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Human Rights

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1 Introduction

In its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice (ICJ) referred to the 'special characteristics' of a Convention 'manifestly adopted for a purely humanitarian and civilizing purpose'.[1] Judge Alvarez, dissenting, specifically indicated the emergence of new categories of conventions, those 'seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals'.[2] Despite Judge Alvarez's claim that this category of treaty was 'formerly unknown', the 1948 United Nations Convention on the Prevention and Punishment of Genocide[3] was by no means the first humanitarian convention.[4] It was however at the forefront of the post–World War II international legal order and, like its exact contemporary the Universal Declaration of Human Rights (UDHR),[5] has its basis in the 1945 Charter of the United

[1] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) (1951) ICJ Rep. 15, at p. 21.

[2] *Ibid.*, at p. 51. In a more modern explication, human rights treaties 'represent a contribution to human dignity and global stability – as distinguished, for example, from a commercial or trading treaty'. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*: Bosnia and Herzegovina v. Serbia and Montenegro (Preliminary Objections) (1996) ICJ Rep. 595, at p. 649 (Separate Opinion of Judge Weeramantry).

[3] 78 UNTS 277.

[4] E.g., dissenting Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo described the 1926 Slavery Convention, 60 LNTS 253, as 'an important humanitarian convention': *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 1, at p. 33. Another humanitarian convention 'with much in common with the Genocide Convention in point of structure' was the 1925 International Opium Convention, 81 LNTS 317: *supra* n. 1, at p. 34.

[5] The Genocide Convention was adopted one day before the UDHR: General Assembly Resolution 217A (III), U.N. Doc A/810 at 71 (10 Dec. 1948).

Nations.[6] By the time of the adoption of the Vienna Convention on the Law of Treaties (VCLT) in May 1969,[7] there was a range of instruments that could be categorised as appertaining to human rights,[8] including those adopted by the International Labour Organization,[9] the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[10] the 1966 International Covenants on Civil and Political Rights (ICCPR)[11] and Economic, Social and Cultural Rights (ICESCR)[12] and, at the regional level, the European[13] and Inter-American[14] human rights conventions. But the 'International Human Rights Movement'[15] was still in its infancy in 1969, and human rights was not yet the significant component of international law and relations that it was later to become.[16] It is therefore not surprising that there is no 'special place' in the VCLT for human rights treaties, which – like all treaties – are widely accepted as instruments of public international law and subject to its terms. But 'human rights' are mentioned directly in the

[6] 1 UNTS 16. Art. 1(3) of the UN Charter includes among the purposes of the Organization 'promoting and encouraging respect for human rights and for fundamental freedoms for all'; the preamble to the Genocide Convention affirms that genocide is 'contrary to the spirit and aims of the United Nations': *supra* n. 3.

[7] 1155 UNTS 331.

[8] E. Schwelb, 'International Conventions on Human Rights', *ICLQ*, 9 (1960), 654–675, describes the diversity of human rights treaties in 1960, including proposals for treaties that never materialised.

[9] The character of labour treaties as human rights treaties is disputed: e.g., Craven does not see ILO treaties as human rights treaties. See M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *EJIL*, 11 (2000), 489–519, at 497–498. ILO conventions are however the model for some of the features of human rights treaties: V. A. Leary, 'Lessons from the Experience of the International Labour Organisation' in P. Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), pp. 580–619.

[10] 660 UNTS 195. [11] 999 UNTS 171. [12] 999 UNTS 3.

[13] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS 221.

[14] The Inter-American Convention on Human Rights (IACHR), 114 UNTS 123, was signed on 22 Nov. 1969, almost exactly six months after the signing of the VCLT. It came into force on 18 July 1978, nearly eighteen months earlier.

[15] L. Henkin, 'Human Rights and State "Sovereignty"', *Ga. J. Int'l & Comp. L.*, 25 (1995–1996), 31–45.

[16] 'Even in 1968 . . . such rights remained peripheral as an organizing concept and almost non-existent as a movement'. See S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010), p. 2; cf. A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 3rd ed., 2013), p. 134 ('the era of modern universal human rights treaties only really began in 1966 with the two international covenants').

preamble to the VCLT as one of 'the principles of international law embodied in the Charter of the United Nations'[17] and indirectly in Article 60(5) VCLT as a 'humanitarian' exception to the general rule on the consequences of material breach.[18] The emergence of human rights law in international relations accelerated after the late 1970s,[19] making it contemporaneous with the growing acceptance of the VCLT as the codification of treaty law.

The legalisation and judicialisation of international human rights have founded arguments that human rights constitutes a sub-discipline of international law, a 'distinct jurisprudential phenomenon',[20] indeed a 'special law',[21] central to the anxieties about the fragmentation of international law.[22] The human rights world is a very different one from that envisaged by the VCLT: the latter is an empty, amoral world where States have reciprocal dealings only with other States, where there are no people hurt by States' actions and demanding reparations, no international institutions creating special mechanisms peopled by experts for monitoring and reporting and no non-governmental organizations (NGOs) demanding accountability. It is not surprising that human rights advocates are uncomfortable with the narrow perspective

[17] Cf. preamble of 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, ILM, 25 (1986), 543–592. Pazarci comments that '[i]n this regard the preamble is of great significance', given that human rights are included within Arts. 1(3), 55 and 56 of the UN Charter as a 'purpose' to be promoted, not a foundational principle: H. Pazarci, 'Preamble (1969)' in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Vol. I) (Oxford: Oxford University Press, 2011), pp. 1–11, at p. 8.

[18] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) ICJ Rep. 16, at p. 55 (paragraph 96). On the effect of Art. 60(5) VCLT, see B. Simma, 'Reflections on Article 60(5) of the Vienna Convention on the Law of Treaties and Its Background in General International Law', *ÖZöR*, 20 (1970), 5–83.

[19] Moyn's argument that human rights emerged in the 1970s 'seemingly from nowhere' seems overstated, for instance in light of the antecedents such as those cited *supra* n. 4: see Moyn, *supra* n. 16, at p. 3.

[20] L. Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements', *BYbIL*, 77 (2006), 163–202, at 164.

[21] International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (2006), p. 12 (paragraph 9).

[22] M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden JIL*, 15 (2002), 553–579.

of the VCLT.[23] They make claims for the supremacy of the 'special law' of human rights as the basis of an embryonic global or regional[24] constitutional order[25] that challenges accepted principles of general international law such as State consent[26] and State responsibility.[27] Further, NGOs feel a sense of ownership towards a human rights treaty for which they have campaigned. Somewhat inconsistently, they may lobby for the hard legal form but seek to ignore (and persuade others to ignore) what they perceive as legal formalities once a treaty has come into force.

This chapter explores some of these claims[28] and the extent to which the 'special character of a human rights treaty'[29] impacts upon the applicability of the VCLT or has been influential in the evolution of the modern law of treaties. It examines the threshold question of what constitutes a human rights treaty and looks at a number of significant areas where the applicability of the VCLT has been explored or contested,

[23] M. Scheinin, 'The Status of International Treaties on Human Rights', European Commission for Democracy through Law (Venice Commission), CDL-UD(2005)014 (Strasbourg, 8 Sept. 2005), p. 5.

[24] See, e.g., the European Court of Human Rights (ECtHR) has repeatedly described the ECHR as the 'constitutional instrument of European public order': *Loizidou v. Turkey* (ECtHR) (Preliminary Objections), Appl. No. 15318/89, 23 March 1995 (paragraph 75) and *Al-Skeini v. UK* (ECtHR GC), Appl. No. 55721/07, 7 July 2011 (paragraph 141).

[25] 'The interpretation and application of human rights treaties have indeed been guided by considerations of a superior general interest or *ordre public* which transcend the individual interests of Contracting Parties'. *Case Concerning Ahmadou Sadio Diallo*: Republic of Guinea v. Democratic Republic of the Congo (2010) ICJ Rep. 639, at p. 756 (paragraph 84 of Separate Opinion of Judge Cançado Trindade).

[26] See, e.g., 'considerations of a superior order (international *ordre public*) have primacy over state voluntarism': *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*: Georgia v. Russian Federation (Preliminary Objections) (2011) ICJ Rep. 70, at p. 281 (paragraph 87 of Dissenting Opinion of Judge Cançado Trindade); 'Consent by an individual state would no longer be an absolute limit to state obligations under human rights treaties but would be pushed aside by an objectively binding "constitution"': Scheinin, *supra* n. 23, at p. 6.

