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Do reservations to human rights treaties merit special consideration and a departure from the provisions of the Vienna convention on the law of treaties?

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Abstract: This article will analyse whether or not Human Rights treaties merit a departure from the provisions of the Vienna Convention on the Law of Treaties taking into account the nature of Human Rights treaties, the importance of ensuring a high standard of protection thereof, the international legal framework of treaty reservation norms and General Comment Number 24 of the UN Human Rights Committee. This commentary argues that Human Rights Treaties deserve a special consideration and a departure from the provisions of the Vienna Convention on the Law of Treaties. This essay will uphold the idea that when establishing state intention in making a reservation, the main factor to consider is whether the state would have ratified the treaty without the reservation. Finally, it will be concluded that the UN Human Rights Committee has the power to decide the validity of new reservations to Human Rights Treaties in order to ensure an effective system of Human Rights protection.

Key Words: Human Rights, Human Rights treaties, International Law, reservations, Vienna Convention, UN Human Rights Committee

I. INTRODUCTION

The Vienna Convention on the Law of Treaties (hereinafter«the Vienna Convention») governs the international relations between states when it comes to the establishment of binding obligations under the terms of a written document[1]. The Vienna Convention does not differentiate between treaties based on their particular designation[2] or on their content. Thus, the treaties which deal with Human Rights mayalso be ruled by this Convention. Nonetheless, due to the nature, the importance and the specific characteristics of Human Rights treaties, one can argue that they merit a different treatment[3].

First of all, we will analyse the nature of Human Rights Treaties and the importance of ensuring a high standard of protection thereof. Then, we will discuss the admissibility of a possible departure from the provisions of the Vienna Convention when making reservations to those treaties.

II. THE NATURE OF HUMAN RIGHTS TREATIES: THE IMPORTANCE OF ENSURING A HIGH STANDARD OF PROTECTION

The purpose of securing Human Rights can be understood as more than purely «instrumental reasons for acting»[4]. On the one hand, natural law authors hold that Human Rights are «not simply means to other ends, but ends-in-themselves»[5] and that they emanated from a higher source than the man-made

[1] Vienna Convention on the Law of Treaties (the Vienna Convention) (Vienna, 23 May 1969, 1155 UNTS 331) Art 1 (1) (a)

[2] Ibídem.

[3]MOLONEY, Roslyn «Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent» en *Melbourne Journal of International Law May*. vol 5. 2004; YAMALI, Nurullah «How adequate is the law governing reservations to human rights treaties?» en *General Directorate of International Laws and Foreign Affairs Turkey e-journal:* Ankara, 2008; GOODMAN, Ryan «Human Rights Treaties, Invalid Reservations, and State Consent» en *American Journal of International Law*, vol 96, 2002; BAYLIS, Elena A. «General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties Human Rights Committee» en *Berkeley Journal of International Law.* Vol 17 Issue 2 Art 4, 1999;General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.6) (1994).

[4] GEORGE, Robert P., «Natural Law» en *Harvard Journal of Law & Public Policy*, vol. 31, 2008, p. 178

[5]Ibídem.

law[6]. On the other hand, positive law theorists affirm that Human Rights are just the codification of an international consensus to which states subscribe[7], and therefore they could be subject to modifications based on state consent, regardless their content. If we were to follow this second movement, we would be asserting that the ethics, morality and the binding obligations behind the nature of Human Rights are merely a myth[8]. However, apart from the different ideological approaches[9], the international community has refused this second theory. Furthermore, in the Nuremberg trials[10] the merely positive nature of Human rights theory was rejected[11]. Indeed, the preamble to the Universal Declaration of Human Rights recognised that those rights are inalienable and inherent to all human beings[12].

Whether Human Rights have their basis in State practice or in natural law, it can be argued that some of them are peremptory norms of International law[13] – *ius cogens norms*-and, therefore, no derogation whatsoever could be made under the provisions of article 53 of the Vienna Convention[14].

