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Treaties

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TREATIES

I. Introduction

[1] When one thinks of ‘human rights’, the association immediately made is with certain rights and freedoms incorporated in the provisions of international treaties. This is not exactly surprising, given the fact that international treaties are the primary source for human rights protection. They are not the only one though, as → customary international law has also a significant role to play. But even ‘human rights treaties’ themselves raise a whole gamut of issues. Firstly, what makes a treaty, a ‘human rights treaty’, and second does this characterization come with any ‘legal baggage’, i.e. does it have treaty-law ramifications. In order to answer these questions, Section II will start with an analysis of why international treaties and not customary law is the primary source of human rights protection. It will then provide a brief presentation of the watershed moments that ushered the modern era of human rights protection, and conclude with an inquiry into what makes a treaty a ‘human rights treaty’. Section III will then examine certain key areas of the law of treaties, which have often been suggested to be affected by the ‘special character’ of human rights treaties, such as → treaty interpretation, → reservations, withdrawal and termination/suspension. Section IV will finally examine certain situations – → countermeasures and → state succession – that although not falling within the law of treaties *stricto sensu*, nonetheless are intertwined with the continued application of human rights treaties and the obligations contained therein.

II. Treaties as the Primary Source for Human Rights Protection

1. Customary International Law and Human Rights Treaties

[2] As mentioned above, when discussing international human rights, one tends to gravitate towards international treaties. However, treaties are not the only formal source of international law. So, what then of customary international law on international human rights? International legal scholarship is rather divided as to the importance, scope and actual effect of customary international law in the field of human rights (Daillier and Pellet [1994] para 286; Malanczuk [1997]; Boyle and Chinkin [2007]; Jennings and Watts [2008]; Aust [2010]; Ramcharan [2013] at 514-8; Rodley and Evans [2014]; Lepard [2019]; Wheatley [2019]).

[3] Another area of debate is linked to the actual emergence of customary international human rights law. It is argued that in certain fields such as international human rights law, international humanitarian law and international criminal law, the classical two-element approach may not be needed and that one element, namely *opinio juris* may suffice, or at least a sliding scale approach may be more meritorious (Kirgis [1987]; Tasioulas [1996] at 96; Meron [1989] at 94; Petersen [2017]; Lepard [2017] at 254; Lepard [2010] at 97-8; Kolb [2003] at 119; Schachter [1991] ch XV).

[4] Although the International Law Commissions (ILC) and the Special Rapporteur on identification of customary international law were of the view that this was not the case, as it would risk ‘artificially dividing international law into separate fields, which would run counter to the systemic nature of international law’ (Wood [2013] para 19; Wood [2014] para 28; see also Kammerhofer [2012]), they did concede, nonetheless, that ‘[t]here may [...] be a difference in application of the two-element approach in different fields [of international law] (or, perhaps more precisely, with respect to different types of rules)’ (Wood [2014] para 28; Wood [2015] para 17).

[5] Apart from the lack of clarity as to the emergence and content of customary law in the field of human rights, another reason for the heavier focus on treaties may be the extensive treatyfication of the field of international human rights, and the monitoring of state compliance through judicial and quasi-judicial bodies established by these treaty instruments (Thirlway [2015] at 498). This notwithstanding, customary international law on human rights still has a role to play.

2. The Emergence of the Modern Regime of Human Rights Protection through Human Rights Treaties

[6] It is undeniable, however, that treaties play a central role in the modern regime of international human rights. This was not always the case. Prior to the → United Nations (UN) Charter and the → Universal Declaration of Human Rights (UDHR), individuals were not even considered as subjects of international law enjoying international legal rights (Buergenthal [2007] para 3). That is not to say that there were no precursors of what is now known as international human rights treaties. There were, for instance, treaties under which individuals or groups of individuals enjoyed a 'derivative protection of international law', as was the case of → diplomatic protection, injury to aliens, the protection of certain → minorities (see, for instance, the 1856 General Treaty for the Re-establishment of Peace; the 1919 Treaty between the Principal Allied and Associated Powers and Poland (Minorities Protection Treaty)), the mandates system under the Covenant of the → League of Nations (Art 22), treaties outlawing → slavery and slave trade (see the 1841 Treaty for the Suppression of the African Slave Trade; the 1926 Convention to Suppress the Slave Trade and Slavery), or the early codification attempts of → international humanitarian law (1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field; 1899 and 1907 Hague Conventions).