[27] E.g., 'the whole conceptual universe of the law of the international responsibility of the State has to be reassessed in the framework of the international protection of human rights, encompassing the origin as well as the implementation of State responsibility, with the consequent and indispensable duty of reparation': *Questions Relating to the Obligation to Prosecute or Extradite*: Belgium v. Senegal (2012) ICJ Rep. 422, at p. 508 (paragraph 49 of Separate Opinion of Judge Cançado Trindade).

[28] For a full treatment, see especially O. de Frouville, *L'Intangibilité des Droits de l'Homme en Droit International: Régime Conventionnel des Droits de l'Homme et Droit des Traités* (Paris: Pedonne, 2004).

[29] Human Rights Committee (HRC), General Comment No. 24: Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 11 Apr. 1994.

in particular with respect to its impact on State obligations. It concludes that apparent deviation from the VCLT often in fact falls within its residual scope and that this flexibility has allowed for an expansive application of human rights treaties in order to enhance their scope of protection. Differences in approach may depend upon the identity of the decision-maker, for example specialist human rights bodies may be less ready to accept the constraints of treaty law than government officials or 'mainstream' bodies of international law such as the International Law Commission (ILC) or ICJ.

2 The Nature of Human Rights Treaties

2.1 What Is a Human Rights Treaty?

Any acknowledgement of the 'special' character of human rights treaties requires identification of treaties within this rubric.[30] However, while there are dozens of treaties that may be so categorised in the contemporary international legal order, 'the category of "human rights treaties" is ... far from homogeneous',[31] and there is no accepted definition of what constitutes a 'human rights' treaty. Matthew Craven argues that the very term creates a semantic problem: are we talking at any given moment about treaties (with all the international law baggage the form entails) 'or the fact that they instantiate human rights' (that is 'that they are premised upon the idea that the rights pre-exist not only the treaties themselves, but also explain or justify the competence of governments in relation to them')?[32]

With respect to form, a number of human rights treaties have been negotiated following an earlier non-binding declaration, demonstrating the importance to their proponents of the hard legal form.[33] UN human rights treaties have been developed through non-legal bodies such as the Commission on Human Rights (now Human Rights Council) or the Commission on the Status of Women, with input from expert bodies and NGOs and adoption by the UN General Assembly (GA). Thus, while

[30] E. W. Vierdag, 'Some Remarks about Special Features of Human Rights Treaties', *Netherlands YbIL*, 25 (1994), 119–142.

[31] A. Pellet, Second Report on Reservations to Treaties, U.N. Doc. A/CN.4/477 & Corr.1 & 2 and Add.1 & Corr.1–4 (10 May and 13 June 1996) (paragraph 82).

[32] Craven, *supra* n. 9, at 493 (footnotes omitted).

[33] E.g., in adopting the non-binding UDHR, the UNGA requested ECOSOC to ask the Commission on Human Rights to give priority to drafting a Covenant: UNGA Resolution 217 (III), 10 Dec. 1948.

they may have been 'discussed [in the GA] at length by all States, who have the opportunity to comment upon them as they see fit',[34] they have not necessarily been subject to the legal scrutiny commensurate with the binding legal obligation incurred by treaty form. In accordance with Article 1 VCLT, human rights treaties are between States, although exceptionally the 2006 Convention on the Rights of Persons with Disabilities allows for confirmation by a 'regional integration organization'.[35] Additional protocols to human rights treaties have been negotiated that create either new rights[36] or new procedures.[37] Protocols are not provided for in the VCLT but as treaties are themselves subject to its terms.

Attempts have been made to identify some defining features beyond their form and focus on the rights of individuals.[38] Article 64 IACHR allows States parties to consult the Inter-American Court of Human Rights (IACtHR) regarding the 'interpretation of . . . treaties concerning the protection of human rights in the American states'. In determining that the 1963 Vienna Convention on Consular Relations (VCCR)[39] concerns human rights, the Court relied upon the VCLT definition of a treaty[40] and noted the former's dual purpose: it recognises both the right of the State to assist its nationals and that of the individual to contact the consular officer to obtain assistance.[41] The Court concluded

[34] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 1, at p. 51 (Dissenting Opinion of Judge Alvarez).

[35] 2006 Convention on the Rights of Persons with Disabilities (CPD), 2515 UNTS 3, Art. 44. Art. 59(2) ECHR (as amended by Protocol No. 14) provides that the EU may accede to the Convention: *supra* n. 13.

[36] E.g., 1989 Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, 1642 UNTS 414; 1989 Convention on the Rights of the Child (CRC), 1577 UNTS 3; 2000 Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, 2173 UNTS 222, and 2000 Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227.

[37] E.g., 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1249 UNTS 13; 1999 CEDAW Optional Protocol (CEDAW OP), 2131 UNTS 83; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 UNTS 85, and 2002 Optional Protocol to the CAT, 2375 UNTS 237.

[38] Although simply, 'human rights treaties *stricto sensu*: basically they are all concerned with the rights of the human being': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 2, at p. 637 (Separate Opinion of Judge Shahabuddeen).

[39] 596 UNTS 261.

[40] *The Rights to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (IACtHR) (Advisory Opinion) OC-16/99, 1 Oct. 1999 (paragraph 71).

[41] *Ibid.* (paragraph 80).

that Article 36 VCCR 'endow[ed] a detained foreign national with individual rights that are the counterpart to the host State's correlative duties'.[42] In comparable cases, the ICJ accepted that Article 36 bestows individual rights but declined to determine whether they constitute human rights.[43]

The IACtHR's analysis suggests that human rights treaties have two essential elements. First, like all treaties, a human rights treaty has horizontal effect, regulating inter-State behaviour.[44] This characteristic is exemplified by provision for inter-State complaint and dispute resolution.[45] Indeed, the centrality of human rights in contemporary international relations has encouraged the (unsuccessful) use of dispute resolution clauses in human rights treaties to establish ICJ jurisdiction where human rights are not core to the dispute.[46] Second, as a 'framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction',[47] a human rights treaty represents a vertical relationship, a governmental pledge[48] and limit to governmental power.[49] This feature of human rights treaties is concretised at the international level by an individual

[42] *Ibid.* (paragraph 84).

[43] *LaGrand Case*: Germany v. United States of America (2001) ICJ Rep. 466, at p. 494 (paragraph 78) and *Case Concerning Avena and Other Mexican Nationals*: Mexico v. United States of America (2004) ICJ Rep. 12, at pp. 60–61 (paragraph 124). See, however, paragraph 34 of Separate Opinion of Judge Cançado Trindade in *Ahmadou Sadio Diallo, supra* n. 25, at p. 739 ('I shall address this question, characterizing the right to information on consular assistance as an *individual right*, within the conceptual universe of human rights').

[44] HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004 (paragraph 2).

[45] '[W]e can nowadays reckon that we have before us as essentially a human rights case, a case pertaining to the international protection of human rights. It is lodged with this Court within the confines of an inter-State mechanism': *Ahmadou Sadio Diallo, supra* n. 25, at p. 735 (paragraph 20 of Separate Opinion of Judge Cançado Trindade).

[46] *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002): Democratic Republic of the Congo v. Rwanda (Jurisdiction and Admissibility) (2006) ICJ Rep. 6, at pp. 16–17 (paragraph 15) and *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* n. 26. This can lead to a formalistic analysis of disputes and of compromissory clauses in human rights treaties.

[47] *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)* (IACtHR) (Advisory Opinion) OC-2/82, 24 Sept. 1982, Ser. A, No. 2 (paragraph 33).

[48] Brilmayer, *supra* n. 20.

[49] Human rights treaties 'restrict the power of governments over their own citizens. That is their function'. See A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), p. 12.

complaints mechanism and at the national level by their adoption as bills of rights core to the State constitutional framework.[50]

Traditionally international law had no stake in the substance of treaties, but this is changing and human rights law is at the forefront of this.[51] Human rights treaties are 'inspired by higher shared values (focusing on the protection of the human being)'[52] and 'embody essentially objective obligations'.[53] This results in a correlation between moral values and principles of the international legal order because, while the object and purpose of a human rights norm is humanitarian, it is also the maintenance of international peace and security.[54] This intersection has seen human rights become a cornerstone of post-conflict constitutional reordering within States[55] and territories[56] as well as within the Security Council's mandate under Chapter VII of the UN Charter.[57]

The broader term 'humanitarian' highlights the hybrid character of some treaties. Despite the accepted characterisation of the Hague Regulations[58] and Geneva 'Red Cross' Conventions as international humanitarian law,[59] 'a tendency may be detected in the Geneva

[50] S. Gardbaum, 'Human Rights as International Constitutional Rights', *EJIL*, 9 (2008), 749–768.

