AVOIDING LEGAL OBLIGATIONS CREATED BY HUMAN RIGHTS TREATIES*

ED BATES

Abstract This article examines the legality of the options that may be open to a State that is unwilling to accept a legal obligation created by a human rights treaty it has already ratified. It briefly addresses the subject of 'derogation' from human rights treaties before looking in detail at denunciation of the same. It proceeds to examine the legality of strategies such as entering a late reservation to a human rights treaty and of denouncing the treaty with the sole purpose of entering a new reservation to it.

I. INTRODUCTION

The international legal obligations created by a human rights treaty may be highly inconvenient for a State. This has been illustrated by the United Kingdom (UK) Government's evident displeasure in recent years with the legal precedent set by the European Court of Human Rights in *Chahal v United Kingdom*[1] and the general unpopularity of the UK's Human Rights Act.[2] So what options, if any, does a State have in international law if it is simply unwilling to accept a legal obligation(s) created by a human rights treaty that it has *already* ratified? This article examines that question.

* Dr Ed Bates, School of Law, University of Southampton. My thanks to Professor David Harris, Professor Rob Cryer and Andrew Serdy for some very useful comments on an earlier draft. Thank you also to Ms Elise Cornu of the Council of Europe Treaty Office and to Professor Francesco Seatzu. Any errors are, of course, the sole responsibility of the author.

[1] (1997) 23 EHRR 413 ('*Chahal*'). This case established that, even if an individual is a security threat, he may not be expelled from a Convention State when there are substantial grounds for believing that there is a real risk that he or she may ultimately receive treatment contrary to Article 3 in the destination State (*Chahal*, para 79). When he was Home Secretary, John Reid MP described *Chahal* as an 'outrageously disproportionate judgment' (HC Debates 24 May 2007, Vol 460 Col 1433). On the UK Government's opposition to *Chahal* more generally see Anthony Lester and Kate Beattie, 'Risking Torture', (2005) 6 EHRLR 565. A unanimous judgment from the Grand Chamber of the European Court of Human Rights recently upheld *Chahal* in *Saadi v Italy* Appl 37201/06 [2008] ECHR 179 (28 February 2008).

[2] See analysis in Joint Committee on Human Rights, *The Human Rights Act: the DCA and Home Office Reviews*, (Thirty-second Report of session 2005–2006: HL 278/HC 1716) paras 128–131. At the start of 2007 the official position of the Department for Constitutional Affairs ('DCA') is that withdrawal from the ECHR or repealing the Human Rights Act ('HRA') is ruled out (ibid 37–38) and that 'immediate legislative change is not necessary', see Department for Constitutional Affairs, 'The Human Rights Act: the DCA and Home Office Reviews Government Response to the Joint Committee on Human Rights Thirty-second Report of Session 2005–06', Cm 7011 (January 2007) para 27.

[*ICLQ* vol 57, October 2008 pp 751–788] doi:10.1017/S0020589308000602

As well as the European Convention on Human Rights[3] (ECHR), the focus of this article will be on the main UN human rights treaties,[4] and the American Convention on Human Rights (ACHR).[5] First, and as a preliminary matter, the relevance of derogation provisions for human rights treaties generally is briefly examined (section II, below). If a State validly derogates from a human rights treaty, then it is acting within the terms of the treaty and it cannot be said that it is avoiding the legal obligations created by it. However, this assumes that the State has validly derogated. Next the matter of withdrawal from or denunciation of human rights treaties generally will be considered (section III, below). Denouncing a human rights treaty is clearly the ultimate way for a State to terminate the legal obligations it has entered into. However, as this section discusses, it is debatable whether it is possible to denounce the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Even for a human rights treaty that may be denounced, there may be a prohibitively high political price for doing so. After a general discussion of how bodies such as the European and Inter-American Court of Human Rights have defended the integrity of their respective treaty regimes (section IV), the ability of a State to submit a late reservation to a human rights treaty will be examined in section V. It may come as a surprise to many international lawyers, but, in certain limited circumstances at least, it would seem that it is in fact possible for a State to enter a late reservation to a treaty. This matter is discussed below and the question posed as to whether it is possible to enter a late reservation to a human rights treaty. The last section (VI) will address what this author will refer to as 'strategic denunciation' and re-ratification, that is the legality of denouncing a human rights treaty with the sole purpose of re-ratifying it with a 'new' reservation(s)—this idea was suggested by Tony Blair (then Prime Minister) in 2003 with respect to the ECHR and in connection with the *Chahal* case. The relevant precedents that exist here are discussed and various arguments for and against the legality of such a course are presented.

[3] ETS No 5.

[4] That is, the International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (UNCAT); the Convention on the Rights of the Child, 1577 UNTS 3 (ICROC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc A/RES/45/158 (ICMW); the Convention on the Rights of Persons with Disabilities, UN Doc A/RES/61/106, in force 3 May 2008 (ICRPD); and the International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc A/RES/61/177, not yet in force (ICAED).

[5] American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123.

II. DEROGATION FROM THE HUMAN RIGHTS TREATY

Of the human rights treaties examined in this article, only the ICCPR, the ECHR and the ACHR allow 'derogation'. Each prohibits derogation from certain rights[6] and requires that any derogation made be strictly proportionate to the circumstances of the public emergency.[7] However, the condition-precedent for derogation is, for the ECHR and ICCPR, that there exists a 'public emergency [*threatening/which threatens*] *the life of the nation*',[8] and for the ACHR there must be a time of 'war, public danger, or other emergency that *threatens the independence or security of a State Party*'.[9] What these qualifying circumstances specifically entail has been discussed in detail elsewhere,[10] but the essential point is that a State may not use the derogation provision of a human rights treaty as a convenient tool to avoid a legal obligation existing under that treaty.[11] Similarly, a State may not simply react to an adverse ruling or decision against it by a human rights tribunal by derogating from the relevant human rights instrument. Of relevance here is the UK's reaction to *Brogan v United Kingdom*[12] whereby the Strasbourg Court found a violation of Article 5(3) in the context of the pre-trial detention regime applicable when Northern Ireland was blighted by terrorism. Rather than

[6] See Article 4(2) ICCPR, Article 15(2) ECHR and Article 27(2) ACHR.

[7] See Article 4(1) ICCPR and Article 15(1). Article 27(1) ACHR is very similar.

[8] See, respectively, Article 4(1) ICCPR (emphasis added) and Article 15(1) ECHR (emphasis added). The latter also allows for derogation during 'war', but only when 'threatening the life of the nation'. The European Commission of Human Rights concluded that was no 'public emergency' for the purposes of Article 15(1), ECHR in *Denmark, Norway, Sweden, Netherlands v Greece*, (Commission Report) 12 Yearbook of the European Convention on Human Rights (1969).

[9] Article 27(1) ACHR (emphasis added).

[10] See Edward Bates, 'A "public emergency threatening the life of the nation"? The United Kingdom's derogation from the European Convention on Human Rights of 18 December 2001 and the "*A*" case' (2005) 76 BYIL 245; Subrata Chowdhury, *Rule of Law in State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (Pinter, London, 1989); Jaime Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press, Oxford, 1992); Joan Fitzpatrick, *Human Rights in Crisis* (University of Pennsylvania Press, Philadelphia, 1994); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Martinus Nijhoff, The Hague, 1998); Dominic McGoldrick, The Interface between Public Emergency Powers and International Law 2(2) *International Journal of Constitutional Law* (2004) 380 and Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd edn, Engel, Kehl, 2005) ('*Nowak ICCPR Commentary*') 83–110.

[11] When the UK derogated from Article 5(1)(f) of the ECHR in 2001, it was argued on behalf of *Liberty* that it was, 'strongly arguable that the Secretary of State [was] not seeking to derogate from Article 5(1) because of a public emergency threatening the life of the nation, but because Article 3 [as interpreted in *Chahal*] prevent[ed] him removing from the United Kingdom asylum-seekers who may face persecution abroad'. It was 'very doubtful that it is a valid use of Article 15(1) to impose detriments on persons because they seek to take advantage of rights conferred by Article 3, especially when Article 15(2) prohibits any derogation from Article 3 itself because of its fundamental nature', *Opinion of David Pannick QC prepared for Liberty (the National Council for Civil Liberties) on the derogation from Article 5(1) of the European Convention on Human Rights to allow for detention without trial* (on file with author). The House of Lords held in *A v Secretary of State for the Home Department* [2004] UKHL 56 that at the material time there had been a 'public emergency threatening the life of the nation' for the purposes of Article 15(1) (Lord Hoffman dissenting).

[12] (1989) 11 EHRR 1341.

amend domestic law so as to limit the power of extended detention without appropriate judicial control, ie make it compliant with Article 5(3), the Government derogated from that Article by resort to Article 15. According to some leading Convention commentators this was an act of 'bad faith',[13] but in *Brannigan and McBride v United Kingdom*[14] the European Court accepted that the derogation was 'clearly linked to the persistence of the emergency situation', and that there was 'no indication that the derogation was other than a genuine response [to it]'.[15] In the Court's judgment, for the facts underpinning *Brannigan and McBride* there *was* a 'public emergency threatening the life of the nation'[16] and the measures taken in connection with it by the UK Government were strictly proportionate to that situation.[17] According to the Court's analysis in *Brannigan and McBride*, therefore, the UK Government had not *evaded* the legal obligation established by Article 5(3) of the Convention as the Court in *Brogan* had expounded it. It is vital to stress, however, that the UK's actions had only been permitted given the existence of a 'public emergency' within the meaning of Article 15.

III. DENOUNCING OR WITHDRAWING FROM THE TREATY

A. Denunciation: Law[18]

Articles 54 and 56 of the Vienna Convention on the Law of Treaties (VCLT)[19] set out the basis for denouncing[20] a treaty when it is silent on the matter, as is the case for the ICCPR, the ICESCR, the CEDAW and the newly established Convention on Disappearances (ICAED). Essentially, denunciation is only possible if it is established that the parties intended to allow for this, or the ability to do so is implied from the nature of the treaty. Citing the VCLT rules, the HRC has stated, in General Comment No 26[21]—produced shortly after the

[13] Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerp, 2006) 1073.

[14] (1994) 17 EHRR 539.

[15] ibid para 51.

[16] ibid para 47.

[17] ibid paras 48–74.

[18] See Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge, 2007), ('Aust') chap 16 and Laurence Helfer, 'Exiting Treaties' (2005) 91 Virginia Law Review 1579. On denunciation of human rights treaties generally, see P Weis, 'The Denunciation of Human Rights Treaties' (1975) 8 Human Rights Journal 3 and the comments made by Judge Cançado Trindade in his Separate Opinion in *Caesar v Trinidad and Tobago*, Inter-Am Ct HR, Ser C No 123, para 47–52.

[19] The Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[20] Aust (n 18) 277 explains that rather than 'denounce' or 'denunciation' it is better to employ the term 'withdrawal' from a treaty. The writer has kept with the former wording as this is consistent with the words employed in the text of the human rights treaties being considered in this article.

[21] Human Rights Committee General Comment No 26 (Continuity of Obligations) (Contained in document A/53/40, annex VII) para 5. See Elizabeth Evatt, 'Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence?' (1999) 5 Australian Journal of Human Rights 215, 215–222 and *Nowak ICCPR Commentary*, xxxvi–xxxix.

Democratic People's Republic of Korea (DPRK) purported to denounce the ICCPR in August 1997—that it is 'firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to [the ICCPR] to denounce it or withdraw from it'. The HRC argued, first, that it was evident that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation;[22] secondly, 'it [was] clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation',[23] this because it forms part of the 'International Bill of Human Rights' and so did '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'.[24] The HRC's General Comments (like its Views under the First OP to the ICCPR) are not legally binding;[25] their authority is based on the fact that the HRC is the expert Committee charged with overseeing the implementation of the ICCPR.

In contrast to the HRC's view, with respect to the ICCPR the UN Secretary-General has relied on Article 54 VCLT, according to which a State can only withdraw from a treaty with the consent of all the other Member States to it.[26] That provision was drawn to the attention of all the other States parties to the ICCPR in a notification sent to them by the Secretary-General when the DPRK purported to denounce the ICCPR.[27] At least one State, Denmark,[28] sent a notification to the Secretary General agreeing with his understanding of Article 54 VCLT and stating that it did not consent to the DPRK's withdrawal.

Clearly, if the HRC's view is legally correct, no State may withdraw from that treaty, nor, it would seem, the ICESCR, since this forms part of the 'International Bill of Human Rights' too and also has no provision for its denunciation. But even if the better view is that the ICCPR (and ICESCR) may only be denounced with the consent of all the other State Parties to it, this would be a very formidable task: as of 1 August 2008, the ICCPR has been ratified by 160 States; the ICESCR by 157 States. Finally, it is noteworthy that in 2000 North Korea submitted its long overdue second periodic report under Article 40 of the ICCPR to the HRC[29] and participated in the examination

[22] ibid para 2 (see this para for further reasoning).

