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HUMAN RIGHTS AND THE DENUNCIATION OF TREATIES AND WITHDRAWAL FROM INTERNATIONAL ORGANISATIONS

INTRODUCTION

Since the 1990s the international community has witnessed an almost discernible trend – the withdrawal from and denunciation of human rights treaties by an increasing number of States, which includes extricating themselves from supervision by international monitoring mechanisms such as the Human Rights Committee (HRC). The latter has particularly been the case with respect to the Optional Protocol to the International Covenant on Civil and Political Rights (OPT),[1] Jamaica was the first to do so in 1997.[2] But it has also occurred with respect to the American Convention on Human Rights (ACHR).[3] More recently, in September 2013, Venezuela's withdrawal from the ACHR took effect.[4] Similarly, the issue has also arisen of terminating membership in international

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[1] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[2] On 23 October 1997, with effect from 23 January 1998, UNCHR, Report of the Human Rights Committee, UN Doc. A/57/40, vol. 1, p. 146. *See* N. Schiffrin, *Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights*, 92 American Journal of International Law 563 (1998). Jamaica was followed by Trinidad and Tobago, twice, on 26 May 1998 with effect from 26 August 1998, when a new instrument of accession was deposited, including a reservation on death penalty cases, and on 27 March 2000, with effect from 27 June 2000, UNCHR, Report of the Human Rights Committee, *ibidem*, and by Guyana, on 5 January 1999, with effect from 5 April 1999, although it re-acceded on the same date with a reservation, UNCHR, Report of the Human Rights Committee, *ibidem*.

[3] Art. 78(1) of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. Trinidad and Tobago gave notice of their withdrawal on 26 May 1998, with effect from 26 May 1999, www.cidh.org/Comunicados/English/1998/Press10-14.htm. *See* N. Parassram Concepcion, *The Legal Implications of Trinidad and Tobago's Withdrawal from the American Convention on Human Rights*, 16 American University International Law Review 847 (2001).

[4] *See* www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Venezuela; Inter-American Commission on Human Rights, *IACHR Deeply Concerned over Result of Venezuela's*

organisations in order to dispense with the sometimes stringent restraints imposed by human rights obligations accompanying membership. There had been speculation that the United Kingdom might withdraw from the Council of Europe in response to the London terrorist bombings in July 2005.[5] In light of the object and nature of human rights treaties, such drastic steps, seemingly motivated by a desire to evade the strictures imposed by international legal obligations or to avoid embarrassing litigation, while still relatively rare, have negative connotations for the effective protection of human rights and arguably constitute a direct challenge to the international protection systems.[6]

The inclusion of denunciation clauses of a diverse nature in multilateral treaties is a common practice.[7] This article focuses on a distinctive category of treaties; those relating to human rights, including the foundational treaties of international organisations with a human rights remit. Prominent in the discussion is the question whether States have the right, under international law, to extricate themselves from such obligations in the absence of explicit permission to do so. We use the term "human rights treaties" to refer to those legally binding documents guaranteeing certain basic freedoms, in addition to those establishing enforcement or monitoring mechanisms. International treaties on humanitarian law, applicable in times of armed conflict, are excluded from our consideration. However, treaties covering specific actions or crimes constituting human rights violations are included. It should be noted that this essay is not meant to be an exhaustive examination of all relevant treaties; the ones mentioned and discussed are illustrative of the issues under consideration.

1. THE TREATIES OF THE INTER-WAR PERIOD

While the international protection of human rights is primarily a post-World War II development, it should be recalled that the question of human rights at the transnation-

Denunciation of the American Convention, Press Release No. 64/13, 10 September 2013, available at: https://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp, both assessed 17 April 2014; D.G. Mejía-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, 17(1) ASIL Insights (2013).

[5] The then-Lord Chancellor, Lord Falconer, nevertheless made it plain that the UK would not denounce the European Convention on Human Rights, BBC News, *Human rights law 'may be changed'* (14 May 2006) http://news.bbc.co.uk/1/hi/uk_politics/4768259.stm, accessed 23 March 2014.

[6] *See* the correspondence of the Inter-American Court of Human Rights and the European Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, 1999, Appendix XXXVIII, XXXIX and XL, OEA Series L/V/III 47, Doc. 6. The HRC expressed its 'profound regret' at Trinidad and Tobago's OPT denunciation, UNCHR, Report of the Human Rights Committee, UN Doc. A/56/40, vol. 1, p. 31 para. 7 (26-10-2001). *See also* Y. Tyagi, *The Denunciation of Human Rights Treaties*, 79 British Yearbook of International Law 86 (2008), pp. 184-85. Under customary international law denunciation does not free a State from parallel obligations, *see* Art. 43 of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331. *See* International Law Commission, *Law of Treaties*, A/CN.4/143, YILC, 1966, vol. II p. 237 (ILC).

[7] ILC, *supra* note 6, p. 236; L.R. Helfer, *Exiting Treaties*, 91 Virginia Law Review 1579 (2005) pp. 1582-1583, 1597-1599.

al level had its modern inception in the era of the League of Nations. In the aftermath of the World War I, the victorious Allies accepted the principle of national minority rights as part of the general settlement in Europe, and put into place a multilateral system for their protection, with the League acting as guarantor,[8] at the same time making universal the prohibition of slavery and the slave trade.[9] The International Labour Organisation (ILO) concluded a groundbreaking treaty suppressing forced labour, closely associated with slavery, in all its forms. Given that the effective protection of minorities in the European context has still not been achieved at a satisfactory level and issue of minority protection has often lead to inter-state friction and that manifestations of slavery-related practices have persisted to this day, a brief examination of the relevant regimes of the inter-war years retains much more than historical interest only.

A series of treaties designed to protect certain "elementary rights" of the members of distinct national, religious and linguistic minorities, known as the Minorities Treaties,[10] were signed between, on the one hand, the principal Allied and Associated Powers and, on the other hand, Poland, Czechoslovakia, Bulgaria, Hungary, Yugoslavia and Turkey, establishing an embryonic protection system.[11] The 1919 Treaty with Poland provided a model for similar treaties.[12] A common feature was that the League of Nations played a supervisory role, developing a system for receiving petitions alleging breaches of treaty rights, while any disputes could be referred to the Permanent Court of International Justice for adjudication.[13]

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[8] T.D. Musgrave, *Self-Determination and National Minorities*, Oxford University Press, Oxford: 2000, pp. 37-41.

[9] S. Drescher & P. Finkelman, *Slavery*, [in:] B. Fassbender & A. Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford: 2012, pp. 890, 911.

[10] H. Lauterpacht, *Oppenheim's International Law*, vol. 1, (8th ed.), Longmans, London: 1955, p. 716. In *Minority Schools in Albania* (Advisory Opinion) (1935) PCIJ Rep Series A/B No. 64, the Permanent Court of International Justice stated that the treaty's purpose was not only to secure equality, but also to ensure the preservation of racial peculiarities, traditions and national characteristics.

[11] F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York: 1991, paras. 93-96; A.H. Robertson & J.G. Merrills, *Human Rights in the World*, (4th ed.), Manchester University Press, Manchester: 1996, pp. 20-23; H. Hannum, *The Rights of Minorities*, [in:] J. Symonides (ed.), *Human Rights: Concepts and Standards*, UNESCO/Ashgate, Aldershot: 2000, pp. 277, 279.

[12] *E.g.* Treaty Concerning the Recognition of the Independence of Poland and the Protection of Minorities between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland (signed 28 June 1919, entered unto force 10 January 1920) 225 CTS 412; Treaty Concerning the Recognition of the Independence of Czechoslovakia and the Protection of Minorities (signed 10 September 1919, entered into force 16 July 1920). *See* T.S. Woolsey, *The Rights of Minorities Under the Treaty with Poland*, 14 American Journal of International Law 392 (1920); C. Broelmann, *The PCIJ and International Rights of Groups and Individuals*, [in:] C.J. Tams & M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice*, Martinus Nijhoff, Leiden: 2013, pp. 123, 127-129.

[13] Art. 12 of the Polish Minorities Treaty; Capotorti, *supra* note 11, paras. 108-117, 123-127; F.P. Walters, *A History of the League of the Nations*, Oxford University Press, Oxford: 1960, pp. 173-175; A.P. Fachiri, *The Permanent Court of International Justice*, reprint of the 2nd ed., London: 1932, Scientia Verlag,

During the 1930s, as the international order was disintegrating in the led-up to the Second World War, the minorities' regime was undermined. In September 1934 Poland, despite the lack of a withdrawal clause, denounced the Treaty, drawing protests from some countries that it could not unilaterally discharge itself from its obligations.[14] The prevailing opinion of the time was that, absent a withdrawal clause, denunciation was impermissible.[15] The League system of minorities' protection unravelled and eventually "ceased to exist."[16]

The Slavery Convention was signed under the League's auspices in 1926 and is still in force. Under Art. 10, which has never been applied, the contracting parties have an unfettered right to denounce it at any time, such denunciation to take effect a year after the UN Secretary General has received notification thereof.[17]

The Forced Labour Convention was adopted by the ILO in 1930.[18] It too remains in force.[19] Under its complicated denunciation clause (Art. 30), parties were barred from denouncing it within the first ten years, i.e. before 1 May 1942. Thereafter, the parties had a year to exercise the right of denunciation, following which they remained bound for successive periods of five years. Currently parties are allowed to secede at the expiration of each five-year period. Thus, the application of the denunciation clause does not relate to when the Convention was ratified/acceded to, but only to the expiration of the five-year periods. No party has ever withdrawn from the Convention.

2. HUMAN RIGHTS TREATIES CONTAINING A DENUNCIATION CLAUSE

A number of treaties seeking to protect and promote human rights make express provision for withdrawal and lay down specific, mainly procedural, conditions to be met, primarily a notice period, although these vary. In such cases parties are perfectly within their rights to invoke the denunciation clause, subject to compliance with the specified terms.

The general rules regarding denunciation of a treaty or withdrawal from an international organisation are set out in the Vienna Convention on the Law of Treaties 1969

Aalen: 1980, pp. 86-87. *See e.g.*, *Certain Questions relating to Settlers of German Origin in Poland* (Advisory Opinion) (1926) PCIJ Rep Series B No. 6; *Acquisition of Polish Nationality* (Advisory Opinion) (1923) PCIJ Rep Series B No. 7.

[14] Musgrave, *supra* note 8, pp. 56-57; Walters, *ibidem*, p. 616.

[15] N. Feinberg, *Unilateral Withdrawal from an International Organization*, 39 British Yearbook of International Law 189 (1963), p. 193.

[16] Capotorti, *supra* note 11, para. 140; Musgrave, *supra* note 8, pp. 56-57.

[17] Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253. Recent accessions include Paraguay (2007) and Kazakhstan (2008).

[18] Convention concerning Forced or Compulsory Labour (No. 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55.

[19] Canada acceded in 2011.

(VCLT).[20] According to Art. 42(2) thereof, they may take place only on the basis of the relevant treaty's provisions or in accordance with the VCLT's terms, which are exhaustive and include a material breach or *rebus sic stantibus*.[21] Moreover, Art. 54 VCLT stipulates that a party may withdraw either in conformity with the treaty's provisions or with the consent of all the parties following consultation with them.[22] Art. 56 VCLT seeks to address the problem of treaties which lack denunciation or withdrawal clauses, and this is discussed later in Section 6. Since the VCLT makes no special allowance for human rights treaties, which by their distinctive nature may have a solid claim to special consideration, it is accepted that these rules apply equally to human rights treaties. However, the law of treaties on this issue, especially in relation to withdrawal from international organisations, has been criticized as uncertain.[23] But alternatively it could be said that the VCLT sanctions withdrawal only in the limited circumstances set out therein.[24] It is also important to be mindful of the fact that, first, the VCLT itself does not apply retrospectively,[25] and, secondly, the VCLT as such is inapplicable to non-parties unless they agree to its application or the rules have acquired the status of customary law.

