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MEETING WITH HUMAN RIGHTS BODIES (15 and 16 May 2007)*

Report prepared by Mr. Alain Pellet, Special Rapporteur

1. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the International Law Commission convened a meeting with representatives of United Nations human rights treaty bodies and regional human rights bodies. The meeting took place on 15 and 16 May 2007 at the United Nations Office at Geneva and provided an opportunity for a fruitful exchange of views that was welcomed by all participants.

2. Mr. Ian Brownlie, Q.C., Chairman of the International Law Commission, chaired the meeting, the last segment of which was co-chaired by Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the working group on reservations to treaties of the Meeting of chairpersons of the human rights treaty bodies. Mr. Brownlie welcomed the participants and explained that the meeting offered a unique opportunity to pursue a dialogue with the human rights bodies on the issue of reservations to treaties. Mr. Alain Pellet,

* The present report - which is not a "statement of conclusions" - was prepared solely by the Special Rapporteur on reservations to treaties. It was submitted for opinion to outside participants and to those members of the Commission who had made introductory presentations but in no way engages their responsibility.

Special Rapporteur of the International Law Commission on reservations to treaties, underscored the importance of such an exchange of ideas for strengthening mutual understanding between the Commission and the human rights expert bodies.

1. INTRODUCTION OF THE PRACTICE OF THE HUMAN RIGHTS BODIES REPRESENTED

3. The meeting began with brief presentations by the representatives of the human rights bodies participating in the meeting on the respective practice of each of the bodies represented, with the understanding that neither those presentations nor what was said during the meeting would in any way engage the responsibility of the bodies in question.[1] The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI));[2] and the Sub-Commission on the Promotion and Protection of Human Rights.

(a) Reservations to human rights treaties

4. The use of reservations in human rights treaties varied from treaty to treaty. For that matter, some conventions explicitly provided for the formulation of reservations (Convention against Torture, European Convention on Human Rights and Fundamental Freedoms). Two broad trends could be observed.

5. On the one hand, some treaties - in particular, those that had been widely ratified - had been the subject of numerous reservations. Significant examples included the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, but also conventions against torture and the elimination of all forms of racial

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[1] See annex for the complete list of participants.

[2] The other regional bodies invited were unable to send representatives.

discrimination and the European Convention on Human Rights and Fundamental Freedoms. Conversely, few reservations had been made to the International Covenant on Economic, Social and Cultural Rights.

6. On the other hand, reservations were frequently made to the fundamental or substantive provisions of human rights treaties. In that connection, the representative of the Committee on the Elimination of Racial Discrimination pointed to the large number of reservations made to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, concerning the prohibition of incitement to hatred or to racial discrimination. The same comment was made with regard to the Convention on the Elimination of All Forms of Discrimination against Women.

(b) The practice of human rights bodies with respect to reservations

7. The practice of human rights bodies, as described by some representatives, was relatively uniform and was characterized by a high level of pragmatism. The question of reservations could arise in two situations: the consideration of periodic reports submitted by States and the examination of individual communications. However, the latter option was available only to bodies charged with receiving individual petitions or communications.

8. In considering the periodic reports submitted by States, nearly all the various committees had taken a somewhat pragmatic approach to the question of reservations. Their chief position was that the formulation of reservations by States should be strictly limited. In practice, however, they were relatively flexible and showed great willingness to establish a dialogue with States, to which the latter are generally amenable. While encouraging and recommending the withdrawal of reservations, the committees engaged in discussions with States about the justification and the scope of their reservations. Although the objective of the dialogue was the complete withdrawal of reservations, the committees' position was flexible, owing to their goal of achieving universal ratification of their conventions. Only very rarely had the committees taken a formal position to declare a reservation invalid.

9. Some committees had had occasion to consider the scope and even the validity of reservations when considering individual communications. However, that practice was limited, if only because few bodies received such communications. Currently, only the Human Rights

Committee (and the European Court of Human Rights) followed it. In the case of the Human Rights Committee, the risk that the State whose reservation was declared invalid might withdraw from the Optional Protocol could not be overlooked.