[7] However, the treaties mentioned above 'did not confer rights on individuals *qua* individuals, but sought rather to protect certain categories or classes of human beings' (Buergenthal [2007] para 7). Additionally, in most cases, the relevant provisions related to the treatment of nationals of one state by another, and not the treatment of individuals by their own state, as the latter was considered to fall within the sphere of exclusive jurisdiction of the state, the so-called *domaine réservé* (Buergenthal [2007] para 3; see also → intervention, prohibition of).

[8] A watershed moment that led to a monumental shift to this approach can be identified with the 1945 UN Charter. According to its preamble, the parties 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person', while Article 1(3) identifies as one of the purposes of the UN Charter 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'. In pursuit of this, Articles 55 and 56 clearly set out that the UN parties shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all' and 'pledge' to take joint and separate action in pursuit of this principle. Despite their vagueness, these provisions prompted states into action, and forced UN member states to gradually 'accept the proposition that the UN Charter had internationalized the concept of human rights' (Buergenthal [2007] para 7).

[9] This can be seen in the fact that the UN Charter was quickly followed by the proclamation by the UN General Assembly of the UDHR in 1948, a milestone document in the history of human rights. This, in turn, led to the negotiation and conclusion of a large number of international human rights treaties, including the → International Covenant on Civil and

Political Rights (ICCPR), and the → International Covenant on Economic, Social and Cultural Rights (ICESCR) (see also → historical development of international human rights law).

3. What is a Human Rights Treaty?

[10] Before examining whether human rights treaties feature 'special' characteristics that necessitate a specialized approach to them as far as the law of treaties is concerned, the precursor question that needs to be addressed is what exactly is a 'human rights treaty'? Despite the question's simplicity the answer is far from that (Vierdag [1994]; Craven [2000]; Chinkin [2018]). Although several treaties can unquestionably be categorized and are accepted as human rights treaties, this set of treaties is far 'from [being] homogeneous' (Pellet [1996] para 182). Things are further complicated not only by the existence of numerous typologies of treaties, based on form, normative effect (*traités-lois v traités contrats*) and content, but also because the lines between the categories are not clear and their consequences as to treaty law are hotly debated (Brölmann [2018]). For instance, human rights treaties may contain provisions with a synallagmatic character, without that affecting the overall qualification of the treaty. The converse is equally true, when a *traité-contrat*, has provisions aimed at protecting rights of individuals. The diversity and open-endedness of treaties having been and continuing to be signed would argue in favour of avoiding adopting a very rigid definition of what a human rights treaty is.

[11] Judge Shahabuddeen suggested that it might be artificial to try and draw a sharp distinction between some treaties (in that case the → Genocide Convention) and human rights treaties *stricto sensu*. In his view, they 'are all concerned with the rights of the human being', and, thus, should be considered as human rights treaties (ICJ, *Bosnian Genocide* (Separate Opinion of Judge Shahabuddeen) [1996] at 637). Pragmatic as this approach may be, it may still not be nuanced enough in determining which treaties are human rights treaties across the wide spectrum of treaty making, especially if the characterization of a treaty as a human rights one comes with treaty law implications.

[12] A few decades earlier, the → International Court of Justice (ICJ) had suggested that the main issue was that in such treaties 'the contracting States 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 the convention' (ICJ, *Genocide Convention* (Advisory Opinion) [1951] at 23). The → *Inter-American Court of Human Rights* (IACtHR) in its 1982 and 1999 Advisory Opinions on *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Articles 74 and 75)* (para 33) and *The Rights to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (paras 71-84) respectively, took a slightly more nuanced approach. It opined that human rights treaties have both a horizontal and vertical effect. Horizontal, in the sense that they regulate inter-state behaviour, and vertical in the sense that they function as a framework that allows states to 'pledge' that they will not violate human rights of individuals within their jurisdiction. Such pledges are legally binding and limit governmental power (Chinkin [2018] at 514-5; Brilmayer [2006] at 164; Simpson [2001] at 12).

[13] As one can see, defining a human rights treaty is not as easy as may seem at first glance. In some cases, it will be evidently clear, but there will always be cases where there might be ambivalence. However, at the end of the day how important is it really to classify a treaty as a human rights one? As far as the law of treaties is concerned it may be relevant only if such

classification corresponds to a particular/specialized set of rules applying to it. It is to this point that we shall now turn our attention.