Although Human Rights origins can be settled on the American Declaration of Independence[15], Ancient Greece[16] or even further back[17]. The present

[6] SHAW QC, Malcolm N, *International Law.* Cambridge: Cambridge University Press CUP 6th Ed, 2008. p. 266

[7] BOUCHER, David «The Human Rights Culture and its Discontents. The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition» en Oxford Scholarship Online, Oxford University Press. Delhi 2009, p. 16

[8] GEORGE: op. cit., p. 179

[9] SHAW: op. cit., pp. 268-269. Note that the URSS State supremacy approach on Human Rights started to change by the end of the 1980s and, finally, in 1989 the URSS recognised the jurisdiction of the International Court of Justice with regard to certain Human Rights. Also note the tension between Human Rights and cultural traditions in the Third Word States.

[10] Nuremberg International Military Tribunal 1946 (1947 41AJIL172)

[11] OLLERO, Andrés, *El Derecho en Teoría.* Thomson-Aranzadi, Navarra, 2007; JANIS Mark W.; KAY, Richards y BRADLEY, Anthony W., «European Human Rights Law» en *Oxford University Press* 3th Ed, p. 11

[12] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Preamble

[13] BIANCHI, Andrea, «Human Rights and the Magic of Jus Cogens» en *The European Journal of International Law* Vol. 19 no. 3, 2008, pp. 491–508

[14] SHAW: *op. cit*., p. 125

[15] ROBIN, C.A., WHITE, y OVEY, Clare. *Jacobs, White & Ovey: The European Convention on Human Rights.* Oxford University Press 2010, p. 3

[16] VIZARD, Polly, «Antecedents Of The Idea Of Human Rights: A Survey Of Perspectives» en *Human Development Report 2000 - Background Paper*, 2000 p. 2

understanding and the latest codifications of Human Rights are directly linked with an international response to World War II[18].The main concern of the drawers of the Human Rights declarations was to prevent humanity from repetition of the Second World War violations of Human Rights[19].Due to the importance of this commitment, the international community may ensure a high standard of protection thereof and an adequate international legal system to protect them[20]. Indeed, in 1993 the World Conference on Human Rights in Vienna affirmed that the «promotion and protection of human rights is a matter of priority for the international community»[21].

III. RESERVATIONS ON HUMAN RIGHTS TREATIES. A DEPARTURE FROM THE PROVISIONS OF THE VIENNA CONVENTION

The Vienna Convention establishes that reservations are unilateral statements which allow states to modify or to remove certain terms of a treaty before becoming a Contracting Party to it[22]. On the one hand, this particular nature of reservations, which is based on state-consent[23], may encourage countries to join a treaty[24]. On the other hand, a large number of reservations may undermine the integrity of the treaty and its purpose[25].Furthermore, by creating such reservations, contracting parties can «remain in technical compliance with [a treaty] while engaging in practices that [the treaty] condemns»[26].

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[17] ROBIN, WHITE y OVEY: *op. cit*., p. 4 "It [Human Rights] can be viewed in the context of the much longer struggle to secure respect for personal autonomy, the inherent dignity of persons, and the equality of all men and women"

[18] PERRY, Michael J., «Toward a Theory of Human Rights: Religion, Law, Courts Part 1: Morality of Human Rights» en *Cambridge University Press*, August 2008, p. 4; SHAW: *op. cit*., p. 271; BALLIS: *op. cit*., p.1

[19] ROBIN, WHITE y OVEY: *op. cit*., p. 4

[20] SHAW: *op. cit*., p. 271; YRIGOYEN, Hipólito Solari «Las reservas a los Tratados Internacionales de Derechos Humanos» en *Agenda Internacional* Nº 8. pp. 72-85

[21] Vienna Declaration and Programme of Action (adopted on 25 June 1993 A/CONF.157/23)

[22] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 1155 UNTS 331) Art 2(1) (d)

[23] SHAW: *op. cit*., p. 914

[24] Office of the United Nations High Commissioner for Human Rights, *Human Rights, Civil and Political Rights: The Human Rights Committee* (Fact Sheet No. 15) p.9

[25] PARISI, Francesco y ŠEVCENKO, Catherine, «Treaty Reservations and the Economics of Article 21 (1) Of The Vienna Convention» en *Berkeley Journal of International Law*, Vol. 21, No. 1, 2003, p.9

[26] BALLIS: *op. cit*., p. 277

The only condition for a valid reservation to be made is to pass a two-stage test, which first analyses the permissibility of the reservation (article 19 Vienna Convention) and then the opposability by other states to it(article 20 and 21 Vienna Convention).

