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Statement by Mr Pierre-Henri IMBERT*

The Group's function is essentially to work for fuller harmonisation of the measures taken by the Council of Europe member states regarding inadmissibility of reservations - particularly in respect of human rights treaties.

This approach is prompted by a finding which has caused justifiable concern: for some years past, very numerous and above all alarmingly far-reaching reservations have been made to several human rights treaties. In fact these treaties:

- either contain no reservation clause,
- or contain an inoperative reservation clause (Convention on racial discrimination),
- or merely refer in some way to the Vienna Convention.

However, the Vienna Convention does not provide answers to all questions. Most significantly, it is based on the multilateral reactions of States, whereas the criterion of compatibility can only be operative if stipulated *erga omnes*.

Hence, I believe, the idea of eliciting at least a co-ordinated reaction from a significant number of States. This reaction should be founded on the "Strasbourg approach".

Before seeing what the manner and matter of this reaction might be, I consider it indispensable to clarify the situation as far possible and dispel misunderstandings, in fact to define the precise terms of the problem and the legal/political environment in which this proposal will be placed.

My presentation will attempt to answer a series of questions:

- What are the real features of the current situation?
- What is the true place of the Vienna Convention?
- What is the "Strasbourg approach"? Can it be transposed into a universal context? Are adjuncts to it possible/expedient?

1. The situation

Many writers consider that at the time when the rules on reservations were formulated, the question of reservations to human rights treaties could not be conceived in present-day terms because today's impressive network of treaties did not yet exist. The International Law Commission itself seems to corroborate this argument in its "preliminary conclusions":

> para. 4: "the establishment of monitoring bodies by numerous human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties".

Likewise, the thematic summary of the Sixth Committee's discussions mentions:

> "[monitoring] bodies, whose development was relatively recent and subsequent to the Vienna Convention" [A/CN.4/483, para. 71].

This can be granted for the opinion of the International Court of Justice (1951), though the Court's probable awareness of the problem is apparent from the celebrated passage stressing that in a treaty like the Genocide Convention there are no individual advantages or disadvantages to States, nor is there a perfect contracting balance between rights and duties.

* The text reproduced was compiled from the speaker's notes.

True, no monitoring body is specified in the Genocide Convention. However, before the adoption of the Vienna Convention (May 1969), several treaties prescribed such bodies (not to mention the European Convention on Human Rights): racial discrimination (1965), Covenants (1966), and the American Convention which was nearing completion (November 1969).

Subsequently, there were only the Conventions on Discrimination against Women (1979), against Torture (1984) and on the Rights of the Child (1989).

Thus it cannot be claimed that the negotiators of the Vienna Convention lacked a basis for approaching the problem.

I believe that they could or would not perceive it because:

- most internationalists have always found human rights treaties rather exotic and hard to credit with any specificity whatsoever;

- they feared all the consequences which would ensue if the peculiarities of these human rights treaties were taken into consideration;

- the overriding concern was to achieve the broadest possible participation of States.

This frame of mind was replicated in the fora where the treaties in question were drafted; there was a fully conscious refusal to adopt specific arrangements for reservations:

- Racial discrimination: majority system;

- Covenant: nil; the International Law Commission's draft was relied on (after contemplating several solutions, in particular the majority system or a clause resembling Article 64 of the European Convention on Human Rights);

- Women and children: compatibility.

When the Convention on Discrimination against Women was being negotiated, all the questions with which we are concerned were addressed, debated - and shelved. Only one was not mentioned: the competence of monitoring bodies, nevertheless excluded because the question did not arise. This was already the case in 1950 with the European Convention on Human Rights (there was a desire to dispense with unanimous consent; the best system appeared to be the majority rule). The reservation clause of the American Convention should also be seen in this light, as should the first pronouncements of the CERD and the Human Rights Committee. The special nature of the subject-matter covered by the human rights conventions was certainly realised, but nobody contemplated the intervention of monitoring bodies in assessing the validity of reservations.