III. Pertinent Aspects of Treaty Law

1. Interpretation

[14] According to McNair, 'there is no issue that the drafter approaches with more trepidation than the issue of interpretation' (McNair [1961] at 364). This is true for all treaties. Despite objections as to the desirability and utility of including rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT), such a set of rules was adopted, namely Articles 31-33 VCLT (Fitzmaurice and Merkouris [2020] at 158-68). These articles reflect customary international law, and describe a process that is 'holistic', whereby all interpretative elements are thrown into the crucible, and which leads the interpreter to the correct for each case interpretation (ILC [1966] at 219-20, para 8).

[15] If 'human rights treaties' are of a special nature, the question that inexorably arises is, does this also mean that they are to be interpreted in a manner that deviates from the VCLT, or at least by specialized interpretative rules? Although there is some support for this (Vagts [1993]; Tobin [2010]), the dominant view, reinforced by case-law, is that there is no such need. In fact, international practice suggests that international bodies not only accept Articles 31-33 VCLT as customary international law, but also refer to almost all the elements enshrined therein (Burgorgue-Larsen [2020]; Çalı [2020]; Pazartzis and Merkouris [2020]; Schmalenbach [2020]; Ulfstein [2020]; Fitzmaurice [2013]).

[16] Having said that, two particular interpretative tools merit special attention, as being often associated with interpretation of human rights treaties: i) evolutive interpretation, and ii) *pro homine* interpretation.

a. Evolutive Interpretation

[17] Time and change are central to interpretation. An interpretation that allows for a treaty to adapt to changing circumstances is one that also ensures the latter's relevance and effectiveness. Treaties that demonstrate such adaptability, and human rights treaties fall in this category, are often described as 'living instruments', 'live instruments', 'living tree(s)' or instruments of the 'always speaking type', and this type of interpretation is known as evolutive (HRCtee, *Judge v Canada* [2002] para 10.3; ECtHR, *Hatton and Others v UK* (Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner) [2003] para 2; IACtHR, *Yakye Axa Indigenous Community v Paraguay* [2005] para 125; see also Moeckli and White [2018]).

[18] However the default rule is not evolutive interpretation but rather the principle of contemporaneity. According to this principle, the terms of a treaty 'must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded' (Fitzmaurice [1957] at 212 and 225). However, there is an important caveat. Where 'it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, *the treaty must be interpreted so as to give effect to that intention*' (Thirlway [2006] at 57, emphasis added).

[19] Such evolutive interpretation can happen along two main tracks: i) evolution of fact; this can include medical and scientific advancements, societal and cultural changes, the

socioeconomic situation of a state, and changes in morals; and ii) evolution of law; this can include all sources of international law and domestic law (on evolution of fact see: ECtHR, *Vo v France* (Dissenting Opinion of Judge Ress) [2004] para 5; ECtHR, *Öztürk v Germany* (Dissenting Opinion of Judge Bernhardt) [1984]; IACtHR, *Gómez Paquiyauri and others (on behalf of Gómez Paquiyauri and Gómez Paquiyauri) v Peru* [2004] para 165; ECtHR, *Cossey v UK* (Joint Dissenting Opinion of Judges Palm, Foighel and Pekkanen) [1990] para 5. On evolution of law see: IACtHR, *Case of the 'Street Children' (Villagrán Morales et al) v Guatemala* [1999] paras 193-4; ECtHR, *Dudgeon v UK* [1981] para 60).

[20] Courts and tribunals have often referred to three main bases for evolutive interpretation: the intention of the parties, the object and purpose (nature) of the treaty (often resorted to when interpreting human rights treaties) and the use of 'generic' terms (Merkouris [2014]; Djefal [2015]). Whether these are self-standing bases or different manifestations of the intention of the parties is still debated (in support of the latter: Bjorge [2014]; Merkouris [2015]).

[21] Although evolutive interpretation is often resorted to by human rights courts and monitoring bodies, it is neither the only interpretative approach they use, nor is it unique to human rights treaties. Evolutive interpretation emerges logically and straightforwardly from the rules of interpretation enshrined in Articles 31-33 VCLT, without the need of having to search for specialized and treaty-type dependent interpretative rules.

b. *Pro homine* Principle

[22] Another interpretative approach often cited in connection to interpretation of human rights treaties is the *pro homine* (*pro persona*) approach. According to this, the interpreter should opt for the interpretation that gives deference to the individual, i.e. the interpretation that offers the greatest protection of the individual's rights (Pinto [1997]; Lixinski [2010]; Fitzmaurice [2013] at 765-7; de Oliveira Mazzuoli [2016]). In the context of human rights, this approach is the mirror image of the *in dubio mitius* maxim, but whereas *in dubio mitius* opts for the interpretation that is less onerous for the state, the *pro homine* approach goes the other way, by selecting the interpretation that is more favourable to the individual and by extension the one that creates more obligations for the state.

