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Edited by

Andreas Zimmermann
and Rainer Hofmann

Assistant Editor:

Hanna Goeters



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Unity and Diversity with Regard to International Treaty Law

By Monika Heymann

A. Introduction

Treaties are the main source of international law¹ and of each field of law examined in this report, namely: Law of the sea, human rights, humanitarian, economic and environmental law. Thus, treaties cover a variety of subject-matters. They regulate the use of the sea-bed, the transboundary movements of hazardous waste, the use of chemical weapons during an armed conflict, the trade between two and more nations as well as the prohibition of torture.

The following questions, examined in this report, arise from the diversity of subject matters covered by international treaties: Is the general international treaty law which is mainly embodied in the Vienna Convention on the Law of Treaties (VCLT)² still relevant for each particular subject matter? Or has every field of law developed its own treaty law?

This report is divided into three parts. In Part B the general structure of the different fields of law is reviewed. In Part C, the differences concerning the conclusion, application, interpretation and termination of a treaty are discussed. Finally, in Part D the relationship between treaties covering the same and different subject matters is reviewed.

¹ *Alfred Verdross/Bruno Simma*, *Universelles Völkerrecht* (1984), § 533; *Rudolf Bernhardt*, *Treaties*, *EPIL* 4 (2000), 926, 926; *Georg Dahm/Jost Delbrück/Rüdiger Wolfrum*, *Völkerrecht*, I/3 (2002), 512.

² UNTS 1155, 331.

B. The General Structure of the Different Fields of Law

Generally, environmental law, humanitarian law, human rights law, economic law and the law of the sea reveal the same structure. They are composed of universal and – with the exception of humanitarian law – regional multilateral treaties.³ Additionally, fundamental multilateral treaties with a (quasi-)universal character also exist.⁴ The importance and number of bilateral treaties vary according to the relevant subject matter. Whereas bilateral treaties still play a crucial role in some areas of economic law, particularly with regard to investment law (currently around 2100 bilateral treaties worldwide), their importance in environmental law and the law of the sea is limited and they do not exist in humanitarian and human rights law.

³ An example for a global environmental treaty is the United Nations Convention on Biodiversity 1992 (ILM 31 (1992), 851), a regional treaty is the Convention on the Protection of the Environment through Criminal Law 1998 (ETS No. 172). An example for a global humanitarian law convention is the Geneva Convention Relative to the Treatment of Prisoners of War 1949 (UNTS 75, 135). An example for a global human rights treaty is the International Covenant on Political and Civil Rights 1966 (UNTS 999, 171), a regional treaty is the European Convention on Human Rights (ETS No. 005). An example for a global law of the sea convention is the United Nations Convention on the Law of the Sea 1982 (UNTS 833, 3), a regional treaty is the Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 (ILM 32 (1993), 1068). An example for a global economic treaty is the Marrakesh Agreement Establishing the World Trade Organization 1994 (UNTS 1867, 154), an example for a regional treaty is the North American Agreement Free Trade Agreement 1992 (ILM 32 (1993), 289).

⁴ An example for an environmental convention with a (quasi-) universal character is the United Nations Framework Convention on Climate Change 1992 (ILM 31 (1992), 849) with 189 State parties (unfccc.int/essential_background/convention/status_of_ratification/items/2631.php, last visited 17 October 2004). The United Nations Convention on the Law of the Sea (note 3) with 145 members (www.un.org/Depts/los/reference_files/status2003.pdf, last visited 22 September 2004) is an example for a quasi universal treaty of the law of the sea. The four Geneva Conventions of 1949 ratified by 192 States (www.eda.admin.ch/cda/f/home/foreign/intagr/fram/iprotection.html, last visited 16 October 2004) epitomize the (quasi-) universal character of some humanitarian law conventions. The International Covenant on Civil and Political Rights (note 3) has 149 State parties (www.ochhr.org, last visited 15 October 2003) and is an example of a quasi-universal human rights treaty. Finally, the WTO Agreement (note 3) has 148 contracting parties (www.wto.org, last visited 16 October 2004) and epitomize a (quasi-) universal convention in the area of economic law.

C. Conclusion, Application, Interpretation and Termination of Treaties

I. Conclusion of Treaties

1. *The Development of Treaties*

The way treaties are developed varies according to the relevant subject matter. Human rights treaties are virtually developed exclusively by International Organizations.⁵ All main universal human rights instruments have been adopted by the General Assembly.⁶ This means that they have been elaborated by the UN Commission on Human Rights, which could be described as having a quasi-monopoly in this area.

The majority of the relevant humanitarian treaties (*i.e.* the Law of Geneva and the Additional Protocols of 1977⁷) has been adopted and developed by diplomatic conferences.⁸ The competence to develop law of the sea conventions is shared

⁵ Bruno Simma, *How Distinctive are Treaties Representing Collective Interest? The Case of Human Rights Treaties*, in: Gowlland-Debbas (ed.), *Multilateral Treaty-Making* (2000), 83, 83.

⁶ International Covenant on Civil and Political Rights (General Assembly Resolution 2200 A (XXI) of December 16, 1966); International Covenant on Economic, Social and Cultural Rights (General Assembly Resolution 2200A (XXI) of December 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly Resolution 2106 (XX) of December 21, 1965); Convention on the Elimination of All Forms of Discrimination against Women (General Assembly Resolution 34/180 of 18 December 1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 39/46 of December 10, 1984).

⁷ The four Geneva Conventions of 1949 have been adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War held in Geneva from April 21 to August 12, 1949. The Additional Protocols have been adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.

⁸ There are also humanitarian conventions which have been elaborated in relation to or under the auspices of the United Nations (*e.g.*, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 1980 (UNTS 1342, 137) which has been adopted by the General Assembly of the United Nations and the Conference on Disarmament).

mainly by diplomatic conferences convened by the General Assembly⁹ and the International Maritime Organization (IMO).¹⁰ Environmental agreements are developed under the auspices of or in relation to the United Nations, by diplomatic conferences or by the State parties to an existing environmental framework treaty.¹¹ Finally, major parts of international economic law have been developed under the auspices of, or at least in relation to the UN system. However, some multilateral economic agreements have been developed by diplomatic conferences initiated by States, and especially in the areas of world trade and investment protection, States still maintain a dominant position.

2. Possibility of a Unilateral Differentiation: The Problem of Reservations

Reservations to treaties are a highly complex issue in international treaty law – reservations to human rights treaties¹² are especially a “hot topic.”¹³ Thus, the following remarks can only touch on this issue very briefly. They will focus on the admissibility requirements of reservations and the legal regime of inadmissible reservations.

a) Admissibility of Reservations

According to Article 19 VCLT, reservations cannot be made where they are expressly prohibited by the treaty, or where the treaty provides that only specified

⁹ The four Geneva Conventions on the Law of the Sea (Geneva Convention on the Territorial Sea and the Contiguous Zone, Geneva Convention on the High Seas, Geneva Convention on the Continental Shelf and Geneva Convention on Fishing and the Conservation of the Living Resources of the High Seas) have been adopted by the 1st UN Conference on the Law of the Sea held at Geneva in 1958. The United Nations Convention on the Law of the Sea (note 3) was adopted by the 3rd UN Conference on the Law of the sea, which lasted 11 years (1973-1982).

¹⁰ Conventions concerning the maritime safety, the prevention of marine pollution and liability and compensation especially in relation to damage caused by pollution are concluded under the auspices of the IMO.

¹¹ See generally *Philippe Sands*, *Principles of International Environmental Law*, 2nd ed. (2003), 129.

¹² See detailed Second Report on Reservations by Mr. *Alain Pellet*, Special Rapporteur, UN Doc. A/CN.4/477 (1996).

¹³ See also *Bruno Simma*, *Reservations to Human Rights Treaties – Some Recent Developments*, in: *Hafner/Rest/Sucharipa-Behrmann/Zemanek* (eds.), *Liber Amicorum Ignaz Seidl-Hohenveldern* (1998), 659.

reservations may be made and these do not include the reservation in question or, where in the case of no mention being made in the text of the treaty the reservation is incompatible with the object and purpose of the treaty.

None of the subject matters treated in this paper has yet developed a standard format with regard to the admissibility of reservations. Instead, all kind of prohibitions stipulated in Article 19 VCLT can be found in human rights treaties,¹⁴ environmental agreements,¹⁵ law of the sea conventions,¹⁶ economic,¹⁷ as well as

¹⁴ Human rights treaties prohibiting reservations: Art. 30 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (ILM 42 (2003), 26), Art. 17 Optional Protocol to the Convention on the Elimination of Discrimination Against Women 2000 (GA Res. 54/4, annex, 54 UNGAOR Supp. (no. 49), at 5. Human rights treaties permitting certain reservations: European Convention on Human Rights (note 3): Art. 57 general reservations are not admissible; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNTS 1465, 85): Art. 28 enumerated reservations are allowed; Convention on the Rights of a Child 1989 (UNTS 1557, 3): Art. 51 (1) reservations incompatible with the object and purpose of the Convention are forbidden; Convention on the Elimination of Discrimination Against Women 1979 (UNTS 1249, 3): Art. 28 reservations incompatible with the object and purpose of the Convention are forbidden; Convention on the Elimination of All Forms of Racial Discrimination 1965 (UNTS 660, 195): Art. 20 (2): "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it." Human rights treaties remaining silent on reservations: International Covenant on Social, Cultural and Economic Rights 1966 (UNTS 993, 3); International Covenant on Political and Civil Rights 1966 (note 3).

