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Reservations to the American Convention on Human Rights: A New Approach

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RESERVATIONS TO THE AMERICAN CONVENTION ON HUMAN RIGHTS: A NEW APPROACH

ANDRÉS E. MONTALVO^{*}

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INTRODUCTION

The members of the Organization of American States ("O.A.S.") have been oblivious to reservations made to the conventions of the Inter-American System of Protection and Promotion of Human

Rights ("IASHR").¹ Yet, O.A.S. representatives frequently underscore the importance of strengthening the IASHR. The question is whether strengthening the system is feasible without considering the issue of reservations. This Article anticipates a simple negative answer: the strengthening of the IASHR is not possible without an in-depth analysis of the reservation law and its practice.

The nature of regional organizations and the cooperative interplay among their members explain why states do not take a position against inconsistent reservations. The importance of cordial relations and comity outweighs other considerations and leads states to avoid the issue. Most states do not consider other states' reservations to be a substantive issue and, consequently, do not oppose them, regardless of how antithetical they may be to the fundamental human rights protected by inter-American conventions. The of lack objection is probably best explained by the dearth of palpable direct effects on one country by another country's reservations. This is certainly the case within the O.A.S., where cooperation prevails.

The ongoing debate within the O.A.S. about the IASHR ("Dialogue")² considers "universality"—understood as the general accep-

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1. The IASHR is comprised of the following instruments: American Convention on Human Rights "Pact of San Jose, Costa Rica" (Nov. 22, 1969) [hereinafter American Convention]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Nov. 17, 1988) [hereinafter Protocol of El Salvador]; Protocol to the American Convention on Human Rights to Abolish the Death Penalty (June 8, 1990); Inter-American Convention to Prevent and Punish Torture (Dec. 9, 1985); Inter-American Convention on Forced Disappearance of Persons (June 9, 1994); Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women "Convention of Belém do Pará" (June 9, 1994) [hereinafter Convention of Belém do Pará]. See *Basic Documents Pertaining to Human Rights in the Inter-American System*, O.A.S. Doc. OEA/ser. L./V./I.4 rev.7 (Feb. 2, 2000) [hereinafter *Basic Documents*]. This document prepared by the Inter-American Commission of Human Rights includes all the relevant instruments of the Human Rights System and may be consulted electronically at the following Internet address: <http://www.cidh.oas.org>.

2. See *Dialogue on the Inter-American System for the Promotion and Protection of Human Rights*, Juridical and Political Comm., O.A.S. Doc. OEA/ser. G CP/CAJP-1610/00 rev. 2 (Apr. 24, 2000) (report by the chair) (evaluating the relevant instruments and institutions of the Inter-American System, discussing the

tance of its conventions—central to the strengthening process.³ Therefore, the link between universality and reservations may be the way to induce a debate about the latter. For universal application to be achievable—which is unlikely under the current circumstances—the states would have to continue their silence on reservations in order to facilitate the process of the remaining O.A.S. member countries of becoming parties to the main instruments of the IASHR. However, the principal effect of reservations is to limit the extent of particular rights or group of rights. A confrontation between universality and integrity within the Dialogue is likely to come out to the detriment of integrity, because the Dialogue tends to underscore the value of universality.⁴ The price of such a strong emphasis on universality may, paradoxically, weaken the IASHR. By being oblivious to flagrant violations of international human rights law, a focus on universality contradicts the central purpose of the Dialogue: to improve the promotion and protection of human rights in the hemisphere. The absence of integrity implies, by definition, that human rights protected by some international conventions remain unprotected.

Since reservations are a reality in the current stage of international law, I maintain that it is necessary to force a political decision, absent so far in the Inter-American System, to address this problem and to explore effective alternatives of control to limit its negative effects in accordance with the evolution of international human rights law.⁵

Supervisory organs could play an important role in determining whether a reservation is consistent with human rights treaties. The Inter-American Court of Human Rights (“Court”) could be endowed with an *ex-officio* competence to assess the consistency of reservations without prejudicing its inherent power to decide on the matter

strengthening and development of the Inter-American System and offering proposals to the General Assembly of the O.A.S.).

3. *See id.* at 4 (stating that “[f]ull ratification of or accession to inter-American human rights instruments is essential for strengthening the system”).

4. *See id.*

5. *See* Vienna Declaration & Programme of Action, World Conference on Human Rights, para. 26, U.N. Doc. A/CONF.157/23 (1993) (welcoming the progress made in the codification of human rights instruments, urging the universal ratification of human rights treaties, encouraging all States to accede to these international instruments and “to avoid, as far as possible, the resort to reservations”) [hereinafter Vienna Declaration].

in the exercise of its adjudicatory jurisdiction. Furthermore, the Inter-American Commission on Human Rights ("IACHR") should exercise its broad competence bestowed in the San Jose Pact to report inconsistencies between reservations and the Pact.⁶

Most of the issues outlined above require a theoretical approach. This Article assumes the knowledge of treaty law codified in the Vienna Convention on the Law of Treaties.⁷ The normative contained therein is applicable to the IASHR. Relatively recent developments, especially new doctrine on reservations to human rights treaties, are also useful to the analysis.

This piece is divided into three sections. Part I summarizes the traditional theory of reservations applicable to the System. Part II shows the inconsistency of most reservations with the American Convention on Human Rights and demonstrates the inadequacy of the traditional theory to address the problem. Based on the two previous sections, Part III proposes a novel but achievable approach to reservations to the IASHR regime.

I. THEORETICAL FRAMEWORK

The purpose of this Part is to analyze the reservations regime of the Inter-American System of Human Rights and, particularly, the American Convention on Human Rights ("San Jose Pact").⁸ As explained below, it requires a review of the treaty law codified in the Vienna Convention, because the normative contained therein is directly applicable to the IASHR. Also, new theoretical efforts carried out by international organizations⁹ and academia¹⁰—though devoted

6. See American Convention, in *Basic Documents*, *supra* note 1, art. 41, at 36-37 (listing the functions and powers of the Inter-American Commission on Human Rights in promoting and defending human rights).

7. See Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969), entered into force by U.N. Doc. A/Conf 39/28 (1980) (identifying the fundamental role and importance of treaties in international relations) [hereinafter Vienna Convention].

8. See American Convention, in *Basic Documents*, *supra* note 1, at 23-48 (reaffirming their goal to protect and promote human rights in the region, and to establish a framework of "personal liberty and social justice based on respect for the essential rights of man").

9. See General Comment 24(52): General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to Covenant or the Optional

basically to analyzing either a general theory of reservations or the United Nations treaties—should be taken into consideration. I constantly consult those sources when analyzing the reservations theory relevant to the IASHR, but my goal here is to simply cite these works without analyzing them. I base my analysis on the vast body of existing literature, with the intention of applying it to the IASHR and drawing analogies where appropriate.

A. BACKGROUND

England introduced a reservation to one of the 1899 Hague Conventions, and the Netherlands (depository of the Convention) deemed it necessary to consult the other parties to determine whether they accepted such a reservation before proceeding with the instrument's deposit. Some years later, this practice was generalized within the framework of the Society of Nations. The so-called "Society of Nations rule" or "universal rule" was established. This rule made it impossible for a reserving state to become a party to the convention until the reservation has the unanimous consent of the parties.

The turning point on this perspective came when the former Soviet Union incorporated a reservation in its instrument of ratification to the "Convention on the Prevention and Punishment of the Crime of Genocide"¹¹—a fact about which Ecuador and Guatemala objected.

Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Human Rights Comm., U.N. Doc. CCPR/C21 rev. 1 Add. 6 (1994), *reprinted in* CHRISTINE CHINKIN ET AL., *HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT. RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS*, at 185-92 (J.P. Gardener ed., British Institute of International and Comparative Law, 1997); *see also* Vienna Declaration, *supra* note 5 (suggesting alternative frameworks for analyzing the general theory of reservations within the human rights field).

10. *See* ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 100, (Cambridge Univ. Press, 2000); LIESBETH LUNZAAD, *RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN?* (Martinus Nijhoff Publishers, 1995); *see also* FRANK HORN, *Reservations and Interpretative Declarations to Multilateral Treaties*, in 5 *STUDIES IN INTERNATIONAL LAW* (Swedish Inst. of Int'l Law, 1988); THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS. CASES AND MATERIALS* 468-82 (4th ed. 1995) (evaluating harmful impacts of reservations within the current framework and examining potential alternative schemes).

11. *See* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 28 I.L.M. 763 (Dec. 9, 1948) [hereinafter Genocide Con-

Pursuant to the Society of Nations rule, the Soviet Union would be prevented from becoming a party to the Genocide Convention. Different positions as to the aforementioned practice emerged and the United Nations General Assembly requested that the International Court of Justice provide an advisory opinion related to objections to the Genocide Convention.¹² The General Assembly also requested a general opinion from the International Law Commission on the whole issue of reservations to multilateral treaties. What is significant for the purpose of this work is the fact that, for the first time, the Soviet Union reservation raised the problem of reservations to human rights treaties. Since then, the International Law Commission ("ILC") has developed an extensive body of work on this subject. At the risk of oversimplification, this paper notes that the traditional approach to reservations prevails in the ILC Rapporteur's perspective, and the disinclination to grant different treatment to human rights conventions is evident.¹³

At the regional level, the issue was handled differently. In 1928, the Sixth Inter-American Conference held in Havana, Cuba, approved the "Convention on Treaties."¹⁴ The Pan-American Union, ancestor of the Organization of American States, adopted the so-called "Rules of Procedure"¹⁵ with the exclusive aim to clarify the Havana Convention regarding the role of the General Secretariat of

vention], *reprinted in* M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* 247-50 (Transnational Publishers, 1997) (confirming the intention to prevent genocide).