[51] F. Mégret, 'Nature of Obligations' in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2nd ed., 2014), pp. 96–118, at p. 99.

[52] *Case of the 'Mapiripán Massacre' v. Colombia* (IACtHR) (Merits, Reparations and Costs), 15 Sept. 2005.

[53] *Hilaire v. Trinidad and Tobago* (IACtHR) (Preliminary Objections) Ser. C No. 80, 1 Sept. 2001 (paragraph 94); cf. *Austria v. Italy* (EComm.HR), Appl. No. 788/60, YbECHR, 4 (1961), 116.

[54] F. Hampson, Working Paper Submitted pursuant to Sub-Commission Decision 1998/113, U.N. Doc. E/CN.4/Sub.2/1999/28 (1999) (paragraph 13). See, further, the contribution to this volume of Kritsiotis at pp. 237–302 (Chapter 9).

[55] E.g., Annex 6 of the 2005 General Framework Agreement (the Dayton Peace Accords) lists the human rights treaties to be made applicable in Bosnia and Herzegovina: ILM, 35 (1996), 89–152, at 130–136.

[56] E.g., UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel in Kosovo allows individuals to make complaints against the United Nations Interim Mission in Kosovo for violation of the UDHR and six human rights treaties.

[57] D. P. Forsythe, 'The UN Security Council and Human Rights: State Sovereignty and Human Dignity', *Friedrich-Ebert-Stiftung*, May 2012.

[58] Annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annex: 18 CTS 227.

[59] 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; 1949 Geneva Convention (III) Relative to the Treatment of

Conventions . . . for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties but as individual rights of protected persons'.[60] Indeed, some articles in the 1977 Additional Protocols appear directly to cross the line to human rights.[61] Correspondingly some human rights treaties guarantee fundamental rights in time of conflict, the domain of international humanitarian law.[62] There is a further fusion between human rights and international criminal law treaties. Some such treaties may be perceived as primarily human rights (for example, the Torture Convention),[63] while others as primarily international criminal law (for example, the Genocide Convention).[64] The mix within a single treaty of criminalisation of human rights violations, human rights complaints mechanisms, the assertion of individual criminal and State responsibility for violation, the obligation to extradite or prosecute, punishment of perpetrators and reparations for victims makes problematic any single label.

Space does not allow for consideration of the many variables of form, substance and processes found in treaties that might be understood as 'human rights' treaties. Accordingly, the chapter will focus on a small group, the 'core' UN human rights treaties for which independent expert monitoring bodies with multiple functions have been created[65] and the major regional treaties – the 1950 European Convention on Human Rights (ECHR),[66] the 1969 Inter-American Convention on Human Rights (IACHR),[67] the 1981 African Charter on Human and Peoples' Rights[68]

Prisoners of War, 75 UNTS 135 and 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.

[60] D. Schindler, 'The International Committee of the Red Cross and Human Rights', *Int'l Rev. Red Cross*, 19 (1979), 3–15; cf. the contribution to this volume of Hampson at pp. 538–577 (Chapter 17).

[61] E.g. the 'fundamental guarantees' contained in Art. 75 of 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, and Art. 4 of 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.

[62] E.g., Art. 38 CRC (*supra* n. 36) and Art. 11 CPD (*supra* n. 35). [63] *Supra* n. 37.

[64] *Supra* n. 3. 'The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law"': *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* note 1, at p. 23. 'The Convention belongs to international penal law, not to the international law of human rights': see A. W. B. Simpson, 'Britain and the Genocide Convention', *BYbIL*, 73 (2003), 5–64, at 5.

[65] Functions include considering States' reports, deciding upon individual complaints, inquiry, visits and issuing general comments or recommendations.

[66] *Supra* n. 13. [67] *Supra* n. 14. [68] OAU Doc. CAB/LEG/67/3 rev. 5 (27 June 1981).

and their Protocols. Other regional treaties follow the UN human rights treaty bodies model by also establishing an expert monitoring body;[69] this is perhaps the defining feature of human rights treaties, and the absence of such a body explains why the Genocide Convention, for instance, is not always so regarded.[70] The jurisprudence developed by the expert committees and the regional human rights courts enables an evaluation of the extent to which the VCLT is applied, which can be compared with the approach taken by international mainstream bodies.

2.2 *Human Rights Treaties as 'Living Instruments'*

The interpretation and application of human rights treaties have generated a large literature, especially with respect to the regional human rights courts whose jurisdiction covers all matters 'concerning the interpretation and application' of the relevant convention.[71] Such treaties present particular challenges: they are worded at a high level of abstraction with imprecise and indeterminate language, they do not prescribe States' obligations in any consistent form but rather provide for differing levels of commitment depending upon the context,[72] and they are not comprehensive. There are gaps that must be fleshed out. The language allows States a considerable discretion or margin of appreciation. They must retain their relevance in changing political, social and economic circumstances, even as they become ever more dated. In sum, they must be 'living instruments whose interpretation must consider the changes over time and present-day conditions'.[73] Since renegotiation is not a political

[69] E.g., 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, as amended by Protocol I and II, Art. 1, and 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), CETS No. 210, Art. 66.

[70] '[T]he 1948 Genocide Convention differs from the core human rights treaties, however, in that it is not monitored by a body of independent experts equipped to build a jurisprudence that gives meaning to its clauses, and thus to contribute to the general development of human rights'. See O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge: Cambridge University Press, 2nd ed., 2014), p. 21.

[71] Art. 32 ECHR (*supra* n. 13); Art. 62(2) IACHR (*supra* n. 14), and Art. 28 of the 2008 Protocol on the Statute of the African Court of Justice and Human Rights, ILM, 48 (2009), 334–353.

[72] M. Hakimi, 'State Bystander Responsibility', *EJIL*, 21 (2010), 341–385, at 350.

[73] *Gomez Paquiyauri Brothers v. Peru* (IACtHR), Series C, No. 110, 8 July 2004 (paragraph 165). Cf. *Loizidou v. Turkey, supra* n. 24 (paragraph 71): 'That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law'. See, further, the contribution to this volume of Moeckli and White at pp. 136–171 (Chapter 6).

option, 'evolutive' interpretation is engaged to ensure their continued dynamism[74] and a principle of effectiveness employed to make the treaties' safeguards practical and effective,[75] for example through the formulation of positive obligations and procedural requirements.

Despite the distinctiveness of the effectiveness approach to the interpretation of human rights treaties, decision-makers within the regional human rights courts[76] and the UN human rights committees upon occasion explicitly indicate their reliance upon the VCLT articles on interpretation,[77] for instance the statement by the IACtHR that:

> the interpretation of any norm is to be done in good faith in accordance with the ordinary meaning to be given to the terms used in the treaty in their context and in the light of its object and purpose (Article 31 of the Vienna Convention on the Law of Treaties) and that an interpretation may, if necessary, involve an examination of the treaty taken as a whole.[78]

In other instances, the VCLT language is reflected but without any direct reference. Evolutive interpretation accords greater significance to the object and purpose of human rights treaties than to the ordinary meaning of the text,[79] the *travaux préparatoires*,[80] the historical context or the intentions of

[74] *The Rights to Information on Consular Assistance, supra* n. 40 (paragraph 114). See, further, R. Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Court of Human Rights', *German YbIL*, 42 (2009), 11–25, and G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', *EJIL*, 21 (2010), 509–541.

[75] E.g., *Nada v. Switzerland* (ECtHR GC), Appl. No. 10593/08, 12 Sept. 2012 (paragraph 182).

[76] M. Killander, 'Interpreting Regional Human Rights Treaties', *SUR Int'l J. on Hum. Rts.*, 7 (2010), 145–169. Villiger notes that the ECtHR consistently employs all techniques in Arts. 31 and 32 VCLT, while the IACtHR focuses on Art. 31(1) VCLT: M. E. Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), pp. 105–122, at p. 116.

[77] A number of human rights treaties predate the coming into force of the VCLT, but the ECtHR, for example, has accepted that 'its [Arts.] 31 to 33 enunciate in essence generally accepted principles of international law': *Golder v. UK* (ECtHR, Plenary), Appl. No. 4451/70, 21 Feb. 1975 (paragraph 29).

[78] *The Rights to Information on Consular Assistance, supra* n. 40 (paragraph 72); cf. *Rantsev v. Russia and Cyprus*, Appl. No. 25965/04, 7 Jan. 2010 (paragraphs 274–275).

