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REPORT
"INTERNATIONAL HUMAN RIGHTS TREATIES: A SPECIAL CATEGORY OF INTERNATIONAL TREATY?"

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Answering the question raised by the title of this presentation needs as a first step to define the term treaty. The 1969 Vienna Convention on the Law of Treaties (VCLT), which codified the rules governing this essential domain of international law proposes a solution by stating that for purposes of the VCLT 'treaty' means an agreement between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever their particular designation.

Such formulation excludes all other forms of rules which may or are intended to govern interstate relations, such as customary international law or the general principles of law listed by Article 38 of the Statute of the International Court of Justice , although it does not affect their validity. It seems still useful, however, to have a look at the historical evolution of international law in order to understand the present situation with regard to human rights treaties.

After the collapse of the efforts to institute a universal monarchy in Europe and the religious conflicts which followed, peoples and their princes had to find new general foundations for making coexistence possible among the different political entities which evolved into the modern States. Such foundations were found in the precepts of natural law, originally viewed as divinely based and subsequently seen as flowing from human reason and from the needs of the society.[1] Later legal philosophy developed principles of natural law,[2] but the emergence of modern States claiming to be sovereign led many to consider that international law had to be based exclusively on their will, without necessarily recognizing common values based on principles such as those of natural law. Such legal positivism still had to accept the existence of limits and during the 19th century several common principles were recognized by multilateral treaties concerning humanitarian law in order to reduce the sufferings resulting from war, a step which imposed obligations on all belligerent states without being based on reciprocity. Other treaties adopted during the same period prohibited slave trade and tried to protect women. A great step forward was made after World War I with the adoption of the Constitution of the International Labor Organization on June 19, 1919, recognizing a new solidarity between States for the benefit of workers of all nations, solidarity which was later expressed by the adoption of approximately 200 international labor treaties.

This very short look at the history of international law allows acknowledging the progressive emergence of a growing solidarity among nations composing the society of sovereign states, often called today the international community. Without necessarily restoring ideas of natural law, it shows the emergence and growing recognition of common concerns among States which, as a consequence, have to limit their freedom of action despite their pretension to total independence and exclusive sovereignty. An important step forward was made in this direction after World War II with the adoption of the UN Charter and the Universal Declaration of Human Rights proclaiming common values of humankind such as peace and fundamental rights and freedoms of all human persons flowing from their inherent dignity. Further progress led to the definition of the content of such rights and freedoms for all and for certain categories such as women, children and to the prohibition of certain acts such as
torture or racial discriminations as well as to the establishment of structures and procedures which aim at ensuring the implementation of the duties thus accepted by States.

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[1] *H. Grotius, De Jure Belli ac Pacis, 1625.*

[2] *S. Pufendorf, Du droit de la nature et des gens, 1672 ; E. de Vattel, Du droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains, 1758.*

Do such agreements constitute a special category of international treaties? The historical development allows understanding the re-emergence of common foundations for international life, which is not anymore constituted by the reference to natural law, but by necessity, recognizing the existence of common concerns of humankind. The protection of human rights is an essential part of such common concern, once their character of common value is recognized. Each individual is concerned by the respect of her or of his personality and freedom. Such trend was reinforced by the creation of international institutions which can enforce respect for human rights conventions, including, for the most serious violations of human rights, international criminal jurisdictions.

The understanding that humankind has common values is gave rise to a change in the very nature of a growing number of international treaties. Until the second half of the nineteenth century, most treaties were bilateral and contained equal and reciprocal benefits and burdens for each of the two parties. The new type of treaties proclaiming common values of humankind – peace, human rights, environment - and aiming at their protection do not grant reciprocal benefits to the parties, in the same way that trade or extradition treaties do, but instead impose obligations often referred to as "unilateral" because the primary beneficiaries of the obligations are either the world community (including the global commons) or persons or groups within the States parties themselves. Also, as early as in the 1930s such unilateral character led authors to speak of "traités contracts" for agreements based on reciprocity and "traités lois" obligatory for each contracting state in the interest of the world community, without any immediate advantage for it. Also, the term "international legislation" has been used by a variety of ways by writers who employed it both in the sense to cover the process and the product of the conscious effort to make additions to, or changes in the law of nations and to describe the conclusion of lawmaking treaties on matters of general interest.[3]