12. See Request for Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1950 I.C.J. 15, at 8-9 (Nov. 17).

13. See U.N. Doc. A/CN.4/470/Corrs. 1 & 2; see also U.N. Doc. A/CN.4/477/Add.1; U.N. Doc. A/CN.4/491/Add. 1-6 (including the analysis of Mr. Alain Pellet, ILC's Special Rapporteur for the subject), *cited in* AUST, *supra* note 10, at 123-24.

14. See Conferencia Internacional Americana 1889-1936, General Secretariat of the Pan-American Conference, at 368-72 (1938) (establishing treaty practice and procedure between Inter-American States).

15. See Internal Legal Memorandum (unpublished document on file with the O.A.S. Department of International Law); see also Jose Maria Ruda, *Los Efectos Juridicos de Las Reservas a Los Tratados Multilaterales*, in O.A.S. GENERAL SECRETARIAT, ANUARIO JURÍDICO INTERAMERICANO 1-67 (1983); Luis Herrera Marciano, in O.A.S. GENERAL SECRETARIAT, XIII CURSO DE DERECHO INTERNACIONAL, at 61-71 (1987).

the Union, as well as to consider the effect of reservations. The relevant idea to keep in mind is that the regional regime did not preclude a reserving state from becoming a party to a convention. The effect of the consultation process was to discourage the reserving state from insisting on its reservation in the face of widespread objections; in such a case the reserving state retained its right to become a party to the convention with respect to the non-objecting parties. The result was that the treaties faced potentially diverse juridical effects within the same framework. For instance, a treaty creating an international organization would bring a dichotomy in the status of the organization itself, because a reserving state would be considered a member of the organization only with respect to some of the other members depending on their acceptance of the reservation. In fact, this idea was submitted to the conference that approved the American Convention on Human Rights, as discussed herein.¹⁶ The so-called "Pan-American or regional rule" was the subject of a number of studies.¹⁷ In 1973, the O.A.S. General Assembly approved the "Standards on Reservations to the Inter-American Multilateral Treaties"¹⁸ and in 1987 adopted a resolution on "Standards on Reservations to the Inter-American Multilateral Treaties and Rules for the General Secretariat as Depositary of Treaties."¹⁹ This is the currently recognized applicable regime for the IASHR. The first of the two General Assembly resolutions cited above is based on the Vienna Convention, and the first six articles of the 1987 resolution—which refer precisely to the core of the reservations regime—are nothing more than a transposition of Articles 19 to 23 of the Vienna Convention.²⁰

The proliferation of multilateral treaties changed the scenario from what had been basically bilateral relations between states—even in

16. See *Actas y Documentos*, in O.A.S. GENERAL SECRETARIAT, CONFERENCIA ESPECIALIZADA INTERAMERICANA SOBRE DERECHOS HUMANOS 34, OEA/ser. K/XVI/1.2 (Nov. 7-22, 1969) [hereinafter *Acts and Documents*].

17. See generally Herrera Marciano, *supra* note 15; see also Ruda, *supra* note 15; HORN, *supra* note 10 (examining the impact of the so-called "Pan-American or regional rule").

18. O.A.S. Gen. Assemb. Res. Doc., AG/RES. 102 (III-O 73) (Apr. 14, 1973).

19. O.A.S. Gen. Assemb. Res. Doc., AG/RES. 888 (XVII-O/87) (Nov. 14, 1977); O.A.S. Doc. OEA/AG/doc. 2146/87 (Oct. 14, 1987).

20. The articles referring to the rules for the General Secretariat are not applicable to this work.

the context of multilateral treaties—to a new reality of emerging instruments diverse in nature and content. The emergence of genuinely multilateral non-reciprocal rights and duties demanded a different approach to the study of treaty law in general and to the elaboration of a particular reservations regime. The so-called “treaty-law” changed the traditional idea of the “treaty-contract” that had previously governed relations among states.

When a state rejects some conventional obligations and the other parties are able to do the same without denaturalizing the convention, problems do not emerge. Moreover, this is customary in agreements where the rights are reciprocal, as in so-called “treaty-contracts.”

On the other side, when the idea is to create a normative body in which all parties are bound by certain obligations based on a sense of collective self-commitment to comply with the convention, a reservation may not directly affect the other parties. However, this defeats the inherent principle of equality based on all parties having identical rights and duties.

The aforementioned rationale is particularly relevant to human rights treaties because the special nature of the rights addressed therein requires consistent standards of protection to sustain the integrity of the system. Considering the *sui generis* character of human rights treaties, the reservation topic takes on the utmost importance and requires a particular approach, especially where the treaty has its own supervisory body. This was not addressed under the Vienna Convention, thus affecting the IASHR.²¹

B. THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. *Definition and Ratione Temporis*

The San Jose Pact was opened for signature on 22 November 1969 in San Jose, Costa Rica, after the completion of negotiations held during the Inter-American Specialized Conference on Human Rights

21. See CHINKIN ET AL., *supra* note 9, at i-xxix (explaining the notion of *Mutatis mutandis* with respect to the International Covenant on Civil and Political Rights).

("Specialized Conference").²² With respect to reservations, the Conference adopted Article 75, which reads:

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.²³

According to the records of the drafting process, this provision was not easily adopted. The project submitted to the Conference contained a provision that limited reservations only to specific articles in conflict with constitutional provisions of the reserving state.²⁴ That was considered extremely restrictive and prompted a suggestion that reservations should be accepted not only when a norm of the Convention was in conflict with constitutional provisions but also when it conflicted with legal provisions of the reserving states. It was noted, however, that previous agreement had been achieved regarding the obligation of the states "to adopt, in accordance with their constitutional processes and the provisions of th[e] Convention, such legislative or other measures as may be necessary to give effect to th[e] rights or freedoms [contained therein]."²⁵ An evident inconsistency would have emerged between the two conventional dispositions—the reservation clause and the obligation to adopt internal measures in compliance with the Pact—if legal conflicts with the Convention had been accepted as a reason to admit reservations.²⁶ This controversy led to the adoption of a general reference to the Vienna Convention, which facilitated consensus and adoption of the aforementioned Article 75 in the San Jose Pact. However, the formula subsequently brought on some tribulations regarding the reservations regime that continue to affect the System.

The Vienna Convention includes the following definition:

'[R]eservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acced-

22. See generally *Acts and Documents*, *supra* note 16 (reaffirming the goal of the American States in protecting essential human rights).

23. See *Basic Documents*, *supra* note 1, at 75.

24. See generally *Acts and Documents*, *supra* note 16.

25. See American Convention, in *Basic Documents*, *supra* note 1, art. 2, at 24.

26. See *Acts and Documents*, *supra* note 16, at 365-66, 379.

ing to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. . . .²⁷

Two elements in this rule are particularly relevant to the San Jose Pact. First, states must formulate reservations before the convention becomes binding on the party in virtue of the deposit of the respective instrument of ratification or adherence.²⁸ A reservation by a signatory state does not have any legal effect if it is not reiterated at the time of the deposit of the instrument of ratification because, according to treaty law, "[i]f it is formulated when signing the treaty subject to ratification, acceptance or approval, [the] reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty."²⁹ In general, the reason to formulate reservations when the covenant is not yet in force may be the will of the reserving state to clarify its interpretation as to the reserved disposition. When a state signs an instrument, it discloses its bona fide regarding the obligations stated in the treaty and raises the presumption of its temperament to comply with and be bound by the convention. Therefore, without having an immediate legal effect, a reservation may anticipate the extent to which the reserving state is going to apply the conventional obligations or what that state's position is on the consistency with international law of the reserved provision. In short, the signatory state may think that such disposition is contrary to international law or irreconcilable with its national law. This may also be a good occasion to anticipate the views of other states regarding the reservation, the relevance of which is addressed below. States, acceding to the convention, also should express their reservations, if any, at the time of the deposit of the instrument of adherence.³⁰ The

27. See Vienna Convention, *supra* note 7, art. 2.

28. See American Convention, in *Basic Documents*, *supra* note 1, art. 74.1, at 46 (stating that "[t]his convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States").

29. See Vienna Convention, *supra* note 7, art. 23.2.

30. See American Convention, in *Basic Documents*, *supra* note 1, art. 74.2, at 46. The language provides:

Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into

second aspect of the Vienna Convention definition, which is relevant to the San Jose Pact, concerns the legal effect of the reservation, which relates to the object and purpose of the American Convention.

2. *The Object and Purpose Rule*

As noted above, a reservation modifies the legal effect of the reserved provision and its applicability to the state. However, a reservation should serve a valid purpose and maintain inalterable the nature of the convention itself. The Vienna Convention, Part II, Section 2, Article 19, explicitly addresses this subject and provides a setting to analyze the actual reservations made to the American Convention on Human Rights.

Article 19 - Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- a) the reservation is prohibited by the treaty;
- b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

The American Convention does not prohibit reservations (19.a), nor does it provide for specific ones (19.b). Therefore, only paragraph (c) of the article cited above is applicable to the American Convention. In its Advisory Opinion number 2 (OC-2/82), the Inter-American Court of Human Rights stated that “Article 75 must be deemed to permit States to ratify or adhere to the Convention with whatever reservations they wish to make, provided only that such reservations are ‘not incompatible with the object and purpose’ of the

force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.

Id.