¹⁵ Environmental treaties prohibiting reservations: Art. 18 Vienna Convention on the Protection of the Ozone Layer 1985 (ILM 26 (1987), 1529); Art. 26 (1) Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal 1989 (ILM 28 (1989), 657); Art. 34 Protocol on Environmental Protection to the Antarctic Treaty 1991 (ILM 30 (1991), 1461); Art. 37 Convention on Biological Diversity 1992 (note 14); Art. 38 Cartagena Protocol on Biological Diversity 2000 (ILM 39 (2000), 1027); Art. 24 Framework Convention on Climate Change (note 14); Art. 25 Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (ILM 37 (1998), 22); Art. 47 International Tropical Timber Agreement 1994 (ILM 33 (1994), 1014); Art. 27 Stockholm Convention on Persistent Organic Pollutants 2001 (ILM 40 (2001), 532). Environmental treaties permitting special reservations: Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993 (ILM 32 (1993), 1228): Art. 35 enumerated reservations are allowed; Convention on the Conservations of Migratory Species of Wild Animals 1979 (ILM 19 (1980), 15): Art. XIV (1) general reservations are prohibited. Environmental treaties remaining silent on reservations: Ramsar Convention on Wetlands of International Importance 1972 (UNTS 996, 245); Convention on Long-Range

humanitarian law¹⁸ treaties. However, special features concerning the admissibility

Transboundary Air Pollution 1979 (ILM 18 (1979), 1442); Convention on the Transboundary Effects of Industrial Accidents 1992 (ILM 31 (1992), 1332).

¹⁶ Law of the sea conventions prohibiting reservations: Art. 12 (9) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America 1987 (ILM 26 (1987), 1048). Law of the sea conventions permitting special reservations: Convention on the Law of the Sea (note 3): Art. 309 Reservations are forbidden unless expressly permitted by other articles of this convention; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea 1994 (ILM 33 (1994), 1309): Art. 2 (2) Reservations are forbidden unless expressly permitted by other articles of this convention; Geneva Convention on the Continental Shelf 1958 (UNTS 499, 312): Art. 21 (1) enumerated reservations are allowed; Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas 1958 (UNTS 559, 285): Art. 19 (1) enumerated reservations are allowed. Law of the sea conventions remaining silent on reservations: Geneva Convention on the High Seas 1958 (UNTS 516, 205); International Convention for the Prevention of Pollution by Ships (MARPOL) 1973 (UNTS 1313, 3).

¹⁷ Economic law treaties prohibiting reservations: Art. XVI (1) WTO Agreement (note 3); Agreement on Rules of Origin 1993 (ILM 33 (1994), 1143). Economic law treaties permitting special reservations: Agreement on Implementation of Art. VII of the General Agreement on Tariffs and Trade 1994 (ILM 33 (1994), 1143): Art. 21 and para. 2 of Annex III reservations are permitted if the other parties agree to them; Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 (ILM 33 (1994), 1143): Art. 18 (2) reservations are permitted if the other parties agree to them; Agreement on Subsidies and Countervailing Measures (ILM 33 (1994), 1143): Art. 32 (2) reservations are permitted if the other parties agree to them. Economic law treaties remaining silent on reservations are the Agreement of the International Monetary Fund 1944 (UNTS 2, 40, 726, 260) and the Agreement of the International Bank for Reconstruction and Development 1944 (UNTS 2, 134, 294, 606).

¹⁸ Humanitarian law conventions prohibiting reservations: Art. 19 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997 (ILM 36 (1997), 1507). Humanitarian law conventions permitting certain reservations: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993 (ILM 32 (1993), 800): Art. 22: "The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose."

Humanitarian law conventions remaining silent on reservations: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (UNTS 75, 85); Geneva Convention Relative to the Treatment of Prisoners of War 1949 (note 4); Additional Protocol to the Geneva Conventions of August 12, 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 (UN GAOR, doc. A/32/144, August 12, 1977); Additional Protocol to the Geneva

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of reservations exist in environmental and economic law. The special characteristic of environmental agreements is that most treaties do not allow reservations. There are two principal reasons for this: Firstly, many environmental treaties replace the individual differentiation via reservations with a form of multilateralized differentiation. This differentiation is agreed with by all contracting parties but applicable only to those meeting the established criteria of differentiation.¹⁹ A good example is the Kyoto Protocol: While its Article 24 generally prohibits reservations, it differentiates in respect of burden-sharing in order to achieve the common purpose of the Convention. Article 3 (1) accordingly provides that the "developed country Parties should take the lead in combating climate change and the adverse effects thereof."²⁰

Secondly, many environmental treaties are framework conventions providing general structures and guidelines rather than specific commitments with implications for a particular activity or practice.²¹ They permit further concrete obligations to be established at some stage in the future.²²

The peculiarity of international economic law is that, especially in the system of the WTO, reservations are only permitted if the other State parties give their consent to them, and that (until today) no reservations have been made. In other words, the assent of all parties is needed. Accordingly, it is possible to conclude that the WTO system regards the integrity of the treaty as being of paramount importance.²³

Conventions of August 12, 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977 (UN GAOR, doc A/32/144, August 15, 1977).

¹⁹ *Catherine Redgwell*, Multilateral Environmental Treaty-Making, in: Gowlland-Debbas (ed.), *Multilateral Treaty-Making* (2000), 89, 101.

²⁰ For details see *Peter G. G. Davies*, *Global Warming and the Kyoto Protocol*, ICLQ 47 (1998), 446, 459 *et seq.*

²¹ *Sands* (note 11), 134 *et seq.*

²² The usual technique for the elaboration of more detailed obligations is the adoption of further protocols. See, e.g., the protocols adopted to the International Convention on Long Range Transboundary Air Pollution (note 15): Protocol on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at least 30 percent 1988 (ILM 27 (1988), 707); Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes 1989 (ILM 28 (1989), 212); Protocol Concerning the Emissions of Volatile Organic Compounds or Their Fluxes 1992 (ILM 31(1992), 568) and Protocol on Further Reduction of Sulphur Emissions 1994 (ILM 33 (1994), 1540).

²³ See generally Art. 20 (2) VCLT: "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

b) The Legal Regime of Reservations

The VCLT fails to specify clearly the legal consequences of an inadmissible reservation. Thus, in international legal doctrine and practice three questions are particularly controversial: Firstly, can an inadmissible reservation be accepted by the other State parties (“opposability²⁴ v. admissibility²⁵ doctrine”)? Secondly, do treaty bodies – in absence of a specific treaty provision – have the competence to decide upon the admissibility of reservations? This question is raised in particular with regard to human rights treaties, because those conventions embody integral rights, but the VCLT is primarily posited upon bilateral structures of treaty performance.²⁶ Therefore, it is sometimes argued that human rights treaty bodies had (or ought to have) an implied competence to determine if a reservation is compatible with the object and purpose test.²⁷

Finally, the third particularly controversial question relates to the legal effect of an inadmissible reservation. Is such a reservation invalid and is its author bound by the whole treaty or does an impermissible reservation nullify the State’s acceptance of the treaty as a whole?

Until now, only human rights treaty bodies have tried to fill this major gap in the VCLT and have developed special rules regarding the legal regime of reservations. Firstly, this is due to the fact, that reservations are frequently made to human rights treaties²⁸ and that the most important human rights treaties have established treaty organs competent to receive complaints from individuals claiming a violation of human rights.

²⁴ E.g., *José Maria Ruda*, Reservations to Treaties, RdC 146 (1975 III), 101, 190.

²⁵ E.g., *Derek W. Bowett*, Reservations to Non-Restricted Multilateral Treaties, BYIL 48 (1976-1977), 67, 83.

²⁶ See only *Rudolf L. Bindschedler*, Reservations, in: Rudolf Bernhardt (ed.), EPIL 4 (2000), 965, 969.

²⁷ See the debate in the International Law Commission concerning the relationship between the VCLT and human rights treaties: YILC 1997 I, 2499th meeting, 2500th meeting, 2501st meeting, 2502nd meeting and 2503rd meeting. The Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties in 1997 reaffirmed the applicability of the VCLT to human rights treaties. They emphasized that human rights treaty bodies do not have greater competences than that specifically granted by the respective State parties (Report of the ILC on the work of its forty-ninth session, GAOR, Fifty-second Session, Suppl. No. 10, UN DOC. A/52/10, 95 *et seq.*).

²⁸ See only the reservations made to the International Covenant of Civil and Political Rights (www.ohchr.org/english/countries/ratification/index.htm, last visited 16 October 2004).

Furthermore, the other fields of law treated in this paper, either have treaty organs and no reservations (economic and environmental law), or virtually have no competent treaty organs (humanitarian law), or the relevant treaty organ (International Tribunal of the Sea) has just recently started its work,²⁹ so that until now it has not had the opportunity to deliver a judgment with regard to the legal regime of reservations.

aa) The Approach of Human Rights Treaty Bodies

Two human rights treaty bodies, namely the European Court of Human Rights and the UN Committee on Human Rights, ruled on two controversial issues: Are treaty bodies competent to apply the "object and purpose test?" And what are the effects of an impermissible reservation to a human rights treaty? Both, the Strasbourg Court³⁰ and the UN Committee on Human Rights,³¹ basically reached the same conclusions. Firstly, that they are competent to determine the legality of a reservation and thus can apply the object and purpose test.³² Secondly, they de-

²⁹ The ITLOS took up its work on October 1, 1996 (www.itlos.org, last visited October 16, 2004).

³⁰ The European Court of Human Rights has developed a practice whereby it would first consider the admissibility of a particular reservation, and then proceed to sever the reservation on the presumption that the relevant State still wants to be bound by the Convention. In the famous judgment *Belilos v. Switzerland* the Strasbourg Court stated: "In short, the declaration in question does not satisfy two of the requirements of Art. 64 (Art. 64) of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognized the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected" (ECHR, *Belilos v. Switzerland*, Ser. A 132, para. 60).

³¹ Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in Relation to Declarations under Art. 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 18.