2.1. Universal treaties adopted under UN and ILO auspices

Many universal human rights treaties adopted under the auspices of the United Nations (UN) or the ILO contain clauses expressly providing for a right of denunciation or withdrawal, subject to a defined period of notice. The following treaties, for example, adopted under UN auspices, require a period of one year's notice to withdraw (the prevailing norm): the Convention on Racial Discrimination 1965;[26] the Convention

[20] *Supra* note 6. By virtue of Art. 5 it applies to the constituent instruments of international organisations. Essentially identical provisions are to be found in the Vienna Convention on the Law of Treaties between States and International Organizations (adopted 21 March 1986, not yet in force) International Legal Materials, vol. 25 (1986), p. 543. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, pp. 74-75, the International Court of Justice (ICJ) cautioned that the constituent instruments' special nature invites careful interpretation. According to D.W. Greig, *International Law*, (2nd ed.), Butterworths, London: 1976, p. 857, applying the same principles of law to ordinary treaties and to constituent instruments is 'harmful'. *See* further S. Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge University Press, Cambridge: 1989, pp. 181-258.

[21] ILC, *supra* note 6, p. 237; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para. 100 *et seq*.

[22] *See* ILC, *supra* note 6, p. 249.

[23] M. Akehurst, *Withdrawal from International Organisations*, 32 Current Legal Problems 143 (1979), pp. 144-145.

[24] L. Brilmayer & I.Y. Tesfalidet, *Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 Yale Law Journal Online 217 (2011), pp. 218-219, http://yalelawjournal.org/images/pdfs/935.pdf, accessed 23 March 2014.

[25] Art. 4 VCLT. *See also Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)* [2005] ICJ Rep 6, para. 125. According to Tyagi, *supra* note 6, p. 148 this dictum means that the VCLT as such is inapplicable to those human rights treaties adopted before its conclusion.

[26] Art. 21 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

Against Torture 1984 (CAT)[27] and the 2002 Optional Protocol;[28] the Convention on Child Rights 1989 (CRC),[29] the Optional Protocol on Sale of Children 2000,[30] and the Optional Protocol on Children in Armed Conflict 2000;[31] the Migrant Workers Convention 1990 (CMW);[32] the Convention against Enforced Disappearances 2006;[33] and the Convention on Disabilities 2006.[34] This same condition applies to the Rome Statute of the International Criminal Court (ICC) 1998.[35]

It is interesting to observe that the period of notice laid down in three UN protocols is shorter than in the primary treaty. Thus the Optional Protocol to the Convention on Discrimination against Women 1999[36] and the Optional Protocol to the Covenant on Economic, Social and Cultural Rights 2008 specify periods of six months' notice,[37] whereas the OPT requires only three months' notice.[38] Moreover, in certain instances

[27] Art. 31(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[28] Art. 33(1) of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237.

[29] Art. 52 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[30] Art. 15(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

[31] Art. 11(1) of the Optional Protocol to the Convention on Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

[32] Art. 89(2) of the International Convention on the Protection of the Rights of All Migrant Workers (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

[33] Art. 40(1) of the International Convention for the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2715 UNTS 3.

[34] Art. 48 of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[35] Art. 127(1) of the Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. In its ongoing tussle with the ICC over the indictment of Sudanese President al-Bashir and other African leaders, the African Union Assembly met in Extraordinary Summit in October 2013 to reflect on Africa's continued relationship with the ICC, but proposals for *en masse* withdrawal from the Rome Statute lacked the required support, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, AU Doc. Ext/Assembly/AU/Dec. 1 (12 October 2013). In September 2013 Kenyan MPs approved a (yet not realized) motion to leave the ICC in protest against the trials of President Kenyatta and Deputy President Ruto for crimes against humanity, BBC News, *Kenya MPs vote to withdraw from ICC* (12 September 2013) www.bbc.co.uk/news/world-africa-23969316, accessed 23 March 2014.

[36] Art. 19(1) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

[37] Art. 20(1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UNGA Res. 63/117, text A/RES/63/435.

[38] Art. 12(1) OPT.

withdrawal is contingent upon the satisfaction of further formal conditions. For example, in the Optional Protocol on Children in Armed Conflict denunciation takes effect only if the State concerned is not involved in an armed conflict at that precise moment,[39] while in the CMW it is possible only after having been in force for the denouncing State for at least five years.[40] Finally, an additional condition is that the decision to withdraw is made publicly. This requirement is satisfied by notifying the UN Secretary-General accordingly.[41]

Following the end of the Second World War, the ILO continued to adopt treaties on a wide range of subjects touching on human rights, such as freedom of association, and child labour.[42] The denunciation clauses in these instruments follow the pattern set by the Forced Labour Convention 1930.[43] Although ILO conventions permit denunciation, a high threshold is set: it is possible only after the first ten years following the relevant Convention's entry into force, and, in the absence thereof, States may not denounce them for further periods of either five years[44] or ten years.[45] These lengthy periods are explicable on the basis that the effect of the conventions could be felt only after the passage of time. Denunciation has been rare: only the Abolition of Forced Labour Convention 1957 has been denounced by Singapore and Malaysia, respectively on 19 April 1979 and 10 January 1990.[46] Denunciation need not be accompanied by stated reasons. However, the Handbook of Procedures on ILO Conventions stipulates that if the notice does not indicate the reasons, the International Labour Office should request the government concerned to provide them, which will then be forwarded to the Governing Body for its information.[47] The latter's stated position is that before a government takes the decision to denounce a Convention, it is desirable to consult fully

[39] Art. 11(1) of the Optional Protocol on children in armed conflict.

[40] Art. 89(1) CMW.

[41] *See e.g.* Art. 3 CAT, Art. 52 CRC.

[42] L. Swepston, *The International Labour Organization's System of Human Rights Protection*, [in:] J. Symonides (ed.), *Human Rights: International Protection, Monitoring, Enforcement*, UNESCO/Ashgate, Aldershot: 2003, p. 91.

[43] Most ILO conventions contain denunciation clauses, K. Widdows, *The Denunciation of International Labour Conventions*, 33 International and Comparative Law Quarterly 1052 (1984).

[44] Art. 5 of the Abolition of Forced Labour Convention (No. 105) (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291.

[45] Art. 16 of the Freedom of Association Convention (No. 87) (adopted 9 July 1948, entered into force 4 July 1950) 68 UNTS 17; Somalia ratified it on 20 March 2014. *See also* Art. 39 of the Indigenous and Tribal Peoples in Independent Countries Convention (No. 169) (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383; Art. 11 of the Worst Forms of Child Labour Convention (No. 182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161; Art. 22 of the Convention Concerning Decent Work for Domestic Workers (No. 189) (adopted 16 June 2011, entered into force 5 September 2013), available at: www.ilo.org.

[46] International Labour Conference, 96th Session, 2007, Report III (Part 1B), *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, ILC96-III(1B)-2007-02-0014-1-En, 12. *See further* Tyagi, *supra* note 6, pp. 136, 178-79.

[47] International Labour Office, International Labour Standards Department, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, Geneva, Revision edition 2006, p. 47.

with the representative organizations of both employers and workers on the problems encountered and how they may be resolved.[48] Lack of consultation will not, however, invalidate the denunciation.

2.2. Regional treaties

Certain regional instruments also make provision for withdrawal subject to notice.

2.2.1. Americas

In the case of the instruments concluded under the auspices of the Organization of American States (OAS), the preferred period of notice is twelve months. This is the case with the ACHR,[49] the Convention on Torture 1985,[50] the Convention on Forced Disappearance of Persons 1994,[51] the Convention on Prevention of Violence against Women 1994,[52] the Convention on Elimination of Discrimination Against Persons with Disabilities 1999,[53] and the Convention Against Terrorism 2002.[54] These treaties additionally require that instruments of denunciation be deposited with the General Secretariat.

2.2.2. Europe

Different periods of time apply to treaties adopted by the Council of Europe, with notifications of denunciation to be submitted to the Secretary-General. For example, notice period is six months in the case of the European Convention on Human Rights (ECHR),[55] the Convention on Migrant Workers 1977,[56] the Convention on National Minorities 1995,[57] and the European Social Charter (ESC).[58] The ESC is of special

[48] ILO, Minutes of the Governing Body, 184th Session (November 1971) 95 and 210, reproduced *ibidem*, p. 46.

[49] Art. 78(1) ACHR. *See* J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge: 2003, pp. 113-15. The OAS treaties and protocols are available at: www.oas.org/DIL/treaties_subject.htm. For the denunciations of Trinidad and Tobago, as well as Venezuela, *see supra* notes 3 and 4.

[50] Art. 23 of the Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987).

[51] Art. 21 of the Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996).

[52] Art. 24 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995).

[53] Art. 13 of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (adopted 8 June 1999, entered into force 14 September 2001).

[54] Art. 23(1) of the Inter-American Convention Against Terrorism (adopted 3 June 2002, entered into force 10 July 2003).

[55] Art. 58(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended). The ECHR may be denounced in respect of dependent territories under Art. 58(4) thereof. Council of Europe's treaties are available at http//:conventions.coe.int.

[56] Art. 37(1) of the European Convention on the Legal Status of Migrant Workers.

[57] Art. 31(2) of the Framework Convention for the Protection of National Minorities.

[58] Art. 37(1) ESC.

interest because it contains a unique provision permitting denunciation of individual articles or paragraphs, although subject to conditions ensuring that the contracting parties remain bound by minimum standards.[59] The same structure has been retained in the revised European Social Charter.[60] A twelve-month notice period is specified in the case of the Torture Convention 1987,[61] but only three months in the Convention on Human Rights and Biomedicine 1997.[62] More recently, the Convention on the Prevention of Terrorism 2005 also requires only three months' notice,[63] as does the Convention against Trafficking in Human Beings 2005,[64] the Convention on Protection of Children against Sexual Exploitation 2007,[65] and the Convention on Violence against Women 2011.[66] It should be observed however that under both the ACHR and the ECHR denunciation is possible only where the State in question has already been a party for a minimum period of five years.[67] This is also the case with the ESC, with the added option of denunciation at the end of successive periods of two years.[68]

The Convention on Human Rights adopted by the Commonwealth of Independent States (CIS) in 1995 permits denunciation after six months' notice to the depositary.[69] However, denunciation does not release the relevant Party from its treaty obligations with respect to any act constituting a violation of such obligations which may have been performed by it before the denunciation became effective.[70]

2.2.3. Africa

Treaties relating to human rights adopted under the auspices of the Organization of African Unity (OAU) and its successor the African Union (AU) do not contain a denunciation clause.[71] The only exception is the Kampala Convention on Internally

[59] Art. 37(2) ESC. On 26 June 1987 the United Kingdom denounced Art. 8(4)(a) ESC, *United Kingdom Materials on International Law*, 64 British Yearbook of International Law 641 (1989).

[60] Art. M of the revised European Social Charter.

[61] Art. 22(2) of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

[62] Art. 37(2) of the Convention for the Protection of Human Beings and Dignity of the Human Being with regard to the Application of Biology and Medicine.

[63] Art. 31(2) of the European Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007).

[64] Art. 46(1) of the Convention on Action against Trafficking Human Beings.

[65] Art. 49(2) of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

[66] Art. 80(2) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

[67] Art. 78(1) ACHR, 58(2) ECHR. *See also* Art. 37(2) of the European Convention on Migrant Workers.

[68] Art. 37(1) ESC.

[69] Art. 37(1) of the Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995, entered into force 11August 1998), available at: www.unhcr.org/4de4eef19.html, accessed 25 March 2014.

[70] *Ibidem*, Art. 37(2).

[71] Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39; Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3. AU treaties are available at: www.au.int.