31. Vienna Convention, *supra* note 7, art. 19.

Convention.”³² This coincides with the wording of Article 19.c of the Vienna Convention. From this it may also be inferred that only Article 19.c is relevant to the American Convention.

The Court has consistently referred to the so-called object and purpose rule in the exercise of its advisory jurisdiction.³³ However, the Inter-American Human Rights System is not a model in implementing the object and purpose rule, as evidenced in the next section. Actually, most of the actual reservations formulated to the American Convention are incompatible, not just with the reservations regime of the Convention itself, but they contradict essential rights protected by the Convention. For the moment, it is sufficient to mention that the object and purpose rule is central to the inter-American reservations regime,³⁴ and that the nexus between the American Convention and the rule is found in its Article 27 (suspension of guarantees):

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating

32. See *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A), no. 2, para. 2 (Sept. 4, 1982) [hereinafter Advisory Opinion OC-2/82]. This opinion was rendered upon request of the Inter-American Commission on Human Rights, which contested the O.A.S. Counsel's view that Barbados and Mexico were not to be deemed as being states parties of the Convention, because their instruments of ratification and adherence contained reservations; according to the former O.A.S. Counsel, a consultation period of one year was necessary to give other member states a chance to oppose the reservations according to Article 20.5 of the VCLT. *Id.*

33. See, e.g., *Restriction to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A), no. 3, paras. 59, 61 & 65 (Sept. 8, 1983) [hereinafter Advisory Opinion OC-3/83]; see also *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A), No. 8, paras. 14 & 16 (Jan. 30, 1987) [hereinafter Advisory Opinion OC-8/87] (illustrating the Courts' practice in referring to the so-called "object and purpose" of the Convention when giving advisory opinions).

34. See, e.g., Protocol of El Salvador, in *Basic Documents*, *supra* note 1, art. 20; see also *Basic Documents*, Inter-American Convention to Prevent and Punish Torture, art. 21, *supra* note 1; Inter-American Convention on Forced Disappearance of Persons, in *Basic Documents*, *supra* note 1, art. XIX; Convention of Belém do Pará, in *Basic Documents*, *supra* note 1, art. 18 (demonstrating that most of the other instruments of the IASHR, with some variations, required that reservations must be made to specific provisions and that the object and purpose of the Convention should not be affected).

from its obligations under the present Convention

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.³⁵

Article 27.2 lists the articles that may not be suspended even in emergency cases. The Inter-American Court analyzed the provision in its Advisory Opinion number 8 (OC-8/87).³⁶ The Inter-American Commission on Human Rights submitted to the Court a question with respect to the applicability of a writ of habeas corpus in an emergency situation. The relevance to our study is the Court's opinion "that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended."³⁷

The temporary character of the measures to be adopted pursuant to Article 27 also should be underscored. The term "derogating"³⁸ might lead to an idea of permanence. To the contrary, however, the Court interpreted the *ratione temporis* of the provision by explaining "that [only] in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State."³⁹

To summarize, Article 27 is clear as to the exceptionality and the *ratione temporis* of the suspension of some guarantees, and particularly clear in listing the articles containing rights that never can be

35. American Convention, in *Basic Documents*, *supra* note 1, at 33.

36. See Advisory Opinion OC-8/87, *supra* note 33 (analyzing Article 27.2 and 7(6) of the American Convention on Human Rights).

37. *Id.* para. 21.

38. The French, Portuguese and Spanish versions of the American Convention use terminology that can be translated as "measures suspending" instead of "measures derogating."

39. Advisory Opinion OC-8/87, *supra* note 33, para. 27.

suspended. Those rights somehow encapsulate the rationale of the object and purpose rule, without implying that other rights could be subject to unlimited reservations.⁴⁰

3. *The Right to Object to Reservations*

It is necessary also to consider the relation of the American Convention to Article 20 of the Vienna Convention (acceptance of and objection to reservations), which reads as follows:

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraph . . . 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.⁴¹

The Inter-American Court, in its controversial OC-2/82, stated that

40. See 1 Hernán Salgado, *Las Reservas En Los Tratados de Derechos Humanos*, LIBER AMICORUM HECTOR FIX ZAMUDIO 11 (Inter-American Court of Human Rights, 1998).

41. Vienna Convention, *supra* note 7, art. 20.

only paragraph 1 of Article 20 is relevant to the Convention.⁴² This opinion contradicted a former O.A.S. Legal Counsel view that deemed Articles 20.4 and 20.5 regarding reserving states to be applicable. According to the latter, for the reserving state to be considered a party to the Convention, it was necessary that the reservation be accepted by at least one of the states parties (20.4.c) or for twelve months to pass without objection (20.5). With regards to the American Convention, this perception seems to redeem, to some extent, the traditional Pan-American Rule. The Court reasoned that human rights treaties are different from traditional multilateral covenants and affirmed that the acceptance by the other states parties of reservations made to the treaties is not necessary for reserving states to become parties to the Convention. The Court thus arrives at the conclusion that the American Convention "must be seen [as] a multilateral legal instrument . . . enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction."⁴³ According to the Court ruling, it is irrelevant whether the instrument of ratification or accession has reservations for the purpose of the Convention becoming binding or the date of entry into force. As the Court noted, this reasoning has the virtue of permitting the protection of individuals from the moment of ratification, taking into account the particular nature of the rights protected by human rights treaties.⁴⁴ It would serve no purpose to delay the

42. See Advisory Opinion OC-2/82, *supra* note 32, art. 27. It notes:

In the opinion of the Court, only paragraph 1 of Article 20 of the Vienna Convention can be deemed to be relevant in applying Articles 74 and 75 of the Convention. Paragraph 2 of Article 20 is inapplicable, *inter alia*, because the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality. Moreover, the Convention is not the constituent instrument of an international organization. Therefore, Article 20(3) is inapplicable.

Id.

43. Advisory Opinion OC-2/82, *supra* note 32, art. 33.

44. See Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 21-23 (1985) (justifying the opinion in the text); *cf.* HORN, *supra* note 10, at 360-65 (maintaining that paragraphs four and five of Article 20 of the VCLT are relevant to the American Convention because the right to object to reservations is inherent in treaty law and because it is not precluded by the nature of human rights treaties).

right of protection provided for in the Convention. Without a doubt, the paramount virtue of the Court's opinion is the recognition of the specificity of human rights treaties.

However, there are elements other than the simple expeditious entry into force that the Court may have sacrificed in its plausible intention to give conventional protection to as many persons as possible in the least possible time. Arguably, human rights treaties do not bring with them some multilateral or bilateral interests.⁴⁵ The American Convention includes provisions that certainly may affect bilateral relations. This is noteworthy in respect to the competence of the Inter-American Commission on Human Rights to "receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in th[e] Convention."⁴⁶ Certainly this provision has the potential to raise some bilateral interests. Also, when O.A.S. General Assembly resolutions call for the ratification of the treaties of the System, a multilateral interest in assuming similar rights and duties becomes clear.⁴⁷ States may have different reasons for promoting these resolutions, but, undeniably, there is at least a collective perception that the System may be strengthened by these means. What purpose do resolutions serve if states do not have the right to speak out about the "unilateral commitments" of member states to not "violate the human rights of individuals within their jurisdiction"? Why do states consider the human rights supervisory institutions' annual reports presented to obtain, *inter alia*, reactions from the states as to the content of the reports?⁴⁸

45. See HORN, *supra* note 10, at 362 (noting that "the idea that human rights treaties are completely void of mutual or bilateral aspects is erroneous.").

46. American Convention, in *Basic Documents*, *supra* note 1, art. 45, para. 1.

47. See, e.g., *Report of the Committee on Juridical and Political Affairs on the Observations and Recommendations of the Member States Regarding the Annual Report of the Inter-American Court of Human Rights Explanatory Note*, O.A.S. Doc., OEA/ser. G. CP/doc. 3326/00 (May 24, 2000); see also *Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights*, O.A.S. Doc. G.A. Res. 1660, OEA/ser. P. AG/RES 1660 (giving examples of such assertions based on the Permanent Council's draft of Resolutions on Human Rights to the General Assembly in June 2000).

48. See OAS CHARTER art. 54, para. f (describing one of the General Assembly's powers as considering reports of other entities).

Collective self-control is implicit in the international protection of human rights. States have the right to opine on reservations to human rights treaties affecting the System of which they are a part. Even if Articles 20.4 and 20.5 of the Vienna Convention are not applicable to the American Convention, the Court's opinion misrepresented the states' right to object to reservations. Contrary to what the Court stated, the obligations acquired by ratifying the San Jose Pact are not mere "unilateral commitments." It is necessary to rethink the applicability of the Vienna Convention and its impact on the IASHR, while not dismissing the contingency of states objecting to reservations.

Advisory Opinion OC-2/82 also linked Article 75 of the American Convention to Article 20.1 of the Vienna Convention and deduced that reservations not contrary to the "object and purpose" of the Convention are covered by Article 20.1.

The Court notes, in this connection, that Article 20(1), in speaking of "*a reservation expressly authorized by a treaty*," is not by its terms limited to [a] specific reservation. A treaty may expressly authorize one or more specific reservations or reservations in general. If it does the latter, which is what the Court has concluded to be true of the Convention, the resultant reservations, having been thus expressly authorized, need not be treated differently from expressly authorized specific reservations. The Court wishes to emphasize, in this connection, that unlike Article 19(b), which refers to "special reservations," Article 20(1) contains no such restrictive language, and therefore permits the interpretation of Article 75 of the Convention adopted in this opinion.⁴⁹

The phrase "reservation expressly authorized" used by the Vienna Convention, though, could not be broadened to the extent provided for in the Court's advisory opinion. By definition, the terminology "expressly authorized" is limited, and its enlargement constitutes a clear contradiction. Moreover, other international jurisprudence is more persuasive in clarifying the scope of Article 20.1 of the Vienna Convention when concluding that it "covers only 'specifically authorized reservations'" and that, even in those cases, the right to

49. See Advisory Opinion OC-2/82, *supra* note 32, art. 36.

object remains.⁵⁰ Certainly, it is necessary to take into account the different nature and specificity of human rights treaties, and precisely because of that, the parties' right to opine should be preserved.