³² But it should be also noted that not all human rights treaty bodies affirmed to have such a competence. Thus, the Committees established under the 1966 Convention on the Elimination of Racial Discrimination and the 1989 Convention on the Elimination of Discrimination against Women have both denied the competence to assess the validity of reservations. See only *Catherine Redgwell*, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, BYIL 64 (1993), 245, 280.

cided that an impermissible reservation is generally to be severed and that the declarant State is bound by the whole treaty.³³

Nevertheless, the reactions of the State parties differed considerably. Whereas the jurisprudence of the European Court of Human Rights was generally accepted amongst the member States of the ECHR, the General Comment 24/52, however, triggered off great concern with certain governments. In 1995, the United Kingdom, the United States of America, and France submitted written observations to the Human Rights Committee criticizing the conclusions reached in its General Comment.³⁴ They objected in particular to the severability solution.

bb) Transferability to Other Subject Matters?

It is one of the most controversial questions in international treaty law, if the severability doctrine can at all be applied to human rights treaties and, moreover, if it could be transferred to other subject matters. A potential transferability is discussed with regard to the law of the sea. The United Nations Convention on the Law of the Sea allows only enumerated reservations and thus corresponds to Article 19 (b) VCLT. For this reason, the question if an impermissible reservation could be accepted by the other State parties is less controversial. It is generally recognized that such an impermissible reservation is invalid, whether or not it is accepted by another contracting party.³⁵

In international doctrine it is sometimes argued that the severability doctrine adopted by the human rights treaty bodies can be transferred to the Law of the Sea Convention.³⁶ The State practice in the framework of the Convention of the Law

³³ But it should be noted that the First Optional Protocol to the International Covenant on Civil and Political Rights confers to the UN Committee on Human Rights only the competence to issue non-binding recommendations, whereas the European Court of Human Rights has the power to give binding judgments.

³⁴ J. P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt out: Reservations and Objection to Human Rights Convention* (1997), 193 *et seq.*

³⁵ See only the clear and equivocal statement of Sir *Humphry Waldock*. He stated "that a contracting State could not purport, under Art. 17 (now Art. 20), to accept a reservation prohibited under Art. 16 (now Art. 19), para. (a) or para. (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance" (Official Records United Nations Conference on the Law of Treaties, First Session (1968), Meetings of the Committee of the Whole, Twenty-Fifth Meeting, 133).

³⁶ In this direction *Dolliver Nelson* (Vice-President of the International Tribunal for the Law of the Sea), *Declarations, Statements and Disguised Reservations with Respect to the Convention on the Law of the Sea*, ICLQ 50 (2001), 767, 781-783. See also *Richard W.*

of the Sea also seems to support the "severability doctrine."³⁷ But it should be noted that this State practice does not refer explicitly to the relevant jurisprudence of the human rights treaty bodies.

II. Application of Treaties

1. Territorial Application

According to Article 29 VCLT a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established. All fields of law – with the exception of economic law – deviate from this presumption.³⁸

Firstly, law of the sea conventions, due to their very nature are hardly susceptible of territorial application. Their scope of application is primarily the sea, and not the territory.

Secondly, the application of humanitarian law conventions is not limited to the territory of the contracting party. Their applicability *ratione loci* is defined as follows: They apply to the territory of the belligerents, to any place where a combat takes place (inside or outside the territory of the belligerents, for example at sea) and to zones covered by the belligerent State even if no combat takes place (for example in case of the occupation of a foreign territory).³⁹

Edwards, Reservations to Treaties, Michigan Journal of International Law 10 (1989), 362, 376 *et seq.* who does not regard the severability doctrine as an exclusive doctrine for human rights treaties.

³⁷ See only the declaration made by the Russian Federation upon ratification of the Convention on the Law of the Sea (note 3): "The Russian Federation, bearing in mind Arts. 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or made for any other reason in connection with the Convention, that are not keeping with the provisions of Art. 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and for this reason they shall not be taken into account by the Russian Federation in its relation with that party to the Convention" repr. in: *Dolliver Nelson* (note 36), 767, 782 *et seq.*

³⁸ See more detailed *Anthony Aust*, Modern Treaty Law and Practice (2002), 162 *et seq.*

³⁹ This has been confirmed by the jurisprudence of the ICTY (*Prosecutor v. Tadić*, ICTY Case no. IT-94-1-AR72, October 2, 1996, paras. 68-69) and ICTR (*Prosecutor v.*

Furthermore, the territorial scope of environmental treaties depends on the subject matter covered by the relevant agreement. Thus, environmental agreements aimed at the universal protection of the marine environment apply to the sea; and regional environmental agreements only cover a certain geographical region.⁴⁰

Even human rights treaties are not limited to a territory. Generally, human rights treaties declare that the beneficiaries of the relevant rights are "all persons subject to the jurisdiction of the contracting parties."⁴¹ This means, in general, that human rights treaties apply to a territory, where a State party exercises effective control.⁴² But the exact extent of this notion is still controversial.⁴³

2. Affects on Third States

As a general principle of international treaty law it is recognized that a treaty only binds the contracting parties and does not create either obligations or rights for a third State without its consent.⁴⁴ In the field of human rights, humanitarian

Jean-Paul Akayesu, Merits, ICTR Case No ICTR-96-4-T, Trial Chamber, September 2, 1998, para. 635).

⁴⁰ See, e.g., Art. 2 (1) of the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (www.cep.unep.org/pubs/legislation/cartxt.html, last visited 23 October 2004) which reads as follows: "The 'Convention area' means the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30 degrees north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in Art. 25 of the Convention."

⁴¹ Art. 1 of the European Convention on Human Rights (note 3) reads as follows: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention." See also: Art. 2 (1) of the International Covenant on Civil and Political Rights (note 3), Art. 1 of its Optional Protocol (999 UNTS 302) and Art. 1 of the American Convention on Human Rights 1978 (1144 UNTS 123).

⁴² See the established jurisprudence of the European Court of Human Rights: *Loizidou v. Turkey* (Preliminary Objections), Ser. A 310, para. 62 with further references. See also Inter-American Commission of Human Rights Report No. 109/99, Case No. 10.951, *Coard et al. v. the United States*, September 29, 1999, paras. 37, 39, 41 and 43.

⁴³ See only the recent decision of the ECHR, *Bankovic et al. v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, ILM 41 (2001), 517, para. 75.

⁴⁴ See Art. 34 VCLT.

law and economic law this principle has not been questioned.⁴⁵ However, some environmental and law of the sea conventions have softened the *pacta tertiis* rule.

In a small number of cases, environmental agreements contain import prohibitions in view of non-members. Well known examples in this sense are Article 4 of the Montreal Protocol on Substances, that deplete the Ozone Layer⁴⁶ or Article 4 (5) of the Basle Convention on the Control of Transboundary Movements on Hazardous Waste and Their Disposal.⁴⁷ The latter one states that "a party shall not permit hazardous waste or other wastes to be exported to a non-party or to be imported from a non-party."

Some law of the sea conventions go even further and impose direct obligations on third States. The most famous example is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Such obligations are contained in its Articles 8 (4), 17 and 23 (3).⁴⁸

The deviation from the *pacta tertiis* rule in environmental and law of the sea conventions is due to the fact that both fields of law protect a common concern and interest of the international community. The third State impact of the subject matters mentioned above is aimed to limit the "free-rider effect."⁴⁹ Thus, the particular goal (e.g., protecting the ozone layer) can be achieved only by widespread if not universal acceptance of the specific restraints.⁵⁰

⁴⁵ In the above mentioned fields of law the role of third parties is only discussed with regard to the question if treaty provisions could create effects for third States because they incorporate customary international law.

⁴⁶ UNEP, Montreal Protocol on Substances that Deplete the Ozone Layer, Final Act (1987), 12.

⁴⁷ See *supra*, note 15.

⁴⁸ Another example is Part XI of the Convention on the Law of the Sea (note 3) creating a regime for the use of the deep-sea resources. See detailed *Jonna Ziemer, Das gemeinsame Interesse an einer Regelung der Hochseefischerei* (2000), 234.

⁴⁹ See also *Joost Pauwelyn, Conflict of Norms in Public International Law* (2002), 101.

⁵⁰ See also *Bernard Oxman, The International Commons, the International Public Interest and New Modes of International Lawmaking*, in: Jost Delbrück (ed.), *New Trends in International Lawmaking – International "Legislation" in the Public Interest* (1996), 21, 25 *et seq.*

III. Interpretation of Treaties

The general rules of interpretation embodied in Articles 31-33 VCLT apply to any treaty, in any field of law treated in this paper.⁵¹ This is due to the fact the principles contained in Articles 31-33 VCLT are phrased broadly enough to cover the peculiarities of each subject matter.

IV. Termination of Treaties Through Withdrawal or Denunciation

Withdrawal or denunciation⁵² denotes a unilateral act by which a party seeks to terminate its participation in the treaty. According to the residual clauses of the VCLT, the withdrawal of a party may take place in conformity with the provisions of a treaty, or at any time by consent of all parties after consultation with the other contracting parties (Article 54). Article 56 VCLT contains the presumption that a treaty which contains no provisions regarding its termination and does not provide for denunciation is not subject to denunciation unless it is established that the parties intended to admit the possibility of denunciation, or a right of denunciation may be implied by the nature of the treaty.

No subject matter treated in this paper has uniform treaty provisions with regard to the withdrawal of a party. Generally, human rights treaties, humanitarian law conventions, environmental agreements, economic law treaties as well as law of the sea conventions can be divided into three categories. Either they do not provide for denunciation, or they contain a simple or qualified denunciation clause.⁵³

⁵¹ For human rights treaties see only ECHR, *Bankovic et al. v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, ILM 41 (2002), 517, paras. 55-58; concerning economic law see the constant jurisprudence since United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report adopted May 20, 1996, WT/DS2/AB/R, para. III.B, 17; concerning environmental law see only *Sands*, Principles of International Environmental Law, 2nd ed. (2003), 131 *et seq.*

⁵² The words “denunciation” and “withdrawal” express the same legal concept (*Aust*, Modern Treaty Law and Practice (2002), 224; United Nations, Final Clauses of Multilateral Treaties, Handbook (2003), 109).