Displaced Persons 2009, which has two unusual features: first, it stipulates that denunciation must be reasoned,[72] and secondly, although it requires that a year's notice be given to the Chairperson of the AU Commission, it adds the proviso "unless a subsequent date has been specified."[73] It is not entirely clear why parties would wish to postpone the withdrawal's entry into force; perhaps as a practical measure to enable them to be freed from the complex obligations imposed by the treaty, or as a bargaining tool. Presumably parties to any treaty envisaging withdrawal have the right to determine that its effects will take place only *after* the stipulated period of notice has lapsed.

2.2.4. Sub-regional treaties

Treaties with, *inter alia*, a human rights objective, broadly defined, have been adopted by African sub-regional organisations,[74] such as the Economic Community for West African States[75] (ECOWAS) and the Southern African Development Community (SADC).[76] The ECOWAS Protocol Relating to Conflict Prevention 1999[77] and the Supplementary Protocol on Democracy and Good Governance 2001, adopted by the ECOWAS, provide for withdrawal subject to a year's notice.[78] The same is true of the SADC Protocol on Politics, Defence and Security Co-operation 2001.[79] Moreover, the Pact on Security, Stability and Development in the Great Lakes Region, adopted by the International Conference on the Great Lakes Region (ICGLR) in 2006, includes the Protocol on Democracy and Good Governance among its ten protocols. It commits Member States to setting up institutions promoting the rule of law and respect for human rights through constitutional systems based on the separation of powers.[80] Art. 35 of the Pact allows Members to withdraw at any time after the expiration of ten years from the date on which it entered into force for the withdrawing State; such withdrawal will take effect a year later. Since the various Protocols cannot be ratified separately from

[72] Art. 19(1) of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, in force 6 December 2012). Art. 3(l)(d) and 9 oblige parties to ensure respect for the human rights of the internally displaced.

[73] *Ibidem* Art. 19(2).

[74] *See* F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, Oxford: 2007, pp. 495-500.

[75] On ECOWAS, *see infra*.

[76] On SADC, *see infra*.

[77] Art. 56 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, A/P1/12/99 (adopted 10 December 1999, temporarily entered into force upon signature), reproduced in S. Ebobrah & A. Tanoh (eds.), *Compendium of African Sub-Regional Human Rights Documents*, Pretoria University Law Press, Pretoria: 2010, p. 203.

[78] Art. 48(1) of the Protocol on Democracy and Good Governance, A/SP1/12/01 (adopted 21 December 2001, entered into force 20 February 2008), reproduced in *ibidem*, p. 220.

[79] Art. 14 of the Protocol on Politics, Defence and Security Co-operation (adopted 14 August 2001, entered into force 2 March 2004), reproduced in *ibidem*, p. 407.

[80] Pact on Security, Stability and Development in the Great Lakes Region (adopted December 2006, entered into force June 2008, amended November 2012), available at: www.icglr.org, accessed 25 March 2014.

the Pact, it follows that its denouncing the Pact would result in withdrawal from all Protocols.

Finally, as regards the Common Market of the South (Mercosur), the original Treaty of Asunción 1991 made no references to human rights.[81] However, subsequent instruments, namely the Ushuaia Protocol I 1998,[82] the Protocol of Asunción 2005,[83] and the Ushuaia Protocol II 2011,[84] – which form an integral part of the Treaty – have now firmly embedded fundamental freedoms in the region.[85] As these instruments are silent on denunciation, they are presumably governed by Art. 21 of the Treaty of Asuncion, which permits withdrawal and demands that the withdrawing party informs the other parties "of its intention expressly and formally" and submits the relevant documents within 60 days.

3. PROCEDURAL REQUIREMENTS

For a denunciation to be regarded as lawful the State concerned must comply with all formal conditions laid down in the relevant treaty, as reflected in Art. 54(a) VCLT. As has been seen above, certain periods of time are specified before denunciation can become effective,[86] and invariably notifications must be submitted in writing to a designated Office. Any procedural irregularity will render the attempted denunciation null and void. This point has been stressed by the Inter-American Court of Human Rights (IACHR) in *Ivcher Bronstein v. Peru* and in *Constitutional Court v. Peru*: State Parties had assumed procedural obligations under the ACHR with which they had to comply.[87]

The facts behind the above cases are simple. In 1999 Peru sought to withdraw, with immediate effect, from its 1981 declaration recognizing the IACHR's contentious

[81] Treaty Establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (adopted on 26 March 1991, entered into force 29 November 1991) 2140 UNTS 257.

[82] Ushuaia Protocol on Democratic Commitment in the Mercosur, the Republic of Bolivia and the Republic of Chile (adopted 24 July 1998, entered into force 17 January 2002) 2177 UNTS 375.

[83] Protocol of Asunción on Commitment with Promotion and Protection of Human Rights in Mercosur (adopted 20 June 2005, not yet in force).

[84] Protocol of Montevideo on Commitment with Democracy in Mercosur (adopted 20 December 2011, not yet in force). All instruments are available at: www.mercosur.int.

[85] *See generally* L. Lixinski, *Human Rights in MERCOSUR*, [in:] H.T.F. Filho, L. Lixinski & M.B.O. Giupponi (eds.), *The Law of MERCOSUR*, Hart Publishing, Oxford: 2010, p. 351.

[86] These periods of notice are meant to act as a disincentive for States, E. Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57 International and Comparative Law Quarterly 751 (2008), p. 756.

[87] *Ivcher Bronstein v. Peru* (Competence) Series C No. 54, IACHR 24 September 1999, para. 37; *Constitutional Court v. Peru* (Competence) Series C No. 55, IACHR 24 September 1999, para. 36. *See* D. Cassell, *Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?*, 20 Human Rights Law Journal 167 (1999); K. Sokol, *Ivcher Bronstein*, 95 American Journal of International Law 178 (2001); C. Sandoval, *The Challenge of Impunity in Peru: The Significance of the Inter-American Court of Human Rights*, 5(1) Essex Human Rights Review 1 (2008). IACHR jurisprudence is available at: www.corteidh.or.cr.

jurisdiction under Art. 62(1) ACHR.[88] The IACHR concluded that Peru's withdrawal had no legal effect, because the "[ACHR] contains no provision that would make it possible to withdraw recognition of the Court's contentious jurisdiction, as such a provision would be antithetical to the Convention and have no foundation in law. Even supposing a State could withdraw its jurisdiction of the Court's contentious jurisdiction, formal notification would have to be given one year before the withdrawal could take effect, for the sake of juridical security and continuity."[89]

The IACHR emphasised that the special nature of human rights treaties required their interpretation and application in a manner designed to make them practical and effective.[90] Interpreting the ACHR in accordance with its object and purpose meant preserving the integrity of the IACHR's binding jurisdiction under Art. 62(1). In turn, jurisdiction could not be subordinated to any limitations that a State might seek to add to its recognition of binding jurisdiction, because its efficacy could be adversely affected. Except as provided for in Art. 62(1), no limitations could be imposed on a State's acceptance of the IACHR's contentious jurisdiction.[91] Since the ACHR made no express provision for States to withdraw their recognition of the IACHR's binding jurisdiction, once recognized the ACHR as a whole is binding on the States. Any interpretation allowing contracting parties to withdraw such recognition of jurisdiction would jeopardize the protective nature of the ACHR and would be contrary to its object and purpose.[92]

In keeping with Art. 44 VCLT on the separability of treaty provisions, the IACHR held that preserving the ACHR's integrity meant that denunciation was possible only *vis-à-vis* the treaty as a whole, unless the treaty or the Parties provide otherwise. Moreover, only the ACHR as a whole could be denounced, not parts thereof, which would have the effect of undermining its integrity. Such a partial denunciation does not appear to have been the intention of the contracting parties, nor could it be implied. In light of the object and purpose of the ACHR, the IACHR held that a State can only release itself of its treaty obligations by following the procedures stipulated therein.[93] It continued that: "Even supposing, for the sake of argument, that 'release' was possible – *a hypothetical that this Court rejects* – it could not take effect immediately."[94] Termination with immediate effect was precluded by the law of treaties, which demanded reasonable notice.[95] In conclusion, Peru's purported denunciation of its recognition of the IACHR's binding jurisdiction was inadmissible.[96] In its summary, the IACHR was

[88] Annual Report of the Inter-American Court of Human Rights, 1999, Appendix XVI.
[89] *Ivcher Bronstein v. Peru*, para. 24; *Constitutional Court v. Peru*, para. 24.
[90] *Ivcher Bronstein v. Peru*, paras. 41-48; *Constitutional Court v. Peru*, paras. 41-48.
[91] *Ivcher Bronstein v. Peru*, paras. 35-37; *Constitutional Court v. Peru*, paras. 34-36.
[92] *Ivcher Bronstein v. Peru*, paras. 39-41; *Constitutional Court v. Peru*, paras. 38-40.
[93] *Ivcher Bronstein v. Peru*, paras. 40, 46, 50-51; *Constitutional Court v. Peru*, paras. 39, 45, 49-50.
[94] *Ivcher Bronstein v. Peru*, para. 52; *Constitutional Court v. Peru*, para. 51 (emphasis added).
[95] *Ivcher Bronstein v. Peru*, paras. 52-53; *Constitutional Court v. Peru*, paras. 51-52.
[96] *Ivcher Bronstein v. Peru*, para. 54; *Constitutional Court v. Peru*, para. 53.

persuaded by "the special status of the ACHR, the unitary nature of the Convention embodying both substantive and procedural obligations, the unconditional acceptance of the jurisdictional clause by Peru, the unlimited duration of the acceptance of the jurisdictional clause by that State, and the absence of a provision for withdrawal in the jurisdictional clause."[97] Ultimately, the ACHR could be denounced, but recognition of the IACHR's competence could not be withdrawn.

4. TEMPORAL SCOPE OF TREATIES FOLLOWING DENUNCIATION

A number of treaties allowing denunciation expressly address the question of their temporal scope, or of admissibility *ratione temporis*, stating that denunciation does not release a State from its obligations with respect to acts occurring prior to its taking effect or while it was a Party. In the present context, the State remains accountable for any possible violations of human rights during this period of transition – an immediate release is not possible.[98] This rule seems to be designed to discourage denunciations.[99] Such is the case under Art. 12(2) OPT[100] enabling the HRC to continue to consider communications concerning Jamaica[101] as well as Trinidad and Tobago,[102] notwithstanding that they had denounced the OPT, if such communications were submitted before the withdrawals became effective. The statement below is typical of its approach:

> On becoming a State party to [OPT], Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with Art. 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol.[103]

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[97] Tyagi, *supra* note 6, p. 150.

[98] L.-C. Chen, *An Introduction to Contemporary International Law*, (2nd ed.), Yale University Press, New Haven: 2000, p. 370.

[99] *Ibidem*, stating that denunciation clauses "cannot easily be made effective"; Pasqualucci, *supra* note 54, p. 115.

[100] *See also* Art. 20(2) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

[101] *See e.g. Freemantle v. Jamaica* (2000) Communication No. 625/1995, UN Doc. CCPR/C/68/D/625/1995 para. 10; *Robinson v. Jamaica* (2000) Communication No. 731/1996, UN Doc. CCPR/C/68/D/731/1996 para. 13; *Osbourne v. Jamaica* (2000) Communication No. 759/1997 UN Doc. CCPR/C/68/D/759/1997 para. 12; *Reece v. Jamaica* (2003) Communication No. 796/1998 CCPR/C/78/D/796/1998 paras. 6.2, 10.

[102] *See* the cases listed by the HRC in Report of the Human Rights Committee, UN GAOR A/57/40, vol. 1 para. 110 (2002).

[103] *Sextus v. Trinidad and Tobago* (2001) Communication No. 818/1998 UN Doc. CCPR/C/72/D/818/1998 para. 10. *See also Evans v. Trinidad and Tobago* (2003) Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000 para. 9.