[79] *Ahmadou Sadio Diallo, supra* n. 25, at pp. 755–756 (paragraph 83 of Separate Opinion of Judge Cançado Trindade).

[80] But see *Bankovic v. Belgium and Others* (ECtHR GC), Appl. No. 52207/99, 12 Dec. 2001 (paragraph 65) where the ECtHR took a restrictive approach supported by the *travaux préparatoires* to determine 'the scope and reach of the entire Convention system of human rights' protection'.

the authors,[81] whether made explicit or not.[82] Nevertheless, it is seen as 'consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention'.[83] Closely linked is the concept of an 'autonomous' interpretation of treaty terms,[84] meaning that they are not simply equated to their domestic law equivalent.[85] The European Court of Human Rights (ECtHR) has explained that if this were not the case and States were, for instance, free to classify an offence as 'disciplinary' or 'criminal' at their will, fundamental human rights provisions 'would be subordinated to their sovereign will'.[86] A conscious human rights approach opens the way to innovative jurisprudence. For example, Judge Cançado Trindade (a former President of the IACtHR) has asserted that States' obligations under human rights treaties must be of result, not merely of conduct, as this is the only way to make individual rights effective. Otherwise a State could claim that its conduct was appropriate but that other (internal or external) factors had prevented it from achieving full compliance with its obligations. Further, the Court cannot consider a case terminated because of the 'allegedly "good conduct" of the State concerned'.[87]

A purposive or evolutive methodology contrasts with the traditional international law approach which favours pursuance of 'a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties'.[88] It has not surprisingly been contested by some States. For

[81] 'It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago'. See *Loizidou v. Turkey, supra* n. 24 (paragraph 71).

[82] Not many decision-makers are as explicit as Judge Alvarez: 'These conventions must be interpreted without regard to the past, and only with regard to the future'. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 1, at p. 53.

[83] E.g., *Gomez Paquiyauri Brothers v. Peru, supra* n. 73 (paragraph 165).

[84] '[H]uman rights treaties have a normative character and that their terms are to be autonomously interpreted': *Ahmadou Sadio Diallo, supra* n. 25, at pp. 756–757 (paragraph 85 of Separate Opinion of Judge Cançado Trindade).

[85] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (IACtHR), Ser. C, No. 79, 31 Aug. 2001 (paragraph 146): 'The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law'.

[86] *Engel and Others v. The Netherlands* (ECtHR), Appl. No. 5100/71, 8 June 1976 (paragraph 81) (the Court was referring to the designation of criminal offences for the applicability of Arts. 6 and 7 ECHR).

[87] *Questions Relating to the Obligation to Prosecute or Extradite, supra* n. 27, at pp. 505–508 (paragraphs 44–51 of Separate Opinion of Judge Cançado Trinidade).

[88] *Ahmadou Sadio Diallo, supra* n. 25, at pp. 755–756 (paragraph 83 of Separate Opinion of Judge Cançado Trindade).

example, citing Article 31(1) VCLT as 'the fundamental rule of interpretation', the United States has rejected the extra-territorial application of certain human rights treaties.[89] It has argued that Article 2(1) ICCPR unambiguously applies only with respect to individuals 'who are both within the territory of a State Party *and* subject to that State Party's sovereign authority'.[90] It bolstered its position (that 'and' is conjunctive and does not denote either/or) by reference to the *travaux préparatoires* of the ICCPR in accordance with Article 32 VCLT.[91] In response, the Human Rights Committee (HRC), presumably imbued by the principle of effectiveness, regretted that the USA deemed the Covenant inapplicable 'to individuals under its jurisdiction and outside its territory'.[92] The United States responded similarly to the Committee against Torture's General Comment No. 2, rejecting the latter's assertion that Articles 3 to 15 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are 'obligatory as applied to both torture and ill-treatment'. The United States considered this to be 'directly inconsistent with the express language of the Convention' and that 'there is no basis in international treaty law for the Committee to rewrite, in effect, the clear provisions of the treaty under the guise of interpretation'.[93]

Unlike the United States, in this instance neither the HRC nor the CAT referred to the VCLT articles on interpretation. There is no consistency in this regard, and it seems that there is simultaneously both an inherent recognition of the importance of the VCLT articles on interpretation and a rejection of any need for consistent reference to them. It has been argued, however, that compliance with the VCLT is a matter of obligation and necessity for the UN treaty bodies.[94] First, since States have to interpret human rights treaties in accordance with the VCLT, bodies performing this function in lieu of States should also have to do so. Second, although the statements of the treaty bodies are not legally authoritative, their 'special experience of handling problems in the

[89] USA, Third Periodic Report, U.N. Doc. CCPR/C/USA/3, 28 Nov. 2005, Annex I. See, further, the contribution to this volume of Waibel at pp. 201–236 (Chapter 8).
[90] *Ibid.* [91] *Ibid.*
[92] Concluding Observations of the HRC, USA, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 Dec. 2006 (paragraph 3) and U.N. Doc. CCPR/C/USA/CO/4, 2 Apr. 2014 (paragraph 4).
[93] Observations by the USA on Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 3 Nov. 2008. The US has since reviewed its position: see U.N. Doc. CAT/C/USA/CO/3–5, 19 Dec. 2014 (paragraph 10) (www.state.gov/documents/organization/138853.pdf).
[94] K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', *Vanderbilt JTL*, 42 (2009), 905–947, at 909.

human rights area'[95] gives their interpretations of human rights treaties persuasiveness and legitimacy, as recognised by the ICJ.[96] This is enhanced when they act in apparent conformity with the VCLT but is undermined when they lack any rigorous or coherent interpretive methodology.[97]

Specialist human rights bodies or individual judges[98] do not always favour an extensive interpretation of a human rights treaty. As a creature of international law, a human rights treaty cannot operate in a vacuum but must be interpreted in light of relevant principles of international law.[99] This is in accordance with Article 31(3)(c) VCLT and applies 'in particular' to 'rules concerning the international protection of human rights'.[100] Accommodation of the development of international law may be compatible with a dynamic approach[101] but may also be more restrictive.[102] Indeed, Alexander Orakhelashvili argues that restrictive interpretive trends can be discerned in the ECtHR, which the Court justifies on the basis of their conformity with international law.[103]

Drawing any firm conclusions about the applicability of the VCLT in the interpretation of human rights treaties is not easy. Rather, who is interpreting the treaty, for what purpose and the context are likely to determine the chosen approach to interpretation. While States may be expected to favour a positivist or dogmatic view that gives priority to the ordinary meaning of the words, the specialist human rights bodies are

[95] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 2, at p. 654 (Separate Opinion of Judge Weeramantry).

[96] *Ahmadou Sadio Diallo, supra* n. 25, at pp. 663–664 (paragraph 66).

[97] Mechlem, *supra* n. 94, at 905.

[98] E.g., Judge Fitzmaurice at first adopted a restrictive, textual approach, refusing to imply into the Convention 'a right or freedom which the Convention does not trouble to name': *Golder v. UK, supra* n. 77 (paragraph 28).

[99] E.g., *Sabeh El Leil v. France* (ECtHR GC), Appl. No. 34869/05, 29 June 2011 (paragraph 48).

[100] *Nada v. Switzerland, supra* n. 75 (paragraph 169).

[101] E.g., '[t]he Convention [CEDAW] is a dynamic instrument that accommodates the development of international law'. CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 16 Dec. 2010 (paragraph 1).

[102] E.g., *Bankovic v. Belgium, supra* n. 80 (paragraphs 56 and 57) (international law principles of territorial jurisdiction engaged to limit the territorial scope of the ECHR) and *Al-Adsani v. UK* (ECtHR GC), Appl. No. 35763/97, 21 Nov. 2011 (State immunity does not constitute a disproportionate restriction on the right of access to a court).

[103] A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *EJIL*, 14 (2003), 529–568.

more likely to seek a progressive interpretation that gives effect to and moves beyond the treaty text. This can be justified on ethical grounds: 'If the purpose of international human rights law is to make States accountable for the violation of some fundamental moral rights which individuals have against their government, then the purpose of human rights courts is to develop, through interpretation, a moral conception of what these fundamental rights are'.[104] In order to achieve 'the necessary clarity and the essential consistency of international law, as well as legal security', the ICJ believes it should 'take due account' of the interpretation given to human rights treaties by the bodies 'specifically created . . . to monitor the sound application of the treaty in question'.[105] Proponents of either a progressive or a regressive, an expansive or formalistic approach may cite the VCLT to support and legitimate their conclusion; lip service may be given to the VCLT by different decision-makers but with no guarantee that their outcomes will coincide.