⁵³ Treaties not providing for denunciation: International Covenant on Political and Civil Rights (note 3); Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques 1976 (ILM 16 (1977), 88); Convention on the Conservation of Migratory Species of Wild Animals (note 15); Geneva Convention on the High Seas (note 16). Treaties providing a simple denunciation clause: Article 21 Convention on the Elimination of All Forms of Racial Discrimination (note 14); Article 8 Convention (IV)

A simple denunciation clause means that the withdrawal on notice may take place at any time, whereas a qualified denunciation clause sets up further requirements, such as, for example, a crucial reason or that a specified period of time elapses. However – with exception of the law of the sea – special features exist in every field of law.

As far as human rights law is concerned two trends can be observed. On the one hand, the overall majority of human rights treaties permit denunciation without further requirements,⁵⁴ and on the other hand, the UN Committee on Human Rights argues that human rights treaties which do not contain a withdrawal provision⁵⁵ are not subject to denunciation. It based its decision *inter alia* on the argument that the Covenant on Civil and Political Rights, as an instrument codifying human rights, was not the type of treaty that implies a right for denunciation by its

Respecting the Laws and Customs of War on Land 1907 (Martens, NRG (3rd Serie), vol. 3, 461)); Art. 43 (1-2) Tropical Timber Agreement (note 15); Art. XV WTO Agreement (note 14); Art. 22 United Nations Convention on Conditions for Registration of Ships 1986. Treaties containing a qualified denunciation clause: European Convention on Human Rights (note 3): Art. 58 (1) denunciation is possible after 5 years membership; Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personal Mines and on their Destruction (note 18): Art. 20 (2): Full explanation of the reasons motivating the withdrawal is required; Basel Convention on Transboundary Movements of Hazardous Waste (note 15): Art. 27: denunciation is possible after three years membership; Art. 51 Convention Establishing the Multilateral Investment Guarantee Agency 1985 (UNTS 1508, 99): denunciation is possible after the expiration of three years following the date upon which this convention has entered into force with respect to the relevant member; International Convention for the Prevention of Pollution from Ships (note 16): Art. 18 (1): denunciation is possible after 5 years membership.

⁵⁴ Human rights treaties containing a simple denunciation clause: Art. 44 Convention Relating to Refugees 1951 (UNTS 189, 150); Art. 52 Convention on the Rights of a Child 1989 (note 14); Art. 15 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (GA Res. 54/263, Annex II, 54 UN GAOR Supp. (No. 49), at 6); Art. 9 Protocol Relating to the Status of Refugees 1966 (UNTS 606, 267); Art. 31 (1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (note 14); Art. 33 (1) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (note 14); Art. 19 (1) Optional Protocol to the Convention on the Elimination of Discrimination against Women (note 14).

⁵⁵ Human rights treaties not providing the possibility to withdraw are: The International Covenant on Social, Cultural and Economic Rights (note 14); the International Covenant on Political and Civil Rights (note 3); the Second Additional Protocol on the International Covenant on Civil and Political Rights 1989 (GA Res. 44/128, annex 44, UN GAOR Supp. (No. 49), 207 UN Doc. A/44/49) and the Convention on the Elimination on Discrimination against Women (note 14).

nature.⁵⁶ Furthermore, most humanitarian law treaties contain provisions governing the right of State parties to terminate the conventions through denunciation. But under these provisions, a denunciation would produce no effect if the State parties were engaged in an armed conflict at the time or within the notice period with regard to that armed conflict.⁵⁷

The special feature of economic law – especially WTO law – is the predominance of a simple denunciation clause.⁵⁸ Every State party – apart from the duty to observe the relevant notice period – is completely free to denounce the respective treaties.

The vast majority of environmental agreements contain a qualified denunciation clause requiring that a specified period of time elapses before a contracting party may withdraw from the treaty.⁵⁹ The purpose of this requirement is to secure – at least for a certain period of time – the membership in an environmental treaty.

⁵⁶ General Comment No. 26: Continuity of Obligations: 08/12/97.CCPR/C/21/Rev.1/Add.8/Rev.1. General Comment 26, para. 3: “[T]he Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.”

⁵⁷ Common Art. 63/62/142/158, para. 3 of the four Geneva Conventions, provides: “... a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation (Art. 158 of the Fourth Convention uses ‘release, repatriation and re-establishment’) of the persons protected by the present Convention have been terminated.” See also similar provisions in: Art. 99 First Additional Protocol to the Geneva Conventions (note 18), Art. 24 Second Additional Protocol to the Geneva Conventions (note 18); Art. 20 (3) Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personal Mines and on their Destruction (note 18).

⁵⁸ See, e.g., Art. XXXVI (1) of the Agreement on the Establishment of the International Monetary Fund (note 17): “Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principle office. Withdrawal shall become effective on the date such notice is received.”

⁵⁹ Art. 17 Convention on Long-Range Transboundary Air Pollution (note 15); Art. 19 Vienna Convention on the Protection of the Ozone Layer (note 15); Art. 19 Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (note 46); Art. 27 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (note 15); Art. 38 United Nations Convention on Biological Diversity (note 3); Art. 39 Cartagena Protocol on Biological Diversity (note 15); Art. 25 (1) Framework Convention on Climate Change (note 14); Art. 31 (1) Convention on the Transboundary Effects of Industrial Accidents 1992 (note 15); Art. 15 Protocol to the Convention on Long-Range Transboundary Air Pollution on Further Reduction on Sulphur Emissions 1994 (note 22); Art. 26 (1-2) Kyoto Protocol to the United Nations Framework Convention on Climate Change (note 15); Art. 28 Stockholm Convention on Persistent Organic Pollutants (note 15).

D. The Relationship Between Treaties

Due to the absence of a centralized law-making authority in international law, a series of treaties does not, in mathematical terms, constitute an ordered "set" but an "accumulation."⁶⁰ Thus, the relationship between various treaties covering the same or different subject matters can be quite complicated.⁶¹

Generally, two main problems arise: Firstly, what is the relationship between two successive treaties binding upon the same parties. To be more specific, what is the relationship between agreements which are not expressly intended to replace (in whole⁶² or partly⁶³), supplement⁶⁴ or to clarify another existing treaty (-ies)? Secondly, what is the relationship between two treaties binding upon different groups of parties?

I. Relationship Between Successive Treaties Relating to the Same Subject Matter

The VCLT contains in its Article 30 a residual clause for the relationship between successive treaties relating to the same subject matter. It is based on the *lex posterior* principle, the equality of all treaties with the exception of the United Nations Charter and the *pacta tertiis* principle. Thus, Article 30 (2) VCLT states that when a treaty specifies that it is subject to, or that is not to be considered as inconsistent with an earlier or later treaty, the provisions of that other treaty prevail. Article 30 (3) affirms the *lex posterior* principle and para. 4 combines the *lex posterior* with the *pacta tertiis* principle for the case when the parties to the later treaty do not include all the parties to the earlier one.

⁶⁰ Paul Reuter, Introduction to the Law of Treaties, 2nd rev. ed. (1995), 130.

⁶¹ Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester (1984), 93 describes the relationship between successive treaties covering the same subject matters as a "particular obscure aspect of the law of treaties."

⁶² See, e.g., Art. 311 (1) of the Convention on the Law of the Sea (note 3).

⁶³ An example is the Art. 2 of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982 (note 16): "1. The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail."

⁶⁴ See, e.g., Art. 6 (1) of the Second Optional Protocol to the International Covenant on Civil and Political Rights (note 55): "1. The provisions of the present Protocol shall apply as additional provisions to the Covenant."

The relationship between successive treaties relating to the same subject matters differs according to the relevant subject matter. Whereas the relationship between the various environmental treaties is particularly controversial and remains unsolved because many agreements overlap as far as their objectives and measures are concerned,⁶⁵ the relationship between law of the sea conventions is not problematic. This is due to the fact that most of the conventions and agreements developed in recent times implement the provisions of the United Nations Convention on the Law of the Sea.

Furthermore human rights, humanitarian and economic treaties have developed special rules concerning the relationship between successive treaties which partly deviate from the residual clause of the VCLT.

Thus, the relationship between successive human rights treaties is virtually determined by the irrelevance of the *lex posterior* and the *pacta tertiis* principles. Instead, it is marked by the principle "accumulation of human rights only,"⁶⁶ which derives from a repeated and explicit conflict clause in many human rights treaties.⁶⁷ Therefore, a succession of human rights treaties can never result in a loss of human rights. The irrelevance of the *pacta tertiis* principle results from the fact that human rights treaties create integral obligations, instead of reciprocal rights between State parties.⁶⁸ This implies that a contracting party is always

⁶⁵ Moreover, the international environmental issues and actions may be closely interrelated. A famous example in this regard is the promotion of the establishment of carbon sinks by the Kyoto Protocol (note 15), which may result in a loss of biodiversity and thus put into question the very aims of the Convention on Biodiversity (note 3). Such effect is due to incentives that the Kyoto protocol envisages for the cultivation of plants, which absorb carbondioxide. It is feared, that some States could engage in such farming on the cost of pre-existing and more environmentally sound land uses.

⁶⁶ Joost Pauwelyn, *The Role of Public International Law in the WTO: How far can we go?*, AJIL 51 (2001), 535, 551.