This is also the situation under Art. 78(2) ACHR and its supervisory organs – the IACHR and the Inter-American Commission on Human Rights – have been particularly zealous in protecting temporal jurisdiction. In a series of cases concerning Trinidad and Tobago they held that it was not relieved from its obligations for alleged violations committed before denunciation (which was submitted on 26 May 1998 and thus took effect on 26 May 1999) and, therefore, the IACHR possessed jurisdiction over all alleged violations before the latter date. In the words of the Inter-American Commission on Human Rights:

> States Parties to [ACHR] have, by the plain terms of Art. 78(2), agreed that a denunciation taken to the Convention by any of them will not release the denouncing state from its obligations under the Convention with respect to acts taken by that state prior to the effective date of the denunciation that may constitute a violation of those obligations. A state party's obligations under the Convention encompass not only those provisions of the Convention relating to the substantive rights and freedoms guaranteed thereunder. They also encompass provisions relating to the Convention's supervisory mechanisms, including those under Chapter VII relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention, therefore, the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to May 26, 1999. Consistent with established jurisprudence, this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date.[104]

The IACHR stated in similar terms that "pursuant to Art. 78(2) [ACHR], the denunciation does not have the effect of releasing the State from its obligations with respect to acts occurring, in whole or in part, prior to the effective date of denunciation, which may constitute a violation of the said Convention."[105] Furthermore, it found that "[t]he State's denunciation of the Convention, pursuant to Art. 78 [...] does not affect the jurisdiction of either the Court or the Commission to consider the alleged acts, occurring [...] before May 26, 1999, the day in which the State's de-

[104] *Ramcharan v. Trinidad and Tobago* (2002) para. 26 (footnotes omitted). *See also Ramlogan v. Trinidad and Tobago* (2002); *Roach and Ramnarace v. Trinidad and Tobago* (2002), available at: www1.umn.edu/humanrts/cases/annual-report2002.html; *Balkissoon v. Trinidad and Tobago* (2001), available at: www1.umn.edu/humanrts/cases/annual-report2001.html, both accessed 24 March 2014. The Inter-American Commission on Human Rights reiterated this point in relation to Venezuela's denunciation, *supra* note 4.

[105] *James et al. v. Trinidad and Tobago* (Provisional Measures) Series E IACHR 2 September 2002, para. 3. *See further e.g. Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits) Series C No. 94 IACHR 21 June 2002, para. 13; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Compliance with Judgment) 27 November 2003, para. 3. In *Caesar v. Trinidad and Tobago* (Merits) Series C No. 123 IACHR 11 March 2005, para. 6, the IACHR used slightly different words, "According to Art. 78(2) [ACHR], a denunciation will not release the denouncing State from its obligations under the Convention with respect to acts of that State occurring prior to the effective date of the denunciation that may constitute a violation of the Convention."

nunciation of the Convention entered into force."[106] The IACHR justified its stance by declaring that it had the inherent authority to determine the scope of its own jurisdictional competence,[107] and further that it would be unacceptable to subordinate its binding jurisdiction to "restrictions that would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system established in the Convention."[108]

This situation had previously arisen in Europe, where in December 1969 Greece renounced its membership in the Council of Europe, effectively withdrawing from the ECHR.[109] Greece was faced at that time with a highly critical report by the (now defunct) European Commission of Human Rights, which found allegations of, *inter alia*, torture and ill-treatment to be established facts. Its ruling was subsequently endorsed by the Committee of Ministers, and Greece – fearing that it could be expelled – chose to forestall events by withdrawing.[110] Art. 65(2) ECHR provided that it remained applicable for a further six month period, and that any complaints submitted either before or during that period could be considered by the Commission.[111] Consequently, Greece's outstanding obligations before its denunciation became effective could have been considered by the Commission (although in the event it chose not to do so).[112]

The Rome Statute is particularly interesting because a State's withdrawal cannot discharge it from its obligation to co-operate with the ICC in relation to criminal investigations and proceedings commenced prior to the withdrawal becoming effective, nor prevent the ICC from continuing to consider any matter up to that point.[113] Attention was drawn to this fact by the President of the Assembly of States Parties,

[106] *James et al. v. Trinidad and Tobago* (Provisional Measures) Annual Report of the Inter-American Court of Human Rights 2001, vol. 2, Appendix XLII, p. 1117. *See also e.g. Hilaire et al. v. Trinidad and Tobago* (Preliminary Objections) Annual Report of the Inter-American Court of Human Rights 2001, vol. 2, Appendix XXIII, p. 785; *James et al. v. Trinidad and Tobago* (Provisional Measures) (2003), para. 2.

[107] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits) paras. 17-18; *Caesar v. Trinidad and Tobago*, para. 8.

[108] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits) para. 19; *Caesar v. Trinidad and Tobago* para. 9.

[109] *See* Art. 58(3) ECHR (Art. 65(3) at the relevant time): any State "which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention."

[110] Robertson & Merrills, *supra* note 11, pp. 136-38; Tyagi, *supra* note 6, pp. 157-160; K.D. Magliveras, *Exclusion from Participation in International Organisations*, Kluwer Law International, The Hague: 1999, pp. 80-83. Greece gave notice of its intention to withdraw in accordance with Art. 7 of the Statute of the Council of Europe. According to the Committee of Ministers Resolution (70) 34 of 27 November 1970 on the legal and financial consequences of the withdrawal of Greece from the Council of Europe, it ceased to be a Member State and contracting party to the ECHR on 31 December 1970.

[111] Now Art. 58(2) ECHR.

[112] P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, (2nd ed.), Kluwer, The Hague: 1990, p. 11. This onus was clearly spelt out in Resolution (70) 34 para. 1(1) which stated, *inter alia*, that Greece would not "be regarded as bound by any obligation deriving from the Statute of the Council of Europe...subject, however, to the obligations which she has assumed under that Statute in respect of any fact prior to her withdrawal from the Organisation taking effect."

[113] Art. 127(2) Rome Statute. Financial dues must also be met.

Ambassador Intelmann, in response to Kenya's aforementioned threat to denounce the Rome Statute.[114]

The aforementioned treaties adopted by African sub-regional organisations also make it manifest that Member States remain bound by the terms of the respective treaty up to the date the withdrawal becomes effective.[115]

5. PROTOCOLS TO HUMAN RIGHTS TREATIES

Treaties omitting all reference to a denunciation clause should be distinguished from treaty protocols, which do not refer to withdrawal. The latter should be treated as belonging to a special category. The prime example are the substantive protocols which have been attached to the ECHR, specifically Protocol No. 1 (1952), Protocol No. 4 (1963), Protocol No. 6 concerning the Abolition of the Death Penalty (1983), Protocol No. 7 (1984), Protocol No. 12 concerning Non-Discrimination (2002), Protocol No. 13 concerning the Abolition of the Death Penalty in All Circumstances (2002), and Protocol No. 16 (2013). Provisions have been inserted into these protocols subjecting them to the relevant ECHR clauses, including by necessity the denunciation clause in Art. 58 thereof.[116] The question arises whether the individual protocols are capable of denunciation separately, or whether such denunciation amounts to denunciation of the ECHR as a whole.

The answer appears to be the latter. It is important to recognise that these Protocols add provisions to the ECHR and expand the ambit of protected rights; indeed their substantive provisions are stated to be "additional Articles to the Convention". In essence, once each Protocol has entered into force, it becomes an integral part of the ECHR – the latter is amended and revised by the addition of the new provisions. In other words, following the entry into force of each of these Protocols, the text of the ECHR is effectively codified, even though no actual changes are made to the original treaty. Thus, the codified text applies to each of the Member States which has ratified the Protocols in question. It follows that a different codified version may apply *vis-à-vis* different contracting parties, depending on which Protocols they have ratified. If a contracting party sought to extricate itself from a specific Protocol, this would amount to a denunciation of the ECHR as a whole. Had it been the intention to allow denunciation of individual protocols it seems safe to assume that this would have been stated explicitly.

[114] *President Intelmann on approval of motion in the Parliament of Kenya to start the withdrawal process from the Rome Statute*, ICC-ASP-20130906-PR938, Press Release: 06/09/2013, www.icc-cpi.int/, accessed 20 March 2014.

[115] Art. 91(2) ECOWAS Treaty, Art. 34(3) SADC Treaty.

[116] *See* Art. 5 of Protocol No. 1, Art. 6(1) of Protocol No 4, Art. 6 of Protocol No. 6, Art. 7(1) of Protocol No. 7, Art. 3 of Protocol No. 12, Art. 5 of Protocol No. 13, and Art. 6 of Protocol No. 16 titled "Relationship to the Convention" and stating, *inter alia*, that "all the provisions of the Convention shall apply accordingly" to the Protocol in question. W.A. Schabas, *The Abolition of the Death Penalty in International Law*, (3rd ed.), Cambridge University Press, Cambridge: 2002, pp. 292-293 writes that the drafters of Protocol No. 6 agreed that denunciation could take place, but only in accordance with the ECHR requirements, even though a specific clause was omitted.

6. HUMAN RIGHTS TREATIES CONTAINING NO DENUNCIATION CLAUSE

A number of human rights treaties do not contain any provisions on denunciation. Regarding instruments adopted under UN auspices, these include the International Covenants 1966,[117] the Protocol on the Abolition of the Death Penalty 1989,[118] and the Convention on the Elimination of Discrimination against Women 1979.[119]

Regional human rights treaties with no denunciation clause are more numerous. In the Americas these include the Protocol of San Salvador 1988[120] and the Protocol to Abolish the Death Penalty 1990.[121] As mentioned above, the majority of OAU/AU conventions, namely, the African Charter on Human and Peoples' Rights 1981[122] (African Charter) and the Protocol on Women Rights 2003,[123] the African Charter on the Rights of Child 1990,[124] as well as the African Democracy Charter,[125] do not contain a denunciation clause. This is also true of the following three Protocols: on the Peace and Security Council 2002,[126] on the African Human Rights Court 1998,[127] and on the African Court of Justice and Human Rights 2008.[128] The revised Arab Charter on Human Rights 2004, adopted by the Arab League, also belongs in this category.[129]

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[117] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[118] Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

[119] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[120] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999).

[121] Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990, entered into force 28 August 1991).

[122] African Charter on Human and Peoples' Rights (adopted 17 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

[123] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (adopted 1 July 2003 entered into force 25 November 2005).

[124] African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999).

[125] African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012).

[126] Protocol to the Constitutive Act relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003).

[127] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004).

[128] Protocol to the Constitutive Act on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, not yet in force). *See generally* G. Naldi & K. Magliveras, *The African Court of Justice and Human Rights: A Judicial Curate's Egg*, 9 International Organizations Law Review 387 (2012).

[129] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 International Human Rights Reports 893 (2005).

Unlike the ECHR protocols discussed above in Section 5, which refer to the ECHR provision on denunciation, a number of other protocols are wholly silent on denunciation; e.g. Protocol No. 9 (1990), Protocol No. 11 (1994), Protocol No. 14 (2004), and Protocol No. 15 (2013). This is due to their subject matter, which amends and restructures the ECHR's control system, creating a new state of affairs. A change, or reversal, of these institutional changes is possible only through the adoption of a subsequent amending treaty. A State Party wishing to be released from obligations thereunder would be compelled to denounce the ECHR.