The approach mentioned above is consistent with the view that the concept of reciprocity for bilateral and multilateral relations "loses much of its relevance for the application and interpretation of human rights instruments."⁵¹ It is not wise to ascribe all the traditional concepts of treaty law to human rights instruments. The particular character of the latter makes it necessary to rethink those concepts and construe them in favor of individuals. Certainly, Article 21 of the Vienna Convention, which relates to the legal effect of reservations,⁵² is not sound in human rights matters.⁵³ The one year consultation pro-

50. See HORN, *supra* note 10, at 363 (citing the ad hoc Court of Arbitration ruling in the Anglo French Continental Shelf).

[T]he Court considers the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 to be clearly corrected. Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorized the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorizes the making of reservations to articles others than Article 1 to 3 in quite general terms. Article 12, as the practice of a number of States recorded in Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation.

Id.

51. Buergenthal, *supra* note 44, at 23.

52. See *id.* (establishing the extent to which a reservation comes to modify the relations among reserving, accepting and objecting States inter se within the scope of international treaties).

53. See *id.* at 21-22.

Serious conceptual problems arise . . . when one attempts to apply these traditional rules to human rights treaties. What does reciprocity mean in this context? Does it mean, for example that if state X makes a reservation to a due process provision of the treaty, a national of state X, who was denied due process by state Y, may not invoke that treaty clause against state Y because the latter's acceptance of state X's reservation has modified the treaty as between them, and consequently for their national, to the extent of the reservation? To ask the question is to recognize that it is founded in a concept that is

cedure, however, provided for in Article 20.5, and rejected by the Inter-American Court of Human Rights, theoretically could serve the purpose "of uncovering any possible opposition to a reservation and providing a smooth way for the reserving state to abandon its reservation when it faces strong condemnation" from its peers who are parties to the Convention.⁵⁴ This theoretical possibility may not be discarded *prima facie* and deserves further analysis.

The role that the supervisory bodies may play in assessing inconsistent reservations should also be discussed. For instance, in the European system, the Court has developed a system of control based on analyzing the contentious cases under its jurisdiction.⁵⁵ The Human Rights Committee under the International Covenant on Civil and Political Rights' General Comment No. 24 is even more remarkable.⁵⁶ The core idea of the Comment is to attribute to the Committee a role "in the objective assessment of whether a reservation is contrary to the object or purpose of the [Covenant]."⁵⁷ These experiences may be applicable to the supervisory bodies of the IASHR, as explained in Section III below.

II. THE PRAXIS OF RESERVATIONS IN THE INTER-AMERICAN SYSTEM

This Part analyzes the reservations to the American Convention on Human Rights, in light of the applicable treaty law and new trends with regard to reservations. The internal law of the reserving states is only considered in relation to the provisions of the Convention. Considering the applicable international law and Article 75 of the San Jose Pact,⁵⁸ it seems that the most relevant stipulation of the Vienna

basic to traditional international law: that the rights of the individual under international law derive from and are dependent on the rights of the state of his nationality. It is equally obvious, of course, that this concept conflicts with international human rights law and modern human rights treaties, whose principal objective is the protection of the individual against his own state.

Id.

54. See HORN, *supra* note 10, at 362.

55. See SALGADO, *supra* note 40, at 6-8.

56. See CHINKIN ET AL., *supra* note 9.

57. See Mary Robinson, *Introduction*, in CHINKIN ET AL., *supra* note 9, at xvii.

58. See American Convention, in *Basic Documents*, *supra* note 1, art. 75 (cit-

Convention is Article 19.c.⁵⁹

Within that context, the analysis covers (1) the appropriate time to formulate reservations (*ratione temporis*), and (2) the subject matter of the reservations (*ratione materiae*).

A. RESERVATIONS *RATIONE TEMPORIS*

The American Convention entered into force on July 18, 1978 in accordance with Article 74.2.⁶⁰ The Inter-American System of Human Rights follows the Vienna Convention on the Law of Treaties as to the time to make reservations.⁶¹ Uruguay was the first state to formulate a reservation when it signed the Convention⁶² with respect to some political rights protected by Article 23.2.⁶³

As explained above, the reserving state generally may formulate reservations before the instrument is in force so that it can clarify its interpretation as to the reserved disposition. The state may think that such disposition is (a) contrary to international law or (b) irreconcilable with its national law. This is important to bear in mind because the signing of a convention raises the presumption of the signatory's temperament to comply with and to be bound by the convention once

ing in Section 1 of the Theoretical Framework stating that "[t]his convention shall be subject to the reservations only in conformity with the provisions of The Vienna Convention on the Law of Treaties signed on May 23, 1969").

59. See Vienna Convention, *supra* note 7, art. 19.

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Id.

60. See American Convention, in *Basic Documents*, *supra* note 1, art. 74, para. 2 (explaining the procedure for ratifying the American Convention).

61. See Vienna Convention, *supra* note 7, art. 2, para. 1(d) (defining "a 'reservation' [as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty]").

62. See American Convention, in *Basic Documents*, *supra* note 1 (noting that Uruguay made its reservations known on November 22, 1969).

63. See *id.* art. 23, para. 2 (enumerating the political rights available to citizens).

ratified. Therefore, without having an immediate practical effect, a reservation may anticipate the extent to which the reserving state is going to apply the conventional obligations or what its position is on the consistency with international law of the reserved provision. The latter seems to have been the reason for Uruguay's reservation, which was reiterated at the time of ratification approximately fifteen years after the signature.⁶⁴

The other reserving States to the American Convention are Argentina,⁶⁵ Barbados,⁶⁶ Chile,⁶⁷ Dominica,⁶⁸ El Salvador,⁶⁹ Guatemala,⁷⁰ Mexico,⁷¹ Trinidad and Tobago,⁷² and Venezuela.⁷³ According to the American Convention and following the normative of the Vienna Convention on the Law of Treaties, the reservations were made either at the time of ratification or accession.

It should be noted that the only other convention of the System that has been subject to reservations is the Inter-American Convention to Prevent and Punish Torture. Guatemala was the first state to

64. See American Convention, in *Basic Documents*, *supra* note 1 (noting that Uruguay signed the Convention on March 26, 1985).

65. See *id.* (noting that Argentina signed the Convention on February 2, 1984, and ratified, with reservations, on September 5, 1984).

66. See *id.* (noting that Barbados signed the Convention on November 22, 1969 and ratified, with reservations, on November 5, 1981).

67. See *id.* (noting that Chile signed the Convention on November 22, 1969 and ratified, with reservations, on August 21, 1990).

68. See *id.* (noting that Dominica ratified, with reservations, the Convention on June 3, 1993).

69. See *Basic Documents*, American Convention, *supra* note 1 (noting that El Salvador signed the Convention on November 22, 1969 and ratified, with reservations, on June 23, 1978).

70. See *id.* (indicating that although Guatemala signed the Convention on November 22, 1969 and ratified with reservations, on May 25, 1978, it withdrew its reservations on May 20, 1986).

71. See *id.* (stating that Mexico deposited the instrument of accession on March 24, 1981).

72. See *id.* (noting that Trinidad and Tobago deposited the instrument of accession on May 28, 1991).

73. See *id.* (noting that Venezuela signed the Convention on November 22, 1969, and ratified, with reservations, on August 9, 1977).

formulate a reservation to that convention at the time of signature.⁷⁴ Chile was the other state that formulated reservations to the Convention on Torture and its reservations were included in the instrument of ratification.⁷⁵ The *ratione temporis* in these situations is the same presented above with regard to reservations to the American Convention.

B. RESERVATIONS *RATIONE MATERIAE*

To consider reservations from the subject matter perspective implies a necessary reference to the "object and purpose" of the treaty. Also, one must consider that the framework of any human rights analysis is the pro-homine nature of international human rights law. There is an indissoluble nexus between the pro-homine nature and the object and purpose principles, a nexus that should inform the *ratione materiae* analysis of reservations.

The greatest difficulty that faces reservations to human rights treaties is that human rights and fundamental freedoms are interrelated and should be considered as a whole. According to the Preamble to the American Convention, and many other international instruments, these rights "are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."⁷⁶ This recognition obliges reservations to be consistent with the object and purpose of human rights treaties, which are limited to providing international juridical protection of rights inherent to individuals. This paper endorses this view because inherent human rights pre-exist their recognition by the state.

However, because reservations are unavoidable, it might be useful for a practical and methodological analysis to classify rights as dero-

74. See Inter-American Convention to Prevent and Punish Torture, in *Basic Documents*, *supra* note 1 (commenting that although Guatemala reserved its reservation at the time of signature on October 27, 1987, and ratified, with reservations, on December 10, 1986, it withdrew its reservation on October 1, 1990).

75. See *id.* (noting that although Chile also signed the Convention on Torture on September 24, 1987, and ratified, with reservations, on September 30, 1988, it withdrew its reservations formulated to Article 4 and to the final paragraph of Article 13 on August 21, 1990).