⁶⁷ See, e.g., Art. 32 European Social Charter (ETS No. 35); Art. 8 European Agreement on Transfer of Responsibilities for Refugees 1980 (ETS. No. 107), Arts. 53 and 60 European Convention on Human Rights (note 3); Art. 23 Convention on the Elimination of Discrimination Against Women (note 14); Art. 11 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (note 54); Art. 5 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in an Armed Conflict 2000 (GA Res. 54/263, Annex I, 54 UN GAOR Supp. (No. 49), 7). Also in this sense Art. 5 (2) of the International Covenant on Civil and Political Rights (note 3) and Art. 5 (2) of the International Covenant on Economic, Social and Cultural Rights (note 14).

⁶⁸ See, e.g., the *Decision of the European Commission on Human Rights as to the Admissibility of Application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy*, YBECHR 4 (1960), 116, 138-

obliged to apply a human rights convention even in relation to non-contracting parties. As a result, the problem of how to apply different human rights agreements which bind different countries is virtually non-existent.

The relationship between the various humanitarian law conventions is not as homogenous as that between various human rights treaties. However, many humanitarian conventions contain a conflict clause stating that the relevant convention shall not be interpreted as detracting from other obligations imposed upon the contracting parties by international humanitarian law conventions.⁶⁹ Moreover, the Geneva Conventions prohibit further agreements resulting in a lower protection to the respective protected persons.⁷⁰ Furthermore, the problem of how to apply humanitarian agreements binding upon different parties is resolved in favor of a strict application of the *pacta tertiis* principle. Thus, many humanitarian conventions contain a clause expressly stating that the respective treaty does not apply for third States⁷¹ and moreover they expressly allow the contracting parties not to apply the relevant convention in relation to third parties for the case that the other party does not apply and accept the provisions of the relevant convention.⁷² The result is that a humanitarian law convention is always applied on a mutual basis.⁷³

142. The European Commission on Human Rights stated (at 140) that: "the obligations ... in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement of any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves." It further concluded that Austria had the right to file a complaint against Italy with regard to matters arising before Austria had become a Party to the Convention.

⁶⁹ Art. 2 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (note 8); Art. XIII Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (note 18).

⁷⁰ See only Art. 6 (3) of the Third Geneva Convention Relating to the Treatment of Prisoners of War (note 3).

⁷¹ See, e.g., Art. 135 of the Third Geneva Convention Relating to the Treatment of Prisoners of War (note 3).

⁷² See, e.g., Art. 96 of the First Additional Protocol of 1977 (note 18).

⁷³ See Yves Sandoz/Christophe Swinarski/Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of August 12, 1949*, Geneva 1987, para. 50: "Thus reciprocity invoked as an argument not to fulfil the obligations of humanitarian law is prohibited, but this does not apply to the type of reciprocity which could be termed 'positive', by which the parties mutually encourage each other to go beyond what is laid down by humanitarian law. Further the concept of reciprocity on which the conclusion of any treaty is based also applies to the Convention and the Protocol: they

Finally, the relationship between the various economic treaties is primarily governed by the presumption of a conflict-free relationship. Thus, the WTO law refers to other economic agreements.⁷⁴ This presumption is also epitomized in the report *Argentina Footwear of the Appellate Body*.⁷⁵

II. Relationship Between Treaties Covering Different Subject Matters

Unlike the relationship between treaties covering the same subject matter, the relationship between treaties relating to different fields of law is not expressly regulated in the VCLT. But it contains three provisions which also govern – at least implicitly – the relationship between agreements covering different subject matters. These provisions are Article 53 stating the invalidity of treaties inconsistent with peremptory norms, Article 30 (1) stating the priority of the UNC and Article 31 (3) (c) VCLT. However, the relationship between some subject matters, for example between economic and environmental treaties, is particularly controversial.⁷⁶

Nevertheless, humanitarian, economic, environmental, human rights as well as law of the sea conventions share two general common features. Firstly, various – sometimes very subtle – links exist between the different fields of law. There are cross-references between treaties covering different subject matters. Thus, the Preamble of the International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988⁷⁷ recognizes “in particular that everyone has the right to life, liberty and security of person, as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.” Moreover, treaty bodies refer to conventions relating to other subject matters while interpreting a treaty.⁷⁸ A good example is the Report of

apply between the Parties which have consented to be bound by them – and only in exceptional cases to a Party’s own nationals, or to the nationals of a Party which is not bound.”

⁷⁴ The most important reference in this regard is contained in Art. I:3 TRIPS (note 17) referring to WIPO Treaties.

⁷⁵ *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Report of the Appellate Body of March 27, 1998, WT/DS56/AB/R, para. 72. See also pointing in this direction para. 10 of the Agreement Between the IMF and the WTO, which contains a direction to the staff of the IMF and the WTO Secretariat to consult on “issues of possible inconsistency between measures under discussion.”

⁷⁶ See only *Sands* (note 11), 940 *et seq.*

⁷⁷ ILM 27 (1988), 685.

⁷⁸ In this sense also ECHR, *Bankovic et al. v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway,*

the Appellate Body *Shrimp/Turtle*. The Appellate Body referred, amongst others, to the Convention on the Law of the Sea and the Convention on Biological Diversity in its interpretation of Article XX lit. g) GATT 1994.⁷⁹ Finally, the strongest tie exists between human rights and humanitarian law treaties. It is undisputed that international humanitarian law is *lex specialis* to human rights treaties in the case of an armed conflict.⁸⁰

The second common point is that many treaties embody the presumption of a conflict-free relationship between the various subject matters.⁸¹ Therefore, the

Poland, Portugal, Spain, Turkey, and the United Kingdom, ILM 41 (2001), 517, para. 57: "[T]he court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law...".

⁷⁹ United States – Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Appellate Body of October 12, 1998, WT/DS58/AB/R, para. 130.

⁸⁰ See for the international jurisprudence: ICJ, *Legality of the Threat or Use of Nuclear Weapons*, ICJ-Reports 1996, 66, para. 25: "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The rest of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary of Art. 6 of the Covenant, can only be decided by reference to the law applicable in armed conflicts and not deduced from the terms of the Covenant itself." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (www.icj-cij.org), paras. 103-106. European Court of Human Rights *Lawless Case (Merits)*, Judgment of July 1, 1961, YBECHR 5 (1961), 438 paras. 20 *et seq.*

⁸¹ See, e.g., Art. 2 (3) Cartagena Protocol on Biodiversity (note 15): "Nothing in this protocol shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments." The Preamble of the same Protocol: "Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under existing international agreements, Understanding that the above recital is not intended to subordinate this Protocol to other international agreements." The Preamble of the Stockholm Convention on Persistent Organic Pollutants (note 15): "Recognizing that this convention and other international agreements in the field of trade and the environment are mutually supportive ...". The Preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures 1994 (ILM 33 (1994), 1554): "Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant interna-

relationship between treaties covering the various subject-matters seems to reflect the customary law principle embodied in Article 31 (3) (c) VCLT, namely that any relevant rules of international law applicable in the relationship between the parties shall be taken into account while interpreting a treaty and its underlying presumption, that all fields of law shape an uniform system of international law.

E. Conclusion

This brief analysis leads me to the following conclusions: Each field of law treated here shows no inner homogeneity concerning international treaty law. This is due to the fact that every subject matter is composed of a variety of international treaties, concluded at different times and with different objects. Nevertheless, every subject matter has special features. There are three principal reasons for these existing differences:

Firstly, some differences are due to the nature of the subject matter (*e.g.*, the differences concerning the territorial application), or more specifically to the different structure of performance. The differences concerning the application of treaties to third parties and the relationship between successive treaties covering the same subject matter can be mentioned in this context.

Secondly, some differences are due to the structure of the relevant field of law, more precisely to the existence of treaty organs and the powers conferred to them. Thus, the differences in relation to the law of reservations can be primarily explained by the fact that human rights treaties have established supervisory treaty bodies which are competent to receive individual complaints.

Finally, some differences derive from the general structure of international law. Particularly, the differences relating to the development of treaties depend on the existence of Specialized International Organizations and on the role taken by the United Nations.

As far as the system of general international treaty law is concerned, I conclude that no subject matter examined in this paper has formed its own self-contained (treaty law) regime, but rather, every field of law falls back upon the general rules

tional organizations, ..., and the international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health."

of international treaty law embodied in the VCLT.⁸² Accordingly, the VCLT applies to all kind of treaties.⁸³ In other words, the evolution of environmental, humanitarian, economic, human rights, and law of the sea conventions takes place against the background of the general residual rules embodied in the VCLT.

Furthermore, the special rules, respective features developed by the different subject matters might have two effects on general international treaty law: On the one hand, they contribute to the dynamic evolvement of general treaty law.⁸⁴ This could be particularly true, with regards to the doctrine of severability. On the other hand, they can lead to the crystallization of some individual rules for a particular subject matter. As a potential – or perhaps already existing – special rule, the principle of “accumulation only” with regards to the succession of human rights treaties can be cited. The evolvement of individual rules does not question the existence of general treaty law because the VCLT already contains special rules for some types of treaties. Article 60 (5) VCLT is the best example, as it states: “Paras. 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any forms of reprisals against persons protected by such treaties.”

Another reason is that differences in international treaty law are immanent in the current system of general treaty law, because the VCLT mainly contains residual rules, for the case that the relevant treaty does not “provide otherwise.” Thus, a deviation from the residual rules in single treaties or treaties covering a particular subject is already foreseen in the VCLT.

⁸² Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Art. 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 5: “The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the First Protocol is governed by international law. Art. 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance.” See also the Preliminary Conclusions adopted by the ILC on Reservations to Normative Treaties, Including Human Rights Treaties (Report of the ILC on the work of its forty-ninth session, GAOR, Fifty-second Session, Suppl. No. 10, UN DOC. A/52/10, 95 *et seq.*).

⁸³ See also *Marcelo Kohen*, *La codification du droit des traités: Quelques elements pour un bilan global*, RGDIP 104/II (2000), 577, 609.

⁸⁴ As far as environmental law is concerned see also *Redgwell* (note 19), 89, 107.