7. ANALYSIS AND OBSERVATIONS

The review undertaken above establishes that many human rights treaties contain denunciation clauses, but that a wide variation exists as to the procedural requirements regarding their invocation, such as the periods of notice.[130] Failure to comply with these requirements means that the denouncing State breached its treaty obligations and the attempted denunciation is deemed of no effect. It is also clear that that in general there can be no separability, i.e. all treaty provisions must stand or fall together. The central question that arises concerns the permissibility of unilateral denunciation by State Parties of human rights treaties containing no denunciation clause. Where no specific provision for unilateral denunciation or withdrawal is made, the general rule in Art. 56(1) VCLT, deemed to reflect customary international law,[131] states that the treaty is not subject to denunciation or withdrawal unless (a) it is established that the parties intended to allow the possibility of denunciation or withdrawal, or (b) a right to do so is implied from the treaty's nature.[132] In addition, twelve months' notice is specified under Art. 56(2).[133]

The crucial substantive points therefore are firstly, the intention of the parties as to whether a right to denounce or withdraw is deemed to exist in each specific case, and secondly, the subject matter of the treaty, taking into account all the relevant circumstances.[134] Absent these conditions, the presumption is that the treaty cannot be denounced.[135] This

[130] Helfer, *supra* note 7, p. 1597; Tyagi, *supra* note 6, p. 117.

[131] *Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, p. 420. According to an authoritative oeuvre on the customary law of treaties, the intention of parties is to be inferred from the treaty, its nature and circumstances, Lord McNair, *The Law of Treaties*, Clarendon Press, Oxford: 1961, pp. 511-513.

[132] *See* ILC, *supra* note 6, pp. 250-51. This provision was criticised as a compromise that confused matters, K. Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 British Yearbook of International 83 (1982), p. 93; Greig, *supra* note 20, p. 497.

[133] ILC, *supra* note 6, p. 251. According to H.W. Briggs, *Unilateral Denunciation of Treaties in the Vienna Convention and the International Court of Justice*, 68 American Journal of International Law 51 (1974), p. 64, it was unwisely adopted.

[134] ILC, *supra* note 6, *ibidem*. *See generally* I. Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd ed.), Manchester University Press, Manchester: 1984, pp. 186-188.

[135] I. Brownlie, *Principles of Public International Law*, (7th ed.), Oxford University Press, Oxford: 2008, p. 621; I.A. Shearer, *Starke's International Law*, (11th ed.), Butterworths, London: 1994, p. 433; Greig, *supra* note 20, p. 498.

rationale stems from the fundamental principle of *pacta sunt servanda*.[136] Ascertaining the parties' intention is not an easy exercise as the *travaux préparatoires* may often be silent on the issue.[137] But as will be seen, the policy of the OAU/AU satisfies the scenario envisaged by subparagraph 1(a). With regard to the second contingency (the nature of the treaty), it appears that the preparatory work of the Conference on the VCLT only acknowledged treaties of alliance and treaties 'intrinsically temporary in character' as falling within the scope of the provision.[138]

A consensus has arisen that a treaty of a clearly non-temporary nature, intended as being of unlimited duration, is a law-making treaty and establishes a regime or system deemed permanent (e.g. treaties of peace or delimiting boundaries, or creating a permanent international organisation). Such treaties cannot be denounced unilaterally at will.[139] While the VCLT makes no specific reference to human rights treaties, it seems beyond question, given the evolution of the law, that they belong to this category.[140] Hence Aust writes, albeit tentatively, that they are probably incapable of withdrawal.[141] However, since a number of them do contain denunciation clauses, such a right could be implied where omitted, States being free to do what is not prohibited. But as Aust observed, "Since it is now very common to include provisions on withdrawal, when a treaty is silent it may be that much harder for a party to establish the grounds for the exception."[142]

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[136] *James et al. v. Trinidad and Tobago* (Provisional Measures), Annual Report of the Inter-American Court of Human Rights 2001, vol. 2, Appendix XLII, 1116; Greig, *supra* note 24, pp. 496, 498.

[137] Tyagi, *supra* note 6, pp. 130-131.

[138] The ILC was opposed to the contention that some treaties could be denounced simply by virtue of their nature, ILC, *supra* note 6, *ibidem*. *See* Briggs, *supra* note 133, p. 64; Greig, *supra* note 20, p. 498; Feinberg, *supra* note 15, pp. 218-219. In the *Fisheries Case* (Jurisdiction) [1973] ICJ Rep 4, paras. 25-26, Iceland argued that treaties not of a permanent nature could be denounced. Treaties of commerce have also been advanced as amenable to denunciation due to their subject matter, J. Brierly, *The Law of Nations*, (5th ed.), Clarendon Press, Oxford: 1955, p. 256.

[139] Lauterpacht, *supra* note 10, p. 938; McNair, *supra* note 131, pp. 493-494, 511; Sinclair, *supra* note 134, *ibidem*; and the authorities cited by Feinberg, *supra* note 15, p. 212, note 2. According to Widdows, *supra* note 132, p. 93, up to that time, few examples existed of States claiming a right to denounce treaties at will, while Briggs, *supra* note 133, *ibidem*, relying on the *Fisheries Jurisdiction Case*, para. 29, argued that claims to a unilateral right to denunciation would be treated with caution. According to the United Kingdom's Foreign and Commonwealth Office, such treaties do not usually contain denunciation clauses, *United Kingdom Materials on International Law*, 64 British Yearbook of International Law (1989), p. 641. While the ILC was of this view in general, it expressed caution in drawing conclusions with respect to law-making treaties, as many expressly permitted denunciation, ILC, *supra* note 6, pp. 250-51.

[140] Human rights courts have emphasised the special nature of these legal orders, *see e.g. Wemhoff v. Germany* [1968] Series A vol. 7; *Ireland v. United Kingdom* [1978] Series A vol. 25; *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, Series A No 2, IACHR 24 September 1982. The HRC has thus described the ICCPR rights as being for the benefit of persons within State jurisdiction, UNHCR, General Comment 24, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.3, para. 8 (1997).

[141] A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge: 2000, p. 234.

[142] A. Aust, *Handbook of International Law*, Cambridge University Press, Cambridge: 2005, p. 103.

Chen has stated that omitting denunciation clauses in International Covenants is "highly significant: it signifies that the human rights obligations stipulated in the Covenants are not expected to be unilaterally disregarded. They are *obligatio erga omnes*."[143]

It may certainly be the case that treaties enshrining obligations *erga omnes*, or peremptory norms of international law, whether or not they contain a withdrawal clause may have a deterrent effect on States contemplating denunciation, since they will continue to be bound by those obligations under customary law. It therefore appears safe to conclude that denunciation of or withdrawal from a human rights treaty does not seem possible unless it is evident beyond doubt that the parties intended to permit this, as in the case of the OAU/AU.

The law and practice of the HRC, which has taken an uncompromising position on the ICCPR, reflects this position. Thus the contracting parties to the ICCPR cannot denounce it or withdraw from it.[144] This conclusion was reached on the basis that the ICCPR, as an instrument codifying universal human rights, is not the type of treaty which, by its nature, implies a right of denunciation.[145]

According to the HRC, "the drafters of the ICCPR deliberately intended to exclude the possibility of denunciation" and contracting parties consciously did not admit the possibility of its denunciation,[146] or that of the Second Optional Protocol. If the drafters had intended to allow for denunciation an explicit contingency would have been made, as with the OPT and the Convention on Racial Discrimination, both of which permit denunciation.[147] The stance adopted by the HRC is defended by Chen: "Given the authoritative policy in support of the intense demand for global protection of human rights, and given the absence of explicit provision for denunciation, it would appear that the commitments incorporated in the two covenants were intended neither to admit the possibility of denunciation or withdrawal nor to imply a right of denunciation or withdrawal."[148] But the HRC's standpoint has been criticized as being out of step with other UN human rights organs.[149]

The HRC had been compelled to adopt a position by North Korea's attempted withdrawal from the ICCPR in August 1997, when it submitted to the UN Secretary-

[143] Chen, *supra* note 98, p. 369.

[144] UNHCR, General Comment 26, *Continuity of Obligations*, UN Doc. A/53/40, vol. I, annex VII (1997); *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* HRI/GEN/1/Rev.9, p. 222, para. 5 (27-5-2008); P. Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford: 1983, pp. 120-21, note 1. However, in considering the third draft of a general comment on reservations in 2004, a member of the HRC, Professor Higgins (as she then was), commented that "the legal effects of the absence of any reference to denunciation in the Covenant were not clear", UN Doc. CCPR/C/SR 1380 para. 5 (2006).

[145] General Comment 26, *ibidem*, para. 3. *See also* E. Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an exercise of the right of self-defence?*, 5 Australian Journal of Human Rights 215 (1999), pp. 220-221.

[146] But *see* Tyagi, *supra* note 6, pp. 137-38, who maintains that this assertion is factually inaccurate.

[147] General Comment 26, *supra* note 144, para. 2.

[148] Chen, *supra* note 98, p. 370.

[149] Tyagi, *supra* note 6, pp. 138-139.

General a notification of withdrawal.[150] In an aide-memoire, the latter expressed the opinion that it would not be possible unless States parties unanimously approved it.[151] In this regard the HRC and the Secretary-General were not as one. The former adopted an absolutist position denying any possibility of withdrawal and choosing to ignore the North Korean missive, and the latter, reflecting the VCLT position, accepted the possibility of withdrawal subject to onerous conditions. Indeed, each State Party was effectively given the right to veto its withdrawal. North Korea has remained a party to the ICCPR,[152] a fact confirmed by its subsequent behaviour. In 2000 it submitted its second periodic report, which was considered by the HRC in July 2001.[153]

It is highly unlikely that the Protocol to the ACHR to Abolish the Death Penalty can be denounced. This is because the ACHR is abolitionist in outlook and the death penalty, once removed, cannot be reinstated.[154] Thus the IACHR has declared that "a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, *ipso jure*, a final and irrevocable decision."[155]

An example of implied denunciation, by contrast, is the African Charter 1981 which, as has been noted, lacks a denunciation clause. However, the negotiating history indicates that it was the manifest intention of the parties to permit denunciation.[156] The stance, adopted by the African Commission, must therefore be seen in this context, as reflecting the position set out in Art. 56(1) VCLT. In *Civil Liberties Organization v. Nigeria*, the African Commission had to consider decrees passed by Nigeria's military government seeking to nullify the African Charter's domestic effect.[157] By concluding that "[i]f Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done," it found that Nigeria's obligations remained unaffected by the purported revocation of the Charter's domestic

[150] Regarding North Korea's motivation, *see* Evatt, *supra* note 145, pp. 215-216.

[151] UN Doc. C.N.467.1997.TREATIES-10 (12-11-1997); UN Doc. E/CN.4/2000/96, paras. 10-11 (14-12-1999). According to J. Crawford, *The UN Human Rights Monitoring System: A System in Crisis?*, [in:] P. Alston & J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge: 2000, pp. 1, 10, this was a conclusion was shared by a number of States.

[152] For information on the status of the ICCPR, *see* http://untreaty.un.org and www.ohchr.org, accessed 24 March 2013.

[153] HRC, *Concluding Observation of the Human Rights Committee: Democratic People's Republic of Korea*, UN Doc. CCPR/CO/72/PRK (27-8-2001). *See also* Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Marzuki Darusman*, UN Doc. A/HRC/22/57, para. 19 (1-2-2013).

[154] Art. 4(3) ACHR. *See also Restrictions to the Death Penalty Case* (Arts 4(2) and 4(3) of the American Convention on Human Rights), Advisory Opinion OC-3/83, Series A No. 3, IACHR 8 September 1983, para. 52.

[155] *Restrictions to the Death Penalty*, para. 56. *See also International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion OC-14/94, Series A No. 14, IACHR 9 December 1994.

[156] International Commission of Jurists, *Human and Peoples' Rights in Africa and the African Charter*, International Commission of Jurists, Geneva: 1986, p. 34.

[157] *Civil Liberties Organization v. Nigeria* Communication No. 129/94, 9th Activity Report 1995-1996, available at www.achpr.org.

effect.[158] The African Commission therefore accepted that denunciation is possible subject to proper notice being given. It may be assumed that this is also the position with respect to the other OAU/AU human rights treaties.

