UNITED STATES OF AMERICA

General Comments - Government Responses

CCPR A/50/40/Vol.1 (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

A. United States of America a/

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 where appropriate. General Comment 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 interpretive competence since the Committee lacks the authority to render binding interpretations or judgements. 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

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

a/ Observations transmitted by letter dated 28 March 1995.

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 reservations, is of considerable 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 of 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 purpose 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 any 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, moreover, 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 insofar as it bears on the permissibility of reservations. In fact, 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 of 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 the 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.

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 reservations 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 could thereby 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 remainder 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.