Comment by Marcelo Kohen

Treaty Law: there is no need for special regimes.

First of all, I would like to thank the colleagues and friends from the Walther Schücking Institute for having invited me to participate in this symposium commemorating the 90th anniversary of the commencement of this important institution devoted to international law and peace.

I will be focusing on the main substantial issues of Monika Heymann's paper, and not on some ancillary – albeit important – points. I concur with one of her conclusions, one that I consider the most important, *i.e.*, that general international law applies to all fields of international law with regard to treaties and that there are no self-contained treaty law regimes. However, I would reach this conclusion taking a different approach. I am not able to follow Ms. Heymann when she ascertains the existence of different treaty law rules from the different “branches” of international law she analyzes (human rights law, humanitarian law, economic law, environmental law and the law of the sea). In my mind, these so-called differences are either due to the adoption of particular solutions by the treaties themselves, or simply, do not exist. One must not lose sight of the fact that most of the provisions of the Vienna Convention on the Law of the Treaties (VCLT) have a “dispositive” character; namely one from which, unlike peremptory norms, it is possible to derogate, or which can be applied only if States have not decided otherwise.

The proposed examples of these differences in treaty law were questions relating to the territorial scope of treaties, the severability of treaties, the so-called “principle of accumulation of human rights only” with regard to successive human rights treaties and the “softening” of the rules concerning Third States in some fields.

The author denies the application of Article 29 of the VCLT to all other fields of international law, with the exception of economic law. With all due respect, I think that there is a misunderstanding here. *It is one thing that a given treaty is generally binding upon a party in respect of its entire territory, as provided by Article 29. The spatial sphere of application of treaties is another one, depending, in general, upon their material scope. As a matter of course, the territory of the State party is not important with regard to treaties concerning the outer space, the moon and other celestial bodies.*

The same applies with regard to some aspects of the law of the sea. Even if you take Article 2 (4) of the UN Charter as an example, what is relevant for its application is not one's territory but rather, the territory of other States (the prohibition of the threat or the use of force against the territorial integrity of other

States). As such, there is no specificity in the UNCLOS or in environmental treaties regarding the spatial sphere of application of treaties. Article 29 of the Vienna Convention on the Law of Treaties envisages a completely different problem: the question of the so-called "federal clauses" and "colonial clauses," or the "territorial clauses" in general. Thus, there is nothing special with regard to the spatial application of treaties in the different fields of international law analyzed in the paper under consideration. Treaties concerning an extreme variety of topics do contain these kinds of clauses or allow reservations of this nature.

The question of "severability" refers to the existence of particular regimes with regard to reservations. Even if a reservation is invalid, the State author of the reservation will continue to be party to the treaty. This regime would then be, according to this theory, only applicable to human rights treaties. The question whether the invalidity of a reservation amounts to the invalidity of the ratification or accession as a whole is a very controversial one and does not regard human rights treaties only. The problem also arises with regard to reservations contained in declarations made under Article 36 (2) of the Statute of the International Court of Justice or to treaties in other fields. *There would be no logic in applying the rule of "severability" to human rights and ignoring other fields.* Indeed, this problem relates to the extent of the consent of the State. Whether an invalid reservation amounts to the invalidity of the ratification or accession to a treaty does not depend on the "branch" of international law concerned. For example, a solution like the one adopted in the *Belilos* Case by the European Court of Human Rights can be reached by any other tribunal, irrespective of the subject matter of the treaty concerned. Indeed, one could consider that the *Norwegian Loans* Case decided by the ICJ as an antecedent, even if the Court did not explicitly address the question of the validity of the French reservation at issue.

The so-called "principle of accumulation only" would be applicable to successive human right treaties, however, I think that there is no specificity in this point either. In fact, Article 30 (4) of the Vienna Convention provides the solution. "When all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." I think that this is the only real situation that can be seriously envisaged. Assuming that States would like to diminish the human rights standards already recognized by them, they would, in general, be prevented to do this, not because of the existence of a purported "principle of accumulation only," but due to the peremptory character of most of these standards. If they do not relate to *ius cogens*, then nothing prevents States from modifying previous human rights provisions. This solution is, of course, without any prejudice either to the

question of acquired rights, a problem that falls outside the law of treaties, or to the particular provisions embodied in the treaties themselves. Again, nothing in the VCLT precludes the possibility of the incorporation of a clause such as the "accumulation only" in a treaty. Should this be the case, then the rule of accumulation applies only because it was agreed by the parties themselves to the treaty and not because of the existence of such a rule in a particular "branch" of international law. Finally, I wonder whether the examples of obligations imposed on third parties in the field of environmental law or the law of the sea can be seen as real cases departing from the rules embodied in the Vienna regime. At the most, we would be faced with a situation similar to that of the Antarctic Treaty of 1959.

At the end of the day, the main point is to find out whether practice or logical necessity leads us to the conclusion that there are particular rules concerning conclusion, reservations, interpretation, termination and succession with regard to treaties depending on their subject matter. What are the examples mentioned as evidence of the existence of particular regimes? We have already dismissed some of them, *e.g.*, the "severability" and "accumulation only" theories.

Other examples are the different application of the permissibility/opposability approaches with regard to reservations, the exclusion of denunciation or withdrawal, the "evolutionary" interpretation and the automatic succession rule which would only be applicable to human rights treaties but not to the others. However, none of these examples are relevant.

As Ms. Heymann's study shows, the possibility to make or, in fact, not to make reservations to treaties does not depend on the subject matter. The idea then, according to which, the permissibility approach would be applicable only to human rights treaties, and the opposability approach for the other treaties has no justification. The possibility of scrutinizing reservations is not a privilege of the European Court of Human Rights. Nothing precludes the International Court of Justice, for instance, to analyze the validity or not of a given reservation to a multilateral treaty that would be applicable to a dispute submitted before it. And it is the same for all the other jurisdictional bodies.

With regard to the denunciation (bilateral treaties) or withdrawal (multilateral treaties), Article 56 of the Vienna Conventions of 1969 and of 1986 is quite clear: if treaties do not provide for it, the possibility only exists if it is established that the parties intended to admit such a possibility or that a right of denunciation or withdrawal may be implied from the nature of the treaty. There is no need to resort to any new invention to come to the conclusion that a given treaty in a particular field is not open to withdrawal or denunciation.

The so-called "evolutionary" interpretation must be handled with care. Otherwise, it could lead to the deformation of the real agreement of the parties. At any rate, this kind of interpretation was not only applied by the ECHR, but also earlier, in 1971 by the International Court of Justice, with regard to Article 22 of the Covenant of the League of Nations.

The treatment of the possible particularities on State succession with regard to treaties has been given insufficient attention, in Monika Heymann's paper. The claim made by some organs and authors that the automatic succession is applicable to human rights treaties irrespective of the type of State succession (separation, dissolution, unification, newly independent States) corresponds neither to the provisions of the 1978 Vienna Convention nor to State practice. The former envisages the automatic succession rule to all categories of State succession, with the exception of the newly independent States. Rather the recent practice shows that the "clean slate" rule (and consequently the need of declarations of succession) was followed for all kinds of multilateral treaties, no matter their content.

Hence, a brief examination of these examples leads us to the conclusion that they do not provide an argument for the existence of particular rules concerning reservations, interpretation, withdrawal, denunciation and succession depending on the field of international law that the treaties operate in. It must be said that authors alleging the existence of particular rules depending upon the subject matter of treaties fail to differentiate between the *negotium* and the *instrumentum*. By evoking the existence of special regimes, they are focusing on the *negotium*, whereas the problem of the conclusion – including reservations –, interpretation, validity, suspension, termination and succession of treaties is governed by the rules concerning the *instrumentum*.

Nevertheless, a perusal of the Vienna Conventions shows that it does, indeed, envisage particular solutions to certain treaties by virtue of their content. Authors advocating particularities do not refer to them, or at least to all of them. That is the case of treaties constituting international organizations, treaties containing peremptory rules, treaties establishing boundaries (Articles 62 (2) (a) of the 1969 and 1986 Vienna Conventions, or "boundaries established by treaties," as mentioned by Article 11 of the 1978 Vienna Convention), and treaties of humanitarian character (Article 60 (5) of the Vienna Conventions of 1969 and 1986).

Treaties constituting international organizations deserve this particular treatment because of their dual character. They are not only treaties, but also the instruments of constitution of a different personality within international law. It is this last aspect that deserves special treatment. For the remaining, these treaties are

subject to the same general rules as the other treaties, as the ICJ case law clearly demonstrates.

As far as *ius cogens* is concerned, it is probably the most important (unique?) case in which the content of treaties does, indeed, determine special treatment. In fact, the hierarchy established by *ius cogens* in international law concerns the content and not to the source of the rule. There is no other way to determine *ius cogens*, but to examine the content of a particular rule.

With regard to treaties establishing boundaries and treaties of humanitarian character, their explicit inclusion in the Vienna Conventions was made *ex abundante cautela*. For example, para. 5 of Article 60 was proposed by Switzerland at the Vienna Conference, in order to provide an absolute safeguard to the rules of the 1949 Geneva Conventions prohibiting reprisals. Indeed, even if this paragraph would not exist (it must be recalled that it was not proposed by the ILC in its draft articles), the situation envisaged by Switzerland would have been covered by para. 4 of the same article. Equally, not only are the treaties establishing boundaries not subject to the application of the *clausula rebus sic stantibus* but even peace treaties, for instance, are not candidates to the invocation of this clause either, even if they are not expressly mentioned in Article 62. A sole reference to the object and purpose of the treaty would seem preferable in these two cases.

To sum up, I would say that the Law of Vienna – the three Vienna Conventions – constitutes a coherent set of rules applicable to all kinds of treaties, no matter the “branch” of international law involved. Treaties are a particular tool available to States and other subjects of international law, in order to be able to materialize their common will to establish rights and obligations, institutions and situations. It is the set of rules governing the treaties that determines how they are concluded, who becomes party and how to interpret them, which kind of reservation is possible, their invalidity, suspension and termination.