Such considerations have been reinforced by the Advisory Opinion of the International Court of Justice on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide [4]:

> *"The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting Stats 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 he convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.*

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[3] *Stefan Talmon, The Security Council as World Legislature, 99 American Journal of International Law, 175 (2005) who mentions as an example the work edited by Manley Hudson in 1931: "International Legislation,:a Collection of Texts of Multipartite International Instruments of General Interest". It can be added that such treaties may also adopt uniform technical standards such as the treaties and regulations adopted in the framework of the International Civil Aviation Organization or the World Trade Organization. Multilateral treaty-making is a major source of legal obligation with the advent of permanent international organizations.*

[4] *28 May 1951, I.C.J. Reports 1951, p.23.*

Given the specificities which the International Court of Justice stresses, in addition to the moral foundations of human rights law and exploring the proper role of government, some scholars and human rights bodies have questioned whether human rights treaties constitute a "special regime" in which the customary rules of treaty law are modified in key respects.

Several issues in particular should be examined in this regard. One has a fundamental character: the definition and justification of the object of human rights treaties. Conventions adopted in the framework of the UN and generally deriving from the Universal Declaration of Human Rights certainly enter this category. [5] International Labour Conventions may raise

[5] *UN Conventions in the Field of Human Rights as of 15 July 2005:*

1. Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277
2. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 21 Mar. 1950, 46 U.N.T.S. 271.
3. Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 .
4. Convention on the Political Rights of Women, 31 Mar. 1953, 193 U.N.T.S. 135 .
5. Convention on the International Right of Correction, 31 Mar. 1953, 435 U.N.T.S 191.
6. Protocol amending Slavery Convention, 7 Dec. 1953, 182 U.N.T.S. 51.
7. Slavery Convention, as amended, 7 Dec. 1953, 112 U.N.T.S. 51.
8. Convention relating to the Status of Stateless Persons, 28 Sept 1954, 360 U.N.T.S. 117.
9. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956, 266 U.N.T.S. 3.
10. Convention on the Nationality of Married Women, 20 Feb. 1957, 309 U.N.T.S. 65.
11. Convention on the Reduction of Statelessness, 30 Aug. 1961, 989 U.N.T.S. 175.
12. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10 Dec. 1962, 521 U.N.T.S. 231.
13. International Convention on the Elimination of All Forms of Racial Discrimination, 7 Mar. 1965, 660 U.N.T.S. 195.
14. International Covenant on Economic, Social, and Cultural Rights, 19 Dec. 1966, 993 U.N.T.S. 151.
15. International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S.171.
16. Optional Protocol to the International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171.
17. Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 U.N.T.S. 267.
18. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 Nov. 1968, 754 U.N.T.S. 73.
19. International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 Nov. 1973, 1015 U.N.T.S. 243.
20. Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13.
21. Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 10 Dec. 1984.
22. International Convention against Apartheid in Sports, 10 Dec. 1985, G.A. Res. 40/64, 40 U.N. GAOR Supp. (No. 51) at 37. U.N. Doc. A/RES/40164 (1985).
23. Convention on the Rights of the Child, 20 Nov. 1989, GA. Res 44/25.
24. Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 15 Dec. 1989.
25. Optional Protocol to CEDAW establishing an Individual Communications Procedure, 6 Oct. 1999, GA Res. 54/4 of 6 Oct. 1999.
26 Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts, 25 May 2000, GA Res. 54/263.
27. Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, GA Res. 54/263.
28. Optional Protocol to the Convention against Torture, 18 Dec. 2002, GA Res. 57/199.

questions, the more so since some of them are older than the Universal Declaration.[6] Regional human rights treaties should not be forgotten: those adopted in the frame of the Council of Europe,[7] texts prepared within the Organization of African Unity [8] and conventions adopted within the Organization of American States.[9] After having examined the terms in which these instruments refer to their ethical and legal foundations, problems of a more technical nature, such as that of reservations to and the denunciation of human rights treaties will be examined.