2. PRESENTATIONS

10. Presentations serving as a basis for the discussion were delivered by:

- Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties: “Codification of the right to formulate reservations to treaties”;
- Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights: “Principal aspects of the problem”;
- Mr. Enrique Candioti, member of the International Law Commission: “Grounds for the invalidity of reservations to human rights treaties”;
- Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination: “Assessment of the validity of reservations to human rights treaties”;
- Mr. Giorgio Gaja, member of the International Law Commission: “The consequences of the non-validity of reservations to human rights treaties”.

(a) Codification of the right to formulate reservations to treaties

11. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, described the history of the codification of the law of treaties. He began by recalling the Commission’s mission of codification and presenting the Vienna Convention on the Law of Treaties as its most significant achievement. He went on to describe the process used by the Commission in drawing up draft conventions or draft guidelines. Lastly, he described the Commission’s consideration of the topic of reservations.

12. Although flexible and relatively detailed, the Vienna regime was vague and ambiguous with respect to the legal regime of reservations to treaties. Efforts to draft a Guide to Practice that would complement the provisions of the Vienna Conventions had been initiated in 1996. The lack of specific rules governing reservations to human rights treaties had been considered by

the drafters of the Vienna Convention. For one thing, human rights treaties were not accorded the same importance at the time the Convention was drafted; for another, and most notably, the authors of the Convention, who had been cognizant of the specificity of certain types of treaties, including human rights treaties (see article 60, paragraph 5, even though some objected to categorizing “treaties of a humanitarian character” as human rights treaties), had intended that the rules pertaining to reservations should be uniformly applied. However, as the Special Rapporteur had demonstrated in his second report (A/CN.4/478/Rev.1), the considerable extent of practice in respect of reservations to human rights treaties could not be ignored, and the International Law Commission was thus very interested in the practice of human rights bodies.

(b) Principal aspects of the problem

13. Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights, began by outlining those aspects of the problem on which there was general consensus. One point on which consensus had been reached was the principle that reservations that were incompatible with the object and purpose of a treaty produced no effects. An invalid reservation was null and void. In such cases it was assumed that the other contracting parties did not have the option of accepting such a reservation. Moreover, articles 20 to 23 of the Vienna Convention on the Law of Treaties and, in particular, the rules concerning objections to reservations did not apply in the event of incompatibility. The “validity” or “effectiveness” of a reservation depended on an objective criterion and not on the potential acceptance or objection of States. Such a declaration of incompatibility could be made by the contracting parties - which were not compelled to take such action - or by any body whose functions required it to take such a decision.

14. There was also consensus on the lack of a special regime applicable to reservations to human rights treaties. Nevertheless, the possibility existed that certain specific situations might produce predictable results. In the case of human rights treaties, the bodies established by those instruments were competent to determine whether or not a reservation was compatible with the object and purpose of the treaty. That observation applied both to judicial bodies that were competent to hand down decisions having the authority of *res judicata* and to bodies whose monitoring of the implementation of treaties resulted in recommendations or opinions that were not legally binding.

15. Ms. Hampson next identified the areas in which problems remained. There were a number of unanswered questions with respect to the general regime of reservations and, in particular, with respect to the effects that a declaration of incompatibility of a reservation with the object and purpose of a treaty might have. In the case of human rights treaties, questions arose as to whether the treaty bodies were under an obligation or simply had the option of entering into a "reservations dialogue" with States. Moreover, given the diversity of human rights bodies, it was difficult to adopt a general method for assessing a reservation's compatibility with the object and purpose of the treaty. Lastly, in cases involving incompatibility, the question arose as to the severability of the invalid reservation and whether or not the author of the reservation retained the status of contracting party. The precedents established by the human rights bodies and the reactions of the States that had taken the floor in the Sixth Committee of the General Assembly would seem to indicate that the rule of severability could stand to be revised in certain areas of international law and, in particular, in the area of human rights.

(c) Grounds for the invalidity of reservations to human rights treaties

16. Mr. Enrique Candioti, member of the International Law Commission, acknowledged that it was difficult to define objectively the grounds for the invalidity of reservations to treaties. He described the proposed guidelines contained in the Guide to Practice that had been prepared by the Commission. The Special Rapporteur had proposed a general definition according to which a reservation was incompatible with the object and purpose of a treaty if it affected an essential element of the treaty. Another group of guidelines concerning non-derogable norms and human rights treaties were currently being considered by the Commission.