[23] The IACtHR has adopted a *pro homine* approach in a number of cases, such as in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* ([1985] para 52), *Certain Attributes of the Inter-American Commission on Human Rights* ([1993] para 50), and *Juridical Condition and Rights of Undocumented Migrants* ([2003] para 156). However, as Burgorgue-Larsen and Negishi rightly point out, this is due not only to the fact that a human rights treaty is involved but also because Article 29 of the → American Convention on Human Rights (ACHR) authorizes such an approach (Negishi [2017]; Burgorgue-Larsen [2020]). According to Negishi the 'more favourable' provisions that exist in almost all universal and regional human rights treaties embody this *pro homine* approach as well (Negishi [2017] at 471). Other judicial and quasi-judicial bodies have also, on occasion, opted for a *pro homine* approach, although explicit reference to it is usually to be found in the opinions of the judges/members (HRCtee, *Elgueta v Chile* (Individual Opinion of Ms Helen Keller and Mr Fabian Salvioli) [2009] para 11; ECtHR, *Garib v the Netherlands* (Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Vehabović) [2017] para 11).

[24] The *pro homine* approach seems mainly descriptive of the outcome of the interpretative process, rather than an autonomous approach or principle that exists *praeter* VCLT. Usually, the relevant bodies will arrive at a *pro homine* interpretation by using either the text of the

treaty and its context (as in the case of Article 29 ACHR), its object and purpose, systemic integration, or the evolution of fact or law, i.e. by utilizing the existing toolbox provided by Articles 31-33 VCLT.

2. Reservations

[25] According to Article 2(1)(d) VCLT a treaty reservation (see in detail → reservations to treaties) is 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

[26] According to Article 19 VCLT, a state can make reservations unless the treaty explicitly prohibits it – either *in toto* or for specific articles – or if the reservation goes against the treaty's object and purpose. Other states can either accept or object to the reservation. Lack of a reaction, after a reasonable amount of time (12 months) is equated to acceptance (Art 20(5) VCLT). Acceptance of the reservation modifies the rights and obligations between the reserving and accepting state in the manner indicated by the reservation (Art 21(1) VCLT). Objection, on the other hand, results in the provisions to which the reservation relates not applying in the relations between the objecting and the reserving state to the extent of the reservation (Art 21(3) VCLT).

[27] Human rights treaties are no exception to reservations. Of the nine core international human rights instruments, two have no provision on reservations, two allow for reservations with respect to dispute settlement and the competence of the Committee, although they are silent on other reservations; and five have a provision, echoing the VCLT, prohibiting reservations incompatible with the treaty's object and purpose.

[28] A question that has been debated is whether the nature of human rights treaties necessitated a reservations regime unique to them, different from the VCLT one. Nonetheless, as evinced from the ILC's work on reservations, the existing regime suffices as long as it is applied in 'an appropriate and suitably adapted manner' (Pellet [2009] para 27; cf Simma and Hernández [2011] at 62, 68; Giegerich [2010]; Milanovic and Sicilianos [2013] at 1057).

[29] This debate was mainly felt in the context of the legal effect of impermissible reservations, a well-known blind spot of the VCLT. One approach considers that although impermissible reservations are null and void, this does not affect the consent of the state, which remains bound by the entirety of the treaty without benefitting from the reservation. This is known as the 'severability doctrine/approach' and has emerged mainly from the practice of human rights courts and treaty bodies. The other approach takes the position that the reservation's invalidity poisons the consent of the state in its entirety, and thus the state is not bound by the treaty (GPRT Guideline 4.5.3 Commentary; Simma and Hernández [2011]; Pellet and Müller [2011]; Gaja [2008]; de Frouville [2004] at 385-9; Coulée [2004]; Staff [2018]; McCall-Smith [2014]; Moloney [2004]; Klabbers [2000]; Greig [1995]; Redgwell [1993]; Bowett [1976]).