76. See American Convention, in *Basic Documents*, *supra* note 1 (quoting the preamble of the Convention); see also AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (1948).

gable or non-derogable, as in Article 27.2 of the American Convention. This facilitates the analysis of reservations to the covenants of the System and allows the discussion to focus on how to limit their negative effects.

1. The American Convention on Human Rights

Article 27 of the American Convention is consulted for the reasoning of this discussion. This provision may be used as the starting point to analyze the reservations regime in the San Jose Pact. To that effect, it is necessary to recall the rationale of the provision and to determine whether it is an objective guideline for the analysis of the existing reservations. As stated earlier, it appears that Article 27.2 lists the provisions that cannot be suspended even in an emergency.⁷⁷ The Court addressed this in its OC/8 and, as noted above, the possibility exists of suspending some of the Convention's legally available rights. It was underscored above that such suspension is viable only under exceptional circumstances. Keeping in mind this classification of derogable and non-derogable rights from Article 27, I shall now analyze the particular provisions of the Convention that have been subject to reservations. For the purpose of this article, only derogable rights are subject to reservations.

a. Right to Life

Article 4 of the Convention says:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

77. See American Convention, in *Basic Documents*, *supra* note 1, art. 27.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.⁷⁸

The following countries have reservations to this article: Barbados (4.2 and 4.5), Dominica (4.4), Guatemala (4.4),⁷⁹ and Trinidad and Tobago (4.5).⁸⁰ Mexico formulated an Interpretative Declaration (4.1).

One basic premise of the American Convention is that the right to life is one of the fundamental rights to be protected by its provisions. Article 4 stipulates the conventional obligation to protect life by law and that “[n]o one shall be arbitrarily deprived of his life.” This fundamental principle does not require any explanation or elaboration. The subsequent paragraphs consider the exceptional circumstances in which the death penalty is compatible with the Convention, and set forth the legal regime to its applicability within the limits of the Convention. Hence, the right to life under the Convention may only be limited by permissible death penalty. The Inter-American Court has said that “[t]he text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned.”⁸¹ This restrictive approach is to be read in light of the first part of Article 4 (respect for life) and the fundamental nature of the right in question. But no matter how important the safeguards against the imposition of the death penalty are, its lawful application under the conventional parameters does not preclude violation of the most essential human right.

78. *Id.* art. 4.

79. *See id.* (noting that Guatemala withdrew its reservation on May 20, 1986).

80. *See id.* (commenting that in May 1999, Trinidad and Tobago were no longer parties to the American Convention because they denounced the Convention a year earlier on May 26, 1998).

81. Advisory Opinion OC-3/83, *supra* note 33, arts. 52-58 (explaining how the Court links the death penalty legal regime to strict procedural guarantees, the seriousness of the offense and *intuito personae* considerations, showing the intention of the framers to progressively advance toward its abolishment).

Even with this restrictive approach, however, there are no legal barriers to keep the states from further restricting their conventional obligations by means of reservations. Moreover, the highest tribunal for human rights in the Americas has validated any state reservation to the Convention in its partially disputable advisory opinion on death penalty restrictions, rendered at the request of the Inter-American Commission.⁸² The Court disregarded an argument claiming that a reservation made to Article 4.4 also affects Article 4.2, noting "that a state which has not made a reservation to paragraph 2 is bound by the prohibition not to apply the death penalty to new offenses, be they political offenses, related common crimes or mere common crimes." The Court went further and stated that "a reservation made to paragraph 2, but not to paragraph 4, *would permit the reserving State to punish new offenses with the death penalty in the future provided*, however, that the offenses in question are mere common crimes not related to political offenses."⁸³ If a state is allowed to modify its internal law to expand the death penalty after the American Convention is already binding on it, and the reservation that allows it to do so is not against the object and purpose rule, it will be rather difficult to oppose any reservation in this respect. That opinion loosens the restrictive approach to the death penalty, and the regime set forth by the convention becomes much more flexible than originally planned.

On the other hand, this flexible regime, contrasts with the rigid interpretation that the "right [to life] shall be protected by law . . . from the moment of conception."⁸⁴ (The different positions with regard to abortion could be the subject of extensive debate that is outside the scope of this piece.)

It is relevant to discuss the Mexican interpretative declaration to the rule in question. According to Mexico, the states would not be obliged "to adopt, or keep in force, legislation to protect life 'from the moment of conception'" because it "falls within the domain reserved to the States."⁸⁵ This is a potential reservation because Mexico

82. *See id.*

83. *Id.* art. 70 (emphasis added).

84. American Convention, in *Basic Documents*, *supra* note 1, art. 4, para. 1.

85. Advisory Opinion OC-3/83, *supra* note 33, arts. 52-58.

hypothetically could abolish a law punishing abortion under the umbrella of its interpretative declaration. One could draw this conclusion from the Court's third advisory opinion:

[A] reservation . . . designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. *Since the reservation referred to . . . does not appear to be of a type that is designed to deny the right to life as such*, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.⁸⁶

Pursuant to the language of this opinion, Mexico could make an interpretative declaration that to eliminate a law punishing abortion is not to be deemed as "designed to deny the right to life as such."⁸⁷

However, a different interpretation is also possible according to the same advisory opinion rendered by the Court:

The purpose of Article 4 of the Convention is to protect the right to life. But this article, after proclaiming the objective in general terms in its first paragraph, devotes the next five paragraphs to the application of the death penalty. The text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned.⁸⁸

If restrictions to the right to life are set forth exclusively in Articles 4.2 to 4.6,⁸⁹ one might infer that Article 4.1 does not permit any restriction to that right.⁹⁰ If so, the protection of life "from the moment of conception" would be an absolute principle that does not

86. *See id.* art. 61 (emphasis added).

87. *Id.*

88. *See id.* art. 52.

89. *See American Convention, in Basic Documents, supra* note 1, arts. 4.2-4.6 (specifying how member states may apply the death penalty).

90. *See American Convention, in Basic Documents, supra* note 1, art. 4.1 (declaring that "[e]very person has the right to have his life respected").

admit any limitation.⁹¹ But, the right to life established in Article 4.1, as seen above, is not a categorical one. The problem here is not with the concept of right to life but with the moment that it begins. Even assuming that we were strictly talking about the right to life per se, its protection, as seen here, is not absolute under the American Convention, since it allows broad latitude for application of the death penalty. It seems rather awkward, in such circumstances, to support the idea of two totally different regimes within the same disposition: an absolute one constituted by paragraph 4.1 and a flexible regime with regard to the death penalty. Therefore, it is more likely that a reservation to the phrase “from the moment of conception” would be acceptable under the conventional regime.

The Court has not directly addressed the issue of reservations to all paragraphs of Article 4 or specific reservations formulated for each and every state, neither in the course of its adjudicatory competence nor within its advisory jurisdiction. Our conclusion, however, from what has been seen, is that the Convention does not bar reservations to Article 4.

b. Right to Humane Treatment

Article 5 of the Convention says:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essen-

91. *See id.*

tial aim the reform and social re-adaptation of the prisoners.⁹²

Dominica is the only state that has made a general reservation to this article. The reservation alludes to "corporal punishment," which is not prohibited under Dominican internal law.⁹³ Dominica did not specify to which of the six paragraphs of Article 5 it wanted to make a reservation, as it did in its reservations to other articles.⁹⁴ In this context, it is possible to elaborate at least three different interpretations.

First, the reservation may apply exclusively to paragraphs somehow linked to the wording of the reservation in question. According to the reservation, "corporal punishment" is not prohibited by Dominican law and therefore, the reservation may be *prima facie* related to the protection of physical integrity mentioned in Article 5.1.⁹⁵ Furthermore, this interpretation eliminates any possible nexus between corporal punishment imposed according to Dominican law and the eventual violation of the moral and mental rights provided for in the same paragraph.⁹⁶ The reservation also protects Dominica from the possible interpretation that corporal punishment applied under its internal law constitutes "degrading punishment" according to Article 5.2.⁹⁷

The second interpretation is that the reservation considers the article as a whole and therefore all the paragraphs, where applicable, are

92. American Convention, in *Basic Documents*, *supra* note 1, art. 5.

93. The pertinent part of the reservation refers to "[C]orporal punishment administered in accordance with the Corporal Punishment Act of Dominica or the Juvenile Offenders Punishment Act." See *Basic Documents*, *supra* note 1, at 62-63.

94. See *id.* (documenting Dominica's reservations to Articles 4.4, 8.2.e, 21.2, and 27.1).

95. See American Convention, in *Basic Documents*, *supra* note 1, art. 5 (stating that, "Every person has the right to have his physical, mental, and moral integrity respected.").

96. The Inter-American Court of Human Rights has extensive jurisprudence referred to the rights protected under Article 5.1. See *Velasquez Rodriguez case*, Inter-Am. Ct. H.R. OEA/ser. C/No. 4/paras. 155-56 (1988); see also *Godínez Cruz case*, Inter-Am. Ct. H.R. OEA/ser. C/No. 5, paras. 163-64 (1989); *Neria Alegria and Others case*, Inter-Am. Ct. H.R. OEA/ser. C/No. 20, para. 86 (1995); *Loayza Tamayo case*, Inter-Am. Ct. H.R. OEA/ser. C/No. 33, para. 57 (1997).

