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THE LATEST (AND HOPEFULLY LAST) BOAT TRAGEDY. IS THERE A RIGHT TO BE RESCUED AT SEA?

Is there a right to be rescued at sea? A skeptical view

By EFTHYMIOS PAPASTAVRIDIS on Jun 23, 2014 •

1 Introductory remarks The recent tragic and deadly sea incidents, including the sinking of a boat with 500 people off the coast of Lampedusa on 3 October 2013[1] and of another boat with more 200 people on 12 May 2014 [2] mark the significance and urgency of the problem of migration by sea. Indeed, thousands ...

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The latest (and hopefully last) boat tragedy. Is there a right to be rescued at sea?

By QIL-QDI on Jun 23, 2014 •

Introduced by Andrea Caligiuri and Irini Papanicolaopulu in the aftermath of the Lampedusa boat tragedy of 3 October 2013, the President of the European Commission, José Barroso, stated: "[T]he scale of the human tragedy in the Mediterranean means we have to act now. The European Union cannot accept that thousands of people die at our ...

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By DEBORAH RUSSO on Jun 9, 2014 •

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By GUIDO ACQUAVIVA on Jun 1, 2014 •

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By DOV JACOBS on Jun 1, 2014 •

1 Introduction In February 2013, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) acquitted the former chief of the general staff of the Yugoslav army, Momčilo Perisic, of aiding and abetting crimes committed in Sarajevo and Srebrenica [1] The Appeals Chamber found that the Trial Chamber had erred in not ...

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Procedural obligations and good faith: the case of the human rights treaties

Deborah Russo *

1. *The procedural limits to withdrawal deriving from good faith: some preliminary remarks*

There are not many grounds on which to challenge the conclusions discussed by Timothy Meyer and Tom Coppen on the topic of the unilateral withdrawal from treaties. However, inspired by the practice of human rights treaties', certain aspects merit further consideration. Thanks to some noteworthy pronouncements by their monitory bodies this recent practice provides us with a fortunate perspective in which to analyse the issue.

In its 1999 resolution on the continuity of obligations under international human rights treaties, the UN High Commissioner for Human Rights highlighted that the declarations of withdrawal appended to the human rights treaties amounted, in the majority of cases, to an attempt to escape the judicial control.¹

The most recent practice supports this finding. In 2012, the Government of Venezuela gave notice of its intention to withdraw from the American Convention on Human Rights, with the aim 'to distance itself from the current perverted practices of the Organs of the Inter-

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¹ The resolution, while recognising that the withdrawal from a human rights mechanism may or may not be unlawful under the treaty in question, noted that in practice denunciation only occurred 'following a determination of violation of the relevant treaty commitment by the mechanism in question' (OHCHR, 'Continuing of obligations under international human rights treaties' Sub-Comm Res 1999/5, 25 August 1999).

American System of Human Rights'.² In its view, the Inter-American Commission and the Inter-American Court were engaging in political interventionism by ruling on the domestic legislation's compliance with the Inter-American Convention, as interpreted by its organs (the so-called 'control de convencionalidad'), thereby exceeding their subsidiarity role.³

One year later, the UK government also considered the possibility of withdrawing, on a temporary basis, from the European Convention on Human Rights in a bid to resolve the Abu Qatada political crisis derived from the Court of Strasbourg's ruling against the deportation of terrorist suspects at risk of torture.⁴

The State's choice of withdrawing from a human rights treaty or, more specifically, from the judicial provisions of it, certainly has heavy consequences for the victims of human rights violations. By impairing the victims' right to access international bodies, they undermine their last chance of protection. In fact, the human rights treaties' systems of judicial control play an essential role in giving substance to the international commitment of the States.

It is of course true that, as a rule, the duty of good faith does not impair the state's ability to withdraw from a treaty that provide for denunciation. In fact, the contracting parties' will, codified in the treaty provisions, constitutes the most important point of reference of the law of treaties.

However, the treaties do not stand in a vacuum. Certain general rules govern the most important stages of their life, from negotiation to termination.

Such rules are not only anchored in the principle of the unilateral will of States. There are certain general interests that impact the law of treaties, by imposing additional burdens.

² The entire text of the note is available at the website <www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PD>.

³ See D Germán Mejía-Lemos, 'Venezuela's Denunciation of the American Convention on Human Rights' (2013) 17 ASIL Insights, available at the website <www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights>.

⁴ The Home Secretary, Theresa May, declared that the Government was exploring various options, including 'leaving the jurisdiction of the Court altogether' (see <www.theguardian.com/law/2013/jun/04/uk-human-rights-withdrawal-political-disaster>).



