The Vienna Convention on the Law of Treaties, which was concluded in 1969, could build on the doctrine elaborated by the International Court of Justice in its 1951 Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Article 19 of the Vienna Convention therefore states that, unless the treaty to which a State seeks to accede with a reservation provides otherwise, such a reservation is allowed except where the reservation is incompatible with the object and purpose of the treaty. However, neither that provision of the Vienna Convention nor the other provisions (articles 20 to 23) refer to the specificity of treaties of a "humanitarian" nature, and to the need, in the context of such treaties, to subordinate the consent of States (as expressed by both the reservations they attach to their acceptance of a treaty and by the objections they emit to other States' reservations) to the objective standard provided by the "object and purpose" of the treaty. In other terms, the negotiators of the Vienna Convention were unwilling to go far towards acknowledging that the classic regime of general international law governing reservations to multilateral treaties could be ill-suited to treaties protecting the basic rights of the individual, whose logic is not purely contractual but rather "objective".

This is why the Inter-American Court of Human Rights, when confronted with the question of reservations under the American Convention on Human Rights and whether the entry into force of the Convention vis-à-vis the reserving State depended on the acceptance of the reservation by the other parties to the treaty (i.e., the absence of objections on their part), decided that the general regime of the Vienna Convention could be set aside in this matter. This is all the more remarkable since Article 75 of the American Convention on Human Rights allows for reservations provided they are 'in conformity with the provisions of the Vienna Convention on the Law of Treaties [of 1969]', which seems to recommend a straightforward application of the general international law governing reservations to treaties in the context of the American Convention. Under this general regime, a reserving State would be deemed to become a State Party only on the date when at least one other State Party has accepted the reservation either expressly or by implication (article 20(4) of the Vienna Convention). As you can deduce from this excerpt (/c4x/LouvainX/Louv2.01x/asset/_Materials__Reservations_-_IACtHR_Advisory_Opinion__Final_.pdf), the Inter-American Court expresses its reluctance to apply that rule to assess reservations attached to the accession to the American Convention on Human Rights.

In this Advisory Opinion, the Inter-American Court of Human Rights confirms the shift from the *subjective* criterion (based on States' attitudes) to an *objective* standard (that takes as determinative the relationship of the reservation to the object and purpose of the treaty). But the European Court of Human Rights took an even bolder position a few years later, in the case of *Belilos v. Switzerland*. Upon ratifying the European Convention on Human Rights on 28 November 1974, Switzerland made a "declaration" on the interpretation of Article 6 para. 1 of the Convention. However, the said declaration (which in fact was a reservation in the material sense) appeared to the Court to be too vague and thus, not in compliance with the conditions imposed under Article 64 (now 57) of the Convention, which prohibits reservations "of a general character". The Court thus dismissed the Swiss declaration, finding it void, and concluded that it could go on to proceed with the examination of whether Article 6 para. 1 ECHR had been violated. In its judgment of 29 April 1988, it stated (Eur. Ct. H.R. (plen.), *Belilos* v. *Switzerland*, judgment of 29 April 1988, Series A No. 132, para. 60):

[T]he declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected.

RESERVATIONS AND THE EUROPEAN COURT OF HUMAN RIGHTS (2/2 points)

Consider now the following questions :

1. Is the attitude of the European Court of Human Rights in *Belilos* consistent with general international law?

- Yes
- No ✔

EXPLANATION

No, at least if we adopt an orthodox reading of general international law. International law is based on the principle of consensualism: States are only bound by what they have agreed to. This follows from the principle of sovereignty. The consequence is that, if a reservation that a State has attached to its ratification of a multilateral treaty is rejected as invalid, the State has a choice, either to join the treaty after withdrawing the reservation, or to withdraw from the treaty altogether. But the State, in principle, should not be bound, since this would mean imposing on a State that it complies with a treaty beyond and against its expression of consent. This explains the perplexity, and sometimes the furore, that followed the Belilos judgment in doctrine.

Help

2. If the position of the European Court of Human Rights in Belilos is not consistent with general international law, then what consideration, if any, could justify it? Would the judgment be justified by the fact that the European Convention on Human Rights is of a "humanitarian" nature, that cannot be reduced to an exchange of obligations between States?

- Yes, the 'humanitarian' character of the European Convention authorizes the Court to dismiss Switzerland's reservation.
- No. Even if the appeal to the 'purpose and object' of the treaty allowed the court to consider the reservation *invalid*, the consequence should have been that Switzerland was not bound by the treaty. ✔

EXPLANATION

The specific nature of the European Convention on Human Rights as a human rights instrument does justify considering with skepticism the "decentralized" monitoring of reservations by the other States parties to the Convention: these States have little interest in examining the reservations attached by one State joining the Convention, and therefore their failure to raise objections cannot be seen as determinative in assessing whether or not a particular reservation is admissible. But that consideration is only relevant here to the extent that it justifies the European Court of Human Rights itself taking responsibility for assessing the compatibility of the reservation with the requirements of the Convention (more precisely, with the prohibition of reservations "of a general nature", expressed

in Article 64 (now Article 57)). The more delicate question concerns the consequence of the Swiss reservation being found invalid: Is the implication that Switzerland must renounce the reservation, if it wants to remain a party to the Convention? Or is the implication that Switzerland remains bound, though its reservation is disregarded? The Court opts for the latter solution. It was this aspect of the decision that proved most controversial, and that is most difficult to justify, except by the consideration that human rights treaties should have as wide a membership as possible due to the importance of the values that they embody.

Check Hide Answer(s)