[23] ibid para 3.

[24] ibid. The Committee of Ministers of the Council of Europe subsequently called on all States 'to refrain from any steps in contradiction with the [HRC's] General Comment . . . confirming that the [ICCPR] is not subject to denunciation or withdrawal'. See Committee of Ministers, 'Declaration on the occasion of the 50th anniversary of the Universal Declaration of Human Rights', Decl-10.12.98E/10 December 1998.

[25] See *Nowak ICCPR Commentary* 668–669, noting that the HRC may be considered a 'quasi-judicial organ', 669.

[26] See *Nowak ICCPR Commentary* xxxvi.

[27] See Evatt (n 21) 222.

[28] See H Klingenberg, 'Elements of Nordic Practice 1998: Denmark' 68 Nordic Journal of International Law (1999) 163, noting that '[o]ther states communicated similar responses', 164.

[29] See CCPR/C/PRK/2000/2.

of that Report in 2001.[30] The DPRK Government, therefore, seems to have accepted that it remained a party to the ICCPR and, possibly, the report's submission revealed that even a State such as North Korea was not immune from the 'political' reaction that followed its purported denunciation.

Unlike the ICCPR and ICESCR, many human rights treaties include a specific provision providing for their denunciation. Article 58(1) (formerly 65(1)) of the ECHR permits a High Contracting Party to denounce that Convention, on condition that that State ratified it more than five years previously and has provided six months' notice. Article 58(2) adds an important rider:

> '[A] denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this 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'.[31]

Article 78 of the ACHR is drafted in very similar terms, although there is a one-year notification period extending the effective date of denunciation accordingly. Unlike the ICCPR and the ICESCR, most of the main UN human rights treaties, and a number of their Optional Protocols, do have specific provisions for denunciation. They are very similar to the ECHR and ACHR, bar the rule that the treaty cannot be denounced during the first five years.[32]

The fact that the effective date of denunciation may be some time after the notice of the same is an important feature of human rights treaties. The ability to denounce with immediate effect is a disincentive for the State to denounce the instrument, as is the fact that the relevant Committee or Court retains 'jurisdiction' over human rights violations for some time after such a decision is made.

[30] For Summary Records, see CCPR/C/SR.1944; CCPR/C/SR.1945; CCPR/C/SR.1946; CCPR/C/SR.1953. For Concluding Observations see CCPR A/56/40 (2001). North Korea's Third Periodic Report was due on 1 January 2004 and remains outstanding.

[31] Via Article 58(3) a High Contracting Party will cease to be a party under the same conditions as set out in Article 58(1)–(2) if it ceases to be a member of the Council of Europe. Article 58(4) provides for denunciation in respect of any territory to which the States has declared to extend the Convention under the terms of Article 56.

[32] See Article 21 ICERD; Article 31 UNCAT; Article 52 ICROC and Article 48 ICRPD (all of which require a one year notice period). ICMW prohibits denunciation in the first five years of membership (Article 89(1)) and provides that denunciation shall be effective 'on the first day of the month following the expiration of a period of twelve months after the date of the receipt of the notification by the Secretary-General of the United Nations' (Article 89(2)). The following Optional Protocols to UN human rights treaties also include denunciation clauses: The First Optional Protocol to the ICCPR, 999 UNTS 302 (Article 12); the Optional Protocol to the Convention on the Elimination of Discrimination against Women, 2131 UNTS 83 (Article 19); the Optional Protocol to the Convention on the Rights of the Child (re Armed Conflict), Doc A/RES/54/263 (Article 11); Optional Protocol to the Convention on the Rights of the Child (re Sale, Prostitution and Pornography) Doc A/RES/54/263 (Article 15) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities UN Doc A/RES/61/106 (Article 16).

B. Denunciation: Practice

So much for the legal provisions: what has been the practice in this field? In fact, none of the *substantive* UN human rights treaties addressed by this article have been denounced.

As just noted, the DPRK purported to denounce the ICCPR in the late 1990s. This was in protest at what the DPRK Government claimed was a politically motivated, condemnatory resolution adopted against it by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which made various references, amongst other things, to the DPRK's failure to respect certain rights protected by the ICCPR.[33] As noted above, it would seem, nonetheless, that the DPRK remains party to that treaty.

The Netherlands actively considered, but did not attempt, withdrawal from the ICCPR in the late 1980s[34] following two controversial views expressed by the HRC under the First Optional Protocol to the ICCPR and concerning Article 26 of the ICCPR (discrimination and equality before the law) in the context of social security.[35] Interestingly, when Switzerland[36] and Lichtenstein[37] acceded to the ICCPR, in 1992 and 1998 respectively, both entered reservations seeking exemptions from the full application of Article 26.[38] Evidently late acceding States have advantages compared to States which ratified the same treaty earlier.[39]

The Dutch Government could have denounced the First OP to the ICCPR, for Article 12 of that non-substantive instrument allows for this as has been demonstrated by Jamaica in 1997,[40] Trinidad and Tobago (1998) and Guyana

[33] See Evatt (n 21) 215–222.

[34] *Nowak ICCPR Commentary* xxxvi.

[35] *Broeks v the Netherlands*, No 172/1984; *Zwaan-de Vries v the Netherlands*, No 182/1984. See generally Christsian Tomuschat, 'The Human Rights Committee's Jurisprudence on Article 26—a Pyrrhic Victory?', in Nisuke Ando (ed), *Towards implementing universal human rights: Festschrift for the twenty-fifth anniversary of the Human Rights Committee* (Nijhoff, Leiden, 2004) (hereafter '*HRC Festschrift*').

[36] For the full text see *Multilateral Treaties Deposited with the Secretary-General (status as at 8 October 2007)* available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp (hereafter 'Multilateral Treaties') Chapter IV(4). Germany ratified the ICCPR in 1973. When it ratified the First OP to the ICCPR in 1993, it entered a reservation which attempted to prevent examination of Article 26 by the HRC under that instrument, ibid Chapter IV(5). See n 76 below.

[37] ibid.

[38] See Tomuschat in *HRC Festschrift* 229 (who notes that the French courts have refused to implement the HRC's views on Article 26, 239–240).

[39] Writing in 1988, Frowein noted that it was 'obvious' from the list of reservations that 'the later a State has ratified the [ECHR], the longer are the reservations', Jochem Frowein, 'Reservations to the European Convention on Human Rights', in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: the European Dimension: Studies in Honour of Gérard J.Wiarda* (Heymanns, Koln, 1988) 194.

[40] See Natalia Schiffrin, 'Jamaica withdraws the right of individual petition under the International Covenant of Civil and Political Rights', (1998) 92 AJIL 563. See also 'Concluding Observations in respect of Jamaica', A/53/40 vol I (1998) 15, paras 78 and 79.

(1999).[41] Controversially, the latter two States immediately re-acceded to the OP with a purported new reservation, the basic purpose of which was to prevent the HRC from addressing individual complaints from those subject to the death sentence.[42] As is discussed further below,[43] in a case under the First OP to the ICCPR, Trinidad and Tobago's 'new' reservation was declared invalid and severable by the HRC and, in 2000, the State in question denounced the First OP for a second time.

Commentators have suggested that the motivation for denunciation of the OP by the Caribbean States just referred to was the respective governments' desire to retain the death penalty and to minimize interference from international human rights bodies in this regard.[44] The Caribbean States in question specifically explained their denunciations in terms of enabling their criminal justice systems to satisfy domestic legal standards (principally those derived from the Privy Council judgment in *Pratt and Morgan v Attorney-General of Jamaica*)[45] that effectively required that death penalty litigation at both the domestic and international level be concluded within a period of five years.[46] The background was the same for Trinidad and Tobago's denunciation of the ACHR on 26 May 1998.[47] The official justification given[48] was the Inter-American Commission on Human Rights' refusal to give assurances that capital cases would be completed within a timeframe appropriate to meet the requirements of *Pratt and Morgan*.[49] Trinidad and Tobago is the only State ever to have denounced the ACHR, although in 1999 and against the background of the *Pratt and Morgan* case, Jamaica, Haiti, St Kitts and Nevis, Barbados, and Surinam threatened to do so.[50]

As to the ECHR, only one State, Greece, has ever denounced this instrument. When under a military regime Greece withdrew from the Council

[41] Each State remains bound by the ICCPR itself, so compliance with that instrument is subject to the HRC's supervision under Article 40 (the so-called State Reporting system). See, however, n 235 below.

[42] See Glenn McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol', (2001) 23 Human Rights Quarterly 769.

[43] See nn 209–210 below.

[44] See McGrory (n 42) 774–780.

[45] (1994) 2 AC 1.

[46] The HRC was unable to give a guarantee that it would complete consideration of OP 'death row' cases from these States within a certain minimum period, see *Nowak ICCPR Commentary* xxxiv–xxxv. As to Trinidad and Tobago's justifications see *Rawle Kennedy v Trinidad and Tobago* No 845/1999 UN Doc CCPR/C/67/D/845/1999 (admissibility), paras 6.2–6.3.

[47] See 'Notice to Denounce the American Convention on Human Rights', in Inter-American Court of Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*, (July 2003) 73. See also Douglass Cassel, 'Peru withdraws from the Court: Will the Inter-American Human Rights System meet the Challenge?' [1999] 20 *Human Rights Law Journal* 167, 168 and Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (CUP, Cambridge, 2003) 114.

[48] ibid.

[49] In subsequent case law, the Inter-American Court confirmed its jurisdiction to hear cases relating to facts that occurred after the date of notification of denunciation, but prior to the effective date of denunciation, see *Hilaire, Constantine and Benjamin et al Case* (Merits), Inter-Am Ct HR, Ser C No 94, para 13.

[50] See Paul Davison, 'Islands Warn "Bully" Britain', *The Independent* (6 March 1999) 13.

of Europe and so denounced the Convention on 12 December 1969,[51] the denunciation took effect on 13 June 1970 after the requisite six-month period.[52] The denunciation did not prevent the Committee of Ministers addressing the European Commission of Human Rights' Reports in two inter-State cases brought against Greece[53] finding widespread, gross violations of the Convention. Greece rejoined the Council in 1974, when it re-ratified the Convention.[54]

In very different circumstances to those just described, there appeared to be a serious prospect that the Switzerland would denounce the ECHR in the late 1980s. This followed *Belilos v Switzerland*[55] when an interpretative declaration made by the Swiss Government was held by the Strasbourg Court to be an impermissible and severable reservation. The Swiss Council of States rejected a call to denounce the Convention by one single vote.[56]

C. Denunciation: Politics

A main factor encouraging compliance with international human rights law is a State's fear of adverse or negative publicity. Against such a background it will fall to the government of a State concerned to make a political calculation as to whether more harm is done to the State's interests by remaining a party to the treaty than by attempting tactics such as denunciation.[57] So, although it may be perfectly legal to denounce the ECHR, there would exist major 'political' obstacles to doing so given the importance attached today to the ECHR in European public law.[58] Denunciation of the Convention could prove especially difficult for any of the 27 Member States of the European Union (EU) and any State hoping to join that organization.[59]

[51] See 12 Yearbook of the European Convention on Human Rights (1969) 78.

[52] ibid 82.

[53] See n 8 above.

[54] See 17 Yearbook of the European Convention on Human Rights (1974).

[55] (1988) 10 EHRR 466.

[56] Iain Cameron and Frank Horn, 'Reservations to the ECHR: The Belilos Case', (1990) 33 German Yearbook of International Law 69, 117.

[57] On politics of denunciation generally see Helfer (n 18) 1621.

[58] See especially Louis Edmond Pettiti, Emmanuel Decaux and Pierre-Heni Imbert, *La Convention européenne des droits de l'homme*, (Economica, Paris, 1999) 956. In 2006 the UK's Department for Constitutional Affairs referred to the 'clear international ramifications' that may occur were the UK to denounce the Convention: 'rights of representation at the Council of Europe could be suspended, and the Committee of Ministers could request its withdrawal after calling for the opinion of the Parliamentary Assembly' (n 2) 37. For procedures relating to expulsion from the Council of Europe see Article 8 of the Statute of the Council of Europe, ETS No 1. If a State was ejected from the Council of Europe, it could no longer remain a party to the Convention, see Article 59(1) ECHR.