97. See American Convention, in *Basic Documents*, *supra* note 1, art. 5.2.

covered by it. Certainly, this interpretation is possible as it applies to Articles 5.1 and 5.2. From a practical perspective, however, this particular reservation is not likely to apply to paragraphs 5.3 through 5.6.⁹⁸ Interpreting the reservation as if it includes the whole article completely bars any possible violation of the "Right to Humane Treatment," by the mere application of Dominican internal law referred to in the reservation.⁹⁹

A third interpretation is that the reservation has no effect since it does not specify the particular paragraph to which it is supposed to be applied. Had Dominica formulated a general reservation to protect its right to apply its internal law with respect to corporal punishment, this might be a good argument to contest the validity of the reservation. However, since Dominica did specify an article of the Convention, and did refer in the reservation to the conflict with its internal law, this position *per se* is not a sound one.

Turning to a brief analysis of derogable vs. non-derogable rights, Article 27.2 includes the right to humane treatment provided for in Article 5 as one of those that cannot be suspended under any circumstances.¹⁰⁰ The broad scope of what is to be considered humane treatment justifies this special protection; crimes against humanity such as forced disappearances of persons or arbitrary detention are violations of the right to humane treatment.¹⁰¹

As for the reservation made by Dominica regarding corporal punishment imposed pursuant to its laws, I find no reason to exclude such situations from the list in Article 27.2.¹⁰² This assertion does not require extensive elaboration. Any action detrimental to the inherent right of individuals to humane treatment—no matter how legal it

98. See *id.* arts. 5.3-5.6 (setting conditions for humane treatment that are not directly related to corporal punishment). Argentina, for instance, has an "Interpretative Statement" to this paragraph, saying that it "shall be interpreted to mean that a punishment shall not be applied to any person other than the criminal, that is, that there shall not be vicarious criminal punishment." See *Basic Documents*, *supra* note 1, at 51.

99. See OC-8/87, *supra* note 32, para. 12.

100. See Advisory Opinion OC-8/87, *supra* note 33, para. 12.

101. See *supra* note 88 and accompanying text (guaranteeing respect for personal integrity).

102. See *supra* note 89 and accompanying text.

may be under internal law—violates international human rights law. No argument is reasonable enough to justify corporal punishment, considering the object and purpose of the rule.

The IASHR, however, has a silent record with respect to invalid reservations. It is true that any human rights treaty has the underlying presumption that inherent human rights are not to be restricted, but the American Convention is very flexible on the matter. Actually, the practice within the System does not provide much leeway for questioning the validity of the reservation in question. The scenario is even worse if we rely on what has been said by the highest tribunal competent to interpret the rights and duties under the treaty. It is enough to recall the words of the third advisory opinion that “. . . if [a] reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose,”¹⁰³ it would not be incompatible “with the object and purpose of the Convention.”¹⁰⁴ In this light, it might be argued that the corporal punishment of Dominican internal law “merely restricts” the right to humane treatment. If the reservation formulated by Dominica to Article 5 of the American Convention were subjected to specific analysis based on the experience of the IASHR regarding reservations, the most likely conclusion would be that it is not contrary to the object and purpose rule.

c. Right to a Fair Trial

The relevant part of Article 8 says:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;

103. See Advisory Opinion OC-3/83, *supra* note 33, para. 61; see also *supra* note 85 and accompanying text (emphasis added).

104. See *supra* note 86 and accompanying text.

- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court. ¹⁰⁵

Venezuela introduced a reservation to Article 8.1 explaining that its internal law provides for in absentia trials for offenses against the res publica, a possibility that is not mentioned in the conventional provision.¹⁰⁶ Barbados¹⁰⁷ and Dominica¹⁰⁸ have reservations to Article 8.2.e. Whereas the Barbadian reservation explains that the right contained therein is limited to certain crimes ("such as homicide and rape"),¹⁰⁹ the Dominican reservation simply rejects the application of this paragraph.

The first paragraph of Article 8 establishes the general principle of fair trials and enumerates proceedings of various natures.¹¹⁰ But it is apparent that Article 8 emphasizes guarantees of due process in criminal proceedings, which are developed in detail in the rest of the article.¹¹¹ The fair trial is protected with special care in such cases, and the rationale for that is the particularly precious nature of the rights that may be affected by an undue criminal process. This is the reason that the Convention establishes minimum guarantees for criminal proceedings.

105. American Convention, in *Basic Documents*, *supra* note 1, art. 8.2.

106. See *Basic Documents*, *supra* note 1, at 57-58.

107. See *id.* at 52.

108. See *id.* at 62-63.

109. See *id.* at 52.

110. See American Convention, in *Basic Documents*, *supra* note 1, art. 8.1.

111. See *id.* art. 8.2-8.5.

In this light, the Venezuelan reservation does not deny the right to a fair trial per se. It explicitly recognizes that, even in cases applicable to the reservation (in absentia trials) the judicial guarantees and due process should prevail. The reservation is not an exception to the judicial guarantees but to the general rule regarding notification of criminal charges and presence of the defendant during the judicial process. As stated by the Court, "Article 8 . . . contain[s] . . . the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention,"¹¹² which the defendant may exercise by appearing at the trial. In fact, there is nothing in Article 8 to be construed as barring in absentia trials since the guarantee of a fair trial remains intact whether the defendant appears before the competent court or tribunal to claim his or her rights. In contrast, reservations that restrict the procedural requirements mentioned in Article 8 potentially affect the fair trial guarantee and are to be considered inconsistent with the object and purpose of the Convention. Such is the case with the Barbadian and Dominican reservations to Article 8.2.

Article 8.2 lists substantial procedures meant to assure due process in criminal cases.¹¹³ It is necessary to underscore the words used in the Convention to assure certain minimum conditions for the administration of justice in criminal proceedings. "By labeling these guarantees as *minimum guarantees*,"¹¹⁴ the Court has stated, "the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing."¹¹⁵ It is indisputable, however, that the guarantees listed in Article 8.2 may not be reduced or restricted by any means.¹¹⁶

112. Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion No. OC-9/87 of Oct. 6, 1987, ser. A, No. 9, para. 27 [hereinafter *Advisory Opinion OC-9/87*].

113. *See supra* note 105.

114. Inter-American Court of Human Rights, *Exception to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90 of Aug. 10, 1990, ser. A, No. 11, para. 24 [hereinafter *Advisory Opinion OC-11/90*].

115. *Id.*

116. *See* Castillo Paez case, Inter-Am. Ct. H.R. OEA/ser. C/No. 34, paras. 75-79 (1997); *see also* Suarez Rosero case, Inter-Am. Ct. H.R. OEA/ser. C/No. 35, paras. 79-83 (1997); *Advisory Opinion OC-11/90, supra* note 114, paras. 25-29.

Article 8 is not an inherent individual right per se, but includes the principles to achieve the effective protection of fundamental freedoms and human rights. In that sense, we should recall that Article 27.2, after enumerating the rights that may not be suspended under any circumstances, ends with the idea that “judicial guarantees essential for the protection of such rights” should also not be suspended.¹¹⁷ It is illustrative to look at the interpretation of the Court on the matter of judicial guarantees. Considering the importance of judicial guarantees in emergency situations, the Court concluded that the judicial guarantees mentioned in Article 27.2 “are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8.”¹¹⁸

The reservations that Venezuela formulated to Article 8.2.e refer specifically to the right of legal assistance.¹¹⁹ According to Article 8.2.e, the defendant has the option to choose his or her legal counsel, carry out his or her own legal defense when permitted by law, and to “be assisted by counsel provided by the state.”¹²⁰ The Convention also stipulates that this is an “inalienable right.”¹²¹ Therefore, even in the hypothetical situation in which a defendant refused legal assistance, the Convention is clear as to the duty of the state to fulfill this obligation and assure an appropriate legal defense. The guarantee established thereby has the special value of preventing potential cases of discrimination. It is not difficult to imagine situations involving indigent defendants unable to obtain legal counsel. Considering the fundamental human rights that usually are at stake in criminal proceedings, justice may not be served in such situations if the state does not provide the necessary support for an appropriate defense.

117. See American Convention, in *Basic Documents*, *supra* note 1, art. 27.2.

118. Advisory Opinion OC-9/87, *supra* note 112, para. 38; see also Loayza Tamayo case, *supra* note 95, para. 50. Article 7.6 refers to the right to judicial recourse to determine the lawfulness of a detention, and Article 25.1 establishes in general the right to judicial recourse for the protection of the fundamental rights of individuals. See American Convention, in *Basic Documents*, *supra* note 1, arts. 7.6, 25.1.

119. See *Basic Documents*, *supra* note 1, at 57-58 (documenting Venezuela's reservations to the American Convention at ratification).

120. American Convention, in *Basic Documents*, *supra* note 1, art. 8.2.e.

121. *Id.*

Focusing on paragraph 8.2.e, it is interesting to note the Court's analysis, made in the context of the exhaustion of legal remedies. In its Advisory Opinion No. 11, the Court emphasized the importance of legal counsel in criminal proceedings and affirmed that "a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which [the defendant is] entitled under that Article."¹²² As for the consideration of particular violations to this paragraph, the Court also stated that:

[i]t is important to note . . . that the circumstances of a particular case or proceeding—its significance, its legal character, and its context in a particular legal system—are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.¹²³

In fact, in the exercise of its adjudicatory jurisdiction, the Court has emphasized the importance of appropriate legal assistance.¹²⁴

One may, therefore, conclude that Barbados and Dominica could not use the reservation formulated to Article 8.2.e as an exception to their obligation to provide the necessary means for appropriate legal assistance in criminal cases where such legal representation is necessary to guarantee a fair trial.

d. Right to Participate in Government

Article 23.2 of the American Convention reads as follows:

The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.¹²⁵

122. Advisory Opinion OC-11/90, *supra* note 114, para. 27.

123. *Id.* para. 28.