[30] The severability doctrine emerged from a number of cases such as *Temeltasch v Switzerland* (1982), *Belilos v Switzerland* (1988), *Chrysostomos v Turkey* (1991) and *Loizidou v Turkey* (1995) (ECommHR and ECtHR), *Rawle Kennedy v Trinidad and Tobago* (2002) (HRcttee) and *Hilairé v Trinidad and Tobago* (2001) (IACtHR) and has been affirmed in General Comment No 24 (1994), where the Human Rights Committee (HRCttee) opined that the 'normal consequence of an unacceptable reservation is not that the [ICCPR] will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable' (para 18, emphasis added). This has led some authors to argue that the severability doctrine is

appropriate for human rights treaties due to their nature and the need to remove them 'from the grip of the bilateralist paradigm' (Simma and Hernández [2011] at 81-4).

[31] However, on closer inspection it becomes clear that the relevant bodies have not automatically resorted to the severability doctrine, but rather applied a much more nuanced approach, taking into account a wide gamut of factors such as the content and context of the relevant provision, in *pari materia* treaties, the special nature and 'object and purpose' of human rights treaties and the state's subsequent practice to name but a few (*Belilos*, paras 60, 93; *Loizidou*, para 95; *Hilaire*, paras 93-4; 2011 ILC Guide to Practice ('GPRT'), Guideline 4.5.3 Commentary, paras. 45-6; Schabas [1995] at 322). Even General Comment No 24 refers to severability as the 'normal' consequence, but not as the 'only' one. Several states such as France, UK and USA, objected to General Comment No 24's approach, while even in the admissibility decision on *Rawle Kennedy*, four members of the HRCtee dissented on this point (Giegerich [2010] para 39).

[32] The abovementioned nuanced approach was confirmed by the Inter-Committee Meetings of the human rights treaty bodies and the Meetings of the Chairpersons of these bodies, where it was acknowledged not only that a separate reservations regime for human rights treaties was not needed, but also that despite growing support for the severability approach, this was not an 'automatic conclusion [...] but only a presumption' (UN [2005] para 37). In their view the correct approach was to focus on the actual intention of the reserving state at the time it entered its reservation, with a rebuttable presumption that a state would prefer to remain a party to the treaty. Both the Sixth Committee and the ILC in its Guideline 4.5.3 agreed with this approach (GPRT Guideline 4.5.3 and Commentary, paras. 20-1; UN, 2007: para 18; UN, 2006: para 16(7)). The ILC was also quite careful to qualify that this rebuttable presumption, which applied to all treaties irrespective of their nature, was not customary law but rather a 'cautious progressive development of international law' (GPRT Guideline 4.5.3 Commentary, para 49; Baratta [2000]).

3. Withdrawal/Denunciation and Termination/Suspension

[33] Although the VCLT takes a unitary approach to treaties, i.e. that all treaties falling under Article 2(1)(a) VCLT are governed by the same rules, explicit reference to human rights and the human person have managed to find their way in the text of the VCLT and its preamble. The sixth preambular paragraph of the VCLT, for instance, affirms that state parties have in mind the principle 'of universal respect for, and observance of, human rights and fundamental freedoms for all'. This is most evident in two provisions dealing with withdrawal and termination/suspension respectively, namely Articles 56(1)(b) and 60(5) VCLT.

a. Withdrawal/Denunciation: Article 56(1)(b) VCLT

[34] Article 56(1) VCLT provides that if a treaty does not have a provision regarding its termination, denunciation or withdrawal it is deemed not to be subject to denunciation or withdrawal unless such an intention can be either (a) directly established (e.g. from the preparatory work) or (b) inferred from the 'nature of the treaty'. The 'nature of the treaty' could arguably include human rights treaties.

[35] Early drafts of Article 56(1)(b) did not include nature of the treaty as a self-standing basis, because it was considered as one of many circumstances from which one could glean the intention of the parties (Giegerich [2018] at 1051, paras 33-4). Nonetheless, what became Article 56(1)(b) was tabled as an amendment by the United Kingdom (the South

American/Spanish amendment was also very similar) during the Vienna Conference on the Law of Treaties, and was adopted by an extremely narrow margin (26 in favour, 25 against, with 37 abstentions) (Villiger [2009] at 699-700, paras 2-3; Christakis [2011] at 1256, para 13). Even today the customary nature of Article 56(1)(b) is doubtful, which raises concerns as to the actual utility of this provision, and whether human rights treaties can be considered as fall under Article 56(1)(b) (Capotorti [1971] at 539; Widdows [1982] at 113; Dinh, Pellet and Daillier [2002] at 307, note 195; Christakis [2011] at 1257, paras 14-5).