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[6] A publication of the Council of Europe : Human Rights in International Law, Collected Texts, 2nd edition, includes nine ILO conventions. Seven of these instruments can be considered as particularly relevant for the present study :

1. Forced Labour Convention (No.29), 28 June 1930, p.17.

2. Freedom of Association and the Right to Organize Convention (No. 87), 9 July 1948, p.28.

3. Equal Remuneration Convention (No.100), 29 June 1951, p.39.

4. Discrimination (Employment and Occupation) Convention (No.111), 25 June 1958.

5. Minimum Age Convention (No.138), 26 June 1973, p.50.

6. Indigenous and Tribal Peoples Convention (No.169), 27 June 1989, p.58.

7. Worst Forms of Child Labour Convention (No.182), 17 June 1999.

[7] Among the human rights treaties reprinted in the book quoted in footnote 6 the most relevant for the present study are the following:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 and its Protocols, p.231.

2. European Social Charter and its Protocols, 18 October 1961, p.256. Revision of the Charter on 3 May 1996 , p.291.

3. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 28 January 1981, p.319.

4. Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, p.329.

5. European Charter for Regional or Minority Languages, 5 November 1992, p.347.

6. Framework Convention for the Protection of National Minorities, 1 February 1995, p.362.

7. Convention on the Exercise of Children's Rights, 25 January 1996, p.371.

8. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 4 April 1997, p.380.

[8] African Charter on Human and Peoples' Rights, 27 June 1981, op.cit., p.407; African Charter on the Rights and the Welfare of the Child, July 1990, op.cit., p.429.

[9] American Convention on Human Rights, 22 November 1969, op.cit., p.453 and Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, p.476; Protocol to Abolish the Death Penalty, 8 June 1990, p. 485; Convention to Prevent and Punish Torture, 9 December 1985, p.487.

I. Ethical and Legal Foundations of Human Rights Treaties

Several human rights treaties explicitly proclaim that they are based on ethical foundations. Regional human rights treaties, such as the American Convention directly refer to the "essential rights of man" which are

> *not derived from one's being a national of a certain state, but are based upon attributes of he human personality, and …they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.*[10]

The 1981 African Charter on Human and Peoples' Rights also recognizes that

> *On the one hand… fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights.* [11]

Other instruments refer to peace as being the aim of the protection of human rights.
The Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination can be quoted as an example when it reaffirms that

> *Discrimination between human beings on the grounds of race, color or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State.*[12]

This statement is echoed by the ILO Declaration on Fundamental Principles and Rights at Work adopted in June 1998 reminding that ILO was founded in the conviction that social justice is essential to universal and lasting peace.[13]

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[10] *Op.cit., p.453. This statement is repeated with small changes in the preamble of the 1988 Additional Protocol on Economic, Social and Cultural Rights (op.cit., p.476). It echoes the preamble of the 1948 American Declaration of the Rights and Duties of Man recognizing that "juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness". Op.cit., p.445.*

[11] *Op.cit., p.407.*

[12] *Op.cit., p.90.*

[13] *Op.cit., p.71. The International Labor Organization was founded in 1919 and is the oldest organization concerned with human rights. The ILO focuses on those human rights related to the right to work and to working conditions, including the right to form trade unions, the right to strike, the right to be free from slavery and forced labor, equal employment and training opportunities, the right to safe and healthy working conditions, and the right to social security. The ILO also provides protections for vulnerable groups, having adopted standards on child labor, employment of women, migrant workers, and indigenous and tribal peoples. It seeks to guarantee these rights through the adoption of conventions (now more than 180) and recommendations containing core minimum standards, and additional flexible provisions that enhance the likelihood of ratification by states. The most important ILO conventions include the conventions on Forced Labor (No. 29) of 1930, Freedom of Association and Protection of the Right to Organize (No. 87) of 1948, Equal Remuneration (No. 100) of 1951, Abolition of Forced Labor (No. 105) of 1957, Discrimination (Employment and Occupation) (No. 111) of 1958, Indigenous and Tribal Peoples (No. 169) of 1989, and the Worst Forms of Child Labor (No. 182) of 1999.*

Most human rights treaties refer to a general international instrument creating an international institution which framed their elaboration. This is the case of most human rights treaties drafted on the basis of the UN Charter as well as of those prepared within regional organizations which were established after the UN, like the Council of Europe, the Organization of African Unity and the Organization of American States.