124. See Suarez Rosero case, *supra* note 116, para. 83 (stating that "[E]l señor Rosero no tuvo posibilidad de . . . contar con el patrocinio letrado de un defensor publico y, una vez que pudo obtener un abogado de su elección, no tuvo posibilidad de comunicarse en forma libre y privada con el. Por ende, la Corte considera que el Ecuador violo el articulo 8.2.c, 8.2.d y 8.2.e de la Convención Americana").

125. American Convention, in *Basic Documents*, *supra* note 1, art. 23.2.

Uruguay formulated a reservation to the Article and explained that its constitution provides for suspension of citizenship if a person is “under indictment on a criminal charge which may result in a penitentiary sentence.”¹²⁶ The concept of citizenship may differ from one country’s legislation to another but, for different reasons, it is conceivable that some political rights that go with citizenship may be suspended while an individual is serving a term in prison or even just in prison under indictment. One may assume that there are situations that bring either a *de facto* suspension of particular rights when practical reasons so require or a *de jure* suspension related to the civil capacity that the indictment involves. It is not clear under the Uruguayan reservation, however, to what extent some non-derogable rights and principles such as the presumption of innocence may be affected. The encroachment on non-derogable rights would deprive the individual of the legitimate exercise of his or her right to access public services as provided by Article 23.1.c.¹²⁷ After all, the language of Article 23.2 is categorical as to the scope with which the law may regulate the exercise of the rights protected by Article 23.1.c. This provision, read together with Article 27.2, leads to the conclusion that it is not permissible to broaden the scope of restrictions set down in Article 23.2. Without prejudice to the above argument, since the reservation is very specific and related to a constitutional provision, it may well be considered as fulfilling the standards set forth by the Convention’s framers.

Mexico also expressed a reservation to Article 23.2 with regard to the political rights of ministers of certain denominations whom are not allowed to vote or to associate for political purposes.¹²⁸ There is no apparent reason—other than internal law, of course—to justify the reservation in question. The arguments presented above about the non-derogable rights included in Article 27.2 of the Convention, and the categorical language of Article 23.2, demonstrate the inconsistency of reservations to non-derogable rights.

It may be helpful to point out a nexus between this reservation and

126. *Basic Documents*, *supra* note 1, at 51, 57.

127. See American Convention, in *Basic Documents*, *supra* note 1, art. 23.1.c (guaranteeing every citizen equal access to public services).

128. See *Basic Documents*, *supra* note 1, at 56.

the interpretative declaration made by Mexico to another of the so-called non-derogable rights contained in Article 12.3,¹²⁹ which concerns freedom of conscience and religion. The interpretation seeks to reconcile this fundamental freedom with the Mexican internal law mandating that "all public acts of religious worship must be performed inside places of public worship."¹³⁰ There is no jurisprudence in the IASHR in this regard, but it seems too comprehensive to confine public worship to specific venues, and it is potentially discriminatory to those who may need places others than shrines or temples to exercise their right to worship. It is also not clear how public worship, in general, may affect the rights and freedoms of others. Moreover, when one reads the aforementioned disposition in conjunction with Article 13 relating to freedom of thought and expression—especially paragraph 1, which recognizes that this "right includes freedom to seek, receive, and impart information and ideas of all kinds"¹³¹—the Mexican interpretative declaration becomes questionable.¹³²

Reading the Mexican interpretative declaration to Article 12.3 together with its reservation to Article 23.2—in light of Articles 12, 13, 23 and 27 of the Convention—highlights the discriminatory character of the reservation and, consequently, its incompatibility with the object and purpose of the American Convention.

e. Other Reservations

Reservations to the American Convention contain many types of flaws ranging from their incompatibility with the object and purpose

129. See American Convention, in *Basic Documents*, *supra* note 1, art. 12.3. "Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others." *Id.*

130. *Basic Documents*, *supra* note 1, at 56.

131. American Convention, in *Basic Documents*, *supra* note 1, art. 13.

132. See Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for Practice of Journalism, Advisory Opinion No. OC-5/85 of Nov. 13, 1985, ser. A, No. 5 [hereinafter Advisory Opinion OC-5/85] (providing an extensive discussion of the inter-American philosophy on freedom of thought and expression); see also Inter-American Court of Human Rights, Enforceability of the Right to Reply or Correction, Advisory Opinion No. OC-7/86 of Aug. 29, 1986, ser. A, No. 7 [hereinafter Advisory Opinion OC-7/86].

of the treaty¹³³ to a vagueness of meaning that render them inapplicable.¹³⁴ In this context, it is illustrative to mention the following reservation formulated by El Salvador in its instrument of ratification: “[S]uch ratification is understood without prejudice to those provisions of the Convention that might be in conflict with express precepts of the Political Constitution of the Republic.”¹³⁵

This is a potential reservation to any provision of the Convention and certainly may be deemed as inconsistent not just with the object and purpose of the American Convention but with international law in general. A reservation formulated to avoid contradiction between the treaty and a constitutional provision of a party to it is undeniably indisputable.¹³⁶ However, from the formal point of view, reservations are supposed to be made no later than at the time of ratification or adherence. Under the Salvadorian phraseology in question, any future restriction to the conventional dispositions may be done by means of constitutional reform. It is also a way to condition, at least to some extent, compliance of the international obligations set forth in the Convention, not just on the constitutional provisions in force at the time of the reservation, but on possible future amendments to the constitution. If the Court deems this kind of reservation valid, it may constitute a substantive defect that exempts any further speculation about the number of possible *ratione materiae* violations that may arise.

III. CONCLUDING REMARKS: A NEW APPROACH

The efforts, if any, to prevent inconsistent reservations to the American Convention on Human Rights have been insufficient. Most of the reservations to the Convention are far from being acceptable by the standards of any traditional multilateral instrument, even out-

133. See, e.g., *Basic Documents*, American Convention, *supra* note 1, art. 27.2 (listing the rights that are not subject to reservations).

134. The Dominican reservation to Article 27.1 is illustrative: “This must also be read in the light of our Constitution and is not to be deemed to extend or limit the rights declared by the Constitution.” See *Basic Documents*, *supra* note 1, at 63.

135. *Id.* at 54.

136. See AUST, *supra* note 10, at 120-21 (noting that different views to the so-called “constitutional reservations” continue to generate controversy, and there is not a single approach to the issue).

side the field of human rights. Multilateral instruments are informed by a mutuality of interests. This is of particular relevance in international human rights law, where reservations should be extremely limited. Therefore, the importance given to universality in the IASHR cannot be compared to the greater interest of international protection for human rights. Contrary to prevalent criteria in the Dialogue,¹³⁷ the standards of inter-American human rights protection are flexible enough to accommodate both universality and integrity. However, when that balance is not possible in cases of fundamental human rights, integrity should prevail. The issue deserves attention because of the specificity of human rights treaties and their core importance in disseminating consistent standards of protection among their parties. Reservations should be framed in that context.

States' parties are the primary guarantors of the Pact's obligations regarding reservations. The so-called "collective guarantee" should be exercised to ensure that reservations to the American Convention are consistent with the spirit of Article 75 and consequently follow the object and purpose rule.¹³⁸ But states are politically motivated, and the cost of objecting to reservations could be greater than the gain, specifically individual political gains or losses not directly related to the System itself. States' interests in international relations are diverse and sometimes circumstantial, a fact that may have a profound effect on some important issues.

The specialization of the reservations topic complicates the scenario even more. Basically, the object and purpose rule is not as "self-evident" as it may seem to be in principle. The fact is that there are no clear guidelines for applying the object and purpose rule. It demands an in-depth consideration that member states of the IASHR are unwilling or unable to give it. It is unthinkable to ask states to study the jurisprudence and advisory opinions of the Court, the general and individual reports of the Commission, the evolution of doctrine in international human rights law, and the many other sources that could put them in position to make informed decisions in this regard. Unfortunately, the decision-making process does not always make juridical coherence a priority in the implementation stage of

137. See *supra* note 2 (discussing the ongoing debate within O.A.S. about the IASHR).

138. See American Convention, in *Basic Documents*, *supra* note 1, art. 75.

the treaties.

It is imperative to use the current legal mechanisms to call attention to this problem. The ideal would be for states to withdraw incompatible reservations, and for other potential parties to the American Convention to be aware that they should not formulate prohibited or incompatible reservations. It does not appear that this is going to happen *motu proprio* because States are not likely to change their practice with regard to reservations.

As far as this study was able to determine, even the two specialized organs of the IASHR have not adequately addressed the issue. The supervisory organs have not provided proper service to the IAHRS with respect to reservations. The Court has issued some dubious pronouncements in the exercise of its advisory competence. As for the Commission, when it had the opportunity to take responsibility, it just avoided the burden and requested an advisory opinion from the Court.¹³⁹ Had it acted otherwise, the history of the System could have been different, and the System could have had its own jurisprudence similar, *mutatis mutandis*, to the European System.¹⁴⁰ It is time to revisit the problem and to adapt it to the evolving field of international human rights law.

For methodological reasons, in this paper, the test to determine the validity of reservations was established in relation to Article 27 of the American Convention, which lists the non-derogable rights.¹⁴¹ Even such a simplistic approach yields a useful means of identifying an objective test of the object and purpose rule. Bearing this basic idea in mind, the supervisory organs of the System may play an important role in dealing with this issue.