Some of these burdens stem from the duty of good faith, which requires the Parties to take into consideration the other contracting parties' interests.⁵

Indeed, even the most rigid voluntarist approach considers that there would not be international cooperation without preserving the contracting parties' reciprocal reliance on the observance of law.⁶

However, the founding premise of the duty of good faith is much debated. While according to some, it expresses an autonomous rule of general international law,⁷ others deny its legal nature and refer to it as a moral duty.⁸

Under a different perspective, the duty of good faith serves as a general interpretative parameter that transversally integrates the law of treaties in order to assess the States' behaviour toward the other parties.⁹ This view also applies to the termination of treaties and explains why a denunciation clause inserted into a treaty does not lead a State to arbitrarily relinquish its other contractual obligations. There are certain legal requirements implied in such clauses that integrate the treaty, notably at the procedural level.¹⁰

In the particular case of the human rights treaties, the duty of good faith also involves the legitimate expectations of individuals, since they are the ultimate beneficiaries of the treaty regime.

The incidence of limitations on the human rights treaties' withdrawal will separately be discussed in three different situations in the following sections: the withdrawal from treaties containing a denunciation clause; the withdrawal from the optional jurisdictional clauses and the withdrawal from treaties that are silent about denunciation.

⁵ Arts 26 and 31 of the Vienna Convention on the law of treaties (adopted 23 May 1969, entered into force 1 January 1980) 1155 UNTS 331 (hereinafter Vienna Convention) confirm its operation in the execution and interpretation of the treaty.

⁶ J Jellinek, *Die rechtliche Natur der Staateverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Hölder 1880) 62.

⁷ A M Stuyt, 'Good and Bad Faith' (1980) *Netherlands Intl L Rev* 54.

⁸ G Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 *Recueil des Cours de l'Académie de Droit International* 290.

⁹ A Cassese, *Il diritto internazionale nel mondo contemporaneo* (Il Mulino 1984) 177.

¹⁰ A Ciampi, 'Invalidity and Termination of Treaties and Rules of Procedure' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011); L Sbolci, *Obblighi di procedura nell'estinzione dei trattati* (CEDAM 2008).

2. *The withdrawal from treaties containing a denunciation clause: the general value of notice as expression of good faith*

The majority of the human rights treaties contain provisions providing for withdrawal, which establish the duty to give notice to other contracting parties a certain time in advance.¹¹

During the notice period, the withdrawal does not produce any substantial effect on the rights and obligations stemming from the treaty. In other words, the efficacy of the treaty is not affected and the State retains the responsibility for any violation committed prior to or during notice.

The obligation to provide notice is also to be found in Article 56, paragraph 2, of the Vienna Convention on the law of treaties in cases where, notwithstanding the silence of the treaty, the power of withdrawal can be inferred from the intent of the Parties or the nature of the treaty. Therefore, the duty to give notice is part of a general rule of international law that, as underlined by the International Court of Justice, is based on the obligation to act in good faith.¹²

Arguably, given the general rule of notice, should a particular clause on denunciation be silent about it, the duty to provide notice is implied in the clause, unless there is an express indication to the contrary.

The notice serves two useful purposes.

First, it allows the parties the possibility of negotiating modifications of the treaty, revealing that the termination of the treaty is not the necessary outcome of denunciation. In accordance with the duty of good faith, the Parties are obliged to make an effort to negotiate an alternative solution to withdrawal.

¹¹ See, for example, art 78 of the American Convention on Human Rights that states: 'the States Parties may denounce this Convention at the expiration of a five-year period starting from the date of its entry into force by means of notice of denunciation given one year in advance and addressed to the OAS Secretary-General'. Similar provisions are contained, for example, in the European Convention on Human Rights, the Convention on the Rights of the Child and the Convention against Racial Discrimination.

¹² *Interpretation of the Agreement of 25 March 1951 between the WTO and Egypt* (Advisory opinion) [1980] ICJ Rep 94, para 47; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and admissibility) [1984] ICJ Rep 419, para 63.



Second, the contracting parties are obliged to respect the treaty prior and during the notice period and are accountable for any violation committed along this time.¹³ The responsibility for any violation committed before the end of notice survives the withdrawal and can be invoked even after the State has terminated its participation to the treaty.

Therefore, the requirement of notice serves as a deterrent by preventing States from using the exit clauses to avoid accountability for past violations.¹⁴

The Human Rights Committee and the Inter-American Court of Human Rights have applied this rule in some cases regarding Jamaica, Guyana and Trinidad and Tobago. The first two States denounced the Optional Protocol to the International Covenant on Civil and Political Rights respectively in 1997 and in 1999, while Trinidad and Tobago denounced simultaneously the same Protocol and the American Convention on Human Rights in 1998. The reason behind their withdrawals was the rejection of the jurisprudence on the 'death row phenomenon' according to which the prolonged detention on death row constitutes of itself, cruel and inhuman treatment. In the legal systems of those States, the delays in judicial process were endemic and systematically caused violations of human rights of the prisoners waiting on death row.