[59] EU Member States must respect fundamental rights when implementing EU measures, so the Convention would continue to have a relevance to any State which had denounced the Convention but remained a party to the EU. It is true that no provision of the European treaties specifically requires that an EU State must ratify the Convention. However, in practice all EU States have done so and it may be a political obligation to do so, see generally Manfred Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU', in

Not dissimilar comments could be made about the ACHR, in spite of Trinidad and Tobago's denunciation of it a decade or so ago. It is significant to note that Peru did not denounce the ACHR in the late 1990s and early 2000s following its announcement in 1998 that it would withdraw from the jurisdiction of the Inter-American Court of Human Rights.[60] The full details of this affair are beyond the scope of this article.[61] It is pertinent to note, however, that the Inter-American Court duly ruled that the only way that a State may withdraw from the jurisdiction of the Court is to denounce the ACHR Convention outright.[62] One commentator noted that '[t]he Court knows that withdrawing from the entire American Convention is especially costly', it being 'increasingly advantageous in international relations for a state to be seen as cognizant and protective of human rights'.[63] After a change of government, Peru 'normalised' her relations with the Court in 2001.[64] Although commentators lamented the silence of the political organs of the Organization of American States following Trinidad and Tobago's denunciation of the ACHR in 1998,[65] in 2006 it was argued that 'the Court has ... managed to win nearly universal acceptance—even confidence—among Latin American governments',[66] the San José institution having become 'essentially a court of human rights for Latin America, joined by all Spanish and Portuguese-speaking nations of the Western Hemisphere (except Cuba)'.

Political factors weighing against denunciation do not only operate at the regional level. For a democracy, at least, as well as considerations of internal political nature—opposition in Parliament or from domestic human rights organisations etc—denunciation of a human rights treaty may have an impact on the credibility and reputation of the State at the international level. Australia's membership of the International Convention on the Rights of the Child (ICROC) illustrates the point, for in 1998 the Australian Parliament's

Philip Alston (ed), *The EU and Human Rights* (OUP, Oxford, 1999). A Member State's voting rights under the Treaty of the European Union can be suspended if there is a serious and persistent breach of Article 6(1) and 6(2), by which States promise to uphold the ECHR. The Department for Constitutional Affairs recently took the view that '[g]iven the high political status of the [ECHR], it is theoretically possible that some partners might wish to activate this machinery on the grounds that the UK's denunciation of the [ECHR] was such a serious breach', see (n 2) 38.

[60] Under the ACHR, a State Party automatically accepts the right of individual petition to the Inter-American Commission on Human Rights (Article 44), but may, at a subsequent date, accept the optional jurisdiction of the Court (see Article 62). Peru accepted this jurisdiction on 21 January 1981. The ACHR is silent on withdrawal of jurisdiction.

[61] See Cassel (n 47) above.

[62] *Ivcher Bronstein v Peru*, Inter-Am Ct HR, Ser C No 54 (1999) paras 40, 46 and 50 and *Constitutional Court v Peru*, Inter-Am Ct HR Ser C No 55 (1999) paras 39, 45 and 49; see Pasqualucci (n 47) 115 and especially Karen Sokol, 'Ivcher Bronstein' (2001) 95 AJIL 178.

[63] Sokol ibid 185.

[64] See Antonio Cançado-Trindade, 'The Developing Case Law of the Inter-American Court of Human Rights', (2003) 3(1) Human Rights Law Review 1, 19.

[65] See Cassel (n 47) 168 and Pasqualucci (n 47) 344.

[66] Douglass Cassel, 'Books on International Law', (2006) 100(2) AJIL 503, 505.

Joint Standing Committee examined whether it should be denounced (in accordance with Article 52), or even denounced so that Australia could accede to the treaty again and enter a new reservation.[67] That Committee noted that 191 State Parties had ratified the Convention: powerful 'evidence of the international acceptance of this treaty'.[68] To denounce the treaty and re-accede with a new reservation would do 'significant harm to Australia's international reputation'.[69] The Committee's Report further highlighted the fact that a State which places an emphasis on human rights considerations as a feature of its foreign policy will be very reluctant to denounce an instrument such as the ICROC.[70] Exactly this point was made by the (UK's) Department for Constitutional Affairs (DCA) in 2006 in the context of a theoretical examination of whether the UK might denounce the ECHR. It was stated that:

> 'From a broader political perspective, [by denouncing the Convention] the UK would be fatally undermined in any efforts to encourage better human rights implementation by other members of the Council of Europe and our position in lobbying for human rights implementation by States elsewhere in the world would also be affected'.[71]

IV. PROTECTING THE INTEGRITY OF HUMAN RIGHTS TREATY REGIMES: THE WORK OF THE HRC AND THE REGIONAL HUMAN RIGHTS COURTS

Of course, at the time of ratification a State might seek to exempt itself from certain international legal obligations created by a human rights treaty by entering a valid reservation (assuming this is possible).[72] There is a vast literature on this subject. However, this article focuses on what a State may or may not legitimately do to avoid an international legal obligation created by human rights treaties *after* it has ratified the treaty. So, having addressed the possibility of derogating from human rights treaties and denouncing the same, the discussion will now move towards the possible use of devices such as adding a late reservation or denouncing the treaty with the aim of re-acceding to it and adding a new reservation. To introduce this it is appropriate in the following section to discuss how bodies such as the HRC, and the Inter-American and European Court of Human Rights have sought to defend the

[67] See Parliament of Australia, Joint Standing Committee on Treaties, 'United Nations Convention on the Rights of the Child (Executive Summary)', 17th Report (Aug 1998) (<http://www.aph.gov.au/house/committee/jsct/reports/report17/rept17ex.pdf>, accessed 1 September 2007).

[68] The ICROC has almost achieved universal ratification; only Somalia and the United States of America have not ratified it.

[69] See Parliament of Australia report (n 67) 66.

[70] ibid, 63 and 66.

[71] See (n 2) 37.

[72] For an overview of the provisions made within the UN human rights treaties on reservations see, 'The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties', Report prepared for the Meeting of Chairpersons of the Human Rights Treaty Bodies, HRI/MC/2005/5, para 5.

integrity of their respective treaties against what might be viewed as post-ratification attempts by States to qualify the extent of the legal obligations they have accepted.

A. The Human Rights Committee and the ICCPR

Despite its non-judicial status, the HRC considers that it, not the States Parties to the ICCPR, has the final say on the validity of reservations under that instrument. As is well known, this position was set out in the HRC's General Comment No 24,[73] which was controversial for the reason just stated, but also because it took the view (contrary to the scheme of the VCLT) that invalid reservations might be severed.[74] Other treaty monitoring bodies have been less robust in their approach to reservations.[75]

The HRC's view that a reservation 'cannot be made to the covenant through the vehicle of the [OP]'[76] was upheld in *Rawle Kennedy v Trinidad and Tobago*,[77] the background to which concerned the respondent State's denunciation of the First OP to the ICCPR. Through the application of the severance doctrine in *Rawle Kennedy*, Trinidad and Tobago was left to choose between accepting the First OP in full in respect of *all* ICCPR obligations accepted by that State, or denouncing the First OP once again. It chose the

[73] See General Comment No 24, UN Doc CCPR/C/21/Rev.1/Add.6 (1994). The General Comment was the subject of significant criticism by the governments of France, the United Kingdom and the United States of America; see Report of the Human Rights Committee, Vol I, 50 UN GAOR (Supp No 40), UN Doc A/50/40, Annex VI, (1995 – UK and USA)) and 51 UN GAOR (Supp No 40), UN Doc A/51/40, Annex VI (1996 – France). For comment and analysis see Christine Chinkin et al, *Human Rights Norms and a State's Right to Opt Out* (British Institute of International Law, London, 1997); EcKart Klein, 'A Comment of the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law', in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime* (Martinus Nijhoff, The Hague, 2004) (hereafter '*Ziemele*'); *Nowak ICCPR Commentary* xxx–xxxiv; Catherine Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment 24', 46 *International and Comparative Law Quarterly* (1997) 390; and Martin Scheinen, 'Reservations by States under the International Covenant on Civil and Political Rights and its optional Protocols, and the Practice of the Human Rights Committee', in *Ziemele.*

[74] ibid para 18. See also the HRC's admissibility decision in *Rawle Kennedy v Trinidad and Tobago*, Communication No 845, UN Doc CCPR/C/67/D/845/1999 (31 December 1999) para 6.3. On the practice of the HRC here see *Nowak ICCPR Commentary* xxviii–xxxvi; Sheinen ibid and 'The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties', HRI/MC/2005/5, paras 22–29 and paras 30–38.

[75] For an overview of the approach of the various treaty monitoring bodies to reservations see ibid paras 8–21. See also the Recommendations produced by the Working Group on Reservations set up by the Chairperson of Human Rights Treaties Bodies, 'Report of the Meeting of the Working Group on Reservations', HRI/MC/2007/5 para 16.

[76] See General Comment No 24 (n 73) para 13. On this basis it is arguable that Germany's reservation to the First OP (see n 36 above) is invalid.

[77] See n 46 above. For detailed analysis of the HRC's approach to reservations in the context of individual communications see 'The Practice of Human Rights Treaty Bodies' (n 75) paras 22–29.

latter course. At this cost,[78] therefore, the HRC arguably upheld the integrity of the system of human rights supervision provided by the ICCPR and its First OP more generally. Strictly speaking a substantive reservation to the First OP could not affect the substantive reservations (or lack or them) already made by a State to the ICCPR. However, the HRC chose not to see it this way. It sent a clear message that, in effect, a late reservation to the ICCPR may not be made via the vehicle of a reservation to its First OP. The latter has yet to be ratified by 51 States which have ratified the ICCPR.

B. Reservations to the ECHR

As Judge Cançado-Trindade of the Inter-American Court has stated, the European and Inter-American Courts have 'set limits to State voluntarism', and so 'safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the will of individual States'.[79]

Reservations to the ECHR are permitted,[80] and 38 of the 47 Member States have entered reservations to either the main Convention or its First Protocol.[81] However, recent State practice[82] signals a trend of withdrawal of reservations[83] and the number entered by new Member States joining the Convention over the last decade and a half has been 'remarkably limited'.[84] This is all in keeping with the idea that reservations may only be withdrawn, not extended further.

In *Belilos*[85] the Strasbourg Court established the so-called 'severance doctrine', which, it is said, is now 'accepted by all the States parties'.[86] Reservations that are precise and clear and so fall squarely within the

[78] Whether by acting as it did the HRC did more harm than good to the ICCPR and the First OP is a matter for debate, see Scheinen (n 73) 50–51 and Klein (n 73) 65.

[79] *Caesar v Trinidad and Tobago* (n 18), Opinion of Judge Cançado-Trindade, para 15.

[80] See Article 57 ECHR.

[81] The figures in the above paragraph only apply to statements submitted by States and described by them as 'reservations', ie they do not include interpretative declarations submitted by States.

[82] For a relatively up-to-date analysis of the reservations attached to the Convention, see Polakiewicz in *Ziemele* 97–104. See also Parliamentary Assembly, 'Ratification of Protocols and Withdrawal of Reservations and Derogations made in respect of the European Convention on Human Rights', Doc 10136, 13 April 2004.

[83] Nine States have withdrawn all the reservations that they initially had; of the 28 States with reservations still in place, seven have reduced the number or the scope of their reservations in recent times.

[84] van Dijk and van Hoof (n 13) 1115.

[85] See n 55 above.

[86] Polakiewicz in *Ziemele* at 118. See for example *Eisenstecken v Austria* (2002) 34 EHRR 35, paras 29–30. The International Law Commission views the Strasbourg jurisprudence as a form of regional customary law and does not accept its applicability for UN human rights treaties, see International Law Commission, Report of the International Law Commission on the Work of Its Forty-Ninth Session, UN GAOR, 52nd Sess, Supp No 10 UN Doc A/52/10 (1997) 49, para 84.

requirements of Article 57[87] have been upheld, but the formal requirements of Articles 57(1) (not of a 'general character')[88] and 57(2) ('brief statement of law')[89] have been strictly applied. According to (former Judge) Franz Matscher, the Court has tended to 'restrict the scope of reservations and interpretative declarations, and even eliminate them as far as possible'.[90] For another commentator *Belilos* was seen as demonstrating 'a view of the Convention which [was] not sovereignty or contract-oriented, but objectivist, autonomous and integrationist'.[91] Quite simply, as Professor Frowein once suggested, 'the possibility of [any] unilateral derogation through reservation does not seem to fit easily into the [Convention] picture'.[92]

Against this background one notes that the European and Inter-American Courts have taken a firm stance against attempts by States to try to, in effect, qualify the extent of the substantive obligations accepted under the ECHR or ACHR via the subsequent acceptance of optional clauses, such as the acceptance of the compulsory jurisdiction of the Court. In the *Loizidou* case the Strasbourg Court addressed Turkey's purported quasi-reservation to its acceptance of both the (then optional) right of individual petition (under former Article 25 of the Convention) and the compulsory jurisdiction of the Court (under former Article 46).[93] The Court rejected these conditioned acceptances as it had 'regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental

[87] See for example, *Chorherr v Austria* (1994) 17 EHRR 358; *Helle v Finland* (1998) 26 EHRR 159; and *Jéçius v Lithuania* (2002) 35 EHRR 16. See generally Polakiewicz in *Ziemele* 108–115.