In those situations where denunciation is accepted notwithstanding silence on the matter, customary international law requires notice, although unlike the VCLT, no definite period is indicated. According to the ICJ, the principle of good faith "requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity."[159] Similarly, the IACHR has stated that reasonable notice is required to protect the interests of the other contracting parties.[160] Art. 56(2) VCLT confirms this position but, in order to promote legal certainty, requires notice of no less than twelve months, this being the period usually encountered in multilateral conventions. Both customary international law and the VCLT disallow withdrawal with immediate effect.

It has previously been observed that the American human rights system places emphasis on the States' acceptance of procedural norms which subject them to the authority of supervisory mechanisms. Hence the IACHR has rejected attempts by States to withdraw their recognition of its binding jurisdiction, as it did with Peru.[161] Even so, had Peru proceeded with its denunciation the ACHR, it nevertheless could have chosen to remain an OAS Member, as proven by Trinidad and Tobago and Venezuela. Such a move, however, does not release a State from international scrutiny since it continues to be subject to the jurisdiction of the Inter-American Commission on Human Rights and bound by the OAS Charter and the American Declaration of the Rights and Duties of Man 1948.[162] It should be noted however that this option is not available in the European system. When Greece denounced the ECHR in 1969, it had to withdraw from the Council of Europe.[163] If such a course were contemplated today, significant difficulties would be encountered if the withdrawing State were also a member of the European Union (EU). Denunciation of the ECHR would jeopardise its continued EU membership, since a condition of membership is adherence to the

[158] *Ibidem* para. 12 and para. 17.

[159] *Nicaragua Case*, para. 63; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, pp. 94-96; *Gabčíkovo-Nagymaros Project Case*, para. 109. *See further* Brownlie, *supra* note 135, p. 621.

[160] *Ivcher Bronstein v. Peru*, paras. 52-53; *Constitutional Court v. Peru*, paras. 51-52.

[161] Pasqualucci, *supra* note 54, pp. 115-117. Unlike the ACHR, the IACHR Statute contains no denunciation clause.

[162] As stressed by the Inter-American Commission on Human Rights, *supra* note 4. The American Declaration, available at www.oas.org, is a source of human rights obligations for OAS Member States, especially those not part of the ACHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights*, (Advisory Opinion) Series A No. 10, IACHR 14 July 1989; T. Buergenthal, *The Inter-American System for the Protection of Human Rights*, [in:] T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford: 1985, p. 439, pp. 470-475, 484-487.

[163] Robertson & Merrills, *supra* note 11, p. 118.

ECHR,[164] a fact acknowledged by the United Kingdom's then-Lord Chancellor and Secretary of State for Justice, Jack Straw, in 2008.[165] The president of the European Court of Human Rights, Judge Dean Spielmann, reiterated this position in 2013.[166]

8. INTERNATIONAL INSTITUTIONS WITH A HUMAN RIGHTS REMIT

Many international institutions, including regional organisations, have a human rights dimension to their remit; their foundational treaties, or "constitutions", contain a human rights clause of greater or lesser specificity. Adherence to human rights, the rule of law and democratic values are among their stated guiding principles; some of these have evolved into sophisticated frameworks of laws and systems of supervision and enforcement, whereas others are still in their formative stages. Our discussion in this article is limited to organisations with international legal personality.[167] Free associations of States with no international personality, such as the Commonwealth,[168] are therefore excluded. Once again, this is not meant to be an exhaustive study of international institutions.

As is the case with human rights treaties, there is no uniform practice in relation to constituent instruments but, where the cessation of membership is expressly permitted, the requirements to be met can vary from institution to institution, although certain features, e.g. specifying periods of notice, settling of financial dues, and methods of withdrawal, are often shared.[169]

8.1. International institutions permitting withdrawal

Commencing with the League of Nations, which had a human rights dimension,[170] Art. 1(3) of the Covenant expressly provided for withdrawal subject to two years' notice

[164] *See* the "Copenhagen criteria" on EU accession adopted by the European Council in 1993, [1993] OJ C 230.

[165] *See supra* note 5.

[166] J. Rozenberg, *UK human rights convention exit ‚would be disastrous'* (4 June 2013) www.bbc.co.uk/news/uk-22754866 accessed 25 March 2014.

[167] *See generally* M. Shaw, *International Law* (6th ed.), Cambridge University Press, Cambridge: 2008, pp. 1296-1303.

[168] Despite the adoption of the Charter on 14 December 2012, available at: http://thecommonwealth.org/our-charter, (accessed 25 March 2014), the Commonwealth has not acquired a legal personality.

[169] Greig, *supra* note 20, pp. 849-850.

[170] Art. 22 and 23 of the Covenant of the League of Nations (adopted 28 June 1919, entered into force 1 October 1920), [in:] M.D. Evans (ed.), *International Law Documents*, (9th ed.), Oxford University Press, Oxford: 2009, p. 1. *See International Status of South-West Africa Case* (Advisory Opinion) [1950] ICJ Rep 128, p. 132; *Legal Consequences for States of the Continued Presence of South Africa in Namibia Case* (Advisory Opinion) [1971] ICJ Rep 16, paras. 45-53; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, p. 523, paras. 54-57 (Separate Opinion of Judge Cançado Trindade). *See* Brownlie, *supra* note 134, p. 554; Robertson & Merrills, *supra* note 11, p. 16.

and the withdrawing member fulfilling its obligations.[171] The insertion of a withdrawal clause was considered necessary as otherwise it would not have been legally possible.[172] Sixteen States withdrew from the League, including the Axis countries of Japan, Nazi Germany and Italy.[173]

Similar conditions exist under Art. 1(5) of the ILO Constitution, which was drafted contemporaneously with the League Covenant.[174] In 1977, the USA withdrew from the ILO (to return in 1980).[175]

Many of the constitutions of regional organisations contain withdrawal clauses. The EU's commitment to human and fundamental rights is expressly set out in the Treaty on European Union (TEU).[176] Even though the founding Treaties did not originally make provision for Member States' withdrawal, and the common opinion was that, given the EU's supranational nature, it was not permitted,[177] the amending Treaty of Lisbon allows Member States to withdraw. While such withdrawal is subject to complex negotiations (including the conclusion of an agreement to guide future relations), potentially discouraging Members from pursuing this path, it will usually take effect when said agreement enters into force or, alternatively, two years after formal notification.[178]

Under Art. 7 of the Statute of the Council of Europe any Member State may withdraw by notifying the Secretary General. Such withdrawal takes effect at the end of the

[171] On the latter condition, *see* P.J.N.B., *Termination of Membership of the League of Nations*, 16 British Yearbook of International Law 153 (1935).

[172] J.J. Burns, *Conditions of Withdrawal from the League of Nations*, 29 American Journal of International Law 40 (1935), pp. 40-41; Feinberg, *supra* note 17, pp. 193-94. *See further* K. Magliveras, *Withdrawal from the League of Nations Revisited*, 10 Dickinson Journal of International Law 25 (1991).

[173] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev. ed.), Routledge, London: 1997, p. 25.

[174] The ILO Constitution draws a connection with human rights even if that term is not used as such, Robertson & Merrills, *supra* note 11, p. 282; Swepston, *supra* note 46, pp. 93-95. According to F. Wolf, *Human Rights and the International Labour Organization*, [in:] Meron, *supra* note 162, p. 273, they "lie at the very heart of [the ILO's] mission".

[175] 72 American Journal of International Law 375 (1978). *See* K. Magliveras, *Membership in International Organisations*, [in:] J. Klabbers & A. Wallendahl (eds.), *Research Handbook on International Organisations*, Edward Elgar Publishing, London: 2011, pp. 84, 100.

[176] Art. 6 and 21 TEU, as currently in force. Under Art. 6(1) TEU, the Charter of Fundamental Rights became binding, while Art. 6(2) commits the EU to acceding to the ECHR; *see further* Art. 17(1) of Protocol No. 14 ECHR (adopted 13 May 2004, entered into force 1 June 2010). Adherence to democratic values is a condition precedent for membership, Art. 49 TEU. The European Court of Justice has repeatedly stated that fundamental rights, as set out in international treaties such as the ECHR, form part of EU Law's general principles, *see* A. Arnull et al., *Wyatt and Dashwood's European Union Law* (5th ed.), Sweet & Maxwell, London: 2006, pp. 257-83.

[177] Akehurst, *supra* note 23, p. 151; R.J. Friel, *Secession from the European Union: Checking out of the Proverbial "Cockroach Motel"*, 27 Fordham International Law Journal 590 (2003-2004), pp. 601-609.

[178] Art. 50 TEU. It is common knowledge that the British Conservative Party, part of the governing coalition, is flirting with exiting the EU. In January 2013, the Prime Minister, David Cameron, pledged to renegotiate the terms of EU membership and put the new agreement to a referendum if the Conservatives win the 2015 election, *Q&A: Tory row over an EU referendum* (16 May 2013) www.bbc.co.uk/news/uk-politics-22509588, accessed 23 March 2014.

financial year in which it is notified. As already mentioned, in 1969 Greece renounced its membership in order to pre-empt Art. 8 of the Statute, i.e. having the expulsion clause invoked against it.[179]

Despite doubts as to the international personality of the Commonwealth of Independent States (CIS),[180] one of its stated purposes relates to safeguarding human rights.[181] Membership in the CIS may be terminated with twelve months' notice.[182] In 2008, following an outbreak of hostilities with Russia, Georgia notified its intention to withdraw, which became effective in August 2009.[183]

The OAS Charter 1948 undertakes to adhere to human rights.[184] It permits denunciation upon written notification to the General Secretariat, withdrawal taking effect two years thereafter.[185]

In relation to Africa, the promotion and protection of human rights forms an integral part of the AU's functions.[186] According to Art. 31(1) of the Constitutive Act, withdrawal requires a year's notice, as was the case under Art. 32 of the Charter of OAU, the AU's predecessor. In 1984 Morocco withdrew from the OAU in protest of the admission of the Sahrawi Arab Democratic Republic.[187]

African sub-regional organisations, such as ECOWAS,[188] the Common Market for Eastern and Southern Africa (COMESA),[189] the Inter-Governmental Authority on

[179] *See generally* Magliveras, *supra* note 110, pp. 79-80.

[180] According to Art. 1 and 7 of the CIS Charter, International Legal Materials, vol. 34 (1995), p. 1282, it is not a supranational entity but an institution comprising most of the former USSR republics. Given that it has an institutional structure with organs, the better view argues that it possesses legal personality, P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed.), Sweet & Maxwell, London: 2009, p. 161; Shaw, *supra* note 167, p. 241.

[181] Art. 2, 3 and 4 CIS Charter.

[182] *Ibidem*, Art. 9.

[183] Sands & Klein, *supra* note 180, p. 161 note 12; Ministry of Foreign Affairs of Georgia, 'Georgia's withdrawal from CIS', 19 August 2008, at http://georgiamfa.blogspot.gr/2008/08/georgias-withdrawal-from-cis.html. In March 2014 Ukraine said that it would review its CIS membership following Crimea's annexation by Russia, *Ukraine says it could quit Russia-led political bloc*, 19 March 2014, www.reuters.com, both accessed 2 April 2014.

[184] Art. 106 OAS Charter 119 UNTS 3.

[185] *Ibidem*, Art. 143.

[186] *See in particular* Art. 3(h) and 4(m) of the Constitutive Act; E. Baimu, *The African Union: Hope for Better Protection of Human Rights in Africa?*, 1 African Human Rights Law Journal 299 (2001).

[187] K. Magliveras & G. Naldi, *The African Union*, Kluwer Law International, The Hague: 2009, para. 45.

[188] Art. 4(g) of the Revised Treaty on the Economic Community for West African States 1993 International Legal Materials, vol. 35 (1996), p. 660, recognizes the protection of human rights as a fundamental principle. *See Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008, paras. 41-42, www.chr.up.ac.za, accessed 25 March 2014.

