contra, that an "unacceptable" reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party as if the reservation had not been entered. The United Kingdom agrees that severability of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice. However the United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules "expressly recognized by" the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not "expressly recognized" but rather has indicated its express unwillingness to accept. The United Kingdom fears that, questions of principle aside, an approach as outlined in paragraph 20 of the general comment would risk discouraging States from ratifying human rights conventions f/ (since they would not be in a position to reassure their national Parliaments as to the status of treaty provisions on which it was felt necessary to reserve) or might even lead to denunciations by existing Parties who ratified against a set of assumptions different from those now enunciated in the general comment.

15. The United Kingdom believes that the only sound approach is accordingly that adopted by the International Court of Justice: a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all - unless it withdraws the reservation. The test of incompatibility is and should be an objective one, in which the views of competent third parties would carry weight. Ultimately however it is a matter for the treaty parties themselves and, while the presence or absence of individual State "objections" should not be decisive in relation to an objective standard, it would be surprising to find a reservation validly stigmatized as incompatible with the object and purpose of the Covenant if none of the Parties had taken exception to it on that ground. For all other reservations the rules laid down in the Vienna Convention do and should apply - except to the extent that the treaty regulates such matters by its own terms.

16. The United Kingdom wishes finally to express its gratitude to the Committee for having focused attention on what is undoubtedly a real and serious problem and for having illuminated the underlying issues. Inasmuch as these issues go wider than the Covenant itself, or than human rights treaties in general, the United Kingdom proposes to reflect further on how international

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f/ A similar point applies for example to the First Optional Protocol, to which the United Kingdom is not, however, a party.

consideration of these matters can best be carried forward.