[36] Although the majority of human rights treaties contain withdrawal clauses, the ICCPR and the ICESCR do not (Klein [2011]). On the other hand, the First Optional Protocol to the ICCPR adopted on the same day as the ICCPR regulates denunciation through its Article 12, as does ICERD, which clearly supports the view that the lack of a denunciation clause within the ICCPR was intentional (HRCttee, *GC No 26: Continuity of Obligations* [1997] para 2). Withdrawal from the ICCPR came to the forefront in 1997, when the Democratic People's Republic of Korea (DPRK) sent a notification of withdrawal from the ICCPR to the UN Secretary-General. The Secretariat responded through an *aide-mémoire*, in which it stated that '[i]n considering *whether human rights treaties are by their nature subject to a right of denunciation or withdrawal*, it should be noted that human rights treaties express *universal values from which no retreat should be allowed* [...] [and e]ven though some human rights treaties explicitly provide that they may be denounced, such treaties in general do not imply an inherent right of denunciation or withdrawal. In particular, since the ICCPR is among the relative minority of human rights treaties not explicitly subject to denunciation or withdrawal, *it is incorrect to assume that its nature somehow implies such a right*' (UN, 1997: paras 7-8, emphasis added).

[37] Reacting to this, the HRCttee adopted General Comment No 26 (1997) on the continuity of obligations. In this, the HRCttee stated that '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 [ICESCR], the Covenant codifies in treaty form the universal human rights enshrined in the [UDHR] [...]. 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' (para 3). The Committee also added that that '[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party [...] [and] [...] 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' (para 4). Tomuschat has expressed the view that this approach is contrary to the 'democratic principle', although contrary views have also their supporters (Tomuschat [2008]; *contra* Giegerich, 'Article 56' [2018] at 1057, para 48; Tyagi [2008] at 126-33).

b. Termination/Suspension: Article 60(5) VCLT

[38] The other explicit point of entry of human rights treaties is Article 60(5) VCLT, which provides that paragraphs 1-3 of that Article, dealing with material breach and the ability of a state party to terminate or suspend the treaty due to that breach, 'do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'. This provision echoes the principle of 'universal respect for, and observance

of, human rights and fundamental freedoms for all' mentioned in VCLT's sixth preambular paragraph.

[39] Similarly to Article 56(1)(b), this provision did not exist in the original ILC draft articles, because the issue was already covered by Article 43 VCLT (Simma and Tams [2011] at 1366-7, para 42). It was added during the Vienna Conference, after an amendment proposed by Switzerland (Switzerland, 1969). Its *raison d'être*, according to Bindschedler, the Swiss delegate, was to avoid disturbing 'a whole series of conventions relating to the protection of the human person' (United Nations Conference on the Law of Treaties [1968] para 12).

[40] The reference to 'treaties of a humanitarian character' raises the question of whether Article 60(5) refers only to treaties concerning → international humanitarian law (IHL), or can also include human rights treaties. Varying degrees of the scope of Article 60(5) have been argued, ranging from the very restrictive of Article 60(5) being applicable only to IHL treaties, to the very expansive of all human rights treaties falling under Article 60(5). As Simma and Tams note, a strict textual reading of Article 60(5) would point to a restrictive interpretation, i.e. only IHL treaties, however, the drafting of Article 60(5) would lead the interpreter to including human rights treaties as well. Even then, whether this applies to all human rights is debatable, as certain human rights violations may be better analysed in different contexts, such as that of countermeasures (Simma and Tams [2011] at 1367, paras 44-7; on other views see: Verdross and Simma [1984] at 518 et seq; Feist [2001] at 156 et seq; Villiger [2009] at 746-7, para 24; Aust [2013] at 260; Giegerich, 'Article 60' [2018] at 1120-2, paras 81-6).

IV. Other Pertinent Aspects Related to the Application of Human Rights Treaties

[41] Apart from and in parallel to treaty law, the application of human rights treaties falls within the scope of other areas of international law. To highlight this, the two most characteristic examples will be briefly examined here, namely countermeasures from the domain of → state responsibility and the issue of 'automatic succession' from the domain of state succession to treaties.