The former requirement entails three constraints: the reservation cannot be prohibited by the treaty[27], the reservation may not depart from those permitted by the treaty[28] and the reservation has to be compatible with the object and purpose of the treaty[29]. Based on the latter constrain, one can always argue that, since Human Rights treaties are made to protect the most basic individuals' rights[30], a wide reservation to those treaties will, therefore, not be valid. In the Belilos case[31] the European Court of Human Rights held the Switzerland's interpretative declaration to the Convention relating to the access to court[32] was, indeed, a reservation of general character and hence a violation of article 64 of the European Convention on Human Rights[33];which consequently entailed the invalidity of the reservation[34].

However, according to the *opposability school*, as long as no state objects to the reservation, it would be valid -in spite of being incompatible with the object and purpose of the treaty[35]. Conversely, the *admissibility school* affirms that the compatibility test is essential; thus, a failure to pass it will entail the inadmissibility thereof, regardless of whether or not an opposability claim was raised[36].

According to R Goodman, «invalid reservations to Human Rights treaties should be presumed to be severable unless for a specific treaty there is evidence

[27] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 1155 UNTS 331) Art19(a)

[28]Ibídem. Art 19 (b)

[29] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 1155 UNTS 331) Art19(c); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] ICJ Rep 15, ICGJ 227 (ICJ 1951), 28th May 1951, International Court of Justice [ICJ]

[30] Magdalena Sepúlveda and Carly Nyst The Human Rights Approach to Social Protection (Ministry for Foreign Affairs of Finland, 2012) 12

[31]Belilos v. Switzerland (10328/83) [1988] ECHR 4 (29 April 1988)

[32] Interpretative declaration contained in the instrument of ratification, deposited on 28 November 1974 - Or. Fr.

[33]Eg Article 64 (1) of the European Convention on Human Rights establishes that "reservations of a general character shall not be permitted under this article"

[34] SHAW: op. cit., p. 918

[35]MOLONEY, *op. cit*., p. 3

[36]Ibídem.

of a ratifying state's intent to the contrary»[37]. Therefore, the invalid reservation would be severed from the treaty and the Contracting Party would be bound by the entire treaty -including the provision whose obligations the state sought to modify[38]. Thus, it could be argued that this position challenges the principle of state sovereignty and state consent[39].When establishing state intention, the main factor to take into account is whether a state would have ratified the treaty without the reservation, or if it would have sooner renounced the benefits of treaty membership rather than accepting the provision which was intended to be modified by the invalid reservation[40]. Whereas in the former case the reservation would be severed and therefore the state would be bound by the whole treaty, in the latter one the state would be excluded from being a party to the treaty[41].

The second requirement, the opposability by other states, involves the acceptance of the reservation by the other High Contracting Parties. The1951 Genocide Convention Advisory Opinion[42] put an end to the traditional approach which established that unanimous consent was needed for a reservation to be made[43]. However, the Vienna Convention sets two exceptions where unanimous acceptance is required[44]: when there are a limited number of negotiating parties and when the application of the treaty in its entirety is an essential condition to be a party thereto. Otherwise, in general terms, a reservation may modify the relations between the reserving state and any other party willing to accept it[45]. If no objection is raised within 12 months it would be deemed to have been accepted[46]. However, in case that an objection is raised, the reserved provisions will not apply between the objecting party and the reserving state[47].

[37] GOODMAN *op. cit*., p. 531. ss.