[88] See *Slivenko v Latvia* (Application No 48321/99) decision of 23 January 2002, para 60; *Ilaş cu v Moldova and the Russian Federation*, (Application No 48787/99) decision of 4 July 2001; cf *Belilos v Switzerland* (n 55) para 56.

[89] See Polakiewicz in *Ziemele* 113–115. See *Belilos v Switzerland* (n 55) para 59 and *Weber v Switzerland* (1990) 12 EHRR 508; *Gradinger v Austria* 23 October 1995 (A 328-C); and *Eisenstecken v Austria* (2002) 34 EHRR 35.

[90] *Fischer v Austria* (1995) 20 EHRR 349, Concurring Opinion of Judge Matscher.

[91] Luzius Wildhaber, 'Parliamentary Participation in Treaty-Making, Report on Swiss Law' (1991) 67 *Chicago-Kent Law Review* 437, 457 (the former President of the European Court was commenting in his individual capacity). See also Susan Marks, 'Reservations Unhinged: The Belilos Case before the European Court of Human Rights' (1990) 39 *International and Comparative Law Quarterly* 300, 326–327 (the Convention as 'an integration mechanism') and Luzius Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 *International and Comparative Law Quarterly* 217, 227–229 (comments in his individual capacity).

[92] See Frowein (n 39) 288–289. See also van Dijk and van Hoof (n 13) 1113–1115.

[93] In effect, Turkey sought, inter alia, to prevent both the right of individual petition and the jurisdiction of the Court applying to the facts of events occurring outside the metropolitan territory of Turkey (ie in particular avoiding Northern Cyprus), see *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, paras 15 and 27. The Court has generally blocked State attempts to restrict the application of the Convention obligations entered into via purported territorial restrictions formulated at the time of ratification: see *Ilaşcu v Moldova and the Russian Federation* (2005) 40 EHRR 46, 20–21; *Assanidze v Georgia* (2004) 39 EHRR 32, para 142 and *Cyprus v Turkey* (2002) 35 EHRR 30, para 78.

freedoms',[94] and the fact that 'the object and purpose of the Convention as an instrument for the protection of individual human beings require[d] that its provisions be interpreted and applied so as to make its safeguards practical and effective'.[95] The Court also dismissed arguments presented by Turkey to the effect that its whole acceptance of individual petition and Court jurisdiction had to be considered null and void.[96] It was clear that under the Convention, 'Contracting Parties [should not] be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances' for this 'would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)'. Furthermore, it was noted that 'qualified acceptances' of the right of individual petition and the Court's jurisdiction would lead to 'inequality between Contracting States' and that this 'would . . . run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights'.[97]

In *Loizidou* (as well as other case law)[98] the European Court reflected its perception of the special nature of the Convention by its reference to that instrument as 'a constitutional instrument of European public order (*ordre public*)'.[99] Such terminology would seem to portray the Court's understanding of the Convention as no ordinary, traditional sovereignty-based treaty, but as an instrument with the potential to be a quasi-constitutional document in the field of human rights at the level of European public law.[100]

The understanding of the Convention as a type of integration treaty inspired the Swiss Federal Court in a 1992 judgment,[101] which was primarily concerned with the legality of a new interpretative declaration to the Convention proposed by the Swiss Government after *Belilos*. The Federal Court took the view that that new interpretative declaration was in fact a new reservation, which was not permitted under the Convention. Interestingly it also concluded that it was not possible to use the power of denunciation under Article 58

[94] ibid para 70. [95] ibid para 72. [96] ibid para 90.

[97] ibid para 77. See para 93 for the Court's reasoning on the severing of the quasi-reservation.

[98] *Bankovic v United Kingdom* (2007) 44 EHRR SE5, para 78 and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, para 156.

[99] *Loizidou v Turkey* (n 93) para 75 (and para 74).

[100] See Rudolf Bernhardt, 'Human Rights and Judicial Review', in David Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (M Nijhoff, Dordrecht, 1994) 302, 304.

[101] *Elisabeth B v Council of State of Thurgau Canton* (ATF118 Ia (17 December 1992) – reported 118 *Entscheidungen des Schweizerischen Bundesgerichts* 473 (1992), German language), see Jean Francois Flauss, 'Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6(1)', (1993) Revue Universelle des Droits de l'Homme 297. On late reservations and strategic denunciation of the Convention more generally, see also Jorg Polakiewicz, *Treaty-Making in the Council of Europe*, (Council of Europe Publishing, Strasbourg, 1999) (hereafter '*Treaty-Making CoE*') 96 and Polakiewicz in *Ziemele* 119.

(then, in fact Article 65) of the Convention so as to introduce a new, ie late, reservation under Article 57 (then Article 64). The Swiss court, which was brief on the points in issue, held, in effect, that denunciation of the Convention with the view to re-acceding with a new reservation would probably be an abuse of rights[102] and be contrary to Article 57, which only permitted a reinforcing of Convention commitments over time, not the widening of reservations. The Federal Court stated that its conclusion on the point just noted was encouraged by the special character of the Convention, it being understood that the Convention was a mechanism for a certain level of integration within Europe.[103]

Similar considerations were central to the relatively short Legal Opinion produced in January 2003 (and against the background of the *Chahal* case) for the British non-governmental organization, *Liberty*.[104] This was produced in reaction to the then British Prime Minister's suggestion in 2003 that the UK might denounce the Convention and then re-accede to it with a new reservation (presumably to Article 3).[105] The Convention, the Legal Opinion stated, was 'designed to impose higher standards than other treaties';[106] the denunciation strategy referred to would be 'incompatible with the objects and purposes of the ECHR'; it was 'strongly arguable' that the denunciation and re-accession would be 'invalid and unlawful' as far as 'reservation[s] which could not otherwise validly be made' are concerned.[107]

[102] ibid 487–488.

[103] The Court stated: 'Mit diesem Gedanken der Integration wäre es nicht vereinbar, die Konvention bloss deshalb zu kündigen, um sie sofort wieder mit einem Vorbehalt zu ratifizieren', ibid 487.

[104] David Pannick QC and Shaheed Fatima, *Legal Opinion: Denunciation of the European Convention on Human Rights*, (29 January 2003), copy on file with author.

[105] See *The Guardian*, 'Blair warning on rights treaty', 27 January 2003 and *The Times*, 'Asylum fears force human rights rethink', 27 January 2003. There were contemporaneous newspaper reports that the government had taken legal advice on withdrawing from the *Convention Relating to the Status of Refugees* (1951) 189 UNTS 137, see *The Guardian*, 'You can't quit treaties, Blair warned' (Alan Travis) 6 Feb 2003.

Denunciation and re-accession to the European Convention with a new reservation had been proposed by the official Opposition in 2001, see Oliver Letwin MP, HC Debates, Vol 375, Col 50, 19 Nov 2001 (the author's request for a copy of the legal advice commissioned by the Conservative Party was politely refused). Denouncing and re-acceding with a new reservation was a strategy that had apparently been considered (but never employed) by other Member States to the ECHR in the 1980s see Ronald MacDonald, 'The Margin of Appreciation in the jurisprudence of the European Court of Human Rights', in A Giuffrè, *International Law at the Time of its Codification; Essays in Honour of Roberto Ago* (Giuffre, Milan, 1987) 208 and Frowein (n 39) 199.

[106] Pannick and Fatima (n 104) para 17 (citing *Ireland v United Kingdom* (1978) 2 EHRR 25, para 239).

[107] Essentially a new ('anti-*Chahal*') reservation would be a late reservation and such a reservation to Article 3 would be indirectly derogating from the Convention under Article 15 in a manner normally prescribed by that provision (Article 3 being a non-derogable right). Hence it was 'strongly arguable', 'that it is an abuse of rights, or action which is not in good faith' were the British Government either 'to denounce the Convention for the sole purpose of re-joining with a reservation in the terms it would have adopted under Article 15 if permitted to do so, or in the terms which it would have adopted under Article 57 if parties to the Convention could make fresh

C. The Inter-American Court[108]

Reservations may be made to the ACHR.[109] In the Inter-American Court of Human Rights' third Advisory Opinion,[110] the Court was clear as to the special nature of the legal obligations created by human rights treaties. There are strong grounds for believing that, for an invalid reservation, this Court would follow the severance doctrine adopted in *Belilos*,[111] although as yet there is no equivalent ruling as no comparable case has reached it.

The Inter-American Court has demonstrated its hostility to the idea that States may use the acceptance of the optional jurisdiction of the Court as an opportunity to, in effect, reduce the scope of an obligation entered into under the ACHR. In *Hilaire, Constantine and Benjamin v Trinidad and Tobago (Preliminary Objection)*[112] the Inter-American Court rejected as contrary to the object and purpose of the ACHR Trinidad and Tobago's attempt to impose a far-reaching substantive condition[113] on its acceptance of the compulsory jurisdiction of the Court.[114] The condition would, in effect, have required national law to prevail over the ACHR. The Court interpreted the Inter-American Convention 'in accordance with its object and purpose',[115] and decided that it 'must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention',[116] ie the optional jurisdiction of the Court. With respect to the latter, it was 'unacceptable to subordinate the said mechanism to restrictions that would render the system for the protection of human rights established in the Convention and, as a result, the Court's jurisdictional role, inoperative'.[117] The Court reiterated that

reservations'. To allow either step would make the restrictions on derogations in Article 15 and the restrictions in Article 57 on making reservations after signing ineffective, for 'a State could always achieve its objective by denunciation, and immediate re-ratification with an appropriately worded reservation', para 16(3). By Article 58 a State ratifying the Convention may not denounce it again for a further five years.

In fact, as Article 3 is a non-derogable right, it would be arguable that any reservation to it would be illegal, no matter what the circumstances of its creation.

[108] See especially Antonio Cançado-Trindade (n 64).

[109] Article 75 ACHR reads: 'This Convention shall be subject to reservations only in conformity with the provisions of the [VCLT] . . . '.

[110] Advisory Opinion OC-2/82 (The Effect of Reservations on the Entry into Force of the American Convention on Human Rights), Inter-Am Ct HR, Ser A No 2 (1982), see especially para 29: 'modern human rights treaties in general . . . are *not* multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights *for the mutual benefit of the contracting States*. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, *not in relation to other States, but towards all individuals within their jurisdiction*', (emphasis added). See also the comments made in *Ivcher-Bronstein v Peru* (n 62) paras 46–48.

[111] See generally the Opinion of Judge Cançado-Trindade in *Caesar v Trinidad and Tobago* (n 18).

[112] Inter-Am Ct HR, Ser C No 80 (2001).

[113] For the text of the restriction see ibid para 43.

[114] For the Court's reasoning see ibid paras 82–98.

[115] ibid para 82.

[116] ibid.

[117] ibid.

the principle of effectiveness applied 'not only to the substantive provisions of human right treaties (in other words, the clauses on the protected rights), but also to the ACHR's procedural provisions, such as the one concerning recognition of the Tribunal's contentious jurisdiction'. That clause was 'essential to the efficacy of the mechanism of international protection', so it had to be 'interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties [. . .] and their collective enforcement'.[118] Trinidad and Tobago's purported quasi-reservation was repugnant to the latter since it would cause 'fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention'.[119] Finally, the Court reiterated its view that:

> 'The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human person), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. The latter govern mutual interests between and among the States Parties and are applied by them, with all the juridical consequences that follow therefrom for the international and domestic legal systems'.[120]

More generally in its jurisprudence the Inter-American Court has signalled that a good faith interpretation of the obligations created by human rights treaties should not automatically prioritize the subjective interests of the State, but should have great regard to the fact that the 'object and purpose' of the treaty is to benefit individuals of any nationality within the jurisdiction of the States Parties.[121]

As noted above, in *Ivcher Bronstein*[122] the Inter-American Court was clear that a State which had accepted the Court's compulsory jurisdiction could only withdraw from the same by explicitly denouncing the entire ACHR. It emphasised that 'a State party to the Convention can only release itself of its obligations under the Convention by following the provisions that the treaty itself stipulates'.[123] The ACHR provided for no limitations for acceptance of the Court's jurisdiction and such a fundamental feature of the Convention

[118] ibid para 83, the Court was quoting from its earlier judgment in *Ivcher-Bronstein v Peru* (n 62) para 37; cf the Strasbourg Court's statement in *Loizidou* (n 93) para 71.

[119] See n 112 above, para 93.

[120] ibid para 94; see also *Ivcher-Bronstein v Peru* (n 62) para 42.

[121] Although see *Serrano-Cruz Sisters v El Salvador* (Preliminary Objections, 2004), Inter-Am Ct HR, Ser C No 118. (The Court accepted that it was possible for a State to qualify acceptance of the Court's jurisdiction on the basis that such jurisdiction existed only for events occurring after the date of acceptance).

[122] For the background, see n 60 above.