1. Countermeasures

[42] Countermeasures allow states to exert pressure on a violating state to cease said violation. Actions taken as countermeasures would in and of themselves be a violation of international law, however, if they are a response to another state's violation and satisfy the customary law requirements (e.g. proportionality, prior notification etc), they qualify as a → circumstance precluding wrongfulness, and the state taking the countermeasure cannot be held responsible for it.

[43] However, there are limits as to what countermeasures can be taken, and this is exactly the point where human rights treaties come into play. Article 50 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) lists the obligations that shall not be affected by countermeasures. Most of these are related to human rights and humanitarian law. In detail: 'Countermeasures shall not affect: [...] (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law'.

[44] Article 50(1)(b) ARSIWA crystallizes what *Naulilaa* had already established, i.e. that a countermeasure must be 'limited by the requirements of humanity and the rules of good faith applicable in relations between States' (*Naulilaa* [1928] at 1026; translation by the author). Around the same time, the Institut de droit international (IDI) also adopted a resolution on the

'Regime of Reprisals in Peacetime'. Article 6 of that Resolution provided that a state taking countermeasures must 'abstain from any harsh measure which would be contrary to the laws of humanity and the demands of the public conscience' (IDI [1934] at 710, Art 6(4)). According to the ILC, the underlying reasoning of this limit can also be seen in the multitude of human rights treaty provisions that prohibit derogations from certain rights and freedoms (ILC, 2001: Commentary to Art 50, paras. 6-7). Article 50(1)(c) ARSIWA focuses more specifically on obligations of humanitarian law with regard to reprisals, and is modelled on Article 60(5) VCLT, and similar prohibitions in international humanitarian law treaties, but the underlying reasoning is the same as with Article 50(1)(b) (on Art 50(1)(b) and (c) see Borelli and Olleson [2010]). Finally, Article 50(1)(d) ARSIWA prohibits countermeasures affecting 'other obligations under peremptory norms of general international law' (→ *jus cogens*), which include the protection of a number of fundamental human rights. Of note is the use of the term 'other' as this demonstrates that some of the norms already included in Article 50(1)(b) and (c) can also qualify as peremptory norms and it does not affect them.

[45] One of the most controversial topics was that of countermeasures taken in the public interest in response to violations of obligations owed to the international community as a whole (→ community interests). In the end, countermeasures in the collective interest were left out from the ARSIWA, and Article 54 was adopted to that effect, due to the 'limited' and 'embryonic' state practice on the matter and its potentially destabilizing effect (ILC, 2001: Commentary to Art 54, para 3; Sicilianos [2010] at 1138-42). However, the issue still remains open and debated in international legal scholarship (Tams [2005]; Dawidowicz [2006]; Paddeu [2015]).

2. Succession to Human Rights Treaties

[46] Another aspect not falling within the law of treaties *stricto sensu*, but affecting the application of human rights treaties is that of state succession, which 'has for a long time been dominated by the dichotomy between an alleged principle of universal succession on the one hand and a *tabula rasa* approach on the other', with the former giving greater credence to rights of third states in the maintenance of stability, while the other showing deference to → state sovereignty (Zimmermann and Devaney [2019] para 5).

[47] The question essentially boils down to whether a successor state is bound automatically by treaties signed and ratified by the predecessor state (known as 'automatic succession'), or whether it needs to accede to said treaties anew. Of course, this is relevant only for successor states, as in the case of a state being the continuity of the earlier state, this is not an issue, since for all intents and purposes this is the same state.

[48] In an attempt to provide a more comprehensive framework, the ILC elaborated a set of articles, which led to the 1978 Convention on Succession of States in respect of Treaties. Although this Convention provided guidelines regarding state succession, it took almost two decades to enter into force (in 1996), still only has 23 signatory parties, and even the scholars involved in its drafting were quite sceptical as to whether the solutions adopted were reflective of customary international law (Sinclair [1979] at 153; Zemanek [1980] at 735; Vagts [1993] at 294-5; Kamminga [1996] at 469-84).

[49] A contentious point is that given that state succession occurs in politically highly sensitive contexts, and the uniqueness of the situations involved, state succession is 'a subject altogether unsuited to the process of codification' (O'Connell [1979] at 726; see also Müllerson [1993]; Beato [1994]; Chan [1996]; Conforti [2006] at 106).