3 Human Rights Treaty Norms as *Jus cogens*

Claims of *jus cogens* status for at least some provisions of human rights treaties underline the tension between treaty form and objective values. Elucidation of the legal implications of a determination of *jus cogens* might therefore have been anticipated in the context of human rights treaties. But this has not been the case. Judicial analysis has been limited[106] beyond a slow acceptance that at least some provisions of human rights treaties constitute *jus cogens*, including the prohibition of genocide,[107] torture[108] and discrimination.[109] The HRC has suggested

[104] Letsas, *supra* n. 74, at p. 540.

[105] *Ahmadou Sadio Diallo, supra* n. 25, at pp. 663–664 (paragraph 66).

[106] This is especially true of the ICJ. 'In any case, up to now, the Court has not shown much familiarity with, nor strong disposition to, elaborate on *jus cogens*; it has taken more than six decades for it to acknowledge its existence *tout court*, in spite of its being one of the central features of contemporary international law'. See *Questions Relating to the Obligation to Prosecute or Extradite, supra* n. 27, at p. 550 (paragraph 159 of Separate Opinion of Judge Cançado Trindade).

[107] E.g., *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002), *supra* n. 46, at pp. 31–32 (paragraph 64) and *Jorgić v. Germany* (ECtHR), Appl. No. 74613/01, 12 July 2007 (paragraph 68).

[108] E.g., *Prosecutor v. Furundzja* (ICTY) IT-95–17/1-T, 10 Dec. 1998 (paragraph 153).

[109] The ICJ deemed 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination' to constitute obligations owed *erga omnes*: *Case Concerning the Barcelona Traction, Light and Power Company Ltd.*: Belgium v. Spain (New Application: 1962) (1970) ICJ Rep. 3, at p. 32

a much longer list.[110] The significance of *jus cogens* remains largely symbolic and hortatory. Other rights are stipulated to be non-derogable, although there is no absolute correlation between peremptory norm status, *erga omnes* obligations and non-derogability.

The place of human rights treaties in contemporary governance also portends clashes between domestic, regional and international legal orders.[111] The VCLT offers little assistance in resolving the dilemmas presented by the potential conflict between human rights norms and other substantive norms or procedural requirements, and decision-makers have to make their own determinations. For instance, at the international level claims of violations of human rights treaties have not over-ridden procedural bars to jurisdiction such as immunity.[112] The ECtHR and European Court of Justice (ECJ) have both sought to avoid a conflict between States' obligations under human rights treaties and those under Security Council resolutions. In *Al Jedda v. UK*, the ECtHR noted that Article 30(1) VCLT on conflict between successive treaties[113] gives priority to obligations under Article 103 of the UN Charter but does not render the 'lower-ranking' treaty null and void. Accordingly, States continue to be bound by the ECHR and must seek to

(paragraph 34); with respect to equality and discrimination the IACtHR went further considering that 'the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*': *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03, Ser. A, No. 18, 17 Sept. 2003 (paragraph 101). Judge Cançado Trindade has noted the greater readiness of the IACtHR and international criminal tribunals to recognise *jus cogens*: '*Jus Cogens*: the Determination and the Gradual Expansion of its Material Content in Contemporary International Case-law', available at www.oas.org/dil/esp/3%20-%20cancado.LR.CV.3–30.pdf.

[110] HRC, General Comment No. 24, *supra* n. 29 (paragraph 8), although it has also asserted that there is 'no hierarchy of importance of rights' (paragraph 10).

[111] G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', *Harvard ILJ*, 51 (2010), 1–49.

[112] 'The rules of State immunity are procedural in character . . . [t]hey do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful'. See *Jurisdictional Immunities of the State*: Germany v. Italy (Greece intervening) (2012) ICJ Rep. 99, at p. 140 (paragraph 93); cf. *Al-Adsani v. UK, supra* n. 102. In *Stichting Mothers of Srebrenica and Others v. The Netherlands*, the ECtHR similarly determined that according immunity to the UN 'served a legitimate purpose and was not disproportionate' and thus did not constitute a violation of Art. 6 ECHR: Appl. No. 65542/12, 27 June 2013.

[113] The ECtHR has rejected the 'later in time' aspect of Art. 30(3) VCLT, affirming that member States 'retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention'. See *Bosphorus Hava Yollari Turzim v. Ticaret Anonim Sirketi v. Ireland*, Appl. No. 45036/98, 30 June 2005 (paragraph 154).

give effect to Security Council resolutions in a way that complies with the Convention.[114] Indeed, since promotion of human rights is a purpose of the UN,[115] there is a presumption that the Security Council does not intend to impose an obligation on States to act in breach of human rights. UN member States have a 'free choice'[116] with respect to how they give effect to Security Council resolutions within their domestic legal orders. In a case concerning implementation of anti-terrorist sanctions, the ECtHR held Switzerland in violation of the ECHR since it had failed to demonstrate that it had attempted 'as far as possible, to harmonise the obligations that they regarded as divergent'.[117] Also in a case concerning sanctions, the First Instance Court of the ECJ cited Articles 53 and 64 VCLT and held that Article 103 of the UN Charter gives Security Council resolutions priority over other international obligations with the exception of *jus cogens* norms.[118] On appeal, the ECJ found that it had no need to consider issues relating to rules of international law falling within the ambit of *jus cogens*,[119] although it found the applicable EC Regulation to constitute an unwarranted interference with the fundamental rights of the accused. By casting the judgment in terms of the distinct legal orders of the UN and the European Communities and on its own competence to review an EC Regulation for its compatibility with fundamental rights, the ECJ bypassed the possibility of articulating a human rights legal order and did not engage with questions raised by claims of *jus cogens*. This pragmatic approach that avoids direct conflict between human rights treaties and other legal obligations eschews any special status for human rights treaties, as such, while leaving open the possibilities of a determination of *jus cogens*.

4 States' Obligations

Various VCLT articles are generally applied to human rights treaties, especially where they involve standard, technical questions of treaty law, such as 'the way treaties come into existence, the simple idea that states

[114] *Al-Jedda v. the UK* (ECtHR GC), Appl. No. 27021/08, 7 July 2011 (paragraph 105).
[115] Art. 1(3) of the UN Charter: *supra* n. 6.
[116] *Nada v. Switzerland, supra* n. 75 (paragraph 176). [117] *Ibid*. (paragraph 197).
[118] Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the EU and Commission of the EC* and Case T-315/01 *Yassin Abdullah Kadi v. Council of the EU and the Commission of the EC* [2005] OJ C 281.
[119] Joined Cases C-402/05 & C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (paragraph 329).

are bound by treaties they ratify . . . and that states should discharge their obligations in good faith'.[120] There are numerous examples of references to the VCLT with little or no discussion. For instance, the ICJ has accepted that Articles 27 and 28 VCLT apply to the CAT,[121] the HRC that Article 26 VCLT requires States parties to cooperate with itself in good faith,[122] and the Committee on Economic, Social and Cultural Rights (CESCR) that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[123] The ICJ has suggested that the purpose of Article 60(5) VCLT, the only provision directly signifying the special nature of 'humanitarian' treaties, should guide the continued applicability of such treaties for the benefit of an affected population, despite the imposition of some sanction.[124] However, this approach has not been consistently adopted, causing Judge Parra-Aranguren to query why it was not followed so as to ensure the continued applicability of the Genocide Convention for the protection of the people of Bosnia-Herzegovina.[125]

However, some articles of the VCLT have generated considerable debate about States' obligations under human rights treaties. This section discusses a number of contexts where this has arisen. First is whether States can modify or withdraw from certain obligations through the adoption of reservations and interpretive declarations.

4.1 Reservations

The principle of voluntarism allows States to limit their obligations under treaties through entering reservations, but limited by the terms of Article 19 VCLT. Provisions addressing reservations in human rights treaties[126]

[120] Mégret, *supra* n. 51, at pp. 124 and 127.

[121] *Questions Relating to the Obligation to Prosecute or Extradite, supra* n. 27, at p. 457 (paragraph 100) and p. 460 (paragraph 113).

[122] HRC, General Comment No. 31, *supra* n. 44 (paragraph 3).

[123] CESCR, General Comment No. 9: The Domestic Application of the Covenant, U.N. Doc. E/C.12/1998/24, 3 Dec. 1998.

[124] *Legal Consequences for States of the Continued Presence of South Africa in Namibia, supra* n. 18, at p. 55 (paragraph 122).