[123] See n 62 above, para 40. See also *Hilaire, Constantine and Benjamin v Trinidad and Tobago* (Preliminary Objection) (n 112) para 89.

could not be 'at the mercy of limitations not already stipulated but invoked by States Parties for internal reasons'.[124]

D. Summary

Through the case law that has been discussed above, bodies such as the European and Inter-American Courts in particular, but also the HRC, have refused to allow the subjective interests of sovereign States to simply take precedence over the effectiveness of the legal order created by the respective human rights treaties. The common, higher interest in the maintenance and protection of the rights and freedoms under the ECHR and the ACHR has been especially prioritized in the European and Inter-American case law, the regional courts having resolutely opposed attempts by Member States to qualify substantively the basis upon which they later come to accept the jurisdiction of the Court (or for the ECHR, the right of individual petition and the jurisdiction of the Court). Although strictly speaking one could not call such attempted qualifications 'reservations', in practice they might be viewed as quasi-reservations. Seen in this way, in the jurisprudence noted above the Courts, as well as the HRC, have firmly opposed the idea that a State may have a second chance to enter a (quasi-)reservation.

It is against this background that we may examine the suggestion that a State might attempt to avoid a legal obligation under these treaties by entering a late reservation or seeking to denounce the treaty and re-accede with a new reservation.

V. LATE RESERVATIONS

It would seem that a State that is unwilling to accept a particular legal obligation created by a human rights treaty apparently faces the stark choice of either remaining a Member State or completely denouncing the treaty (assuming this is legally possible). However, perhaps there is an alternative. Can the State remain a party to the treaty in question and simply enter a reservation to the treaty in question, or what may hereafter be termed a 'late' reservation?

A late reservation proposed for ICERD in 1976 was regarded as impermissible by the UN Secretary-General acting through the Secretariat of the UN Depository of Multilateral Treaties (the UN Depository).[125] Indeed the VCLT stipulates that reservations may only be made at the time of signing or of depositing the instrument of ratification, acceptance or approval.[126] However, since 1978, and with respect to UN treaties at least, the UN

[124] ibid para 36.

[125] See Memorandum to the Director of the Division of Human Rights, 5 April 1976, in *United Nations Juridical Yearbook* 1976, 221.

[126] See Articles 2(1)(d) and 19 VCLT. On reservations to treaties generally see Aust (Chap 8) who notes (158) that the VCLT never envisaged late reservations.

Depository's practice has been to modify the VCLT's absolute position.[127] The International Law Commission (ILC) is apparently in the process of endorsing the position adopted by the UN Depository, but, as Aust puts it, 'there continues to be a lively debate about the treatment of so-called late reservations'.[128]

In the following sections the UN Depository's rules and the ILC's position on late reservations are set out and there follows a discussion of relevant State practice for human rights treaties and whether in fact the rules entitle a State to create a totally new exemption to a treaty or not. The question is then posed as to whether a late reservation to a human rights treaty would be contrary to the VCLT's 'object and purpose' test.[129]

A. The UN Depository's and the ILC's Position on Late Reservations

The *Summary of Practice of the Secretary General as Depository of Multilateral Treaties prepared by the Treaty Section of the Office of Legal Affairs*[130] states that:

> 'Under established customary international treaty law, as codified by the [VCLT], reservations may only be made (when allowed) at the time of signing or of depositing an instrument of ratification or the like, *or alternatively, with the unanimous consent of all parties concerned* (see article 19 of the Vienna Convention)'.[131]

It is pointed out that '[t]he Secretary-General normally follows the above-mentioned principles', but that 'in a few cases, when he has received reservations after the deposit of the corresponding instrument, he has circulated the text of the reservation to all parties concerned and has proposed that in the absence of objections by any of those States within 90 days[132] from the date of

[127] The change apparently occurred as a pragmatic reaction to France's proposal that it be permitted to attempt to enter a late reservation to the Convention Providing A Uniform Law for Cheques of 19 March 1931 (League of Nations, Treaty Series, Vol CXLIII 355) in order that it might avoid the process of denouncing that treaty and re-acceding to it with a new reservation, for full details see *United Nations Juridical Yearbook* 1978, 199 (Letter from UN Depository to Permanent Mission of Member States to the UN). On this episode see also International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 482–485, paras 10–14.

[128] Aust (n 18) 158.

[129] Article 19(c) VCLT.

[130] ST/LEG/7/Rev. 1, United Nations, New York 1999 (available at http://untreaty.un.org/olainternet/Assistance/Summary.htm) (hereafter 'UN Depository Practice'). See also The Treaty Handbook prepared by the Treaty Section of the United Nations Office of Legal Affairs available at http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm (both accessed 1 October 2007) at paras. 3.5.3 and 3.5.8.

[131] ibid para 204, emphasis added, footnotes omitted.

[132] Now extended to 12 months, see Palitha Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as Depository of Multilateral Treaties: Reservations and Declarations' (2005) 99 AJIL 433 (hereafter '*Kohona*') 435–437 (citing advice from UN Legal Counsel in 2000: UN Doc. LA 41 TR/221). This article was written in Palitha Kohona's personal capacity, though at the time he was Chief of the Treaty Section, at the United Nations' Office of Legal Affairs.

circulation, the reservations be deemed accepted as part of the State's notification, the absence of objections being then considered by the Secretary-General as amounting to a tacit acceptance by all parties concerned of the reservation in question'.[133] The same practice may be applied when States seek to 'substitute new reservations for initial reservations made at the time of deposit, since this has amounted to a withdrawal of the initial reservations—which raised no difficulty—and the making of (new) reservations'.[134] More generally, the practice is 'all the more desirable in the many cases where the reservation was specifically authorized or where other States had made a reservation identical to that which the State concerned wished to make after the prescribed time'.[135]

According to the UN Depository, therefore, late reservations are possible in the exceptional circumstances of their being validated by the total absence of objections from other States within a period of one year after notification. Any objection makes the purported late reservation void,[136] leaving the State to consider its position regarding withdrawal from the treaty as a whole, if this is possible. The position is the same as that currently set out in the Draft Guidelines adopted by the International Law Commission[137] with respect to its ongoing work on reservations to treaties. It goes without saying that none of what has just been said entails that the State concerned has *carte blanche* to attempt to enter any late reservation it wishes. The general rules governing the substance of reservations (ie most notably the VCLT's 'object and purpose' test)[138] will continue to apply, as will any specific rules on reservations that may be applicable for the treaty in question.

There does not appear to be any cut-off point after which a late reservation may not be entered, and it is clear that the UN Depository regards the above principles as applicable to UN human rights treaties. In November 2006 the Government of Poland was advised by the UN Secretary-General that a late reservation could be entered to the UN Convention Against Torture (UNCAT) on the terms just outlined.[139] Soon after this, on 28 December 2006, the

[133] UN Depository Practice, para 205. [134] ibid para 206.

[135] ibid.

[136] By contrast, under the VCLT for a reservation made upon signature or ratification a single objection will have little impact on the reserving State, for the reservation will take effect in relation to all States Parties, *except* those which have objected to it in the 12-month period for objections.

[137] International Law Commission, Titles and texts of the draft guidelines adopted by the Drafting Committee, Fifty-Third Session, A/CN.4/L.603, see Guidelines 2.3.1 (Late formulation of a reservation), 2.3.2 (Acceptance of formulation of a reservation) and 2.3.3 (Objection to late formulation of a reservation). For commentary on these provisions see International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 476–495.

[138] Article 19(c), VCLT. See Aust (n 18) Chap 8.

[139] See *Written replies by the Government of Poland to the list of issues (CAT/C/POL/Q/4/Rev.1) to be taken up in connection with the consideration of the 4th periodic report of Poland*, CAT/C/67/Add.5 para 210. Poland had signed UNCAT in 1986, but two reservations then referred to were not confirmed upon ratification in 1989, and so Poland was informed that, in

Secretary-General sent a communication[140] to all ICCPR Member States concerning Bahrain's accession to the ICCPR on 20 September 2006, and, in particular, its attempt on 4 December 2006 to enter late reservations to Articles 3, 18 and 23 of that instrument.[141] The communication pointed out the UN Depository Practice position on this matter and, as of 1 August 2008, objections had been received from the Netherlands,[142] Latvia,[143] Portugal,[144] the Czech Republic,[145] Estonia,[146] Canada,[147] Australia,[148] Ireland,[149] Poland, Sweden and Hungary.

Interestingly a number of these objections clearly endorsed the VCLT regime rules (without explicitly rejecting the UN Depository's rules).[150] The reservation was observed to be 'late' (Australia, Czech Republic, the Netherlands, Poland, Sweden and Hungary) and/or made 'after accession' (Australia, the Netherlands, Poland, Sweden and Hungary) such that it was 'inconsistent' with the VCLT regime (Australia, Czech Republic, the Netherlands and Poland). Most objections proceeded to object to the purported reservations as being incompatible with the ICCPR on substantive grounds. This point was made in the Canadian objection, but it also stated that the reservations 'should have been lodged at the time of accession by Bahrain to the Covenant'. The Portuguese objection stated that 'the reservations were made after the accession of the Kingdom of Bahrain to the Covenant', adding that 'the practice of late reservations should be discouraged'. The Latvian objection noted that, in accordance with Article 19 of the VCLT, reservations could only be made upon signature, ratification, acceptance, approval or accession, so 'the said reservation is not in force since its submission'. The Swedish objection stated that '[s]ince [the] reservations were formulated late they are to be considered inconsistent with the general principle of *pacta sunt servanda* as well as customary international law as codified in the [VCLT]'. All of the objections stated that they should not preclude the entry into force of the Convention between the States concerned and Bahrain, except the Latvian objection, which was silent on the point. A communication issued by the Secretary-General, acting in his capacity as depositary, listed the objections made to Bahrain's purported reservation and announced, '[i]n view of the above and in keeping with the depositary practice followed in such cases, the

accordance with Article 19 VCLT, they did not take effect. The country concerned did not attempt to enter a late reservation.

[140] See C.N.1140.2006.TREATIES-24, 28 December 2006.

[141] *Multilateral Treaties* Chapter IV(4).

[142] ibid.

[143] ibid.

[144] ibid.

[145] ibid.

[146] ibid.

[147] ibid.

[148] ibid.

[149] ibid.

[150] cf the Objection made by Sweden (2 April 2002) to the purported reservation made by Serbia to the *Convention on the Prevention and Punishment of the Crime of Genocide* in which the former stated, inter alia, that the reservation was made 'too late' according to Article 19 of the VCLT, and so was 'null and void', *Multilateral Treaties* Chapter IV(1). See similarly the objection submitted by Bosnia and Herzegovina.

Secretary-General is not in a position to accept the reservation made by Bahrain for deposit'.[151] Bahrain therefore remains a Member State to the ICCPR, without the benefit of the reservations purportedly entered on 4 December 2006.

B. Late Reservations and New Exemptions?

It would seem to be the case then that a State party to a UN human rights treaty could in principle attempt to enter a late reservation to that treaty. Further, if that late reservation survived the 'no objections' regime just noted—which may be a big 'if'—it would take effect, so creating a *new exemption(s)* for the State concerned.

Of course, the UN Depository Practice and the ILC's Draft Guidelines do not represent binding international law. So is the position with respect to late reservations as it has just been identified correct at international law?

That the rules on late reservations are controversial is evident from the objections to Bahrain's late reservation to the ICCPR as well as the discussion of the ILC's proposals on late reservations before the Sixth Committee at the UN. Both revealed some opposition in principle to late reservations.[152] At the Sixth (Legal) Committee on the UN General Assembly the point was repeatedly made that late reservations to any treaty were exceptional, generally undesirable and should be avoided whenever possible.[153] Similar comments could be made about 'widening' reservations.[154] In a different context, on

[151] C.N.882.2007.TREATIES-25, 19 September 2007.

[152] See GAOR (Sixth Committee, Summary record of the 19th meeting, 31 October 2003), A/C.6/58/SR.19 at para 97 (Austria) and GAOR (Sixth Committee Summary record of the 24th meeting, 3 November 2000) A/C.6/55/SR.24 para 8 (the Netherlands, describing current UN Depository practice as 'unfortunate, for it deviated from the rules of the law of treaties' and arguing that 'it should be made clear that completely new reservations could not be made after consent to be bound had been expressed').