It is quite plain that this intervention revolutionises the Vienna framework and the prevailing attitude subsequent to the opinion of the International Court of Justice and the 1962 proceedings of the International Law Commission. There is readiness to consider the implications of objections to reservations in human rights treaties, especially as they affect entry into force. Yet nobody then imagined a procedure which, several years after ratification and the expiry of the period of tacit consent, could have the effect of placing the Contracting Party status of a reserving State at the mercy of individual petitions or scrutiny of reports (let us remember that under the unanimity rule, acceptance of a reservation at a given time was final even if new ratifications supervened).

In fact the one thing not really noticed, and only gradually realised by the States (to their detriment, moreover) was the internal dynamics of human rights treaties and their true effect within domestic legal systems. I repeat, these treaties were long considered no different from others; they were not meant to cause any significant upheaval (in 1950 for the European Convention on Human Rights, mainly State applications were envisaged, and we almost ended up with simple referral to the International Court of Justice).

The dynamics and domestic effect of these treaties were to change everything and bring about the present-day situation, which therefore originates not from blindness to the specifics of the problem of reservations in the context of human rights treaties, but rather all the inherent complexities of these treaties.

Result:

- certain monitoring bodies gradually asserted their competence;

- proliferation of reservations, and important ones at that.

Initially, the two tendencies were separate; the Temeltasch report dates from 1982 and the Court's case-law follows its own logic, unaffected by the problems of universal treaties. But the tendencies eventually converged: the United Nations Committees came to rely on the case-law of the European Convention on Human Rights to establish their competence to deal with the many grave reservations.

With that, the specificity of human rights treaties was discovered.

It was realised that these treaties concerned fundamental aspects not only of legal systems but also of cultural, religious and social traditions. The impact is greater still in the case of certain "comprehensive" treaties embracing several fields, viz. the Covenants and the Conventions on Discrimination against Women and the Rights of the Child (no wonder there are so many reservations). It would have been a different matter had there been several protocols - as with the European Convention on Human Rights (in this connection, it should be remembered that so far not all the additional protocols are accepted by all States Parties to the Convention. Consider also the difficulties encountered by proceedings in the Council of Europe on the principle of equality, which concerns women especially).

A special quality is clearly sensed in the incompatibility of reservations with fundamental human rights. At the same time, however, precisely because human rights are involved, objections cannot have the same effects as in other treaties. One naturally hesitates to exclude the reserving State because it is not the "victim"; hence the approach, which the Vienna Convention did not really prescribe, of objections to reservations deemed incompatible but with the treaty's entry into force maintained.

Generally speaking, objections "suffer" by the absence of reciprocity, which does not imply that they are of no use, far from it. Here again, because human rights are involved, objections make it possible to uphold the value of principles and to oppose certain interpretations. But it is true that they do not have the same effect as in other treaties, because the States have no direct interest: compliance with a human rights treaty is more a question of faith than of direct interest. A reserving State need have no qualms about objections, for they do not alter its status and undertakings in any way - at least according to the Vienna Convention's individualistic approach.

2. The real place of the Vienna Convention

Quite enough has been said about the Vienna Convention's unsuitability for reservations to human rights treaties and its many omissions, in particular the absence of any reference to the legal consequences of unacceptable reservations.

Admittedly the Vienna Convention does not provide answers to all questions, but is it correct to talk about omissions and unsuitability?

One point should be strongly emphasised: the rules of the Vienna Convention - above all for reservations - are of a subsidiary character. A real leitmotiv runs through the provisions of the Convention: "unless the treaty otherwise provides". It rests with the States - when they draw up a treaty - to prescribe rules suiting this specific case (see the appeals in favour of reservation clauses issued by the International Court of Justice in 1950 (flexible system) and the International Law Commission in 1951 (still the unanimity system).

The Vienna Convention is a general instrument with universal scope (States concerned and all types of treaties). It is hard to expect it to be more precise than any one clause of a given treaty. On this subject, the following passage from the International Law Commission's 1951 report may be cited:

> "… multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory." (UN General Assembly document A/1858).

One sometimes feels that there are two international communities:

- the one that drew up the Vienna Convention (an unfinished task);
- the one that draws up treaties - referring to the Vienna Convention.

Nor should it be forgotten that the Vienna Convention - after the International Court of Justice - made a choice. After the relinquishment of the autonomy rule and in the absence of a competent authority at the universal level, able to take decisions with *erga omnes* effect (for instance on the validity of reservations), it was hard to see any other acceptable system than that of individual reactions (Sir Humphrey Waldock pointed out that compatibility was an objective criterion subjectively applicated). The sole possibility was to consider the forms and effect of these reactions.