(d) Assessment of the validity of reservations to human rights treaties

17. Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination, generally approved of the principles contained in the tenth report on reservations to treaties (A/CN.4/558 and Add.1 and 2) and in particular the assertion that human rights bodies were competent to assess a reservation's compatibility with the object and purpose of a treaty. He particularly supported the draft guideline which indicated that there were various bodies that were competent to determine the validity of a reservation.

18. Human rights bodies - for which the issue of human rights was not necessarily paramount - assessed reservations through two distinct procedures: the consideration of periodic reports and the examination of individual complaints.

19. In considering reports, committees exercised a quasi-"diplomatic" function. In some instances, the assessment of reservations was clear-cut. There were, however, situations in which it was not necessarily useful or desirable for the committee to make a "yes" or "no" pronouncement. For that reason, Mr. Sicilianos recommended that the realities of the situation should be taken into account: it was essential to deal with political considerations as well as with practical problems (such as the amount of time available to committees for considering reports). He stressed the importance of dialogue with States and of studying States' internal law, since reservations could not be considered in the abstract and their scope was dependent on internal law. It was therefore necessary to establish priorities for the purpose of determining the validity of reservations during the consideration of reports.

20. The individual complaints procedures of the human rights bodies conferred a quasi-judicial function on those bodies. Although the bodies' decisions were not binding, the States concerned were required to draw the appropriate conclusions from the opinions expressed by the bodies. Mr. Sicilianos stressed that a distinction should be made between reservations to jurisdictional clauses and reservations to substantive provisions. He drew attention in that connection to the Judgment of the International Court of Justice of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda).*

(e) The consequences of the non-validity of reservations to human rights treaties

21. Mr. Giorgio Gaja, member of the International Law Commission, shared the view expressed by Ms. Hampson that articles 20 to 23 of the Vienna Convention did not apply to invalid reservations, and particularly to those that were incompatible with the object and purpose of the treaty. Nevertheless, in practice it was generally considered that even invalid reservations were subject to the general regime of reservations and could therefore be accepted by other contracting States.

22. The treaty bodies made use of their authority to play an active role in respect of reservations they considered invalid. They relied on two techniques to accomplish that end. The first was the approach taken by the European Court of Human Rights in the case of *Belilos v. Switzerland.* The Court had concluded that the willingness of Switzerland to be a party to the Convention was "stronger" than its willingness to maintain the reservation in question. The invalidity of the reservation did not subsequently impair Switzerland's status as a State party to the Convention.

23. The second approach was the one adopted by the Human Rights Committee in its general comment No. 24. The Committee did not seek to verify a State's willingness to be bound by the Covenant. It maintained that reservations were severable from the treaty and produced no effects if they were incompatible with its object and purpose.

24. Mr. Gaja urged caution. A restrictive attitude towards the reserving State could lead to political difficulties, such as a State's withdrawal from the Optional Protocol concerning individual communications. He welcomed the spirit of openness to dialogue that existed between the human rights treaty bodies and States. Even though the question of the validity of reservations was a difficult one, a "gentle" approach was called for. The reservations dialogue should be encouraged by the Commission.

3. SUMMARY OF THE DISCUSSION

25. The members of the International Law Commission and the representatives of the human rights bodies had an opportunity to participate in a general discussion following each of the presentations. Mr. Roman A. Kolodkin and Ms. Xue Hanqin, members of the Commission, summarized the discussions on grounds for and assessment of the validity of reservations and on the consequences of the non-validity of reservations, respectively. Their views are reflected in the present report, as are the conclusions of Sir Nigel Rodley.

(a) The specific nature of human rights treaties

26. Some participants emphasized the special nature of human rights treaties. That specific nature did not, however, imply that the law of treaties was not applicable to them. Human rights treaties continued to be governed by treaty law.

27. The special nature of human rights treaties was reflected in the text provided for in article 19 (c) of the Vienna Convention on the Law of Treaties, which concerned the incompatibility of a reservation with the object and purpose of the treaty. It was nevertheless pointed out that that specific feature was not unique and that environmental protection treaties and disarmament treaties also presented particular features that could have an impact in terms of reservations. The reason that human rights treaties were of special interest to the Commission was that they had treaty monitoring bodies. The representatives of the human rights bodies stressed the fact that it was not necessary to establish a separate regime governing reservations to human rights treaties. However, they did feel that the general regime should be applied in an appropriate and suitably adapted manner.