[153] See International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session (Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session prepared by the Secretariat), A/CN.4/521, 54–59. See more specifically GAOR (Sixth Committee Summary record of the 24th meeting, 1 November 2000) A/C.6/55/SR.21, para 61 (comments from German representative); paras 80–81 (Spain) and para 107 (Sweden); GAOR (Sixth Committee Summary record of the 24th meeting, 3 November 2000) A/C.6/55/SR.24 para 17 (Brazil) and para 48 (Greece); GAOR (Sixth Committee Summary record of the 19th meeting, 5 November 2001) A/C.6/56/SR.19, para 42 (Italy); GAOR (Sixth Committee Summary record of the 22nd meeting, 7 November 2001) A/C.6/56/SR.22, paras 52–54 (Japan, 'not axiomatic' that failure to raise an objection within 12 months should be regarded as acceptance, para 53 and questioning whether there was 'enough examples [in State practice] to justify the formulation of general rules', para 54); paras 69–70 (Greece, late reservations only for 'very exceptional cases', whilst '[t]he practice of late reservations was hardly compatible with human rights treaties' at para 70) and paras 84–85 (Kenya, call for 'caution', para 85); and GAOR (Sixth Committee Summary record of the 20th meeting, 26 November 2001) A/C.6/56/SR.20, 3 (Poland, late reservations to be 'exceptional and remain subject to strict conditions', para 3).

[154] The ILC commentary observed that 'a minority of the members of the Commission' appeared to contest the idea that a reservation could be widened at all: they 'took the view that these rules run counter to the Convention on the Law of Treaties and it risked unduly weakening the

behalf of the Treaty Depository at the Council of Europe the opinion has been expressed that late reservations are only possible in exceptional circumstances, for example if there has been an administrative oversight.[155] Indeed, State practice would suggest that late reservations may only be entered in such circumstances. Thus a recent ILC Report noted that late reservations were a 'not uncommon' phenomenon that had 'not been totally ruled out by practice'.[156] A series of examples were cited concerning treaties generally (ie not human rights treaties as a category),[157] but it was noted that the examples:

> 'show that the cases [of late reservations] involved have almost always been fairly borderline ones: either the delay in communicating the reservation was minimal or the notification occurred after ratification, but before the entry into force of the treaty for the reserving State, or else the planned reservation was duly published in the official publications, but "forgotten" at the time of the deposit of the instrument of notification, something which can, at a pinch, be regarded as "rectification of a material error"'.[158]

State practice for substantive UN human rights treaties in particular is consistent with this analysis. Bahrain's 'defeated' reservations to the ICCPR were approximately two-and-a-half months late. So far as the author is aware, there have been no examples of late reservations to human rights treaties if what is meant by this is an attempt to create a totally new exemption in relation to a treaty article against which there is no existing reservation for the State concerned. Having said this, the reservations made by Malaysia (1998)[159] and also the Maldives (1999)[160] to CEDAW are controversial examples of modifying reservations.[161] In each instance when acceding to CEDAW the State concerned purported to enter very broadly framed reservations which

treaty rights of States', International Law Commission, Report of the International Law Commission on the Work of Its Fifty-sixth Session, UN GAOR, 59th Sess, Supp No 10, UN Doc A/59/10 (2004) 269. Reference was made to, 'the established practice of the Council of Europe' which 'seems to be to prohibit any "widening" modification', ibid. Having said this '[t]he majority of the members of the Commission . . . considered that a regional practice (which is, moreover, absolutely not settled) should not be transposed to the universal level and that, as far as the widening of existing reservations is concerned, it would not be logical to apply rules that differ from those applicable to the late formulation of reservations', ibid 270.

[155] See *Treaty-Making CoE* 94 and generally 94–96 (at the time of writing the author was Deputy Head of the Legal Advice Department and Treaty Office of the Council of Europe). See also J Polakiewicz, 'Collective Responsibility and Reservations in a Common European Human Rights Area', in *Ziemele* 115.

[156] International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 476 (footnote omitted).

[157] ibid 479–485, paras (3)–(16).

[158] ibid 486, para 15 (footnotes omitted).

[159] For the full text see *Multilateral Treaties* at Chapter IV(8).

[160] ibid.

[161] For elaboration see *Kohona* 436–437. See also comments on Lesotho's modifying reservation to CEDAW, ibid. See also Luxembourg's further reservation to the ICCPR in 2003 (*Multilateral Treaties* at Chapter IV(4), and see also Depository Notification CN 1338.2003 TREATIES-11), and Azerbaijan's reservation to the Second Optional Protocol to the ICCPR (on

essentially amounted to an attempt to only accept the legal obligations created by CEDAW in so far as they did not conflict with Islamic Shariah law. Those reservations met with various objections. The two States then entered modifying reservations which referred to Shariah law and went on to cite particular articles of CEDAW, as well as making reference to certain aspects of domestic law which were said to be relevant for the purported reservation. Within the applicable timeframe, France[162] objected to what it referred to as the Malaysian 'withdrawal and modifications', simply stating that this was contrary to the 'object and purpose' of the treaty. As a result the modification was 'not accepted' by the UN Depositary.[163] Finland and Germany communicated their opposition to the modification of the reservation entered by the Maldives. Finland welcomed the fact that the Maldives had 'specified' its original reservation, but indicated that in its view the modified reservation remained 'objectionable'.[164] Germany took the view that there had been an attempt to create a 'new' reservation, 'extending and reinforcing the original reservations'.[165] It insisted that, '[a]fter a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations'.[166] In fact, this 'objection' and the Finnish 'objection' were submitted out of time[167] and therefore treated by the UN Depository as mere communications having no legal effect. The Maldives' modification was therefore accepted by the Depositary.[168]

In summary, even if the Maldives' reservation were to be regarded as a late reservation, creating a new exemption, as the German Government regarded it, it represents a very slender basis on which to establish a rule in favour of allowing late reservations for human rights treaties outside what the ILC has referred to as 'borderline' circumstances.

D. Late Reservations and Human Rights Treaties

Even if late reservations are legal for treaties generally on the basis referred to above, are human rights treaties different such that there can be no late reservations to this particular category of treaty?

Both the UN Depository Practice (paragraphs 204 and 205)[169] and the ILC commentary suggest that the unanimous acceptance of a late reservation by the other States Parties validates such a reservation. In the ILC Rapporteur's

abolition of the death penalty) (*Multilateral Treaties* at Chapter IV(12) both of which apparently narrowed the exemptions created by an earlier reservation.

[162] *Multilateral Treaties* at Chapter IV(8). The Netherlands, referring to a 'modification', also objected, but its objection was received one day outside the 90-day timeframe then applicable, ibid. [163] ibid. [164] ibid. [165] ibid.

[166] ibid. At the time of writing Germany had not objected to the late reservation made to the ICCPR by Bahrain.

[167] At the time the period for objection was 90 days, but under the UN Depository rules this has now been extended to 12 months from notification; see n 132 above.

[168] *Multilateral Treaties* at Chapter IV(8). [169] See nn 130–135 above.

words, such unanimous acceptance could be viewed as 'a collateral agreement extending *ratione temporis* the option of formulating reservations—if not reservations to the treaty concerned in general, then at least the reservation or reservations in question'.[170] To this the ILC Rapporteur adds, 'the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems'.[171] Finally, it was said by the ILC Rapporteur that 'pragmatic considerations' also justify allowing late reservations, for '[a] party remains always at liberty to accede anew to the same treaty, this time by proposing certain reservations'.[172]

The last point assumes that the treaty concerned may be denounced—as we have seen, it is arguable that it is not possible to withdraw from the ICCPR and the ICESCR. Further, there is also an assumption here that the action of denunciation and immediate re-accession with reservations is itself a legally valid act. It may not be.[173]

With respect to the first point noted by the ILC ('collateral agreement') it may be said that the reasoning is more suited to traditional, contract-based treaties, creating reciprocal relationships between States and where each State has a subjective interest in the substance of the treaty commitments involved and so an incentive to ensure that inappropriate reservations or modifications are not being made.[174] As is well known, the HRC has suggested that the general VCLT regime on objections to ordinary (let alone late) reservations is, 'inappropriate to address the problem of reservations to human rights treaties'.[175] It takes the view that 'the special characteristics of the Covenant as a human rights treaty', raise doubts as to 'what effect objections have between States *inter se*'.[176] Reassuring though it is that only one State needs to object in order for a late reservation to be void, to what extent can it confidently be said that, for human rights treaties in particular, the silence of the other States Parties in reaction to a late reservation signals their unanimous and active agreement to the same?[177]

If the argument underpinning allowing late reservations is therefore that States are 'the ultimate guardians of a treaty' and so will protect its interests, then this argument may be flawed for human rights treaties. In this respect one

[170] International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at 482 (para 8). See also *Kohona* 435 (citing 1984 *UN Juridical Year Book* 183).

[171] ibid para 9, citing D.W. Greig, 'Reservations: Equity as a Balancing Factor?', 16 Australian Yearbook of International Law (1995) 26, 28–29.

[172] ibid, footnotes omitted. [173] See nn 194–229 below.

[174] Note, however, that the International Law Commission suggests that the VCLT regime reservations applies to all treaties, including human rights treaties, see International Law Commission, Second Report on Reservations to Treaties, UN Doc A/CN4/477 & Add 1, para 163 (1996).

[175] See HRC General Comment No 24 (n 73) para 17. [176] ibid.

[177] cf the comments made in the Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma in *Democratic Republic of the Congo v Rwanda* (3 February 2006, unreported) paras 9–11. See also the Dissenting Opinion of Judge Koroma, para 14.

reverts to the controversial question, who are the guardians of human rights treaties in the context of reservations? For the ECHR and the ACHR it would seem established (firmly in the case of the ECHR) that the respective Courts have the last word on the validity of reservations. Presumably either Court could sever any late reservation and so consider that the State concerned remained a party to the Convention without the benefit of that reservation.[178] Indeed, the argument that a late reservation would be contrary to the ECHR and ACHR would be especially compelling given the emphasis that the respective Courts have placed on the idea of an international *ordre public* in their regions. The impossibility of adding a late reservation to the ECHR seems to have been acknowledged by the Swiss Federal Court,[179] and would, to quote from *Loizidou v Turkey*, 'diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)'.[180] It would in fact represent an attempt on the part of the State to release itself from obligations in a way not provided for by either Convention text.[181] With respect to both the ACHR and ECHR a late reservation could ultimately lead to significant fragmentation, if not the very disintegration of the international *ordre public* created by the respective treaties as States would be able to significantly reconfigure the obligations applicable to them.[182] The acceptability of late or new reservations would also conflict with the notion of 'effective protection' and seriously weaken the role of the Courts in the discharge of their functions[183] on the basis that such reservations would cut away at each Court's authority: ultimately States might react to advances in the Court's jurisprudence by late reservations. The key concept of 'collective enforcement' could be severely undermined.

Different considerations may apply to the UN human rights treaties being discussed in the article. The HRC's self-proclaimed capacity to determine the legality of reservations[184] has been strongly contested by the American, British and French Governments and is not accepted by the ILC.[185] However, it may still be argued that human rights treaties constitute 'a special category of international treaty', since they express 'an important aspect of the common interest of humankind', such that they should be interpreted in the way 'most favourable to individuals in the framework of the VCLT'.[186] Such an

[178] cf *Loizidou v Turkey* (n 93) para 97.

[179] See n 101 above.

[180] *Loizidou v Turkey* (n 93) para 75.

[181] cf the Inter-American Court's statement in *Hilaire, Constantine and Benjamin v Trinidad and Tobago* (Preliminary Objection, 2001), noted in n 123 above.

[182] With respect to the ECHR, this would hardly be reconcilable with the ideals of 'the achievement of greater unity' between the Member States of the Council of Europe and the Convention and the notion of 'common understanding and observance of the human rights' (expressed in the Convention's Preamble).

[183] cf *Ivcher-Bronstein v Peru* (n 62) para 35 and *Loizidou v Turkey* (n 93) para 75.

[184] See General Comment No 24 (n 73) para 18.

[185] See n 86 above.

[186] Alexandre Kiss, 'International Human Rights Treaties: a Special Category of International Treaty?', Report to the Venice Commission of the Council of Europe (doc CDL-UD(2005)017rep), available at <http://www.venice.coe.int/docs/2005/CDL-UD(2005)017rep-e.asp> (accessed 1 October

approach would speak against the validity of late reservations and they hardly sit comfortably with the general object and purpose of human rights treaties. With respect to the ICCPR, the HRC has commented that:

> 'The object and purpose of the [ICCPR] is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken'.[187]

As such, would a late reservation not undermine the ICCPR's object and purpose, even if it were apparently acceptable to other States Parties in accordance with the UN Depository's scheme? The binding nature of the legal obligations concerned would be undermined, as would the system of 'supportive guarantees'[188] afforded by the treaty. The HRC has also stated that 'an essential consideration' in assessing the validity of a reservation is 'the effect of each reservation on the integrity of the Covenant'[189] and that 'reservations [should] not lead to a perpetual non-attainment of international human rights standards',[190] that they 'should be withdrawn at the earliest possible moment'[191] and that a State should 'explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant'.[192] This reasoning is entirely inconsistent with the understanding that a State may enter a new, ie late, reservation to the ICCPR whether acceptable to other States Parties or not. Similar arguments could be made for other UN human rights treaties.