[38] SHAW: *op. cit*., p. 922

[39]MOLONEY, *op. cit*., p. 12

[40] GOODMAN *op. cit*., p. 531. ss.

[41]Ibídem.; General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.6) (1994)18; BALLIS: *op. cit*., p. 278

[42] Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, entered into force 12 January 1951

[43] SHAW: *op. cit*., p. 918

[44] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 1155 UNTS 331) Art20(2)

[45] SHAW: *op. cit*., p. 920

[46] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, 1155 UNTS 331) Art20(5)

[47]Ibídem. art 20 (4)

Since state consent is a basic requirement for a reservation to be made[48], one can always say that the Vienna Convention protects the principle of state sovereignty. Those provisions are perfectly valid when establishing rights and obligations between states. However, the non-reciprocal nature[49] of Human Rights treaties challenges this principle. Human Rights treaties do not set obligations between equal sovereign states, but between states and individuals. Insofar as Human Rights treaties do not create reciprocal obligations between states, High Contracting Parties may forgo opposing to a reservation due to the fact that its provisions would not have a direct impact on them[50].

One can argue that, due to the unsuitability of a merely state-opposability system to provide a high standard of Human Rights protection, the intervention of a third party in the process of reservation admissibility is not only justified but required by the basic nature of Human Rights treaties[51]. This approach was taken by the UN Human Rights Committee in the General Comment No. 24[52]. This General Comment argues that the admissibility of a reservation to the International Covenant on Civil and Political Rights[53] has to be supervised by the UN Human Rights Committee[54].Should the Committee consider the reservation inadmissible, it will be severed and the reserving State will be bound by the entire treaty «without the benefits of the reservation»[55].

In the Reparations Case Advisory Opinion[56] it was held that an international organisation would enjoy the essential and necessary international legal

[48] SHAW: *op. cit.,* p. 909

[49] SHELTON, Dinah, «The Oxford Handbook of International Human Rights Law» en *Oxford University Press*, 1st ed, 2013, p.742

[50] GOODMAN *op. cit*., p. 531

[51] BALLIS: *op. cit*., p. 277

[52]General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.6) (1994).

[53] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

[54] BALLIS: *op. cit*., p. 277

[55]General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.6) (1994)18; BALLIS: *op. cit*., p. 278

[56] Reparations for Injuries Suffered in the Service of the United Nations Advisory opinion, ICJ Rep 1949.

personality to carry out its purposes. Notwithstanding the limited administrative powers given to the Committee by the express wording of the Covenant on Civil and Political Rights, it could be said that States parties had agreed to provide the Committee with the necessary authorities to perform its functions[57], according to the Covenant's objective and purposes. Hence, based on the International Law principle of effectiveness, the Committee's claim to judge the validity of the reservation could be justified.

IV. CONCLUSION

Even if we are to agree with the Positive Law School theory of Human Rights nature or with the Natural Law theorists, the egregious crimes against humanity and the gravest violations of Human Rights which took place during World War II gave rise to the necessity of assuring an effective high standard of protection, regardless of their particular nature. The importance of the commitment of preventing humanity from repeating of those crimes by protecting the most fundamental individual's rights could justify a special treatment of Human Rights treaties. Moreover, some authors affirm that certain Human Rights are *jus cogens* norms, and therefore no reservation could lawfully modify Human Rights provisions.

The Vienna Convention on the Law of Treaties establishes two main conditions for a reservation to a treaty to enter into force: it has to be permissible and, then, accepted by other contracting parties. Those requirements are based on the International Law principles of state-consent and state-sovereignty. However, when dealing with Human Rights treaties, those provisions entail five major issues: Human Rights treaties do not enjoy a reciprocal nature between parties; states may be reluctant to oppose a reservation raised by another country; certain non-rejected reservations may challenge the integrity and the objective and purpose of Human Rights treaties; invalid reservations are not severed from the treaty and therefore reserving States are not bound to respect all the provisions of Human Rights treaties; and, finally, by making certain reservations, states may engage in practices condemned by a Human Rights treaty, while remaining in technical compliance with it.