General Comment No. 24 voiced by the Human Rights Committee under the International Covenant on Civil and Political Rights developed an argument that is applicable, *mutatis mutandis*, to the IASHR.¹⁴² The gist of the Comment, which can be extracted for the

139. The underlying origin of Advisory Opinion OC-3 83 was the ICHR search for the Court's support in a case where Guatemala argued the lack of jurisdiction of the ICHR by virtue of its reservation to Article 4 of the American Convention.

140. See *supra* note 55.

141. See American Convention, in *Basic Documents*, *supra* note 1, art. 27.

142. See *supra* note 9.

purpose of this Article, is that treaties' own supervisory organs have the competence to assess the validity of reservations, taking into account the object and purpose of the instruments. The rationale is that the inherent, if not explicit, powers set forth in the conventions for monitoring compliance with the obligations include such a competence. This, of course, has been contested by states that consider that such an interpretation is without foundation and that, in the absence of an express faculty contemplated in a particular convention, the applicable law is the Vienna Convention. Hence, states feel that they have the exclusive right to act in this respect, and that any other interpretation is contrary to international law.¹⁴³

The Inter-American Commission on Human Rights is the first body in the System that could be called upon to bring the issue to the attention of states. The IACHR has a broad mandate that may be used to efficiently protect the integrity of the System. Its main function is "to promote respect for and defense of human rights" and, to that effect, it has the powers enunciated in Article 41 of the Convention.¹⁴⁴ Of particular relevance for the purpose of this Article are the following provisions that, taken together, provide adequate remedies against inconsistent reservations:

b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

c. to prepare such studies or reports as it considers advisable in the performance of its duties; . . .¹⁴⁵

The substantial limitation to international protection provided by the San Jose Pact directly harms the System itself and potentially deprives individuals of remedies that are subject to reservations. The detrimental effect of incompatible reservations is an unquestionable reality. Therefore, there is no reason to prevent the IACHR from fully exercising its powers and addressing the issue of incompatible

143. See CHINKIN ET AL., *supra* note 9, at 193-203 (discussing the positions of the United States and Great Britain with respect to General Comment No. 24).

144. See American Convention, in *Basic Documents*, *supra* note 1, art. 41.

145. *Id.*

reservations to the American Convention or any other instrument of the IASHR. In the short term, the IACHR could issue a general recommendation that reserving states withdraw their reservations. Further, it could develop a case-by-case study and, *inter alia*, include a chapter on the subject in its annual report to the General Assembly of the O.A.S.¹⁴⁶ It is unjustifiable that these annual reports have never directed attention to the topic. Arguably, there are many more sensitive problems in the area of human rights, but that is not reason enough to avoid the topic as if the question of reservations were without significance. Certainly, an opinion of the IACHR would have only a recommendatory effect, but it would be enough to catalyze a substantive discussion on the issue.

The Inter-American Court's competence is more restricted. It could address the issue of incompatible reservations in individual cases submitted to its jurisdiction according to Article 62.3:

The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.¹⁴⁷

Unfortunately for the System, the Court has yet to decide a case in which its jurisdiction has been contested on the grounds of formulated reservations. This may change since, in the last annual report of the IACHR, it is mentioned that a case has been submitted to the Court and, given the background of the case, it is foreseeable that the state in question may resort to its reservation to challenge the competence of the Court.¹⁴⁸

Article 64.1 also gives any member of the O.A.S. the capacity to request advisory opinions "regarding the interpretation of the

146. According to the Charter of the O.A.S. (Art. 91.f), the Permanent Council should consider the reports of all the bodies and agencies of the Inter-American System, including the ICHR, "and present to the General Assembly any observations and recommendations it deems necessary." See OAS CHARTER, *supra* note 48, at 60.

147. American Convention, in *Basic Documents*, *supra* note 1, art. 62.3.

148. See Annual Report of the Inter-American Commission on Human Rights 1999, Ch. III.D.2, paras. 81-89, O.A.S. Doc. OEA/ser. L/V II.106 Doc.3 (2000).

[American Convention] or of the other treaties concerning the protection of human rights in the American states.”¹⁴⁹ States are wary of taking positions on the issue of reservations, and it is not likely that a state or group of states would be willing to exercise the right to request an advisory opinion regarding inconsistent reservations in general, much less regarding particular reservations formulated by other countries.

The second part of Article 64.1 confers the same right—the capacity to request an advisory opinion—on any of the organs listed in Article 53 of the Charter of the Organization of American States.¹⁵⁰ However, it is unrealistic to expect that the General Assembly or the Permanent Council—political organs of the O.A.S.—will petition the Court to pronounce an opinion on the topic. The actions of these political organs do not represent a particular state’s interest, but their composition is governmental and, as noted above, the temperament of states with regard to the issue demonstrates their aversion to confronting the issue. In practice, an advisory opinion with that origin would be the states’ will, exercised through the political organs. Given this state of affairs, the desired collective action is not likely to occur, since the General Assembly or Permanent Council is not likely to request an advisory opinion unless the sentiments of states regarding reservations undergo a substantial change. The rationale summarized above is also applicable to Article 64.2, which confers upon a state party the right to request from the Court “opinions regarding the compatibility of any of its domestic laws” with the international instruments of human rights, and particularly with the San Jose Pact. As stated above, that is not likely to happen.¹⁵¹

What the aforementioned political organs could do without compromising their “neutrality” is ask the Inter-American Juridical Committee¹⁵² to study the issue regarding reservations to human right

149. American Convention, in *Basic Documents*, *supra* note 1, art. 64.1.

150. Article 64.1 of the American Convention refers to Chapter X of the Charter of the O.A.S., but the instrument in force is the so-called Washington Protocol and the pertinent Chapter that the Convention refers to is number VIII. See OAS CHARTER, *supra* note 48, at 53.

151. See American Convention, in *Basic Documents*, *supra* note 1, art. 64.2.

152. See OAS CHARTER, *supra* note 48, at 62 (noting that “[t]he purpose of the Inter-American Committee is to serve the Organization as an advisory body on ju-

treaties within the Inter-American System. As noted in Part I above, the current regime for the whole Inter-American System is set forth in General Assembly Resolution AG/RES. 888 (XVII-O/87), which has its origin precisely in the work undertaken by the Inter-American Juridical Committee. Also, this is a regime based on the Vienna Convention that therefore is not specific to human rights treaties. While the Inter-American Juridical Committee is likely to approach the issue similarly to the International Law Commission, the risk of duplication would be worthwhile to increase the attention to the particular nature of human rights treaties and the necessity of revisiting the reservation regime in that field.

The potential, as mentioned in the O.A.S. Charter, for organs to request an advisory opinion from the Court regarding reservations to human rights treaties is limited. Article 64.1 of the San Jose Pact reduces that possibility to the organs' "sphere of competence." In fact, the advisory opinions of the Court up to now have been rendered only at the request of states or the IACHR. The bottom line, however, is that, even if somehow an advisory opinion were requested, the results would not be binding on the states.

The ideal scenario to effectively address the issue would be a renegotiation of Article 75 of the American Convention. The other instruments of the IASHR also contain different provisions that might serve as a guide for improving the current regime of the San Jose Pact. It is noteworthy that the other conventions of the System incorporate, with different wording, two elements that could improve the American Convention regime: (a) compatibility with the object and purpose of the Convention, and (b) specificity of the reservation.¹⁵³ The Inter-American Court of Human Rights has already stated that reservations to the San Jose Pact should respect the object and purpose rule. The specificity of the reservation is the missing element in the Convention that should be expressly incorporated into the regime. The first step toward doing so would be to return to the original language on reservations submitted to the Conference that negotiated the Convention.¹⁵⁴ The European Convention on Human

ridical matters [and] to promote the development and codification of international law").

153. See *supra* note 34.

154. See *Acts and Documents*, *supra* note 16.

Rights, for instance, requires that the reservation be accompanied by the legal provision that prevents the state from accepting the conventional obligation. In the case of the American Convention, the provision to be attached to the reservation should be a constitutional disposition because Article 2 of the Convention, construed in conjunction with Article 27 of the Vienna Convention,¹⁵⁵ obliges states parties "to adopt . . . such legislative measures as may be necessary to give effect to those rights or freedoms"¹⁵⁶ set forth in the Convention, meaning that conventional precepts prevail over internal legal dispositions.

A new approach to reservations for a new Article 75 of the American Convention could be based on the following :

1. Any State may, at the time of signature, ratification, or accession, make reservations to this Convention provided that such reservations:

are not incompatible with the object and purpose of the Convention;

are not of a general nature, but instead are related to one or more specific provisions that are not in conformity with the Constitution in force in its territory; and

contain a statement of the constitutional proviso concerned.

2. The Inter-American Court of Human Rights shall determine, ex-officio, whether the reservations formulated comply with the requirements of this Article.

The idea is to consider not just the elements of object and purpose of the Convention, and the specificity of the reservation, but to take advantage of the existence of a judicial organ that should have the capacity to determine whether a reservation is consistent with the Convention. Other complementary options include a temporal limitation of reservations and the necessity to expressly revise them from time to time.¹⁵⁷

155. See Vienna Convention, *supra* note 7, art. 27 (stating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

156. American Convention, in *Basic Documents*, *supra* note 1, art 2.

157. See LIJNZAAD, *supra* note 10, at 422 (stating that "[r]eservations shall be

Finally, as stated at the beginning of this paper, none of these ideas are likely to succeed in the short term if states are reluctant to recognize the evolving reality of international human rights law. More out of personal optimism than realistic expectation, however, I foresee the triumph of this reality over the barriers imposed by the apprehensive principle of sovereignty, and consequently the achievement of universality and integrity at the same time.