[125] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 2, at p. 657 (Separate Opinion of Judge Parra-Aranguren).

[126] There is general acceptance of the Art. 2(1)(d) VCLT definition of a reservation; e.g., *Case Concerning Temeltasch* (European Commission on Human Rights, Decisions and Reports), Apr. 1983 (paragraphs 69–82); *Belilos v. Switzerland* (ECtHR), Appl. No. 10328/83, 29 Apr. 1988 (paragraph 42) and *T.K. v. France* (HRC), Communication No. 220/1987, 8 Nov. 1989.

are drafted in various terms. Some expressly incorporate the VCLT,[127] others reflect its language with respect to compatibility with the object and purpose of the convention,[128] expressly prohibit any reservation,[129] spell out which articles may be reserved,[130] impose conditions for reservations[131] or remain silent.[132] As is well known, there has been a long and disputed history with respect to the applicability of the VCLT articles on reservations to human rights treaties,[133] of which there are many.[134] This is made more complex by the VCLT's lack of 'clear and specific rules' with respect to the legal effects of an impermissible reservation.[135]

The controversy is rooted in both the object of human rights treaties (the effective protection of individuals) and their nature (comprising 'more than mere reciprocal engagements between Contracting States').[136] In the oft-cited words of the ICJ:

[127] E.g., Art. 75 IACHR allows reservations 'only in conformity' with the VCLT: *supra* n. 14.

[128] E.g., Art. 20(2) ICERD (*supra* n. 10); Art. 28(2) CEDAW (*supra* n. 37); Art. 51(2) CRC (*supra* n. 36); Art. 91 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMWF), 220 UNTS 3, and Art. 46(1) CPD (impermissibility of reservations 'incompatible with the object and purpose' of the Convention) (*supra* n. 35).

[129] E.g., Art. 17 CEDAW OP: *supra* n. 37.

[130] E.g., Art. 78 of the Istanbul Convention: *supra* n. 69.

[131] E.g., Art. 64 ECHR: *supra* n. 13. The International Law Commission noted that this regime, 'is unquestionably *lex specialis w*ith respect to general international law': *Guide to Practice on Reservations to Treaties*, UNGAOR Sixty-Sixth Session, Supp. No. 10 (2011) 1, at p. 138.

[132] E.g., 2006 International Convention for the Protection of All Persons from Enforced Disappearance: G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (2006).

[133] E.g., L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff, 1995); J. P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (London: British Institute of International & Comparative Law, 1997); R. Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent', *AJIL*, 96 (2002), 531–560, and I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff, 2004).

[134] *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002), *supra* n. 46, at p. 67 (paragraph 10 of Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma).

[135] A. Pellet, Fifteenth Report on the Law of Treaties, U.N. Doc. A/CN.4/624/Add.1 (31 March 2010) (paragraphs 400 and 401).

[136] *Ireland v. UK*, ILR, 58 (1978), 118–338, at p. 369. The IACtHR considered that only Art. 20(1) and 20(4) VCLT were relevant when applying Art. 75 IACHR 'because the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas': *The Effect of Reservations, supra* n. 47 (paragraph 27).

> In such a convention the contracting states do not have any interests of their own: they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[137]

The differentiation between reciprocal and integral[138] treaty obligations has fostered detailed analyses of different meanings attributed to reciprocity, the relationship between reciprocity and the functions accorded to the 'objects and purposes' of a treaty in its interpretation and application, as well as differing conceptions of international law.[139]

The HRC has made a controversial and confrontational assertion of the special character of human rights treaties and that the VCLT provisions on objections to reservations 'are inappropriate to address the problem of reservations to human rights treaties'.[140] The Committee asserted that since human rights treaties do not form 'a web of inter-State exchanges of mutual obligations' but rather confer individual rights, the principle of mutual reciprocity 'has no place' in the legal regime for reservations to such treaties. Indeed, the inadequacy of the Vienna regime makes States reluctant to enter objections to reservations. The inclusion of expert monitoring bodies in human rights treaties was decisive for the Committee in determining that as a necessary part of its functions it must be competent to assess the compatibility of reservations with the object and purpose of the Covenant, a State prerogative under the VCLT, and also to sever incompatible reservations.[141] In indicating that reservations should be specific and transparent, the Committee also

[137] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 1, at p. 23.

[138] Sir Gerald Fitzmaurice defined classes of multilateral treaties, creating 'social' categories that 'do not lend themselves to differential application, but must be applied integrally': G. G. Fitzmaurice, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/107 (15 March 1967), pp. 53 and 55 (paragraphs 115 and 128).

[139] Craven, *supra* n. 9, especially at 513–517; B. Simma and G. Hernandez, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?' in Cannizzaro (ed.), *supra* n. 76, pp. 60–85, especially at pp. 66–68, and A. Paulus, 'Reciprocity Revisited' in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer and C. Vedder (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), pp. 113–137.

[140] HRC, General Comment No. 24, *supra* n. 29 (paragraph 17).

[141] *Ibid*. See, also, HRC, General Comment No. 31, *supra* n. 44 (paragraph 5); HRC, General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, 23 Aug. 2007 (paragraph 5).

appears to be imposing additional criteria for acceptable reservations to those laid down in the VCLT.

Severance of a reservation from a State's acceptance of the relevant treaty, as first adopted by the ECtHR and followed by the HRC in General Comment No. 24, is also disputed.[142] The HRC's approach has not been explicitly followed by other of the UN human rights treaty bodies. However, in light of the many and far-reaching reservations to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Committee on the Elimination of Discrimination against Women has also made clear to States its disquiet about reservations.[143] It has concluded that certain reservations are impermissible as contrary to the object and purpose of the Convention[144] but without purporting to sever the offending reservation from the State's acceptance of the Convention.

It is unusual to have such an express rejection of the appropriateness of the VCLT provisions as that by the HRC.[145] Not surprisingly, it was rejected by some States and has been scrutinised by the ILC since 1993 throughout its reference on reservations.[146] In its 2011 *Guide to Practice on Reservations to Treaties*,[147] the ILC finally decided not to apply different rules on reservations to human rights treaties, categorising them – along with other treaties, such as peace and environmental treaties – as 'containing numerous interdependent rights and obligations'.[148] In assessing the compatibility of a reservation with the object and purpose of such a treaty, Guideline 3.1.5.6 attempts to strike a balance between the interdependence of the rights and obligations, the importance of the reserved provision, and the impact of the reservation

[142] *Belilos v. Switzerland, supra* n. 126 (paragraph 60); *Loizidou v. Turkey, supra* n. 24 (paragraph 97) where, citing Art. 44 VCLT, the dissenting judges found it 'inappropriate' to do so; *ibid*., at 33 (Joint Dissenting Opinion of Judges Gölcuklu and Pettiti); Alain Pellet considered that this displayed an 'offhand attitude' towards State sovereignty and the requirement of consent: Pellet, Second Report on Reservations to Treaties, *supra* n. 31 (paragraph 230, fn. 419). But see Simma and Hernandez, *supra* n. 139, at p. 60 (supporting severance).

[143] CEDAW, General Recommendation No. 4: Reservations (6th Session, 1987); CEDAW, General Recommendation No. 20: Reservations to the Convention (11th Session, 1992).

[144] E.g. CEDAW, Concluding Observations, Israel, U.N. Doc. CEDAW/C/ISR/CO/5, 5 Apr. 2011 (paragraphs 8 and 9).

[145] The IACtHR also asserted that it would be 'manifestly unreasonable' to apply the entire legal regime of Art. 20 VCLT to Art. 75 IACHR; *The Effect of Reservations, supra* n. 47 (paragraph 34).

[146] For a summary of the process see Simma and Hernandez, *supra* n. 139, at pp. 69–85.

[147] International Law Commission, *Guide to Practice on Reservations to Treaties*, Doc. A/66/10.