As a matter of course, all treaties are not applicable in the same manner. This does not lead, however, to the affirmation of the existence of particular rules or special regimes. Indeed, the constant reference to the “nature and purpose” of treaties in the Vienna Conventions provides the clue to solve the problems, without any need to invent particular regimes. To this extent, the idea of analyzing particular fields of international law, such as human rights, humanitarian law, environment, etc. could appear interesting in order to show what the nature and purpose of treaties in these fields allow. It is a question of method: one has to put the “nature and purpose” rule first, and not the different “branches” on which the research is made.

To conclude my brief remarks, I would like to pay tribute to the general regime of the Vienna Conventions by quoting an organ that was supposed to apply the rules of what would constitute a "self-contained" regime. The report of the WTO Appellate Body in *United States-Antidumping measures on certain hot-rolled steel products from Japan (AB-2001-2002)* made the following statement:

"We observe that the rules of treaty interpretation in Articles 31 and 32 of the Vienna Conventions apply to any treaty, in any field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned."

Comment by Alain Pellet

Being a commentator is a rather comfortable position. You may pick and choose among the points made by the main speakers and it will come at no surprise that, as the Special Rapporteur of the ILC on the topic "Reservations to treaties," I will focus on this aspect which happens to be quite important in Ms. Heymann's presentation.

Dr. Heymann is certainly right in stating that reservations open a possibility for unilateral differentiation in the application, even in the bindingness, of multilateral treaties as has recently been written in an article in the *British Yearbook of International Law* since objecting States may make contradictory declarations as to the effect of their objections¹ and since there are no generally accepted views as to the result of objections. Reservations and objections reflect differences of appreciation as to the content of treaty rules and, sometimes as to the acceptability of certain reservations themselves. This element of "variance" is certainly both an extremely difficult and a "hot" topic, as Ms. Heymann rightly said.

However, I won't try to enter into the nice legal discussion summarized by Dr. Heymann regarding the admissibility – or, more accurately, the validity of reservations, nor even on the legal regime of reservations in general, which is not a "problem" as she said, but can be a source of richness through variety: it is an element which permits States to introduce variety into treaty law, by modulating the very substance of treaties without distorting their object and purpose.

Our main question in this respect, as I understand it, is whether or not the Vienna Convention rules on reservations apply to all multilateral treaties,² whatever their nature or object may be.

One preliminary remark is necessary here. The Vienna Convention itself provides for two exceptions concerning the legal regime applicable to reservations to treaties:

- reservations to treaties of limited participation on the one hand, and
- constituent instruments of international organizations, on the other hand.

¹ *Yogesh Tyagi*, *The Conflict of Law and Policy on Reservations to Human Rights Treaties*, BYBIL (2000), 244.

² Strictly speaking, "reservations" to bilateral treaties do not qualify as reservations; see ILC, *Guide to Practice*, Guideline 1.5.1 on "'Reservations' to Bilateral Treaties" and the corresponding commentary (ILC Report on its 54th Session (1999), A/54/10, 290-302).

By themselves, these specific mentions of two kinds of treaties in Article 20 of the Vienna Convention show, *a contrario*, that, for the rest, a common, single, unified regime applies to all other treaties, whatever their nature. This is all the more so that, in other Articles, the 1969 Convention singularizes the rules applicable to certain particular categories of treaties. This is particularly the case of Article 60 (5), which has been mentioned both by Monika Heymann and Marcelo Kohen. This provision deals with human rights treaties, that is, precisely, the field in which challenges to a single, standardized, Vienna Convention regime of reservations is the strongest.

Moreover, it must be kept in mind that this Vienna regime has its origin in the 1951 Advisory Opinion on Reservations to the Genocide Convention,³ that is precisely a human rights treaty. In other words, the Vienna regime originates in the answers the International Court has given to issues concerning a treaty of this particular kind.

I agree that this is probably not enough to prove that today the so-called “flexible” Vienna Regime is still adapted to the actual needs of human rights treaties. However, in this respect I have to say, at the risk of probably disappointing some of you, that I have not changed my mind and that I still maintain my position as exposed at length in my 1996 Second Report on reservations to treaties:⁴ even though it is an undisputable fact that human rights treaties present some special traits, their specificity does not justify an abandonment of the substantial and procedural rules included in the 1969 Vienna Convention on reservations.

At worse – if I may put it this way – this specificity would “neutralize” certain aspects of the Vienna regime. In particular there can be no doubt that human rights treaties are, if not entirely “non-reciprocal,” at least certainly “less reciprocal” than other treaties and, in particular than those of the “synallagmatic” type, which, by the way, are probably no more the majority of the multilateral conventions concluded in the present time.

But the consequence of this limitation in reciprocity is simply that some rules – in particular, the rules in Article 21 of the Convention – will not apply to those treaties, not that the regime itself, taken as a whole, is not applicable. As the undertakings under human rights treaties are not mainly reciprocal but are partly at least “integral,” then the game of reciprocity in Article 21 will not apply; but the rest of the reservations regime in the Vienna Convention will apply.⁵

³ ICJ Reports 1951, 15.

⁴ A/CN.4/477/Add.1 (1996), Chapter II, “Unity or Diversity of the Legal Regime for Reservations to Treaties (Reservations to Human Rights Treaties)”, paras. 55-260 (to be published in ILC Yearbook, 1996, vol. II, Part I).

⁵ *Ibid.*, paras. 156-157.

Moreover, this reasoning is not specific to human rights treaties. There can be no doubt that it is not because the United States has made invalid reservations to the 1966 Covenant on Civil and Political Rights that France or Slovakia, whether they have objected or not, are free not to respect their own obligations under the Covenant. But whatever the "Human Rightists"⁶ may think, it is not because human rights are at stake, but because the very nature of the obligations in question does not, logically and concretely, leave room for the application of the rule embodied in Article 21 (1), of the Vienna Convention.⁷ But the same holds true for other types of treaties (in particular in the field of the protection of the environment), or for certain categories of reservations (in particular reservations concerning the territorial scope of the treaty). It is hardly conceivable, for example, that Denmark could respond to a reservation by which France excludes the application of a treaty to its overseas departments, by refusing to apply that same treaty to Greenland. This has nothing to do with human rights. It is just a problem of good judgment.

What is true on the other hand – and in this respect I wholly agree with Monika Heymann – is that contrary to most other treaties, human rights conventions quite often create monitoring bodies, and, as she has aptly shown, this fact explains not that the substantial Vienna rules are not applicable, but that the control of the validity of the reservation to those treaties becomes twofold. The newly institutionalized monitoring system does not replace the old traditional interstate system, but it superposes itself to the latter and is certainly more efficient since States traditionally rarely object to reservations and, even nowadays, only a handful of "virtuous" States (mainly European and especially from the North of Europe) systematically object to manifestly invalid reservations.

In this respect, I have no doubt – and I never had any doubt – that for implementing their monitory functions the monitoring bodies instituted by human rights treaties (but this could be true for any other treaties creating monitoring bodies) must be recognized a right to appreciate the validity of reservations. This, by the way, was accepted by the International Law Commission in its 1997 Preliminary Conclusions on Reservations to Normative Multilateral Treaties, including Human Rights Treaties.⁸ However, in those Preliminary Conclusions the ILC noted that

⁶ On this notion, see *Alain Pellet*, 'Human Rightism' and International Law, *Italian Yb. of I. L.* (2000), 3-16.

⁷ "Reservation established with regard to another party in accordance with Articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State."

⁸ See ILC Yearbook (1997), vol. II, Part 2, 57, para. 5.

“in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action” either by withdrawing the reservation, modifying it or by foregoing becoming a party to the treaty.⁹

However, in this respect, I must say that I have partly changed my mind. I still maintain that treaty law – whether in the field of human rights or any other fields – is based on consent, and that the “human rightist” theory of severability (at least of automatic severability) is based on unacceptable premises. I certainly maintain that only the reserving State can know whether it intends to be bound with or without its reservation or with a modified reservation and I also maintain that an expert body cannot substitute its own will or “feeling” to the State’s will. However – and this is where I have partly changed my mind¹⁰ – I recognize that this is not concretely satisfactory, at least when the monitoring body is vested with a power to make binding decisions, as it is the case for the regional Courts of Human Rights, or even when the monitoring body is entitled to make pronouncements on individual complaints. In such cases, from a practical point of view, it is not workable to suspend the proceedings and to wait for an hypothetical decision by the reserving State.

This is not to say that the Court or the monitoring body can in all cases decide that the State is bound without its will by the whole Convention, as the doctrine of the automatic severability postulates. But I suggest that it belongs to the monitoring or judicial body to determine what was the intent of the State with the hope that it will do it more “honestly” or, at least, more prudently than was the case of the European Commission and Court respectively in the *Temeltasch*¹¹ or *Belilos*¹² Cases and that they will not stick to the categorical dogmatic position taken in this respect by the Human Rights Committee in its General Comment No. 24.¹³

But, once again, the reasons for these special means of appreciating the validity of reservations is not that human rights are at stake, but that the Contracting Parties have decided to institute monitoring bodies, which, for performing their duty, must ascertain the validity of reservations made by States Parties, and this would hold true in any other fields as well – if monitoring bodies were instituted in those other fields.

⁹ *Ibid.*, para. 10.

¹⁰ See Second Report on Reservations to Treaties (note 3), paras. 218-230.

¹¹ *Temeltasch v. Switzerland* (European Commission of Human Rights, May 5, 1982, *Yearbook of the European Convention on Human Rights*, vol. 31, 120).

¹² *Belilos v. Switzerland* (European Court of Human Rights, April 29, 1988, Series A, vol. 132, 1).