E. Summary

Even if State practice may point to the acceptability of late reservations in the 'borderline' situations referred to by the ILC rapporteur, it remains doubtful that they can secure totally new exemptions for treaties generally, and human rights treaties specifically. The *pacta sunt servanda* principle is, of course, particularly relevant for human rights treaties.[193] For the reasons that have just been given, it is suggested that strong arguments can be mounted to the effect that late reservations are highly inappropriate, if not illegal, for human rights treaties on the basis that they are contrary to their 'object and purpose'.

Even it is possible to enter a late reservation to a treaty, including a human rights treaty, on the terms set out by the UN Depository, it is to be expected, of

2007). On the special consideration to be given to reservations for human rights treaties see the Concurring Opinion of Judge Cançado-Trindade in *Caesar v Trinidad and Tobago* (n 18) paras 21–46.

[187] General Comment No 24 (n 73) para 7.

[188] ibid para 11 (also indicating that reservations that 'purport to evade' an 'essential element in the design of the Covenant' are contrary to the ICCPR's object and purpose.

[189] ibid para 19.

[190] ibid para 19.

[191] ibid para 20.

[192] ibid para 20.

[193] cf the Concurring Opinion of Judge Jackman in *Caesar v Trinidad and Tobago* (n 18).

course, that a State will be reluctant to do so. Such an action potentially detracts from the credibility of the State on the international stage and, assuming they apply, the rules on late reservations set out in the UN Depository Practice and in the ILC Draft Guidelines are strict. Judging by States' reaction to Bahrain's purported late reservation to the ICCPR, it may be assumed that the chances of there being at least one objection to a late reservation to a human rights treaty must be high. If defeated in this way, or if the reservation was otherwise found to be illegal and ineffective, then the State would have to decide whether to remain a party to the treaty on the original terms or to denounce the treaty as a whole, if this is possible. Might it then re-accede to the Convention and enter a reservation designed to exempt itself from the legal obligation it is concerned about? The final section examines this question.

VI. 'STRATEGIC DENUNCIATION' (DENUNCIATION AND RE-RATIFICATION WITH NEW RESERVATIONS)

'Strategic denunciation and re-ratification', or, for short, 'strategic denunciation', are the terms that I will employ to describe denouncing a treaty with the sole purpose of re-ratifying it with a 'new' reservation(s). This idea was floated by some ECHR States in the late 1980s, as well as by the former British Prime Minister more recently.[194] In the 1990s, a specialist Committee in the Australian Parliament considered the possible strategic denunciation of the ICROC;[195] it rejected the idea as politically unacceptable.[196] The only example of a strategic denunciation that the author is aware of concerns the First OP[197] to the ICCPR, which Trinidad and Tobago[198]

[194] See n 105 above.
[195] See Parliament of Australia, Joint Standing Committee on Treaties (n 67) 66 and 71.
[196] See n 69 above.
[197] This instrument may be denounced, see Article 12.
[198] Trinidad and Tobago denounced the First OP on 26 May 1998 and re-acceded to it on the very same day, even though the denunciation did not take effect until 26 August 1998. The re-accession was with a purported reservation designed to prevent the HRC from addressing potential violations of any provisions of the ICCPR arising from 'any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith'. The reservation accepted 'the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the [ICCPR] itself', see *Multilateral Treaties* at Chapter IV(5). The UN Depository noted that there were 'no precedents' for Trinidad and Tobago's denunciation and re-accession *on the same day*, see *Repertory of Practice of United Nations Organs*, Vol VI Supplement No 9 (available at http://untreaty.un.org/cod/repertory/art98/english/rep_supp9_vol6-art98_e_advance.pdf), para 5. This was regarded as generally 'questionable' because it raised the issue as to 'whether it is possible to accede to an agreement while a State is still party to it', since the three months' notice required by OP Article 12 had not expired when the re-accession was effected. The Repertory explained that the instrument of re-accession was nevertheless accepted, as it was desirable to sustain the objective of 'continuous coverage' of human rights instruments and so avoid the possibility of the 'inapplicability of all the provisions of the agreement to the Republic of Trinidad and Tobago during a period of three months', para 5.

and Guyana[199] strategically denounced in 1998 and 1999 respectively.[200]

Obviously there can be no strategic denunciation if the treaty in issue cannot be denounced, which is of great relevance, as we have seen, for the ICCPR and ICESCR. However, it is likely that a State that validly denounces a human rights treaty will be able freely to accede to it again.[201] So, if the treaty concerned can be denounced, is strategic denunciation a legally valid device for treaties generally and human rights treaties in particular? So far as the author is aware, this matter has not been addressed in detail anywhere. Moreover, where this issue has been commented upon, differing views have been expressed as to the issue of legality.

A. Differing Views on the Legality of Strategic Denunciation

The view has been presented that strategic denunciation is highly dubious if not illegal. Anthony Aust has argued that the right to make a reservation in the way attempted by Trinidad and Tobago plus Guyana through their strategic denunciation of the First OP to the ICCPR is 'legally questionable'. He argues:

> 'For a party to withdraw and then "re-accede" solely for the purpose of making a reservation which it did not make originally, and which if made as a late reservation in unlikely to have been accepted, is open to most serious objection. The stratagem can be viewed as a *single* transaction, the only purpose of which is to enter a late reservation, the effectiveness of which can therefore be defeated by a *single* objection'.[202]

Writing in his personal capacity the Deputy Head of the Council of Europe's Legal Advice Department, Jörg Polakiewicz, has suggested that Council of Europe treaties may not be strategically denounced.[203]

The view has also been presented that strategic denunciation is unwelcome, but not actually illegal. Hence the Council of Europe's Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) has noted that there are 'no formal rules' against strategic denunciation, albeit it is a 'highly

[199] Guyana denounced the First OP on 5 January 1999, re-acceding on 5 April 1999. Its new reservation was almost identical to Trinidad and Tobago's see *Multilateral Treaties* at Chapter IV(5).

[200] Some comparison may be made with Iceland's withdrawal from the International Convention on the Regulation of Whaling in 1992 and its attempt to rejoin the International Whaling Commission in 2002 with a formal 'reservation' to the commercial whaling moratorium, see Alexander Gillespie, 'Iceland's Reservation at the International Whaling Commission' (2003) 14 EJIL 977.

[201] Relevant provisions of the VCLT are Article 15(a)–(c). Most UN human rights treaties include a provision specifically allowing accession.

[202] Aust (n 18) 160 (original emphasis).

[203] See *Treaty-Making CoE* 96 and *Ziemele* 119 (referring to the ECHR).

undesirable' practice.[204] The ILC Special Rapporteur on Reservations to Treaties has cited the view of Polakiewicz as referred to immediately above and commented that, '[o]n the universal level . . . such a conclusion [is] undoubtedly too rigid'.[205] Indeed, he seems to assume that strategic denunciation is legal, at least in some contexts.[206] The same may be said for the Chief of the Treaty Section at the United Nations' Office of Legal Affairs. Writing in his personal capacity, he has argued that strategic denunciation is a legally valid, if not necessarily very welcome, course. By use of the device a State adheres 'strictly to the letter of treaty law in applying' Article 19 VCLT.[207] On this basis it might be said if a treaty includes an unqualified right for its denunciation then States are entitled to rely on this. A disincentive for a State to resort to strategic denunciation is the political cost to its credibility.[208] Such States also risk that the subsequent reservation will be objected to by other States Parties who may block the entry into force between themselves and the strategically denouncing State.

B. 'Strategic Denunciation' of the OP to the ICCPR: The Rawle Kennedy Decision and State Objections

What lessons may be learned from the Trinidadian strategic denunciation of the First OP to the ICCPR? The HRC seems to have tacitly accepted the legality of strategic denunciation, at least for the purposes of the First OP to the ICCPR, since in *Rawle Kennedy v Trinidad and Tobago*[209] the new Trinidadian reservation was declared incompatible with the First OP's object and purpose not on grounds of its general illegality but for reasons going to its substance, namely its discriminatory nature. By a majority the HRC concluded that the reservation was illegal and severable,[210] which led to Trinidad and Tobago's denunciation of the OP for the second time.

[204] CAHDI, 'Practical Issues Regarding Reservations to International Treaties (Appendix IV)', 19th meeting, CM (2000) 50, App. 4 (2000), available at https://wcm.coe.int/ViewDoc.jsp?id=348409&Lang=en.

[205] International Law Commission (Fifty-fifth session, 2003), 'Eighth Report on Reservations to Treaties (Mr Alain Pellet, Special Rapporteur)', A/CN.4/535, para 41.

[206] See International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Sixth Session, UN GAOR, 59th Sess, Supp No 10, UN Doc A/56/10 (2004) 271. See also International Law Commission, Summary Record of the 2651st meeting, A/CN.4/SR.2651, *Yearbook of the International Law Commission* 2000 Vol I, 320 (para 71).

[207] See *Kohona* 438. See also Legal Opinion prepared by the British Institute of International and Comparative Law (Mads Andenas and David Spivack), *The UN Drug Conventions Regime and Policy Reform* (2003) 6 (available at <http://www.senliscouncil.net/documents/BIICL_opinion> (accessed 6 October 2007).

[208] See n 69 above.

[209] No 845/1999 UN Doc CCPR/C/67/D/845/1999 (admissibility). See *Nowak ICCPR Commentary* at xxxiv–xxxv and Sandi Ghandi, 'The Human Rights Committee and Reservations to the Optional Protocol', (2001) 8 Canterbury Law Review 13.

[210] ibid para 6.7. The decision was by a majority. By a later decision, *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998 (2002), the HRC considered that there had been a violation of the ICCPR.

In *Rawle Kennedy* the HRC did not mention the impressive display of objections submitted in reaction to the new Trinidadian reservation. Eleven[211] European States raised objections or communicated their opposition to the 'new' reservation of one or other of these two Caribbean States. Perhaps unsurprisingly, no State insisted that its objection should prevent the entry into force of the OP as between it and the respective State. The States concerned not only took issue with the substance of the purported reservation(s) on very similar grounds to those that were ultimately adopted by the HRC itself, but also raised points of principle about strategic denunciation itself. Reference was made to the 'bad precedent' set for human rights instruments and how this 'undermined' international human rights protection and the ratification process generally.[212] In this regard the objections made the point that the practice in issue was highly unwelcome and undesirable, but not necessarily more than that. A further basis for most of the objections was that strategic denunciation was questionable since it circumvented—rather than contravened—the rules of treaty law,[213] above all the legal regulation of late reservations.

However, France (objecting to both the Trinidadian and Guyana reservation) and Sweden (only, in fact, in relation to the latter reservation) regarded the circumvention of the legal regime of late reservations as an abuse of process. Their criticism was directed at the abusive resort to denunciation in the first place.[214] Thus for France (commenting on the Trinidadian reservation):

[211] The actions of Trinidad and Tobago met with the disapproval of the following States, which delivered objections/ communications on the dates specified in brackets: Denmark (6 August 1999), France (9 September 1999), Germany (13 August 1999), Ireland (23 August 1999), Italy (17 September 1999), the Netherlands (6 August 1999), Norway (6 August 1999), Sweden (17 August 1999) and Spain (25 August 1999). The Danish and Norwegian notices were registered as 'objections' by the UN Depository, the others as communications. See *Multilateral Treaties* at Chapter IV(5).

Perplexingly, from the above list only the following States expressed disapproval of Guyana's actions: France (28 January 2000), Germany (26 August 1999), the Netherlands (22 October 1999), Spain (1 December 1999) and Sweden (27 April 2000). Finland (17 March 2000) and Poland (8 August 2000) objected to Guyana's reservation, but not Trinidad and Tobago's. The French, German, Dutch and Spanish notices were registered as objections; the others as communications, ibid.

[212] See for example the text of the German, Spanish, Irish and Italian objections ibid.

[213] Norway was 'concerned' by the procedure adopted; it represented 'a circumvention of established rules of the law of treaties that prohibit the submission of reservations after ratification'. Denmark and Finland expressed very similar views. According to the Netherlands' objection, what had occurred was '*contrary* to the rules of the law of treaties that prohibit the formulation of reservations after ratification' (emphasis added). Guyana had 'circumvent[ed] such well-established rules'. Poland regarded the procedure as 'not consistent with the law of treaties and clearly undermining the Protocol'.

[214] cf the more focused abuse of process arguments submitted on behalf of the applicant in *Rawle Kennedy*, para 3.16 ('a State may not withdraw from the Protocol for the purpose of shielding itself from international scrutiny in respect of its substantive obligations under the Covenant'). See also the individual, dissenting, opinion of Committee members Ando, Bhagwati, Klein and Kretzmer, para 11, plus see Interights (Opinion authored by Professor James Crawford, Professor Bruno Simma and Alberto Szekely), *Re: Trinidad and Tobago: Legal Effect of Denunciation of the Optional Protocol* (5 December 1998) paras 25–26. Thank you to Erica Ffrench of *Interights* for supplying me with a copy of this *Interights* document.