In the preamble to the Charter, the peoples of the United Nations have reaffirmed their "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and their determination "to promote social progress and better standards of life in larger freedom". Article 1 of the Charter lists among the main purposes of the United Nations the achievement of international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Similarly, in accordance with Article 55 of the Charter, the United Nations has the duty to promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". In Article 56, all Members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55".[14]

These provisions define clearly the obligations of all Members and the powers of the Organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all Members must fulfill in good faith. They must cooperate with the United Nations in promoting both universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Any refusal to participate in the United Nations program to promote the observance of human rights constitutes a violation of the Charter.

On 10 December 1948, the Universal Declaration of Human Rights confirmed that the “peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom” and Member States “have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”. The principles proclaimed in the Universal Declaration give the definition of the content of human rights. As a matter of fact, most human rights treaties drafted under the authority of the UN proclaim to be based on the principles embodied in the Charter as developed by the Universal Declaration. Characteristic formulations can be found in the preamble of the 1953 Convention on the Political Rights of Women which expresses the desire

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[14] *The Charter of the United Nations contains also significant grants of power to various organs of the United Nations. Thus, the General Assembly has the duty to initiate studies and make recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," Responsibility for the discharge of the functions set forth in Chapter IX of the Charter (which includes Articles 55 and 56 mentioned above) is vested by Article 60 in the General Assembly and, "under the authority of the General Assembly in the Economic and Social Council." In discharging this responsibility the Economic and Social Council may, according to Article 62, "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all"; under Article 68, it has an obligation to set up a commission "for the promotion of human rights," which is the only functional commission expressly provided for by the Charter itself and, under Article 64, it may make arrangements with the Members of the United Nations to obtain reports on steps taken by them to give effect to the recommendations of the General Assembly and of the Council.*

of the Contracting Parties to implement "the principle of equality of rights for men and women contained in the Charter of the United Nations" in accordance with the Universal Declaration of Human Rights.[15] Another treaty related to the status of women, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women includes the same references. [16]

Other treaties drafted and adopted under the authority of the United Nations also refer to the obligations flowing from the Charter, but add explicitly that "human rights derive from the inherent dignity of the human person" [17]. These statements have a special importance since they are inserted in the preambles of the two Covenants of 1966. They can also be found in the same terms in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[18] while the 1989 Convention on the Rights of the Child omits the general statement on the origin of human rights but makes reference not only to the Charter and the Universal Declaration, but also to the International Covenants on Human Rights.[19]

The African Charter on Human and Peoples' Rights, prepared within the Organization of African Unity also used the twofold approach.[20] Referring to the Charter of that institution it stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples" and reminds the fundamental character of human rights (see above). The African Charter on the Rights and Welfare of the Child adopted nine years later only refers to the two African Charters, that of the Organization of African Unity and that on Human and Peoples Rights.[21]

The approach of the Council of Europe elaborating its system of human rights protection was rather different. While the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, which had a basic importance, refers to the Universal Declaration, it adds that the aim of the Council of Europe is the achievement of greater unity between its members adding that "one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms" which are "the foundation of justice and peace in the world".[22] All the other European conventions build upon the principles proclaimed by the European Convention on Human Rights without mentioning other motivations.[23]

A specificity of two regional systems protecting human rights can be added. The American Convention on Human Rights, adopted in 1969, proclaims that "every person has responsibilities to his family, his community and mankind", thus extending from states to