In fact, compensating for the shortcomings of the Vienna Convention usually amounts to making up for the lack of indications in the treaties concerned.

I know full well that the adoption of reservation clauses is a most complicated business and that in practice the rules of the Vienna Convention have become the ordinary law (an impression clearly conveyed, moreover, by the International Law Commission in its preliminary conclusions; the sole reference to reservation clauses is made in connection the new question of the competence of monitoring bodies in paragraph 7). But this point is important as it affords a true indication of the readiness of States to regulate the issue of reservations and objections.

Henceforth reservation clauses can concern only future treaties, unless amending protocols are envisaged. Meanwhile, other steps can be taken at least to direct the phenomenon and keep a minimum of order.

3. The "Strasbourg approach"

This expression is interesting and innovative; indeed, hitherto the stance of the Council of Europe member countries on the question of reservations was not notably progressive. (Just consider the Legal Affairs Directorate's document on Recommendation 1223 (1993) [CAHDI (96) 10], with reference to the review and withdrawal of reservations, the role of the committees instituted by conventions and the Secretary General's prerogatives as depositary. In each of these respects, the presentation is altogether consistent with the UN approach. Where the Secretary General is concerned, it may even be slightly more restrictive (in the case of the European Convention on Human Rights, for example, the powers vested in the Secretary General under Article 57 seem to have been overlooked).)

Against this backdrop, no bar to progress but not to be forgotten, what is the Strasbourg approach? Apparently a combination of factors:

- the Commission and Court have affirmed their competence to determine the validity of reservations;

- they have declared certain reservations invalid;

- these reservations have been considered void and dissociated from the consent of the State to be bound by the Convention ("severability").

These elements are closely interlinked. Severability was possible because of the earlier nullification of the reservation by a body able to make *erga omnes* determinations.

Obviously this pattern cannot be universalised in its entirety:

- there is no equivalent to the Commission or Court at the universal level; hence the need for caution in using the expression "Strasbourg approach", widely held to signify the Court and its case-law. There is no reason to take account of a Court which has no existence at that level, and so the Strasbourg "approach" becomes the Strasbourg "exception";

- it must be realised that Article 64 is the sole basis for the Court's case-law. Embodying a minimum of objective criteria, it enabled the Court to adopt an essentially formalistic approach which exempted it from ruling on the merits and judging the validity of reservations. Thus the Court has never needed to apply the criterion of "compatibility" (except for Turkey's reservations, and even so …).

The "exportable" content is thus the idea of a reservation being severable, and objections can be used to make up for the absence of an authority equivalent to the Court - which is what your committee seeks to do.

Various problems should be mentioned:

- the very difficulties of the undertaking. The severability of a reservation is not self-evident. Its effect is to impose on a State one or more provisions which, precisely, it did not wish to accept. This is even more striking in the case of the European Convention on Human Rights, where all reservations (except those of Turkey) have been judged invalid on the ground of non-compliance with paragraph 2 of Article 64 (brief statement of the law concerned). Nothing is known of the actual substance of the reservation, which may well be fully consistent with the Convention.

Severability has been propounded in a very special "environment" (biology, so to speak), the cocoon formed by the European Convention on Human Rights in which the Court enjoys unopposable authority in every sense of the word.

Besides this, there are two "peripheral" factors:

- with regard to "severability": it is most embarrassing that the criticism of the Human Rights Committee's General Comment comes from western States, two of them Council of Europe members. Moreover, all exclude severability - without the least allusion to Strasbourg case-law. Still more strikingly, these very States have favoured severability elsewhere, whether in some of their objections or in settlements of disputes (Mer d'Iroise continental shelf). Hence the paradox that the Human Rights Committee is guided by Strasbourg case-law and called to order by States Parties to the European Convention on Human Rights. These States could at least have indicated that severability is conceivable in a regional framework under certain conditions but can present problems at the universal level, and that the question of the committee's competence arises. They could also have avoided unduly categorical assertions like the one deeming it incompatible with treaty law that, since a given reservation was severable, the Covenant in question would be applicable to the reserving State without the benefit of the reservation. At all events, it is perhaps regrettable that no co-ordinated reaction was forthcoming from the CAHDI members in this case.