> [T]he denunciation of the Protocol may in no case be used by a State Party for the sole purpose of formulating reservations to that instrument after having signed, ratified or acceded to it. Such a practice would undermine international commitments by constituting a form of misuse of procedure, would be manifestly contrary to the principle of good faith prevailing in international law and would contravene the rule of *pacta sunt servanda*. The means used (denunciation and accession on the same day to the same instrument, but with a reservation) cannot but prompt a negative reaction, irrespective of the doubts which may arise as to the compatibility of this reservation with the goal and purpose of the treaty.[215]

Very similar points were made by the Swedish authorities. This abuse of process argument has much in common with the Swiss Federal Court's 1992 judgment discussed above,[216] though that judgment was specifically tailored to the special qualities of the ECHR.

C. Strategic Denunciation: Abuse of Process or a Legally Valid Device?

Against the background of these various views, building on the French objection as just noted, and in agreement with Aust, it is submitted that strategic denunciation must be viewed as a single step amounting to an abuse of process.

With strategic denunciation the true motive is not genuine termination of a State's membership of the treaty, but the ulterior motive of seeking new exemptions from obligations currently accepted and binding on the State, and achieving this in a way that the treaty does not expressly allow for. Arguably strategic denunciation is in effect partial denunciation, which is prohibited by the VCLT.[217] As this is not expressly provided for by the treaty, it might be argued that the situation under Article 56 VCLT, covering '[*d*]*enunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*',[218] applies. This stipulates that there should be no denunciation 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'.

In such circumstances, '[a] party shall give not less than twelve months' notice of its intention to denounce or withdraw from [the] treaty'.[219]

[215] See n 211 above.
[216] See n 101 above.
[217] As Article 44(1) VCLT stipulates, '[a] right of a party, provided for in a treaty or arising under article 56, to denounce, . . . the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree'; cf the points made by the Inter-American Court in *Ivcher-Bronstein v Peru* (n 62) paras 50–51.
[218] The chapeau to Article 56.
[219] Article 56(2) VCLT.

With respect to Article 56(a), unless the contrary is established, it would seem obvious that the intention of the parties in drafting most treaties with a denunciation provision was not to give States licence to, in effect, temporarily and partially denounce that treaty, especially when the motive for doing so is to shirk inconvenient obligations arising from the treaty. Article 56(b) would correctly and appropriately put the onus on the State to make the case that strategic denunciation is implied 'by the nature of the treaty'.

If it is the case that strategic denunciation is illegal, it would seem axiomatic that the new reservation made in connection with it is also illegal. It is a general principle of law that one should not be able to profit from an illegal act and it is only via the exercise of the illegal act of strategic denunciation that the State in question is then able to re-accede to the treaty in question and so attempt to create a new reservation. If the new reservation were illegal the State would be left in its original position, ie without the benefit of the reservation. Such an outcome would accord with the State's obligation to provide restitution for the wrongful act (the strategic denunciation) in that it would be under a duty to 're-establish the situation which existed before the wrongful act was committed', ie be bound by the treaty without the benefit of the new reservation.[220] If so, how should a treaty monitoring body or a regional human rights court address the subsequent jurisdictional questions that are likely to ensue? Could the position be taken that the denunciation, illegal as it was, never took effect, such that the State concerned remained a party to the treaty on its original terms? Would the better view be that the denunciation did take effect, but that the illegality only arose when the State immediately attempted to re-accede to the treaty with a new reservation, such that the re-accession should be regarded as invalid and the State concerned would not be a party to the treaty? This may be the logical approach and, no doubt, the State concerned would argue that it was clear that its re-accession was only on terms that the reservation in issue was valid, failing which it could not be regarded as a party to the treaty. Of course, such an approach has the effect of denying the legal force of the treaty for the State concerned and so the people likely to benefit from it. Another approach may be that the Committee or Court concerned regard the denunciation and re-accession as taking effect, but that the new reservation as illegal and severable, it being arguable that the State concerned had demonstrated that its greater intention was to remain bound by the treaty and that it was foreseeable that the reservation in issue would be severed.[221] This would be the approach advocated by the current author. After all,

[220] cf Article 35 of International Law Commission's, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (in Report of the International Law Commission on the Work of Its Fifty-Third Session, GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 43). See James Crawford, 'The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries' (CUP, Cambridge, 2002). The Draft Articles do not create legal obligations for States.

[221] cf *Loizidou v Turkey* (n 93) paras 95–97.

a government confronted with the last situation outlined would have the choice of whether to denounce the treaty outright or remain a party to it without the benefit of the reservation.

Of course, the analysis just presented returns us to the controversial question of whether in fact a treaty monitoring body set up by a UN treaty would have the capacity to determine that the new reservation was illegal and severable. The European and Inter-American Courts clearly do have this capacity and there is much in their jurisprudence that would indicate their hostility to strategic denunciation of the ECHR and ACHR respectively.

D. Strategic Denunciation of Human Rights Treaties

Even if, contrary to the analysis just provided, it is accepted that strategic denunciation of a treaty is a generally legal practice at international law, is strategic denunciation of a *human rights* treaty legal? Here it may first be pointed out that, given the special subject-matter of human rights treaties, it does not appear to matter that no other State is actually injured by strategic denunciation, assuming such a device is illegal. This is so, at least, according to Article 48(1)(b) of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts.[222] This provides for the invocation of the responsibility by a State other than an injured State if 'the obligation breached is owed to the international community as a whole', ie for what appear to be *erga omnes* obligations as identified by the ICJ in the *Barcelona Traction* case.[223]

In answering the more specific question as to whether strategic denunciation of a human rights treaty is legal, the nature of the legal obligations created by human rights treaties is, of course, important. As has been noted:

> '[G]ood faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual'.[224]

Many if not all of the points that were raised in connection with the legality of late reservations[225] to substantive human rights treaties have some relevance here to bolster the argument as to why resorting to denunciation in a strategic way is an abuse of process. But arguably the points apply with extra force to substantive human rights treaties since many such treaties have features which emphasise the understanding that obligations may not be opportunely broken off and resumed simply at a State's convenience. Thus, as we have seen,[226] a number of human treaties specifically provide for derogation in situations such as 'war' or a 'public emergency threatening the life of the nation'. This

[222] See n 220 above.

[223] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment* [1970] ICJ Reports, para 33.

[224] Concurring Opinion of Judge Jackman in *Caesar v Trinidad and Tobago* (n 18).

[225] See nn 125–193 above.

[226] See nn 6–7 above.

underlines the intention that substantive commitments endure through even the most testing of times, so highlighting the finality of denunciation and that substantive treaty commitments should not just be stopped and started opportunistically. Similarly, as the HRC has observed with respect to the (non-denouncable) ICCPR, '[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party'[227] and they are devolved with territory and continue 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'. Further, as we have noted,[228] it is often the case that human rights treaties ensure that the effective date of denunciation is some time after the delivery of the notice of denunciation. Such a provision is again inconsistent with the drafters' understanding that an individual State's commitment to a human rights treaty can be switched on and off at will. The point is made even clearer by the ECHR and ACHR, both of which prohibit denunciation of the Convention for five years after ratification.[229]

VII. CONCLUSIONS

The purpose of this article has been to examine the legality of the various steps that a State might take to avoid an international legal obligation created by a human rights treaty. We have seen that some clear answers may be given to some matters. For example, derogation from the ICCPR, the ECHR and the ACHR is possible, but only in the circumstances defined by those treaties (if so, this should not be regarded as avoidance). The ECHR, ACHR and certain of the UN treaties may be denounced, although there would be considerable political pressure on any Member State not to do so. Following the DPRK's purported denunciation of the ICCPR, it is not clear whether the correct view is that that instrument (and the ICESCR) may simply never be denounced at all, or that it may only be denounced if all the States Parties agree to this. Even if the latter, it would seem highly unlikely that it could be denounced in practice.

As to the other devices considered in this article—late reservations and 'strategic denunciation'—the answers are less clear, but it has been argued above that both are illegal, at least for human rights treaties. If a late reservation to a human rights treaty is not illegal per se, it would seem highly likely that in practice there would be at least one objection to such a reservation by another State and this would be sufficient to void the reservation, at least according to the UN Depository Practice. In this connection it is notable that a

[227] General Comment No 26 (n 21) para 4.
[228] See nn 31–32 above.
[229] ibid.

number of States have indicated that they do not accept, or at least have doubts over, the validity of late reservation.

The arguments against the legality of late reservations and strategic denunciation are especially strong in the context of the ECHR and ACHR. When it comes to defending the integrity of their respective treaties, the European and Inter-American Courts have considerable advantages compared to the treaty monitoring bodies set up by the UN human rights treaties. States Parties to both the ECHR and the ACHR must accept a right of individual petition (to the European Court in the former case,[230] to the Inter-American Commission on Human Rights in the latter case).[231] Acceptance of the jurisdiction of the Court is compulsory for the ECHR and, though optional under the ACHR, has been accepted by 21 States in the Inter-American System. In delivering judgments in cases like *Belilos*, *Loizidou*, *Ivcher Bronstein* and *Hilaire, Constantine and Benjamin*, the regional courts had the advantage of being respected institutions delivering rulings in the context of regional human rights arrangements where, generally speaking, there has been a culture of compliance.

By contrast, as Louis Henkin is reported to have said on the occasion of the 25th anniversary of the ICCPR, the HRC is 'hedged by limitations. It [is] not a court, only a committee; it [does] not enter judgement, but express[es] views'.[232] In this respect the weak position of the HRC, and other treaty monitoring bodies, was brought home during the HRC's consideration of the combined second and third reports of the USA under the ICCPR. The US Government rejected the HRC's views[233] on, for example, the extra-territorial reach of the ICCPR. It pointed out that in general only the parties to a treaty are empowered to give a binding interpretation of its provisions unless the treaty provided otherwise, which was not the case for the HRC and the ICCPR.[234] So, in the final analysis even a State Party such as the United States may simply be able to reject the interpretation of the ICCPR given by the HRC.

Finally, the question may be frankly raised as to whether the system of enforcement of international legal obligations under the UN treaties is so weak

[230] Article 34 ECHR.

[231] Article 44 ECHR.

[232] UN Press Release, Human Rights Committee Commemorates Twenty-Fifth Anniversary of Entry into Force of the ICCPR, HR/CT/599, 26 March 2001. For a full examination of the status of the HRC's views under the First OP to the ICCPR see Martin Scheinin, 'The Human Rights Committee's Pronouncements on the Right to an Effective Remedy—an Illustration of the Legal Nature of the Committee's Work under the Optional Protocol', in *HRC Festschrift* 103–107.

[233] See HRC Concluding Observations (United States of America), CCPR/C/USA/CO/3/Rev.1, para 10. See also United States of America, Third Periodic Report, CCPR/C/USA/3, 28 November 2005, para 130 and para 3, plus Annex 1 ('Territorial Application of the International Covenant on Civil and Political Rights).

[234] Summary Records of the HRC, CCPR/C/SR.2380, 27 July 2006, para 8, per Mr Harris. See also Summary Records of the HRC, CCCPR/C/SR.2381, 8 November 2006, para 7, per Mr Harris.

that some States do not concern themselves with the need to avoid international treaty obligations via the type of procedures referred to this article. This point is made as it would seem that in practice bodies like the HRC are unable to properly supervise the implementation of their respective treaties for States that do not cooperate in good faith with them. The failure of many States to even submit reports to the UN treaty bodies is notorious.[235] Against that background it may be wondered if, rather than resort to devices like late reservations, such States quite simply ignore inconvenient international legal obligations created by some human rights treaties.[236] Even if this were so, this would not affect the legal arguments that have been raised above and, it is submitted, these remain highly relevant to the many States that do cooperate in good faith with human rights treaty bodies.

[235] The Annual Report of the Human Rights Committee for 2006 reveals that 46 States have Reports that remain over five years overdue, which includes States such as France (five years overdue) and Spain (seven years overdue), see *Report of the Human Rights Committee*, A/61/40 (Vol I) 16–17. With respect to some of the States referred to in this article, the DPRK reported to the HRC in 2000, but its Third Periodic Report has been due since January 2004. Jamaica's (Third Periodic) Report has been overdue since November 2001, whilst Trinidad and Tobago's (Fifth periodic) Report has been awaited since October 2003, as has Guyana's (Third Periodic) Report. Since 2001 the HRC has amended its rules of procedure enabling it to examine from material available to it, the measures adopted by that State party with a view to giving effect to the provisions of the Covenant, even in the absence of a report; see ibid, paras 52–58.

[236] Guyana remains a party to the First OP to the ICCPR, however, it has not cooperated with the HRC with respect to cases heard under that procedure in recent years, see for example *Persaud v Guyana*, CCPR/C/86/D/812/1998, 21 March 2006.