[15] *See footnote 5 Nr.4.*

[16] *See footnote 5 Nr.20.*

[17] *See footnote 5, Nr. 14 and 15.*

[18] *See footnote 5, Nr. 21.*

[19] *See footnote 5, Nr.23.*

[20] *See footnote 8.*

[21] *See footnote 8.*

[22] *See footnote 7, Nr.1.*

[23] *See footnote 7, Nr 2 to 8.*

individuals the scope of the obligations flowing from the necessity to protect human rights.[24] Formerly the American Declaration of the Rights and Duties of Man, adopted in 1948 had already proclaimed that individuals also had duties in this respect and even listed such duties. [25]

The African Convention also insists in its preamble on the duties which flow from the enjoyment of rights and freedoms on the part of everyone and its articles 27 -29 list such duties. It is followed by the African Charter on the Rights and Welfare of the Child which declares that the promotion and the protection of the rights and welfare of the child also imply the performance of duties on the part of everyone and specially insists on parental responsibility.[26]

Can these treaties having the same objectives, the international protection of human rights, a fundamental interest of humankind, be considered as forming a specific category of international agreements? This would mean strong similarities in their construction and in their practical functioning. How far can they be considered as imposing the same or at least comparable constraints on the states parties? An answer can be sought in exploring two practical aspects of such treaties after having established the common values and the common concern on which they are based. The first question in this context is whether the contracting states who have adopted them are entirely free not to apply all their provisions, which means that they can derogate to some of the obligations imposed upon them by making reservations. The second problem to explore is to find out whether they are free to put an end to their participation in such treaties, which means that they can denounce them. The two points will be examined successively.

II. Reservations to Human Rights Treaties

The above quote from the Advisory Opinion of ICJ related to the Genocide Convention raises the problem of the compatibility or incompatibility of reservations with the object and the purpose of human rights treaties. As the Court points out
It must be clearly assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.[27]

Thus the question must be asked whether reservations to human rights treaties should be allowed at all and if the answer is positive, which are their limits.

According to article 19 of the 1969 Vienna Convention on the Law of Treaties

> *A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*
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> *(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*

[24] *Article 32. See footnote 9.*

[25] *Op.cit., p.450.*

[26] *See footnote 8.*

[27] *I.C.J., Reports 1951, p.26.*

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

According to article 21 of the Vienna Convention a reservation established with regard to another party modifies the relations between this party and the reserving state to the extent of the reservation. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Some human rights treaties of fundamental importance like the two UN Covenants, the African Charter on Human Rights and the 1990 African Charter on the Rights of the Child [28] do not include any provision on reservations. Others like the 1999 Protocol to the UN Convention on Discrimination against Women,[29] the 1981 European Convention on Personal Data,[30] the 1987 European Convention on Torture [31] and the 1996 European Convention on the Exercise of Children's Rights[32] explicitly prohibit reservations. ILO does not allow reservations to its conventions.

Still, numerous human rights treaties admit reservations without submitting them to conditions and this is especially true for the instruments concerning specific issues such as the 1953 UN Convention on the Political Rights of Women.[33] The 1969 American Convention on Human Rights simply states that it should be subject to reservations only in conformity with the Vienna Convention on the Law of Treaties.[34]

Other treaties admit reservations declaring that they should not be incompatible with their object and purpose. The 1979 UN Convention on Discrimination against Women, [35] the1989 UN Convention on the Rights of the Child, [36] the 1988 Protocol to the American Convention on Economic, Social and Cultural Rights[37] can be mentioned as examples. The 1985 Inter-American Convention on Torture adds that reservations must concern one or more specific provisions which imply that they should not have a general scope.[38]

While admitting reservations which are not incompatible with the object and the purpose of the Convention, several instruments add other conditions: not to inhibit the operation of any of the bodies established by the treaty. The 1965 UN Convention of Racial Discrimination, art. 20(2)

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[28] *See footnote 8.*

[29] *Article 17.*

[30] *Article 25.*

[31] *Article 21.*

[32] *Article 24.*

[33] *Article VII.*

[34] *Article 75.*

[35] *Article 28 (2).*

[36] *Article 51(1).*

[37] *Article 20.*

[38] *Article 21.*

can be mentioned as an example. On the contrary, article 28 of the 1984 UN Convention against Torture admits that each state may, at the time of its signature, ratification of the Convention or accession thereto declare that it does not recognize the competence of the Committee provided for by the Convention.