[189] Art. 4(e)-(h) of the Treaty on the Common Market for Eastern and Southern Africa 1994, International Legal Materials, vol. 33 (1994), p. 1067 enshrine the principles of human rights, democracy and the rule of law. Lesotho, Mozambique, Tanzania and Namibia have left COMESA, Sands & Klein, *supra* note 180, p. 262.

Development (IGAD)[190] and the East African Community (EAC)[191] list human rights as a core principle. They all accept withdrawal with one year's notice.[192] This is also the case with the SADC.[193] Recent events in relation to the SADC are of interest. Zimbabwe was reported to have indicated its desire to pull out[194] following the adverse ruling by the SADC Tribunal concerning Zimbabwe's controversial land reform policy.[195] However, in a remarkable setback for the international rule of law, calling into question its very commitment to guiding principles, the SADC suspended *de facto* the operations of the Tribunal at its 2010 Summit over Zimbabwe's refusal to abide by its rulings pending a review of its role. Despite resolving in 2012 to establish a new Tribunal that would not be accessible to individuals, this has still not happened.[196]

The Organization of Islamic Cooperation (OIC) also undertakes to promote human rights in its Charter.[197] The OIC Charter requires one year's notice of withdrawal.[198] The Andean Charter for the Promotion and Protection of Human Rights 2002 commits the Andean Community to observe fundamental freedoms.[199] The Andean Community is noteworthy as denunciation results in the immediate termination of membership.[200] Finally, the South American Union of Nations supports the preservation of democratic

[190] Art. 6A(f) of the Agreement establishing the Inter-Governmental Authority on Development (IGAD) 1996, www.igad.int/etc/agreement_establishing_igad.pdf, accessed 25 March 2014, lists human and peoples' rights as central principles.

[191] Art. 6(d), 7(2) of the East African Community Treaty 1999, www.eac.int, accessed 25 March 2014, lay down the principles of good governance, human rights, democracy and the rule of law.

[192] Art. 91(1) ECOWAS Treaty, Art. 191(1) COMESA Treaty, Art. 22(a) IGAD Agreement, Art. 145(1)(b) EAC Treaty respectively. The latter additionally requires a resolution by the parliament of the withdrawing State. In December 2000 Mauritania's withdrawal from ECOWAS became effective, Sands & Klein, *supra* note 180, p. 258, note 38.

[193] Art. 34(1) of the Treaty on the Southern African Development Community 1992 (as amended 2001), www.sadc.int, accessed 25 March 2014. Seychelles withdrew in 2004, Viljoen, *supra* note 74, p. 492, note 51, only to rejoin in 2008. For the commitment to human rights, democracy and the rule of law, *see* Art. 4(c) SADC Treaty.

[194] *See Fick and Another v. Republic of Zimbabwe* SADC (T) Case No 01/2010 (July 2010), www.saflii.org/sa/cases/SADCT/2010/2.pdf, accessed 25 March 2014.

[195] *Mike Campbell (Pvt) Ltd. et al v. The Republic of Zimbabwe* SADC (T) Case No 2/2007 (November 2008), www.saflii.org/sa/cases/SADCT/2008/2.pdf accessed 25 March 2014. *See* G.J. Naldi, *Mike Campbell (Pvt) Ltd. et al v. The Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty*, 53 Journal of African Law 305 (2009).

[196] *See* www.sadc.int/about-sadc/sadc-institutions/tribun, accessed 25 March 2014.

[197] Art. 1(14), 2(6), 15 of the Revised Charter of the Organization of Islamic Cooperation 2008, www.oic-oci.org, accessed 25 March 2014. In 2011 the Statute of the Independent Permanent Human Rights Commission was adopted pursuant to Arts. 5 and 15 thereof, International Legal Materials, vol. 50 (2011), p. 1152.

[198] Art. 35(1) OIC Charter. Financial dues must be settled in accordance with Art. 35(2) thereof.

[199] The Charter, a legally non-binding instrument, was signed on 26 July 2002, www.refworld.org, accessed 25 March 2014.

[200] Art. 153 of the Andean Subregional Integration Agreement (Cartagena Agreement codified) approved 25 June 1997, www.worldtradelaw.net/fta/agreements/cartagenafta.pdf, accessed 25 March 2014.

values and the promotion of human rights.[201] Member States may terminate their participation by giving six months' notice.[202]

8.2. International institutions silent on withdrawal

The most prominent international organisation in this category is the United Nations, the Charter of which contains numerous provisions referring to human rights and fundamental freedoms. Their promotion is stated as one of its missions[203] and has been described as a "core purpose".[204] The subsequent development of the expansive UN human rights system, both institutional and normative, is ultimately based on the brief references in the UN Charter.[205]

The UN Charter does not contain an exit clause. It appears that this was a deliberate ploy to emphasize the UN's objective of perpetuity and universality.[206] Moreover, it reflected a conscious decision to avoid one of the pitfalls of the League of Nations, which explicitly provided for cessation of membership. As has been argued, "[i]n practice, the United Nations has studiously avoided validating a right of exit."[207] Nonetheless, certain commentators maintain that withdrawal is possible since it was either the considered intention of the parties[208] or can be implied.[209] No less an authority than Lauterpacht expressed the view that a right of cessation of membership was preserved[210] on the basis of the declaration on withdrawal adopted during the drafting stage, which referred to "withdrawals … becom[ing] inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace […]"[211] Another authority writes that "despite the absence of a 'withdrawal' clause, it may be assumed that legally a state can withdraw subject to its fulfillment of any outstanding obligations."[212]

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[201] Art. 14 of the Constitutive Treaty of the South American Union of Nations (adopted on 23 May 2008, entered into force on 11 March 2011) www.unasursg.org, accessed 25 March 2014.

[202] *Ibidem*, Art. 24.

[203] Art. 1, 55 and 56 UN Charter. *See* Robertson & Merrills, *supra* note 11, pp. 25-26. In the Namibia Case, p. 57, the ICJ opined that *apartheid* constituted "a denial of fundamental human rights" amounting to "a flagrant violation of the purposes and principles of the Charter."

[204] S. Chesterman, T.M. Franck, D.M. Malone, *Law and Practice of the United Nations: Documents and Commentary*, Oxford University Press, Oxford: 2008, p. 448.

[205] Brownlie, *supra* note 135, pp. 555-58; Shaw, *supra* note 167, p. 278; A. Cassese, *International Law*, (2nd ed.), Oxford University Press, Oxford: 2005, pp. 331-333.

[206] Chesterman, Franck & Malone, *supra* note 204, p. 5.

[207] Akehurst, *supra* note 23, p. 145. However, it seems that the UN Charter's drafters, while wishing to discourage withdrawal, did not wish to proscribe it, Greig, *supra* note 20, pp. 855-856; J. Klabbers, *An Introduction to International Institutional Law*, (2nd ed.), Cambridge University Press, Cambridge: 2009, pp. 84-85.

[208] Feinberg, *supra* note 15, pp. 197-202.

[209] Aust, *supra* note 141, pp. 233-234; Aust, *supra* note 142, pp. 198, 206.

[210] Lauterpacht, *supra* note 10, p. 411.

[211] *See* Documents of the United Nations Conference on International Organizations, vol. 7, 1945, p. 273.

[212] Sands & Klein, *supra* note 180, p. 22. *See also* D.J. Harris, *Cases and Materials on International Law*, (7th ed.), Sweet & Maxwell, London: 2010, p. 699.

However it is difficult to draw lessons from the only existing precedent: Indonesia's purported withdrawal in 1965, only to return the following year.[213] Yet in light of the preponderance of expert opinion the conclusion must be that withdrawal from the UN is permissible only in extreme circumstances.

The Organisation for Security and Cooperation in Europe (OSCE) is an atypical multilateral institution because its foundational documents, such as the Paris Charter, are not in fact treaties.[214] Despite the enduring doubts about its international personality,[215] the plurality of its organs and their wide-ranging activities support the better view that it is a "full-fledged international organisation."[216] The promotion of human rights, democracy and the rule of law is one of the OSCE's essential functions. No provision for withdrawal can be found in its constitutive instruments, which at any rate are not the type to envisage withdrawal. Interestingly enough, the draft OSCE Charter, which was circulated by the Irish Chairmanship in June 2012, is completely silent on secession even though it endows the OSCE with international legal personality and legal capacity.[217]

The Association of South East Asian Nations (ASEAN) constitutes another notable exception in this regard. Under the ASEAN Member States commit themselves to strengthen democracy and the rule of law, and to respect and promote human rights and fundamental freedoms.[218] The ASEAN Charter does not contain a denunciation clause. However, given the "sovereignty-based conception" of international law fiercely adhered to by Asian States it seems likely that such a right is presumed.

9. ANALYSIS AND OBSERVATIONS

The legal position with regard to international institutions can be said to be in all important respects identical to that concerning human rights treaties. Where the constituent instruments permit withdrawal it is clear that Member States are entitled to invoke that right, subject to satisfying any associated conditions. If those conditions are not met the legal validity of the purported withdrawal is open to serious doubt and is

[213] Greig, *supra* note 20, pp. 856-57; Akehurst, *supra* note 23, pp. 146-149. According to E. Schwelb in *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 American Journal of International Law 661 (1967), Indonesia's withdrawal should properly be considered a temporary measure.

[214] Charter of Paris for a New Europe 1990, International Legal Materials, vol. 30 (1991), p. 190.

[215] M. Sapiro, *Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation*, 89 American Journal of International Law 631(1995).

[216] Sands & Klein, *supra* note 180, p. 203.

[217] *See* CIO.GAL/68/12, 12 June 2012, www.osce.org/mc/97950, accessed 27 March 2014.

[218] Art. 1(7) and 2(i) of the Charter of the Association of South East Asian Nations (adopted 20 November 2007, entered into force on 15 December 2008), available at: www.asean.org/asean/asean-charter. On 19 November 2012, the ASEAN Human Rights Declaration, a hortatory document, was adopted www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration, both accessed on 28 March 2014.

in all likelihood illegal.[219] With respect to constituent instruments which are silent on the issue of withdrawal, a consensus cannot be found among international lawyers with respect to its permissibility. One body of opinion adheres to the belief, based principally on notions of state sovereignty, that it is either an inherent or an implied right:[220] "*Prima facie* a state must be deemed to be free to withdraw unless it has surrendered that right expressly or impliedly."[221]

But it has been counter-argued that, given the constituent treaties' nature of permanence and universality, withdrawal is illegal and void unless it is plain that such a right was intended.[222] Others have sought to steer a middle path. Klabbers has pointed out that withdrawal from international organisations is likely to be more complicated than withdrawal from treaties, and that Art. 56 VCLT may be of limited assistance and should be simply considered a guideline, while negotiations conducted in good faith between the parties offer the least problematical solution.[223]

Ultimately, an invalid termination of membership can be disregarded and the State in question may continue to be considered a member.[224] At such a stage, the dispute is unlikely to be amenable to resolution on solely legal grounds.

10. WHY ARE STATES TURNING AWAY FROM THEIR HUMAN RIGHTS OBLIGATIONS?

At this point an attempt will be made to draw attention, briefly, to the legal and quasi-legal concerns that may be motivating democratic societies – new, limited and established – to consider taking steps as radical as extricating themselves from international human rights obligations. Of course, this is not solely a legal issue but includes other disciplines which are outside the scope of this article.[225] It is certainly partially attributable to a "neo-con" *Weltanschauung*. International supervisory bodies are either perceived as activist, guilty of *excès de pouvoir*, and intervening in areas essentially within the domestic jurisdiction of States; or are considered trivial, lacking in democratic accountability and interfering with democratic choices.

In the United Kingdom, a continued and voluble unhappiness prevalent in the right-of-centre and Europhobic circles at the adverse decisions handed down by the European Court of Human Rights[226] led the Government, when the UK held the rotating

[219] This is an opinion of long-standing, *see* Burns, *supra* note 173; P.J.N.B., *supra* note 172.