[148] *Ibid*., at p. 385 (with reference to Guideline 3.1.5.6).

on the treaty. The Guidelines implicitly highlight that what distinguishes human rights treaties is the existence of expert monitoring bodies and accept that such bodies may need to assess the permissibility of reservations to be able to discharge their functions. However, any such determination by a treaty monitoring body shall have 'no greater legal effect than that of the act which contains it'. Recognising the competence of the treaty bodies is, of course, without prejudice to the competence of States parties to do likewise, although States 'that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations'. In addition, there is a presumption of severability of impermissible reservations, allowing the reserving State to be considered a party to the Convention without the benefit of the reservation.[149]

Thus, the ILC has moved somewhat in the direction of the HRC and towards removing human rights treaties 'from the grip of the bilateralist paradigm and plac[ing] them into an objective, but equally consensualist framework'.[150] Nevertheless, it remains the case that 'it would be wrong to see human rights treaties as a special case. The problem of the legal effect of objections to reservations is the same for all multilateral treaties; it is just that the problem occurs more often, and more acutely, with human rights treaties because they seek to reconcile not just different national policies, but different social and religious systems'.[151]

4.2 Treaties and Third Parties

Without reference to the VCLT, the ECtHR has accepted the principle in Article 34 VCLT that 'a treaty does not create either obligations or rights for a third State without its consent'.[152] However, another shift away from the bilateral and voluntarist understanding of international obligations between States that is embedded in the VCLT towards one of promoting community interests concerns assertions of the binding nature of human rights treaties regardless of State consent. As early as

[149] *Ibid*., Guideline 4.5.3 (paragraph 2). Severability applies 'unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established'.

[150] Simma and Hernandez, *supra* n. 139, at p. 84. [151] Aust, *supra* n. 16, at p. 134.

[152] '[The ECHR] does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States'; *Al Skeini v. UK, supra* n. 24 (paragraph 141). See, further, the contribution to this volume of Waibel at pp. 201–236 (Chapter 8).

1951, the majority judges in the *Reservations* advisory opinion asserted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[153] Nearly fifty years later, Judge Weeramantry emphasised that '[t]he human rights and humanitarian principles contained in the Genocide Convention are principles of customary international law' and that their embodiment in a treaty is irrelevant when determining their effect.[154] In *Barcelona Traction*, the Court noted that some *erga omnes* obligations have entered into 'the body of general international law' while 'others are conferred by international instruments of a universal or quasi-universal character'.[155] Article 38 VCLT recognises as an exception to the strict third party rule the possibility of a treaty provision becoming (or already being) binding upon non-party States as a rule of customary international law, but the Court offered no such analysis. Various explanations have been offered. Judge Alvarez had found the basis for the binding nature of 'these conventions signed by a great majority of States [which] ought to be binding upon the others, even though they have not expressly accepted them' in the interdependence of States and 'the existence of an international organization'.[156] Jonathan Charney argued that the process of passing through multilateral fora by-passes traditional modes of customary international law-making;[157] Louis Henkin considered that this non-conventional law is made 'purposefully, knowingly, wilfully';[158] Oscar Schachter argued that where the conduct is 'violative of the basic concept of human dignity', statements of condemnation are sufficient evidence of its status under customary international law;[159] Christian Tomuschat surmises that what is necessary is not a stock-taking of actual State practice but rather deductive reasoning: 'if human life and physical integrity were not protected, the entire idea of a legal order

[153] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 1, at p. 23.
[154] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 2, at p. 648 (Separate Opinion of Judge Weeramantry).
[155] *Case Concerning the Barcelona Traction, Light and Power Company Ltd., supra* n. 109, at p. 32 (paragraph 34).
[156] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 1, at pp. 52–53 (Dissenting Opinion of Judge Alvarez).
[157] J. I. Charney, 'Universal International Law', *AJIL*, 87 (1993), 529–551, at 549.
[158] Henkin, *supra* n. 15, at 31 and 37.
[159] O. Schachter, 'International Law in Theory and Practice', *Hague Recueil*, 178 (1982–V), 1–395, at 334–338.

would collapse';[160] and Judge Cançado Trindade asserts that the international *ordre public* must prevail over State voluntarism.[161]

4.3 Temporal Scope

Article 28 VCLT on the non-retroactivity of treaties has been applied in the context of human rights treaties. The ECtHR, for example has referred to Article 28 VCLT in asserting that '[i]t is beyond dispute that ... the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party'.[162] The ICJ has adopted a similar approach.[163] Article 28 VCLT allows for a particular treaty to depart from this rule, but in its interpretation and application of CAT, the ICJ found nothing to suggest that a State must criminalise acts of torture that took place prior to the Convention's entry into force, although equally nothing in the CAT prevented Senegal from prosecuting Hissène Habré, former President of Chad, for acts of torture committed prior to the Convention's coming into force for Senegal, if it so chose. Judge Cançado Trindade took exception to the majority's position, seeing it as an 'undue invocation of non-retroactivity in relation to *continuing* wrongful situations of obstruction of access to justice'.[164] He considered that non-retroactivity 'gives effect to voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension', which is inappropriate with respect to human rights treaties that focus on 'victimized human beings, who stand in need of protection'.[165] Judge Cançado Trindade was especially concerned about the impact of a principle of non-retroactivity on claims relating to human

[160] C. Tomuschat, *Human Rights between Idealism and Realism* (Oxford: Oxford University Press, 2nd ed., 2008), p. 38.

[161] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* n. 26 (paragraph 87 of Dissenting Opinion of Judge Cançado Trindade).

[162] *Varnava v. Turkey* (ECtHR GC), Appl. No. 16064/90, 18 Sept. 2009 (paragraph 130); *Sargsyan v. Azerbaijan* (ECtHR GC), Appl. No. 40167/06, 14 Dec. 2011, and *Janowiec and Others v. Russia* (ECtHR), Appl. No. 55508/07, Judgment of 16 Apr. 2012 (paragraph 129).

[163] *Questions Relating to the Obligation to Prosecute or Extradite, supra* n. 27, at pp. 457–458 (paragraphs 100–102).

[164] *Ibid*., at pp. 545–546 (paragraph 146 of Separate Opinion of Judge Cançado Trindade).

[165] *Ibid*., at p. 553 (paragraph 166 of Separate Opinion of Judge Cançado Trindade).

rights violations committed during a period of oppression or conflict, as it undermines accountability and furthers a climate of impunity. This is a situation that the ECtHR has also faced. It has reasoned that there is a continuing procedural obligation to investigate a disappearance that is independent from the substantive obligation to find a violation of the Convention with respect to disappearances that occurred before the State in question had accepted the Court's jurisdiction.[166]

4.4 *Continuity of States' Obligations*

The continuity, or otherwise, of States' human rights obligations has arisen in different contexts, including changes in the composition of the State and a State's wish to denounce such obligations. The VCLT does not address the former situation,[167] but the HRC in particular has developed consistent practice and articulated principles that encompass both circumstances.[168] In response to the break-up of the former Yugoslavia, in 1992 the Committee required three successor States – Bosnia-Herzegovina, Croatia and Serbia-Montenegro – to submit urgent reports prior to any explicit acceptance of the ICCPR.[169] It repeated this stance in 1993, affirming that successor States were bound by the Covenant from their date of independence,[170] regardless of whether they had formally accepted this to be the case. Also in 1993, the Commission on Human Rights[171] encouraged successor States to confirm that they continued to be bound by the human rights treaties of the predecessor State. There are a number of justifications for this stance: the special nature of human rights treaties, the concept of universality and, especially, the need to avoid 'operational gaps'[172] in the protection of

[166] *Varnava v. Turkey, supra* n. 162 (paragraphs 136–150).

[167] The issue of whether a State succeeds to the obligations of a predecessor State is subject to the 1978 Vienna Convention on Succession of States in Respect of Treaties, 1946 UNTS 3. Art. 56 VCLT addresses denunciation and withdrawal: *supra* n. 7.

[168] The practice of the HRC has influenced State practice and that of the other treaty bodies; F. Pocar, 'Some Remarks on the Continuity of Human Rights and International Humanitarian Law Treaties' in Cannizzaro (ed.), *supra* n. 76, pp. 279–293, at p. 282.

[169] For the discussion within the Committee, see *ibid*., at pp. 282–284.

[170] Report of the Secretary-General, Succession of States in respect of International Human Rights Treaties, U.N. Doc. E/CN.4/1995/80, 28 Nov. 1994 (paragraph 5). The Report also describes the practice of the Committee on the Elimination of Racial Discrimination.

[171] CHR Res. 1993/23, 5 March 1993, Succession of States in Respect of International Human Rights Treaties.