28. A number of participants underscored the fact that the delicate balance between the integrity and the universality of the treaty lay at the heart of the debate on the specific nature of human rights treaties. According to some, the treaty bodies gave precedence to integrity; however, the opposing view was also expressed that treaty bodies sought to work with reservations and to hold discussions with States, which showed a greater concern for universality.

(b) The use of the term "validity"

29. Several participants expressed uncertainty as to the terminology to be employed. All the members of the human rights bodies had used the term "validity". Nevertheless, notwithstanding the previous decision of the International Law Commission on the matter, some Commission members were openly opposed to the use of that term, owing to its objectivistic connotation and lack of neutrality.

(c) Grounds for invalidity

30. The participants were in general agreement that article 19 of the Vienna Convention on the Law of Treaties set forth the conditions for the validity of a reservation. However, discussion tended to focus on subparagraph (c), according to which a reservation could not be formulated if it was "incompatible with the object and purpose of the treaty". While some participants were opposed to the use of the term "reservation" to designate a reservation that was prohibited under article 19 (c), others pointed to the practical problem that would arise if another term was used.

31. It was noted that because it was not possible to establish a standard criterion for the object and purpose, the draft guidelines of the International Law Commission had been limited to identifying typical problems and attempting to illustrate article 19 (c).

32. Many participants noted the problematic nature of general and vague reservations. Although they were not considered to be incompatible with the object and purpose of the treaty, it was impossible to assess the validity of such reservations.

33. Participants also discussed the issue of reservations to provisions setting forth a rule of *jus cogens*. Some were of the view that any reservation to that type of clause should automatically be considered invalid since it would inevitably affect the “quintessence” of the treaty. Others observed that the problem arose in much the same way that it did for reservations to provisions setting forth a customary norm - which could not be considered to be invalid *ipso jure*.

(d) Assessment of validity

34. All participants agreed that the competence of the human rights bodies to assess the validity of reservations was unquestionable. Many welcomed their reliance on political means of persuasion rather than on legal imperatives in their interactions with States.

35. The discussion focused in particular on the issue of the “reservations dialogue”. It was observed that, in practice, such an approach was extremely useful for understanding the political considerations underlying reservations and that the pragmatism and discretion exercised by the human rights bodies had already met with success.

(e) The consequences of non-validity

36. To date, the human rights bodies had endeavoured, insofar as possible, to avoid taking a position on the validity of reservations. Examples of assessments of validity or declarations of invalidity of reservations were rare and had occurred only in the rare cases in which such determinations were unavoidable. In any event, the consequences of the non-validity of a reservation were not obvious. The participants were unanimous in considering that a reservation that was incompatible with the object and purpose of a treaty was null and void. However, some

disagreement was voiced as to whether there was any need for States to rule on that matter, and it was considered unnecessary for States to object to an invalid reservation. Conversely, several participants felt that States had an interest in taking a position owing both to a lack of monitoring bodies in certain areas or, where such bodies did exist, to the sometimes random manner in which they considered the matters referred to them.

37. The consequences of the non-validity of a reservation for the status of the treaty presented a major difficulty, one which was linked, more specifically, to the consent of the author of the reservation to be bound by the treaty. The problem lay in determining whether or not the invalid reservation was severable from consent to be bound by the treaty. The participants stressed that the human rights bodies must act with caution. Their approach consisted in determining the State party's intention. If intention could not be discerned, a presumption would have to be made. In the view of several speakers, such a presumption should be in favour of severing the invalid reservation from consent to be bound by the treaty and firmly maintained by the human rights bodies (with the understanding that it must not constitute a conclusive presumption). Other participants, however, believed that the principle of State sovereignty must prevail. A reservation that was declared invalid altered the scope of the treaty for the reserving State, which should then have the option of withdrawing its consent to be bound by the treaty. Some participants pointed to the dangers inherent in the severance of an invalid reservation and considered that there was a risk that the reserving State might withdraw its participation in the optional protocol, or even in the treaty. According to one opinion, however, experience had shown that risk to be quite small.

Alain PELLET[3]

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[3] I wish to extend warm thanks to Ms. Céline Folsché, intern from New York University (LLM) during the fifty-ninth session of the International Law Commission, for her valuable assistance in preparing this report.