The 1950 European Convention on Human Rights provides that any state may, when signing the Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall, however, not be permitted. Any reservation made under this article shall contain a brief statement of the law concerned.[39] A comparable provision can be found in the 1997 European Bioethics Convention.[40] The 1992 European Charter for Minority Languages admits reservations only to specific provisions designated by its article 21. Such provisions concern the promotion of minority languages.

It may be added that several human rights treaties include provisions which allow the contracting states to limit the territorial application of the concerned instrument by authorizing parties not to apply treaty provisions to certain parts of their territory. According to article 56 of the European Convention on Human Rights, any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the Convention shall extend to all or any of the territories for whose international relations it is responsible. Article 20 of the European Convention on Torture is comparable but it adds that at any later date the application of the Convention can be extended to any territory formerly excluded. The American and African regional human rights treaties are silent on this subject. On the contrary, such possibility is explicitly excluded by article 50 of the UN Covenant on Civil and Political Rights and article 28 of the UN Covenant on Economic, Social and Cultural Rights which declare that the provisions of the Covenants shall extend to all parts of federal States without any limitations or exceptions.

In the presence of such variety of situations is it still possible to speak of "human rights treaties" as constituting a specific category of international instruments? In General Comment No 24, the UN Committee on Civil and Political Rights[41] examined issues relating to reservations made upon ratification or accession to the UN Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.[42] It has deemed it useful to address the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted.

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[39] *Article 57.*

[40] *Article 36.*

[41] *Articles 28 to 45 of the Covenant on Civil and Political Rights established a Human Rights Committee to which the states parties undertake to submit reports on the measures they have adopted which give effect to the rights recognized under the Covenant and the progress made in the enjoyment of those rights. According to article 40(4), in the context of the state reporting procedure the Committee can adopt general comments addressed to the State Parties in general, designed to provide guidance to them in discharging their reporting obligations under the Covenant. The General Comment has evolved into a type of quasi-judicial instrument in which the Committee spells out its interpretation of different provisions of the Covenant. Over time, General Comments have become authoritative guideposts for the interpretation and application of the Covenant.*

[42] *4 Nov. 1994.*

It addresses the role of States parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations and it makes certain recommendations to States parties for a reviewing of reservations.

The General Comment states that the possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant none the less to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance.http://193.194.138.190/tbs/doc.nsf/8e9c603f486cdf83802566f8003870e7/69c55b086f72957ec12563ed004ecf7a?OpenDocument - 2%2F%20Although Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. A State may not reserve the right to deny fundamental rights by engaging in acts such as slavery, torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of persons of their lives, arbitrary arrest and detaining of persons, or denial of freedom of thought, conscience and religion, or permitting the advocacy of national, racial or religious hatred. While reservations to particular clauses may be acceptable, a general reservation to the right to a fair trial would not be. A State may not reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2 (2)).

The Committee has further examined the question whether reservations can be made to all the clauses of the Covenant. It made a distinction between rights which can be suspended by a state party in time of public emergency threatening the life of the nation and reservations to the non-derogable provisions of the Covenant.[43] Some provisions are non-derogable because of their status as peremptory norms: without them there would be no rule of law - the prohibition of torture and arbitrary deprivation of life are examples. Neither could a State make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. A reservation that rejects the competence of the Human Rights Committee established by articles 28 to 45 of the Covenant in order to monitor the implementation of the Covenant would also be contrary to the object and purpose of that treaty.

The Committee believes that the provisions of the Vienna Convention the Law of Treaties on the role of State objections in relation to reservations made by other states are inappropriate to address the problem of reservations to human rights treaties. It thus claims that human rights treaties are different. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The 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. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have to a reservation made by States between States

[43] *No derogation from Articles 6,7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made udeer Article 4 of the Covenant.*

inter se. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. The Committee repeats the reference to “the special character of a human rights treaty”, in asserting that the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.
Another document throws a light on the claimed specific character of the human rights treaties. In an Annual Report the International Law Commission [44] examined the problem of “The law and practice relating to reservations to treaties". Chapter II of the report dealt, on the one hand, with the question of the unity or diversity of the legal regime of reservations to treaties and, on the other, with the specific question of reservations to human rights treaties. In this regard, the Special Rapporteur sought to determine whether the rules applicable in respect of reservations to treaties (whether codified by the 1969 or 1986 Conventions or customary in character) were applicable to all treaties, regardless of their object, and particularly to human rights treaties.