[172] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 2, at p. 637 (Separate Opinion of Judge Shahabuddeen).

rights vested in individuals. Human rights treaties are said 'to devolve with territory', and, accordingly, 'States continue to be bound by the obligations under the Covenant entered into by the predecessor State'.[173] Judge Weeramantry explained that '[h]uman rights and humanitarian treaties involve no loss of sovereignty or autonomy of the new State, but are merely in line with general principles of protection that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter'.[174] Indeed, Judge Weeramantry concluded that there is a principle of contemporary international law of automatic State succession to 'so vital a human rights convention as the Genocide Convention'.[175] The principle that rights cannot be taken away regardless of changes in the administration of territory has not been applied exclusively to States. The HRC and CESCR both requested the UN Interim Mission in Kosovo, a non-State authority, to report to them following that body's assumption of legislative and executive power and mandate to protect and promote human rights in Kosovo.[176]

Similarly, there has been a bias in favour of continuity in determining that States are not free to withdraw from or to terminate their human rights treaty obligations in the absence of a termination or denunciation clause.[177] Responding to North Korea's purported withdrawal from the ICCPR, the HRC noted that any such possibility 'must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties'.[178] The UN Legal Counsel had concluded that North Korea could not withdraw,

[173] HRC, Concluding Observations, United Kingdom of Great Britain and Northern Ireland (Hong Kong), CCPR/C/79/Add.69, 8 November 1996 (paragraph 4). In the case of Hong Kong, the Committee did not have to rely solely on this jurisprudence as the parties to the Joint Declaration had agreed that the ICCPR would remain in force after transfer of sovereignty to the People's Republic of China.

[174] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 2, at p. 648 (Separate Opinion of Judge Weeramantry).

[175] *Ibid*., at p. 649. Judge Shahabuddeen did not decide whether this principle applies to human rights treaties in general: *ibid*., at p. 637.

[176] Security Council Resolution 1244, 10 June 1999; Concluding Observations of the HRC, Kosovo (Serbia), U.N. Doc. CCPR/C/UNK/CO/1, 14 Aug. 2006; Concluding Observations of the ESCR, on the Initial Report of Serbia and Montenegro, U.N. Doc. E/C.12/1/Add.108, May 2005 (paragraph 9).

[177] 'Only very few human rights treaties do not have a termination clause': E. Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in Fastenrath, Geiger, Khan, Paulus, von Schorlemer and Vedder (eds.), *supra* n. 139, pp. 477–487, at p. 480.

[178] HRC, General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 12 Aug. 1997 (paragraph 1).

unless all other parties to the Covenant agreed.[179] In language reflecting Article 56(1)(b) VCLT, the Committee stated that the ICCPR is not 'by its nature' the type of treaty 'where a right of denunciation is deemed to be admitted'. First, the Covenant is not of a temporary nature, and second, once accorded, Covenant rights belong to the people of the territory and remain with them unless there is an explicit provision allowing for withdrawal.[180] The same concern that people who have enjoyed human rights guarantees should not be subsequently deprived of those protections has motivated the ECtHR's decision that an occupier State party to the ECHR continues to be bound by the Convention in occupied territory within the Convention's legal space.[181] Eckart Klein notes that if the objective order and absolute obligations framed by human rights treaties are separate from the multilateral contractual basis, States do not have the option of unilateral denunciation. Nevertheless, if all States parties agreed to terminate the treaty they could do so, with the exception of obligations that had become binding as rules of customary international law.[182]

The objective that human rights obligations should not be easily undermined means that procedures for treaty amendment or revision[183] generally impose conditions 'somewhat more onerous and specific than the general or default' amendment provisions in the VCLT.[184] The political risk of seeking amendment of human rights treaties is high and is rarely attempted. Where amendment has been sought, formal acceptance has been slow. For instance, the General Assembly accepted in 1996 a proposal to amend Article 20(1) CEDAW by extending the meeting time for the Committee on the Elimination of Discrimination against Women.[185] The Resolution requires acceptance of the amendment by a two-thirds majority of States parties, a condition not necessitated by Article 40 VCLT or Article 26 CEDAW. Some sixteen

[179] Klein, *supra* n. 177, at p. 478.

[180] E.g., Art. 12 of the 1966 First Additional Protocol to the ICCPR, 999 UNTS 302; Art. 31 CAT (*supra* n. 37); Art. 89 CMWF (*supra* n. 128) and Art. 48 CPD (*supra* n. 35); indeed, '[o]nly very few human rights treaties do not have a termination clause': Klein, *supra* n. 177, at pp. 477 and 480.

[181] *Al Skeini v. UK, supra* n. 24 (paragraph 142). However, this does not mean that jurisdiction under the ECHR can never exist outside the territory covered by the Council of Europe Member States: *ibid*.

[182] Klein, *supra* n. 177, at pp. 483–485.

[183] E.g., Art. 51 ICCPR (*supra* n. 11); Art. 29 ICESCR (*supra* n. 12); Art. 23 ICERD (*supra* n. 10); Art. 26 CEDAW (*supra* n. 37); Art. 29 CAT (*supra* n. 37); Art. 50 CRC (*supra* n. 36); Art. 90 CMWF (after a period of five years) (*supra* n. 128) and Art. 47 CPD (Art. 47(3) is new) (*supra* n. 35).

[184] Gardbaum, *supra* n. 50, at 749 and 758. [185] UNGA Res. 50/202, 23 Feb. 1996.

years later the amendment has not been accepted.[186] In practice, amendment is through the adoption of optional protocols or evolutive interpretation.

5 Conclusion

Following the adoption of the VCLT, multilateral treaty regimes have flourished, mainstreaming 'collective and universal values' into the international legal order,[187] including those for human rights, environmental law and disarmament. What distinguishes the former is not so much their substance but the existence of expert judicial or quasi-judicial bodies.[188] This has entailed human rights treaties being subject to more interpretation and practical application by experts from within the human rights world than is perhaps the case with any other conventional special regime. Their function is notionally 'limited to direct supervisory functions in respect of [the relevant] law-making treaty'[189] but is in fact directed towards establishing and upholding a public – even constitutional – international or regional order. This objective has grounded an open-ended, 'evolutive' approach to treaty interpretation that goes beyond the text and in developing the law.[190] While opinions emanating from the human rights courts and bodies are often accorded considerable weight, there is also disagreement from other decision-makers who prefer a 'traditionalist', positivist approach that rejects any deviation in favour of human rights. The current position is one of unarticulated compromise. On the one hand, the proliferation of human rights bodies has not precipitated a damaging fragmentation of international law. Although human rights bodies are not necessarily versed in treaty law, there is a good deal of reliance on the VCLT; either explicitly or implicitly it pervades the language and basis of decision-making. This is facilitated by the flexibility within the VCLT for human rights exceptionalism (Article 60(5)), for opting out and for managing normative conflict.

[186] I. Boerefijn, 'Article 20' in M. A. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: Oxford University Press, 2012), pp. 513–518, at p. 516.

[187] E. Cannizzaro, 'Preface' in Cannizzaro, *supra* n. 76, pp. v–vi, at p. vi.

[188] Another distinction is that one State can 'spoil' the effectiveness of an environmental regime, but this is not the case with human rights treaties.

[189] *Loizidou v. Turkey, supra* n. 24 (paragraph 84).

[190] *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002), *supra* n. 46, at p. 71 (paragraphs 22–23 of Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma).

Human rights bodies have sought harmony rather than confrontation with other areas of international law. Acceptance or otherwise by States of such an expansive approach depends upon political context: the USA views differently the HRC's insistence on the continuity of ICCPR rights when applied to the people of North Korea from that of its extraterritorial application when applied to itself. Neither is directly provided for within the Covenant. On the other hand, the ILC has maintained the integrity of treaty law while recognising the competence of the treaty bodies[191] and a presumption of severability of an impermissible reservation. The ICJ's approach has been mixed. As far back as the advisory opinion on the Genocide Convention in 1951, it was instrumental in identifying the special characteristics of humanitarian treaties and has upheld their extra-territorial application.[192] It has also distinguished their substantive content from procedural requirements, to the dissatisfaction of some human rights grounded judges. But the ICJ has jurisdiction over disputes relating to any area of international law and an obligation to apply principles of international law in many contexts, not just that of human rights. The conclusion is that the human rights treaty regime has not shifted from a 'purely treaty based regime' to a 'constitutional one'[193] but is rather a more flexible and pragmatic one that seeks 'to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'.[194]

[191] The rapporteur Alain Pellet had earlier responded aggressively to this position but later softened his position: Pellet, Second Report on Reservations to Treaties, *supra* n. 31 (paragraph 252(d)).

[192] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep. 136, at pp. 178–181 (paragraphs 107–113) and *Case Concerning Armed Activities on the Territory of the Congo*: Democratic Republic of the Congo v. Uganda (2005) ICJ Rep. 168, at pp. 242–243 (paragraph 216).

[193] Gardbaum, *supra* n. 50, at 753.

[194] *Ahmadou Sadio Diallo, supra* n. 25, at pp. 663–664 (paragraph 66).