[50] With respect to human rights treaties, the question of 'automatic succession' and its customary nature is even more pronounced, with views ranging from acceptance to outright rejection (Jenks [1952] at 142; Müllerson [1994] at 154-7; Bos [1995] at 18; Kamminga [1996] at 472-3; Shaw [1994] at 84; Stern [1996] at 297-306; Higgins [1998] at 696-7; Rasulov [2003]; Ruiz [2011] at 69; Zimmermann and Devaney [2019]).

[51] Supervisory bodies of human rights treaties have seemed to lean toward 'automatic succession', although the practice is not entirely uniform, and the tendency seems to be to 'urge' successor states to submit a declaration of succession or accession. The → UN Commission on Human Rights (the predecessor of the → UN Human Rights Council), for instance, in three Resolutions urged 'successor States to confirm to appropriate depositaries that they continue to be bound by obligations under relevant international human rights treaties' (Commission on Human Rights Resolutions 1993/23, 1994/16 and 1995/18).

[52] Around the same time, similar 'urging' approaches were adopted by the Committee on the Elimination of Racial Discrimination and the Fifth meeting of persons chairing the human rights treaty bodies (Committee on the Elimination of Racial Discrimination, 1993: 113; UNGA, 1994: paras. 31-2; for an overview see: Commission on Human Rights 1994). The chairpersons of the human rights treaty bodies went a bit further by explicitly stating that they were 'of the view that successor States are automatically bound by obligations under international human rights instruments from their respective date of independence and that the respect of their obligations should not depend on a declaration of confirmation made by the new Government of the successor State' (UNGA, 1994: para 32).

[53] The HRCttee has similarly urged successor states, but has also gone a bit further. When dealing with state succession (the first occasion was with respect to the dissolution of the Socialist Federal Republic of Yugoslavia), the HRCttee expressed the view that 'so far as human rights treaties are concerned ... their provisions should be regarded as applying, on a continuing basis, to the people within the territories of the new States' (Pocar [2011] at 282).

[54] Similarly, in General Comment No 26 (1997), the HRCttee held the view that '[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party [...]. [O]nce 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' (para 4). Along the same vein, more recently, in the case of Kazakhstan the Committee regarded the state as being bound by the ICCPR even though it had not made a declaration of accession or succession (HRCttee, 2000: para 55).

[55] The aforementioned practice, combined with the fact that successor states often accede (rather than make a declaration of succession) to human rights treaties, has led Rasulov to argue that this is more due to the inherent freedom of states to enter into treaty relations they deem beneficial, rather than due to an obligation stemming from an allegedly customary rule of automatic succession (Rasulov [2003]).

[56] As far as international courts and tribunals are concerned the ICJ, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case*, did not take a position on automatic succession, although Craven argues that there was an implicit acceptance of it (ICJ, *Bosnian Genocide* [1996] para 23; Craven [1997]). Judge Weeramantry in his separate opinion seemed to lean in favour of it for a number of reasons, including the special nature of the Genocide Convention, 'the inherent dignity of every human being', and

the 'special interest in the continuity of such treaties' (ICJ, *Bosnian Genocide* (Separate Opinion of Judge Weeramantry) [1996] at 645).

[57] The Appeals Chamber of the → ICTY, in turn, in *Čelebići* held that 'Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of conventions entail automatic succession' (ICTY, *Delalić et al* [2001] para 111), although it has to be noted that the Appeals Chamber may have been influenced by the fact that Bosnia and Herzegovina had recognized before the ICJ that 'automatic succession' was in their view customary international law (ICJ, *Bosnian Genocide* [1996] para 21).

V. Conclusion

[58] Human rights treaties are undeniably the primary source of human rights protection in contemporary international law. By combining both horizontal and vertical features, they have elevated the status of the individual in the international sphere, even though a strict categorization and definition of what precisely a human rights treaty is proves somewhat elusive. These special features of human rights treaties may explain the tendency of certain patterns of approaches and solutions in the law of treaties being somewhat more prominent (as for instance in the case of evolutive interpretation, the severability doctrine in reservations and automatic succession) but this does not reach the level of emergence of a specialized set of rules, unique to human rights treaties, that exist *praeter* or even *contra* VCLT. On the contrary, bodies mandated with the interpretation and application of human rights treaties have consistently referred to the law of treaties in their execution of their function, reaffirming thus that this set of rules is applicable to all treaties irrespective of their typology.

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