The question concerns in the first place the unity or diversity of the legal regime(s) applicable to reservations and could be posed in these terms: do some treaties (for example, "normative" treaties: "codification" or human rights conventions or conventions establishing rules of conduct for all States in legal, technical, social, humanitarian and other fields) escape or should they escape the application of the Vienna regime because of their object? If so, to what particular regime(s) were those treaties subject or should they be subject in regard to reservations, setting aside other categories of treaty (limited treaties, constituent instruments of international organizations, bilateral treaties, etc.). While the term human rights treaties often encompassed several classes of treaties of a very differing nature and did not constitute a homogeneous category, such treaties did have certain essential features conferred on them by their "normative" character, designed above all to institute common international regulation on the basis of shared values. It is still important not to take too simplistic a view: such treaties may contain typically contractual clauses. According to the Rapport the "Vienna regime" is suited to the particular features of normative treaties: problems related to the "integrity" of normative treaties, problems with regard to the "non-reciprocity" of undertakings and problems of equality between the parties were not likely to prevent the "Vienna regime" from being applicable.

The Special Rapporteur also considered the implementation of the general reservations regime and, in particular, the application of the Vienna regime to human rights treaties. In practice, the basic criterion of the object and purpose of the treaty was applied to reservations to such treaties (including those cases where there were no reservations clauses). This basic principle was embodied in the texts of several human rights treaties and the practice of States: the particular nature of normative treaties therefore had no effect on the reservations regime.

Referring to machinery for monitoring the implementation of the reservations regime, the Special Rapporteur noted that additional forms of control carried out directly by human rights treaty monitoring bodies had developed since the Vienna Conventions. There were thus two parallel types of monitoring of the permissibility of reservations in this regard: traditional mechanisms (monitoring by the contracting States and, as appropriate, by the courts in the dispute settlement context) and the human rights treaty monitoring bodies. The role of the latter in respect of reservations had acquired genuine significance in the past 15 years both at the regional level (practice of the Commissions of the European and Inter-American Courts of Human Rights) and at the international level (the Committee on the Elimination of Discrimination against Women and, in particular, the Human Rights Committee).

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[44] *A/51/10 (1996), Ch. VI(B), paras. 102-138.*

A combination of the various means of verifying the permissibility of reservations exists with regard to human rights treaties (traditional monitoring by the contracting States in parallel with the control exercised by a monitoring body, when that body had been established by the treaty, in addition to other bodies, such as international jurisdictional or arbitral bodies, in the dispute settlement context, and even national courts).

By way of conclusion, the Special Rapporteur noted that reservations to treaties did not require a normative diversification; the existing regime was characterized by its flexibility and its adaptability and it achieved satisfactorily the necessary balance between the conflicting requirements of the integrity and the universality of the treaty. That objective of equilibrium was universal. Whatever its object, a treaty remained a treaty and expressed the will of the States (or international organizations) that were parties to it. The purpose of the reservations regime was to enable those wishes to be expressed in a balanced manner and it succeeded in doing so in a generally satisfactory way. No determining factor seems to require the adoption of a special reservations regime for normative treaties or even for human rights treaties. The special nature of these instruments had been fully taken into account by the Judges in 1951 and the "codifiers" of later years and had not seemed to them to justify an overall derogating regime.

III. Can Human Rights Treaties be Denounced?

According to customary international law as expressed by article 54 of the Vienna Convention on the Law of Treaties the withdrawal of a party may take place in conformity with the provisions of the treaty. As a rule, treaties include specific rules which determine the ways in which a contracting state can end its participation.