Against the communications regarding these violations, the States contested the jurisdiction invoking the denunciation, while both the Human Rights Committee and the Inter-American Court retained their competence on the ground that the communications had been submitted before the time of notice elapsed.¹⁵

¹³ Art 12, para 2 of the Optional Protocol of the International Covenant on Civil and Political Rights reads as follow: 'Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation'.

¹⁴ L R Helfer, 'Terminating Treaties' in D B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012).

¹⁵ See, for example, UNCHR *Anthony McLeod v Jamaica* Communication n 734/1997 (3 June 1998) UN Doc CCPR/C/59/D/734/1997, para 9. For a comment, see N Schiffrin, 'Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights' (1998) 92 AJIL 563. As to the Inter-American Court of Human Rights see *James et al Case*, Provisional Measures regarding the State of Trinidad and Tobago (28 February 2005).



3. *The withdrawal from the optional jurisdictional clauses*

The Inter-American Court of Human Rights and the European Court of Human Rights affirmed that the declarations of acceptance of the jurisdiction, notwithstanding their optional nature, play an essential role in the system of human rights treaties.¹⁶

The difference between the international settlement of human rights cases and the peaceful settlement of international disputes involving purely interstate litigation is that the former grants protections for individuals against States. The right to access justice is one of the non-derogable human rights and cannot be separated from the other treaty rights, since they functionally are interdependent and form a whole system of protection.¹⁷ Hence, the contracting States cannot take advantage of the same amount of discretion in revoking the jurisdiction of human rights Courts as they do in the context of the ICJ under Article 36, paragraph 2 of its Statute.

What is of essential importance in the reasoning of the human rights treaty bodies is the preservation of the individuals' interests as that constitutes the very object and scope of the treaty. Under this perspective, the practice supports what Timothy Meyer has stressed about the possible limitations of withdrawal from jurisdictional commitments in cases where they are 'central to the overall purpose of the treaty'.

In the *Bronstein* and *Constitutional Tribunal* cases, the Inter-American Court spelt out that

'No analogy can be drawn between the State practice detailed under article 36(2) of the Statute of the ICJ and acceptance of the optional clause concerning recognition of the binding jurisdiction of this Court, given the particular nature and the object and purpose of the American Convention.'¹⁸

¹⁶ ECtHR, *Loizidou v Turkey* (Preliminary objections) (1995) Series A no 310, paras 83-85; IACtHR, *Ivcher Bronstein* (Jurisdiction) (1999) Series C No 54, para 43.

¹⁷ See K C Sokol, 'Ivcher Bronstein. Jurisdiction. Resoluciones y Sentencias, Series C, No 54 and Constitutional Tribunal. Jurisdiction. Resoluciones y Sentencias, Series C, No 55' (2001) 95 AJIL178.

¹⁸ *Ivcher Bronstein* (n 16) para 46; *Constitutional Tribunal*, (Jurisdiction) (1999) Series C No 55, para 45.



Indeed, Article 62 forms an integral part of the American Convention and therefore must be construed in accordance with its object and purpose.

According to the Court, the States that had previously declared their acceptance are not allowed to change their minds and revoke it, unless this possibility is established by the treaty. The State may only release itself from the Court's jurisdiction by renouncing the treaty as a whole, whenever, like in the case of the American Convention, it is provided. However, in such an event, they would also take on the political costs of their choice. Peru has renounced to such a radical decision.

From the overall reasoning described above, good faith is clearly relevant, albeit not explicitly mentioned, and refers to the individuals. While in the case of interstate litigation, the jurisdiction only constitutes a possible means of peaceful resolution of disputes and alternatives are always available, instead, as far as the human rights treaties are concerned, the denial of jurisdiction results in a fatal frustration of the legal commitments toward individuals.

The last part of the Inter-American Court reasoning in the *Bronstein* case is also interesting. According to it:

'Even supposing, for the sake of argument, that "release" was possible – a hypothetical that this Court rejects – it could not take effect immediately.'¹⁹

Hence, quoting the ICJ's reasoning in the *Nicaragua* case, the Court invoked the need to respect a reasonable time for withdrawal.²⁰

Two points are particularly remarkable about this finding. First, the Court confirmed the customary nature of the rule to provide notice.