¹³ “General Comment No. 24 on 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” CCPR/C/21/Rev.1/Add.6, November 11, 1994).

One last word on the ILC Preliminary Conclusions of 1997. Paragraph 11 of said Conclusions provides that "... the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts." This also introduces – very artificially for my point of view – diversity in the reservations regime, at the universal level on the one hand, and at the regional level on the other hand. This has been very strongly criticized by the UN monitoring bodies and I must say that, on this precise point, I fully share their concern, but this was introduced by one of the most "human rights oriented" Members in the Commission, Professor Bruno Simma as he then was.¹⁴

By way of conclusion, let me try to recapitulate and to enlarge the perspective:

- First, by themselves, reservations to treaties are a fortunate factor of diversity in treaty law, at least from a realistic point of view;
- Second, the rules in Articles 19-23 of the Vienna Convention are of general application,
- even though some particular rules cannot in certain circumstances concretely or logically apply to certain provisions or certain categories of reservations.
- In any case, the Contracting Parties are free to opt for other rules in respect with a particular treaty and it can certainly be regretted that they do not do so more systematically. But
- there is no reason to repudiate the Vienna regime of reservations in any specific field as such, including human rights treaties which remain treaties that is an expression of the wills of the Contracting Parties, not international legislation which can be imposed upon Parties against their will.

Even though I am among those who see some merits in the "fragmentation" or diversification of international law, I strongly favor the unity of treaty law provided that it is flexible enough to adapt to all kinds of treaties. And it is my humble opinion that, *grosso modo*, the rules on reservations in Articles 19-23 of the Vienna Convention do meet these requirements. This is also true, more generally, outside the field of reservations: by their flexibility the Vienna rules on the law of treaties are of such a nature that they preserve the unity of the law of treaties as a whole.

¹⁴ See, e.g., his interventions during the general debate of the ILC on the Second Report on Reservations to Treaties (*supra* note 3) in ILC Yearbook 1997, vol. I, 2502nd meeting, July 1, 1997, 201, para. 32; see also, 2509th meeting, July 10, 1997, 251-252, para. 62 (Mr. Rao).

Comment by Jürgen Bröhmer

First I would like to thank Professors Hofmann and Zimmermann for inviting me to comment on this topic on this important occasion. I would also like to thank Frau Heymann for her excellent report.

I will concentrate my comments on the European Convention on Human Rights. The first point I would like to make deals with reservations. Reservations limit the scope of obligations in order to allow States to conclude or to accede to a treaty. Thus reservations are an instrument to gain more unity by accepting some degree of diversity. Article 57 ECHR limits the use of this instrument. The European Court of Human Rights, starting with the famous *Belilos* judgment, began to emphasize what one might refer to as the transparency rule of Article 57 (2) ECHR by stipulating that States Parties must spell out exactly what the reservation in question pertains to and what legal provision(s) in their domestic legal order are subject to that reservation. The Court specifically stated:

“That Article 57 § 1 of the Convention requires ‘precision and clarity’ and that the requirement that a reservation shall contain a brief statement of the law concerned is not a ‘purely formal requirement but a condition of substance which constitutes an evidential factor and contributes to legal certainty’ (Eisenstecken/Austria, Appl.-No. 29477/95, 3.10.2000, § 24 referring to *Belilos*/Switzerland, judgment of 29 April 1988, Series A no. 132).”

The second point concerns the problem of different standards under the ECHR-regime. In this context we have two distinguishable developments. The *Rekvény* judgment of the ECHR¹ stands for the first development. In this case the Court had to deal with limitations of participation in the political process. In question were Hungarian provisions prohibiting members of the armed forces, the police and security services from joining any political party and from engaging in any political activity. The Court upheld these domestic law provisions by referring to the special historical circumstances prevalent in Hungary after the fall of the communist regime. With the police and the military having been the pillars of the old regime and in the light of the fact that many police and service people were members of the communist party the Court accepted these limitations as being within Hungary's margin of appreciation.² If one were to take this judgment at face value it could mean that what might be considered a justified limitation in Hungary may not necessarily be considered a justified limitation in another member State. If that were the case there would indeed be different standards of human rights protection concerning the same clause – in this case Article 10 of the Convention – in various member States. That would indeed be a surprising degree of diversity.

¹ *Rekvény*/Hungary, Appl.-No. 25390/94.

² *Id.*, at paras. 41, 46, 48.

The second development was created by the accession of new member States whose legal systems did not have the chance to grow with the Convention. One could arguably claim that at least some of these new member States are unable to really uphold the standards of the Convention. I am particularly referring to the case of Russia where perhaps one could describe the situation as one of "systemic default." Even assuming the best of will of the Russian authorities it is clear that for years to come they will not be able to uphold even the core standards of many provisions of the European Convention on Human Rights. The prohibition of torture and inhuman treatment in Article 3 ECHR is but one example. Thus we are facing a situation where not the individual, singular violation is the issue but where the mistake lies in the existing reality. It is simply impossible to bring the whole system up to par within a reasonable time span, even assuming that the political will exists. "Systemic default" does not bring about different standards in a legal sense because Russia will always be held responsible for the violation of the Convention. However, a standard that is inherently violated because it cannot be held is, in effect, a different standard. The problems encountered here are, by the way, unavoidable when the observation of fundamental rights demands more than just the omission of certain behavior ("refrain from torture"), namely the allocation of scarce resources.

Another potential diversity with regard to the provisions of the European Convention has to do with the different status that the Convention has in the respective national legal orders. In a decision of October 2004, the German Federal Constitutional Court held that under certain circumstances the courts in Germany cannot and must not adhere to the provisions of the ECHR. The Constitutional Court stated that

"This applies in a particularly high degree to the duties under public international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights (*gemeineuropäische Grundrechtsentwicklung*). In Article 1 (2) of the Basic Law, the Basic Law accords particular protection to the central stock of international human rights. This protection, in conjunction with Article 59 (2) of the Basic Law, is the basis for the constitutional duty to use the European Convention on Human Rights in its specific manifestation when applying German fundamental rights too (see BVerfGE 74, 358 (370)). As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed; clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. 'Take into account' means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the ECHR must be taken into account in making a decision; the court must at least duly consider it. Where the facts have changed in the meantime or in the case of a different fact situation, the courts will need to determine what, in the view of the ECHR, consti-

tuted the specific violation of the Convention and why a changed fact situation does not permit it to be applied to the case. Here, it will always be important how taking account of the decision takes in the system of the field of law in question. On the level of federal law too, the Convention does not automatically have priority over other federal law, in particular if in this connection it has not already been the object of a decision of the ECHR.³

The case concerned the rights of a father to see his illegitimate child who had been given to adoption previously. The Strasbourg court had held that the father's rights under Article 8 ECHR had not been recognized properly. The German court, however, did not follow that judgment. The Federal Constitutional Court actually gave a well balanced judgment in which it emphasized that the German courts must give due regard to the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. However, the Court also explained that the German Constitution, the Basic Law, treats the European Convention on Human Rights as any other international treaty awarding it the status of a federal law. That being so, the courts must take the European Convention of Human Rights into account when interpreting domestic law. However, when the interpretation of a provision of German domestic law leaves no room at all for an interpretation in conformity with the Convention, domestic law must prevail over the Convention. In such a case there are only two perceivable remedies. If the conflict between the domestic norm and the convention coincides with unconstitutionality of the provision, the national court may ask the Constitutional Court to quash that provision on the basis of its unconstitutionality (not its "unconventionality!"). If, however, the conflict is in essence one between German constitutional provisions and the Convention the courts are powerless, must give precedence to national law and the conflict can only be solved by amending the Basic Law. Such potential conflicts are in part due to the fact that the European Convention does not obligate the member States to elevate the Convention to the level of constitutional law. But only in part, because even if the Convention provisions did enjoy constitutional status, interpretation conflicts could ensue as they always can if two courts not connected in a hierarchical system deal with the same set of norms.

Differences in the status of the Convention could therefore result in diversity. However, the difference is that this is a case of intended diversity, which is inherent in the Convention which leaves it to the member States to decide what the status of the ECHR within the national legal order should be. The ECHR only prescribes an obligation of result – to observe its provisions – but does not demand that it should be given a special status within the domestic legal order to perhaps facilitate reaching its objectives.

³ BVerfG, 2 BvR 1481/04 of October 14, 2004, paragraphs No. 62, official translation by the Court, http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html.

My last observation deals with a more general question. In the field of customary international law, which will be the topic of the next panel, one could provokingly say that any attempt to develop customary international law requires the violation of an existing norm. During that period when the old rule is breached and the new one not yet firmly established what you have is diversity. Treaty law has not really been looked at in this manner. However, recent developments, especially in the context of the Iraq crises and Article 2 (4) and Article 51 of the United Nations Charter, seem to imply a potential shift in the interpretation of the Charter, the outcome of which is not clear yet. Secondary law, *e.g.*, the cease-fire resolutions of the Security Council in the Iraq-Kuwait crises, is affected as well. In these cases a large number of States obviously differ in the interpretation of the relevant provisions. Are these examples of developing treaty norms? Is it perhaps to simple to merely claim that all of these nations are evidently breaching the Charter? One famous example of interpretative evolution is Article 27 of the United Nations Charter which deals with the so-called veto power of the permanent member States of the Security Council of the UN. Despite language to the contrary in Article 27 it is now accepted that an abstention does not constitute a veto. The permanent members have to actively vote "no." Such developments even *contra legum* are possible in treaty law. If they are possible in treaty law we may have the same situation as in customary law: one must breach it in order to develop it or, to formulate it differently, a new interpretation of a treaty provision may at first be regarded as a breach but it may eventually become accepted law. Perhaps this will be discussed a little bit later. That concludes my comments. Thank you very much for your attention!