It must indeed be borne in mind that hitherto these reactions have been the only form of message from Council of Europe countries.

Furthermore, these reactions point to the absence of a specific Council of Europe practice. To be more precise, on one side there is the Court and its case-law, and on the other the member countries whose reactions - except in a few cases - are indistinguishable from those of the other States. This is a further reason for caution in using the expression "Strasbourg approach".

- with regard to the force of objections: the Court's case-law has unduly depreciated the reactions of the Contracting Parties (making the importance which it attaches to the "brief statement of the law" extremely dubious).

The Contracting Parties could really have made some sign to the Committee of Ministers during the Temeltasch case, but the chance was missed. Likewise, when Turkey attached "conditions" to Articles 25 and 46, several governments reacted (but without objection, except Greece) by stating that they reserved the right to revert to the matter "before the competent bodies". One might have expected interventions before the Court (at least memorials) and/or the Committee of Ministers (when it considered the Commission's report in the Chrysostomos case).

Finally the States accepted as self-evident the competence of the Convention organs and their case-law. On that score, it is all the more remarkable that while initially (Temeltasch; Belilos) the Commission and Court took the trouble to stress that the government did intend to remain bound by the Convention even without the reservation, subsequently this was no longer specified. The Commission no longer even states that the reservation is invalid, merely that it "does not prevent the Commission from examining this aspect of the case".

To account for this attitude on the governments' part, perhaps they dare not oppose the Convention bodies, but also it may suit them not to have to state a position on these questions. Now, the Strasbourg system (deferring to the Court) does not have undiluted advantages, for as long as there are no applications raising issues of reservations, nothing is known for sure. Thus there may be a long period of uncertainty. I once proposed laying down a procedure for referral to the Court immediately reservations were formulated. Regrettably, there was no

review of Protocol No. 2 when Protocol No. 11 was drafted. At all events, the Court's possible intervention should not excuse the Contracting Parties from reacting.

Once again, these various factors should not deter us from pressing ahead. On the contrary, mindfulness of them should help us gain a clearer perception of the forms and conditions under which the Council of Europe members could propose a new, universally applicable approach to the question of reservations.

This procedure could be applied in two directions:

* Within the Council of Europe:

The Council of Europe message can only be heeded if based on a practice, if the member states show that they apply to themselves what they advocate for the rest. This positive element would counterbalance the "condemnatory" and "critical" quality of reactions to reservations:

Withdrawal of reservations. This would be consistent with the rationale of the European Convention on Human Rights. It is inadmissible that certain States should permanently exclude certain rights forming part of what is considered a minimum standard.

Examination of reservations. The member states have agreed that the steering committees should carry out this examination, but to date it has not been very effective; the committees are usually content to take note of the information given by the reserving States. On the other hand, the Committee of Ministers was against a more formal procedure with reasoned reports (reply to Recommendation 1223). But in fact this could project a good example outside the Council, there already being a procedure under the European Social Charter for provisions which have not been accepted (Article 22).

Acceptance of optional clauses. The question will only arise after Protocol No. 11 takes effect, but two States' die-hard rejection of these clauses for Protocol No. 7 is significant.

Ratification of the additional Protocols (for example, failure to ratify Protocol No. 6 is contrary to the entire current policy of the Council of Europe).

I consider that these various actions would lend weight and credibility to a definite stance adopted by the Council of Europe members at the universal level (cf conclusions of the Council of Europe Colloquy on the 50th anniversary of the Universal Declaration of Human Rights (2-4 September 1998) and the draft Declaration of the Committee of Ministers for 10 December 1998).

* Outside the Council of Europe:

- This aspect is based on the idea of endeavouring to co-ordinate the reactions of Council of Europe member states and arrive at common objections of some sort. As already mentioned in the Group and the CAHDI, it will not be easy; objections have to do with political considerations, not plain technical points.

None the less, it is worth trying. As Ambassador Cede wrote, a co-ordinated line of action by a large group of countries cherishing the same ideals while representing different cultures and legal traditions may genuinely assist in developing a more coherent State practice.