[220] For a summary of such views, *see* Feinberg, *supra* note 15, pp. 212-214.

[221] Sands & Klein, *supra* note 180, p. 554.

[222] Akehurst, *supra* note 23, p. 149; Feinberg, *supra* note 15, pp. 215, 218. *See also* Lauterpacht, *supra* note 10, p. 938.

[223] Klabbers, *supra* note 207, pp. 85-86.

[224] Feinberg, *supra* note 15, p. 218.

[225] For an international relations perspective, *see generally* Helfer, *supra* note 7.

[226] *See e.g.* the Report by think-tank Policy Exchange in 2011, *UK should cut links to European Court of Human Rights* (7 February 2011) www.bbc.com/news/uk-12338931; *Ministers angry at European whole-life*

Chair in the Council of Europe's Committee of Ministers (November 2011 – May 2012), to propose the adoption of the Brighton Declaration, calling for reform of the Court.[227] In the Netherlands, the fact that a number of court decisions invalidated domestic legislation because it violated human rights treaties led officials to call for withdrawal from the ICCPR.[228] In the case of Caribbean States, restrictions on imposing the death penalty, in association with the "death row" phenomenon in particular, were at the core of their denunciations.[229] Caribbean countries are among those asserting that matters of criminal and penal policy, including the legality of penalties, are properly internal issues.[230] Peru's denunciation was provoked by its refusal to comply with a ruling of the IACHR.[231] Guyana's denunciation appears to be prompted by similar concerns.[232] Venezuela justified its denunciation on the grounds that the IACHR exceeded its jurisdiction and misapplied the ACHR.[233] Frustration may be exacerbated by the fact that reservations are of limited use with regard to human rights treaties. In

tariffs ruling (9 July 2013) www.bbc.co.uk/news/uk/23245254. Cases particularly infuriating Conservative politicians include *Hirst v. United Kingdom* (No 2) (Application No. 74025/01) Grand Chamber, ECHR 6 October 2005 on the right of prisoners to vote, and *Othman (Abu Qatada) v. United Kingdom* (Application No. 8139/09) Fourth Section, ECHR 17 January 2012 on the deportation of terrorist suspects, both available at: http://hudoc.echr.coe.int; *see further, UK may withdraw from European rights convention over Abu Qatada* (24 April 2013) www.theguardian.com/law/2013/apr/24/european-rights-convention-abu-qatada, all accessed 26 March 2014.

[227] High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, adopted 19-20 April 2012, www.coe.int. *See further* V. Miller & A. Horne, *The UK and Reform of the European Court of Human Rights*, House of Common Library, Standard Note: SN/IA/6277, 27 April 2012, www.parliament.uk, both accessed 25 March 2014.

[228] A.W. Heringa, *Judicial Enforcement of Art. 26 of the International Covenant on Civil and Political Rights in the Netherlands*, 24 Netherlands Yearbook of International Law 139 (1993), p. 170.

[229] *Pratt and Morgan v. Jamaica* (1989) Communication Nos 210/1986 and 225/1987 UN Doc. CCPR/C/35/D/210/1986, and *Kennedy v. Trinidad and Tobago* (2002) Communication No. 845/1999 UN Doc. CCPR/C/74/D/845/1998; see UNCHR, *Report by Special Rapporteur, Asma Jahangir, on Extrajudicial, Summary or Arbitrary Executions, Mission to Jamaica* UN Doc. E/CN.4/2004/7/Add.2 para. 55 (2004). In the case of Trinidad and Tobago the situation appears to have been exacerbated by the HRC decision in *Kennedy v. Trinidad and Tobago, ibidem*, that the reservation to the OPT was incompatible with its object and purpose, and therefore the Court was not precluded from considering the communication; *see* Individual Dissenting Opinion of Messrs Ando, Bhagwati, Klein and Kretzmer, and Individual Opinion of Ms Wedgwood in *Evans v. Trinidad and Tobago* (2003) Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000. *See also* R. Goodman, *Human Rights Treaties, Invalid Reservations and State Consent*, 96 American Journal of International Law 531 (2002), p. 532; L.R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 Columbia Law Review 1832 (2002).

[230] Commission on Human Rights, Letter dated 23 April 2003 from Saudi Arabia addressed to the Chairperson of the fifty-ninth session of the Commission on Human Rights, *Promotion and Protection of Human Rights: Status of the International Covenants on Human Rights*, UN Doc. E/CN.4/2003/G/84 (24-4-2003).

[231] Tyagi, *supra* note 6, pp. 148-149.

[232] *Ibidem*, pp. 173-174

[233] *See* Mejía-Lemos, *supra* note 4.

order to preserve the integrity of these treaty regimes it may be necessary to offer States greater room for manoeuvre, or a margin of appreciation.[234]

A final argument deserving some consideration is that withdrawal from human rights treaties and/or from international institutions with a human rights remit and no withdrawal procedure could be permitted when it is sanctioned by the citizenship in a free and fair referendum, or by means of another manifestation of the principle of self-determination of peoples. This argument is based on the supposition that the decision of the executive (government) to participate in such instruments and/or international institutions, subsequently ratified by the legislative (parliament), cannot be binding *ad infinitum*, especially if significant political and/or socio-economic changes have taken place. The population of the withdrawing State should be free to determine, for example, that its Constitution and other relevant domestic legislation afford a better level of protection, that the existing domestic supervisory mechanism is effective and well-respected, and that adequate sanctions can be ordered against those violating fundamental freedoms. To that extent, the population should be allowed to determine that the domestic mechanism is superior to the supervisory system envisaged in the respective international treaty/institution.

CONCLUSIONS

In principle the denunciation of treaties may be considered an exercise of States' sovereign rights, provided the VCLT conditions and the relevant treaty stipulations are met. This right of withdrawal extends to human rights treaties and international institutions if they contain denunciation clauses or if it is evident that denunciation is implied and/or accepted by contracting parties. But as the HRC has observed, human rights treaties are of an exceptional nature and therefore deserve special consideration. They do "not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted" even in the absence of a denunciation clause.[235] The evolution of international human rights law since the VCLT means that its pertinent provisions should now be read in light of the peremptory nature of human rights law.[236] A traditional positivist would no doubt reject such a stance, maintaining that the treaty's nature is immaterial and that the sovereign rights of States cannot be constrained.

The conclusion reached by this article is that, in light of the evidence considered above, the presumption applicable to human rights treaties with no denunciation clause is that they do not permit unilateral withdrawal. This is most evident in relation to treaties

[234] *Cf.* the Brighton Declaration calling for greater prominence for the margin of appreciation and the principle of subsidiarity, both of which have found expression in Art. 1 of Protocol No. 15 ECHR, adding a new recital to the ECHR's preamble.

[235] General Comment 26, *supra* note 144.

[236] According to the ICJ, the meaning of legal concepts "follow the evolution of the law and […] correspond with the meaning attached to the expression by the law in force at any given time", *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep 3, para. 77; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213, paras. 63-66.

effecting institutional changes to the supervisory mechanisms, since a return to the previous situation is a practical impossibility and populations should not be left without mechanisms of oversight.[237] But to remove any ambiguity it would seem best if clauses were inserted expressly disallowing denunciation or withdrawal. This would have the benefit of certainty. Surely it would be preferable to include clauses expressly prohibiting denunciation if that was the parties' intention. The reluctance of States to express a view on this question is to be regretted,[238] and this proposal would overcome this problem. If clauses prohibiting reservations are incorporated, there seems to be no good reason why explicit non-denunciation clauses could not be included. Of course, it must be acknowledged that the final texts of treaties are often the result of compromises and that troublesome issues, e.g. denunciation, are sometimes simply fudged so as not to derail the entire process.

With respect to international organisations the conclusion is the same. Where the issue of termination of membership has not been addressed, in light of the nature of these institutions it should be considered illegal and void unless it is evident that such a right was manifestly intended.

An illegal denunciation will have no validity in law[239] and will entail international responsibility. It must be acknowledged, however, that this raises a practical difficulty. A State with an abiding and deep commitment to the rule of law, and concerned about its international standing, will not take the step of denunciation lightly, particularly the cessation of membership in an international or regional institution, as this would be negatively perceived. It has been said that Greece's withdrawal from the Council of Europe had the effect of isolating it internationally and strengthened the democratic resistance.[240] But it cannot be assumed, even in this day and age, that States will be dissuaded from taking drastic action if they perceive their vital national interests to be at stake or if, as in the Caribbean countries where retention of the death penalty is popular, they claim the full support of public opinion. In the Inter-American system shows of strength have sometimes taken place between States and human rights supervisory organs, giving rise to periods of tension. Such a sensitive state of affairs existed with regard to the IACHR judgments on Peru "when its very institutional fabric appeared threatened."[241] However, the rule of law prevailed. Relations between Peru and the IACHR normalized and its obligations under the Inter-American human rights system were accepted.[242] Despite the

[237] F. Megret, *Nature of Obligations*, [in:] D. Moeckli, S. Shah & S. Sivakumaran (eds.), *International Human Rights Law*, (2nd ed.), Oxford University Press, Oxford: 2014, pp. 96, 114.

[238] Greig, *supra* note 20, p. 498.

[239] *Ibidem*, p. 497.

[240] Robertson & Merrills, *supra* note 11, p. 138.

[241] Address by IACHR President Judge Cançado Trindade, 13 September 2001, Annual Report of the Inter-American Court of Human Rights, 2001, vol. 2, OEA/Ser.L/V/III.54, Appendix LVII, p. 1217 (18-2-2000).

[242] In January 2001 Peru submitted itself to IACHR jurisdiction and competence, while its Justice Minister deplored the previous regime's action purporting to withdraw from international obligations, Annual Report, *ibidem*, Appendices XLIX & L, pp. 1169 & 1171. It appears that withdrawal from the ACHR may have been perceived as too costly politically, Sokol, *supra* note 86, p. 185.

positive outcome in this instance, it may be noted that more recently Venezuela, under eccentric leadership, took the plunge and denounced the ACHR.

Amending the treaty to meet some of the concerns of unhappy States Parties offers a possible solution. Alternatively, a less complex procedurally but politically more sensitive path would be to implement reforms without the need to secure treaty amendment, arguably the basis of the Brighton Declaration. Ultimately, however, it may be in everyone's best interests to discharge recalcitrant States from their obligations.[243] But it is also worth recalling that under customary international law, denunciation does not release States cleanly from all treaty obligations. Given that many such rights have achieved the status of customary law and/or peremptory norms of international law, denunciation in such instances may well be an empty gesture.

Denunciation of a human rights treaty or termination of membership in an international organisation is not a step to be taken lightly, as it is certain to attract deserved hostile criticism.[244] It might at the very least constitute "a political disaster."[245] That States should openly flirt with repudiation of their human rights obligations, particularly for short-term domestic political gain, is highly regrettable. It should call into question their moral standing, weakening their ability to lead by example and project soft power, and undermining diplomatic efforts to inculcate good practice in other less fortunate States, leaving themselves open to charges of hypocritical posturing.[246] As Judge Spielmann has observed, "[a]ny member state who would leave the Council of Europe, who would denounce the Convention, would lose its credibility when it comes to promoting human rights also in different parts of the world."[247]

[243] Greig, *supra* note 20, p. 855; Klabbers, *supra* note 207, p. 84.

[244] Bates, *supra* note 84, pp. 759-761.

[245] *Human rights row: UK quitting would be disaster – ECHR head* (14 January 2014) www.bbc.co.uk/news/uk-politics-25726319, accessed 25 March 2014.

[246] *Cf.* the Memorandum issued on 10 October 2013 by the Council of Europe Commissioner for Human Rights, warning the United Kingdom about, *inter alia*, the possible negative consequences on its reputation and influence were it to withdraw from the ECHR, available at www.coe.int, accessed 3 April 2014.

[247] *See supra* note 166.