The importance of the international protection of human rights may raise the question whether treaties guaranteeing such rights can be denounced by each contracting party. As a matter of fact, most such treaties include clauses of denunciation. According to article VIII of the 1953 Convention on Political Rights of Women, any state may denounce the convention by written notification to the Secretary General of the UN and the denunciation takes effect one year after the date of receipt of the notification.[45] Similar or comparable provisions can be found in other human rights treaties drafted under the authority of the UN: article 19 of the 1965 Convention on Racial Discrimination,[46] article 31 of the 1984 Convention against Torture, [47] article 52 of the 1989 Convention on the Right of the Child.[48] Regional human rights treaties include comparable provisions: article 26 of the 1981 European Convention on Personal Data,[49] article 22 of the 1987 European Convention on Torture, [50] article 22 of the 1992 European Charter for Minority Languages,[51] article 31 of the 1995 European Framework Convention on National Minorities,[52] article 31 of the 1997 European Convention on Nationality, [53] and also article 23

[45] *See footnote 5, Nr. 4.*

[46] *See footnote 5, Nr.13.*

[47] *See footnote 5, Nr.21.*

[48] *See footnote 5, Nr.23.*

[49] *See footnote 7, Nr.3.*

[50] *See footnote 7, Nr.4.*

[51] *See footnote 7, Nr.5.*

of the 1995 Inter-American Convention on Torture.[54] Some treaties allow total or partial denunciation, the latter affecting only certain of their provisions following the example of Article 25 of the 1996 European Convention on the Exercise of Children's Rights.[55] Article 37 of the 1961 European Social Charter prescribes that in the case of a partial denunciation the concerned state should remain bound by a certain amount of obligations flowing from the Charter.[56]

The European Convention on Human Rights includes specific provisions in this regard. First, it allows its denunciation only after the expiry of five years from the date when a state became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe. Second, such a denunciation shall not have the effect of releasing the state concerned from its obligations under the Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective. [57] A comparable provision is contained in article 78 of the 1969 American Convention on Human Rights. [58]

Contrary to certain U.N. human rights treaties permitting states parties to withdraw from them after a period of time following notification, the UN Covenants contain no denunciation clauses. Their example was followed by the African Charter on Human Rights, by the 1990 African Charter on the Rights of the Child [59] and by the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[60] Such situations fall within the scope of Article 56 of the Vienna Convention on the Law of Treaties, according to which *A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:*

> *(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or*
> *(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.*

On 12 August 1997, the UN Committee on Human Rights adopted a General Comment on the matter stating that the International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal.[61] Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna

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[52] *See footnote 7, Nr. 6.*

[53] *6 November 1997, European Treaty Series and al, No.166.*

[54] *See footnote 9.*

[55] *See footnote 7, Nr. 7.*

[56] *See footnote 7, Nr.2.*

[57] *Article 58. See footnote 7, Nr. 1.*

[58] *See footnote 9.*

[59] *See footnote 8.*

[60] *See footnote 9.*

Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty. The Committee affirmed that the parties to the Covenant did not intend toadmit the possibility of denunciation and it was not a mere oversight on their part to omit reference to denunciation, as demonstrated by the fact that article 41(2) of the Covenant permits a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the "International Bill of Human Rights". As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.

The General Comment concludes that the rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the state party, including dismemberment in more than one state or state succession or any subsequent action of the state party designed to divest them of the rights guaranteed by the Covenant. The Committee thus concluded that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

CONCLUSION

The last statement of the General Comment is of fundamental importance. By admitting reservations or denunciation human rights treaties may look like any other multilateral treaty. It cannot be forgotten, however, that outside the fact that they are not based on reciprocity, they concern not only the contracting states but also create for them precise obligations towards individuals, giving them a special status which enables them to complain in international fora of the treatment to which they were submitted. The existence of such procedures and institutions intended to ensure the enforcement of human rights treaties stresses their specific character. Without going as far as recognizing new subjects of international law they create a new category in this field: internationally protected individuals and groups. The question which the present study had to examine should be given an affirmative answer: expressing an important aspect of the common interest of humankind human rights treaties constitute a specific category of international treaties and must be handled with as such being given the interpretation the most favorable to individuals in the framework of the VCLT.