The European Convention of Human Rights gave rise to one of the most effective systems of protection of Human Rights in the world by establishing a

[57] BALLIS: *op. cit*., p. 277

European body with power and authority to judge whether or not a reservation to the convention could be considered valid. Whereas in the European Court of Human Rights' constitutive treaty this authority was expressly given to it, no power to decide the validity of new reservations was granted to the UN Human Rights Committee by the Covenant on Civil and Political Rights. Nonetheless, in my opinion, and notwithstanding the treaties' wording, in both cases this authority is equally justified and needed to ensure an effective system of Human Rights protection.

Therefore, I affirm that Human Rights treaties merit special consideration, and possibly a departure from the provisions of the Vienna Convention on the Law of Treaties.

CITED BIBLIOGRAPHY

LEGAL LITERATURE

Baylis EA, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties Human Rights Committee* (Vol 17 Issue 2 Art 4, Berkeley Journal of International Law 1999)

Bianchi A, *Human Rights and the Magic of Jus Cogens* (Vol. 19 no. 3 The European Journal of International Law 2008)

Boucher D, *The Human Rights Culture and its Discontents. The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (Oxford Scholarship Online, Oxford University Press 2009)

George RP, *Natural Law* (Vol 31 Harvard Journal of Law & Public Policy 2008)

Goodman R, *Human Rights Treaties, Invalid Reservations, and State Consent* (96 American Journal of International Law 2002)

Janis MW, Kay R and Bradley WA, *European Human Rights Law* (3th Ed Oxford University Press) 11

Moloney R, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent* (Vol 5, Melbourne Journal of International Law May 2004)

Ollero A, *El Derecho en Teoría* (Thomson-Aranzadi Navarra 2007)

Ovey C, White RCA, *Jacobs, White & Ovey: The European Convention on Human Rights* (Oxford University Press 2010)

Parisi F and Ševcenko C, Treaty Reservations and the Economics of Article 21 (1) Of The Vienna Convention (Vol. 21, No. 1 Berkeley Journal of International Law 2003)

Perry JM, *Toward a Theory of Human Rights: Religion, Law, Courts Part 1: Morality of Human Rights* (Cambridge University Press August 2008)

Sepúlveda M and Nyst C, *The Human Rights Approach to Social Protection* (Ministry for Foreign Affairs of Finland, 2012) 12

Shaw QC , Malcolm N. *International Law* (6th Ed Cambridge University Press CUP 2008)

Solari Yrigoyen H, *Las reservas a los Tratados Internacionales de Derechos Humanos* (Agenda Internacional Nº 8)

Vizard P, *Antecedents of the Idea of Human Rights: a Survey of Perspectives* (Human Development Report 2000 Background Paper 2000)

Yamali N, *How adequate is the law governing reservations to human rights treaties?* (General Directorate of International Laws and Foreign Affairs Turkey e-journal)

Shelton D, *The Oxford Handbook of International Human Rights Law* (1st ed Oxford university Press, 2013)742

CASES:

Belilos v. Switzerland (10328/83) [1988] ECHR 4 (29 April 1988)

Nuremberg International Military Tribunal [1946] (1947 41AJIL172)

Reparations for Injuries Suffered in the Service of the United Nations Advisory opinion [1949] ICJ Rep (1949 ICJRep174).

TREATIES AND OTHER DOCUMENTS OF INTERNATIONAL LAW:

Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, entered into force 12 January 1951

General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.6) (1994).

European Convention on Human Rights (ECHR)(Rome4 November 1950)

Switzerland's Interpretative declaration contained in the instrument of ratification, deposited on 28 November 1974 - Or. Fr

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Office of the United Nations High Commissioner for Human Rights, Human Rights, Civil and Political Rights: The Human Rights Committee (Fact Sheet No. 15)

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

Vienna Convention on the Law of Treaties (the Vienna Convention) (Vienna, 23 May 1969, 1155 UNTS 331)