Second, the Court stressed that this rule applies not only in case of withdrawal from the entire treaty, but also from the optional jurisdictional clauses only. This finding is particularly relevant to those treaties that, differently from the American Convention on Human Rights, provide for the withdrawal of the declaration of acceptance of jurisdic-

¹⁹ *Ivcher Bronstein* (n 16), para 52.

²⁰ *ibid*, para 53.



tion.²¹ In fact, in these cases the denunciation of jurisdictional clauses is permitted, but only with the requisite notice.

4. *The withdrawal from treaties silent about denunciation*

Certain important human rights treaties, such as the UN Covenants, do not provide for denunciation. Consequently, the question arises whether the silence is to be interpreted as the evidence of the Parties' intention to exclude the right of withdrawal.

In August 1997, the unprecedented declaration by a State (the Democratic People's Republic of Korea) to denunciate from the International Covenant on Civil and Political Rights gave the Human Rights Committee the chance to issue a general comment on the continuity of obligations.²²

The Human Rights Committee affirmed that, given the absence of a specific provision in the Covenant, the possibility of denunciation must be considered in the light of the general international rules 'reflected' in the Vienna Convention. In particular, Article 56 was considered relevant. It prohibits denunciation unless it can be derived from the Parties' intention or the nature of the treaty.²³

Accordingly, noting that the withdrawal was provided for only with reference to the jurisdictional clause, the Committee held that the drafters of the Covenant deliberately intended to exclude the denunciation from the entire treaty.

Above all, the Human Rights Committee excluded the possibility that there was an implied right of denunciation in the Covenant, as a result of its treaty nature.

This statement was based on two important considerations. First, the Covenant is, together with the International Covenant of Economic, Social and Cultural Rights and the Universal Declaration of Human Rights, part of the 'International Bill of Human Rights' and, as such, 'it

²¹ See, for example, art 41, para 2 of the International Covenant on Civil and Political Rights.

²² UNCHR 'General Comment 26 (61) on Continuity of Obligations' [1997] UN GAOR, Hum Rts Comm, 53rd Sess, Supp no 40, UN Doc A/53/40, 102.

²³ See for a comment M E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009).



does not have the temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect'.²⁴

Second, the exclusion of the right to withdrawal from the Covenant was founded on the peculiar conception, according to which the human rights belong to people living in the territory of the State party and, once accorded, continue to belong to them notwithstanding 'any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant'.²⁵

The expression 'belong' puts the individual at the heart of the treaty and considers the human rights as property, with the consequent permanent loss of States' power to revoke their protection. Hence, the continuity of protection is a consequence of the precedent commitment of States towards individuals.²⁶

5. Conclusion

The practice confirms that the withdrawal from human rights treaties has always been connected to the rejection of the judicial control, particularly, in cases involving structural and systematic violations and calling for general reforms. In fact, certain contracting parties have perceived that pronouncements that have potential implications beyond the case are invasive of their domestic competence and not in compliance with the treaty.²⁷

This practice calls into question the legitimacy of the human rights Courts' evolving role, but also highlights a wide degree of acceptance and cooperation by other States. As to the case of Venezuela, it is worth considering, for example, the declaration of Mexico, which regretted Venezuela's decision and underlined 'the great service' rendered to the

²⁴ *ibid*, para 3.

²⁵ *ibid*, para 4.

²⁶ Cf. D Russo, *L'efficacia dei trattati sui diritti umani* (Giuffrè 2012).

²⁷ This view has been expressed both in the context of the wave of denunciations of the late nineties and in the most recent cases regarding the withdrawal of Venezuela from the American Convention on Human Rights and the declarations from the UK Government concerning with the European Court of Human Rights case law on the war on terror.

cause of human rights and democracy by the Inter-American Commission and Court.²⁸

Since a specific development of the human rights treaty bodies' role was at issue, the attempts of withdrawal cannot be read as signs of a reverse trend that is calling into question the ongoing 'judicialization' of international law, but as sporadic reactions regarding a particular trend of jurisprudence.

This does not minimise the gravity of withdrawal and the need for the other contracting parties to react. In particular, by virtue of the duty of good faith the contracting parties should respect the rule of notice and make efforts to negotiate a solution alternative to withdrawal.

They are also entitled to claim the prohibition of withdrawal from those treaties, or from the judicial clauses within them, that are silent about denunciation.

²⁸ The text of the declaration is available at <www.sre.gob.mx/en/index.php/archived-press-releases/1953-mexico-regrets-venezuelas-decision-to-withdraw-from-the-american-convention-on-human-rights>. See also the resolution of the Parliament of the European Union on Venezuela's possible withdrawal from the Inter-American Commission on Human Rights 2012/2653(RSP).