Models have been prepared and well received, but I think that here again the approach will be all the more readily accepted if it does not create the impression that the West wants to

give the rest of the world lessons. That is to say, the possibility of objections to reservations by Council of Europe member states or other Western states will also have to be envisaged.

- This effort to arrive at co-ordinated objections should be concomitant with the strengthening of the convention committees. Of course their powers are (de)limited, but even under these conditions it is felt that the western States do not really support them and that for several years the committee chairmen have been preaching in the wilderness. Strengthening the authority of these committees is all the more necessary because - as well as assessing the validity of reservations - they have the capability to limit the impact and scope of reservations.

The two approaches are not contradictory but can be complementary. It must be possible to achieve co-operation, rather than have each entity (states or committees) seek exclusive competence.

- I also take the view that the member states could infuse universal practice with certain elements of the Court's case-law. One in particular, regarding the concept of reservations of a general nature, is the requirement of exactitude (content of reservations; provision referred to). It ought not to be forgotten that under the terms of the Vienna Convention, a reservation should purport to exclude or vary the legal effect of "some provisions" of the treaty.

- Lastly, I should like to raise a point also mentioned by Ambassador Cedes which I consider essential: the idea of dialogue with the reserving State.

In addition to the measures suggested above, there should be provision for some kind of mentoring to make the reserving State appreciate the spirit of the procedure. The fundamentals of its political or religious system are not to be called into question, but on the other hand a situation where the ratification of a treaty does not express a genuine undertaking cannot be countenanced.

The "preliminary objections" in the model serve this purpose, but should be completed by more direct dialogue either on an ad hoc basis or at meetings of Contracting Parties.

Reservations made by Islamic States, for example, are so emotionally charged that they cannot be treated as technical points. They have strong political implications, and this is where the Council of Europe member countries can contribute enormously to the consolidation of international treaties.

<u>Conclusions</u>

The discussions of the CAHDI and the Group have plainly achieved a maturation, a growth of awareness and a resolve to act. Although this is not very definite as yet, there are sufficient elements to make a start in two main areas:

- On the practical side:

  - information (observatory),
  - consultation,
  - co-ordinated objections,
  - political mentoring measures.

- On the legal side:

  To give the approach visibility (and offset the reactions to the Human Rights Committee's General Comment): prepare an official Council of Europe policy statement (resolution or declaration of the Committee of Ministers - cf. resolution of the OAS General Assembly in 1973) reflecting the essential points of the approach:

  - reservations only if indispensable,
  - no general reservations (criteria to be specified),
  - preferably provisional,
  - regular review,
  - in the event of objections, severability.

Yesterday's discussions prompt me to stress the need to take account of the political upheavals which have occurred in the space of a few years.

The international community today differs as greatly from the one in which the Vienna Convention was adopted (especially as the text is very like the International Law Commission's 1962 draft) as the latter differed from the community which existed prior to the opinion of the International Court of Justice.

Admittedly, legal certainty makes it necessary to rely on agreed rules so as not to offer pretexts for throwing everything into the balance. However, it is possible to take certain progressive and pragmatic measures. The CAHDI could play a significant part, further to its action in respect of reservations, by trying to help anticipate the problems: reservation clauses, depositary's role, distinction between reservations and interpretative declarations.

The Council of Europe would become a laboratory not only of ideas but also of practices.

Finally, it must be realised that the issues which we have addressed and which justifiably exercise the CAHDI members are not wholly negative.

These concerns and their object - reservations to human rights treaties - are in fact signs of an encouraging trend:

- governments appear increasingly scrupulous about effective application of human rights treaties, and not only for political reasons. At international level, greater sensitivity to human rights really exists;

- governments appear to realise that it is more difficult not to join these treaties and - after accession - to disguise non-compliance. That is why they formulate reservations - cf the reports submitted by communist States before 1989 to the Human Rights Committee, which obviated reservations.

Thus, awareness is dawning that nowadays there is no evading the obligation to take these commitments seriously, or to frankly admit that they are impossible to honour.

Of course, this is by no means entirely satisfactory, but the tendency exists and your approach to must be geared to it. Perseverance should guarantee that results are achieved.