BRAZILIAN RESERVATION AT THE PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS TO ABOLISH THE DEATH PENALTY

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ABSTRACT: The present article aims to discuss the institute of reservations, by giving a general overview and discussing further the aspect of reservations on human right treaties. Besides that, it analyzes the Brazilian reservation at the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, in this matter, tries to understand the settings that led the country to make such reservation and how it fits in the present environment. After going over some important international documentation, such as United Nations Resolutions and the Rome Statute, it concludes that this specific reservation has become obsolete.

KEYWORDS: reservation, death penalty, human rights, Rome Statute.

1. Introduction

Reservations have long been discussed in international level being adopted in practice by the League of Nations with the condition of unanimity acceptance of the reservation by the other parties of the treaty. Such was the main notion of reservations until early fifties, when the International Court of Justice was asked by the General Assembly to give an Advisory Opinion about legal effects of reservations to the Genocide Case. It was then that the current notion of reservations begun to be built.

In this Advisory Opinion the ICJ claimed that a State could be a party of a treaty even if the reservation had not been accepted unanimously, as long as it did not defeat the purpose or object of the treaty. Subsequently, this was the notion adopted by the Vienna

[43] Mestranda em Direito pela Universidade de Utrecht, Holanda – "Human Rights and Criminal Justice".

Convention on Law of Treaties in 1969.

Regarding Human Right Treaties, even though the majority opinion accepts the reservation in such treaties, there are strong dissident opinions which argue that a reservation in this kind of treaties would *per se* be contrary to the object and purpose of such treaty.

This essay will take intoaccount all the developing theory in reservation and try to apply it, and its dissident opinions in the practical case of the Brazilian Reservation on the American Protocol on Human Rights to Abolish the Death Penalty.

The Death Penalty has long been a subject of discussion in the Human Rights field. Since the Universal Declaration of Human Rights, the international community has settled in its majority that such penalty is a grave violation of Human Rights.

The American Protocol on Human Rights to Abolish the Death Penalty was approved by the Organization of American States General Assembly in June 1990, just one year after the Second Optional Protocol on the Covenant on Civil and Political Rights that aimed for the abolition of death penalty in the universal system. The main purpose of the American Protocol was to extend such abolition to at the regional system since many of our States have not, to the present date, signed or ratified the Second Protocol. Although it is established also as an optional protocol, by bringing it up the death penalty issue at the OAS, the Protocol encourages the American countries to debate further on such issue and to state their national position towards it.

In this environment, the Brazilian State has always made clear that it was against the death penalty by signing and ratifying the Protocol, even though it has made a reservation permitted by the protocol, which states that in time of war the death penalty can be established according to international law.

Besides both treaties mentioned above, and the international customary law, which is against death penalty, it also has to be considerate the Rome Statute, which established the

International Criminal Court and not only has strong views about the death penalty, but also indirectly proposes to wipe death penalty from the States Party of the Convention.

The Brazilian society has always supported the international community towards abolishing the death penalty – as it can be seen through the Brazilian history that the only time death penalty was legal was during our military dictatorship constitution, and even then only in particularly cases. That is why it seems so contradictory that after the 1988's Constitution – which mainly focuses on fundamental rights – the Brazilian state would make such reservation in the American Protocol.

This essay will focus mainly in explaining the setting and the purpose of such reservation, discussing whether it would still be applicable or if it became obsolete over the years, since the reservation expressly stated that death penalty would be ruled through international law and the Brazilian State has constantly positioned itself in the international community as a non-death penalty country, by signing treaties and supporting this stream.

2. Reservation

Reservation is a unilateral statement made by a State when it signs or ratifies a treaty (or even later if the treaty allows it), through which this State modifies or excludes a biding obligation from the referred treaty.[44] That means that through such clause the State is allowed by the International Law to become a part of a multilateral treaty without accepting some specific provision, by keeping back or withholding from them.

As previously affirmed in the introduction of this essay, the current notion of reservation was firstly declared in the Advisory Opinion of the International Court of Justice[45] in the Reservation to

44 DIXON, Martin. *Text Book International Law.* 6th Edition. Oxford University Press, 2007, p. 66.
45 Hereinafter ICJ

Genocide Convention, in which the mentioned Court fully stated that the Reserving State can maintain its reservation despite objections of other states, as long as this reservation is compatible with the purpose and object of the treaty – this was an increacing practice in the years previous to the Advisory Opinion.

A party can make an objection to a reserving state considering its reservation against the purpose or object of the treaty, in which case, for the objecting State, the reserving State will not be a party of the treaty. Lastly the ICJ declared that the reservation only produces legal effects once it is ratified, and the objection made upon a reservation which has not yet being ratified does not produce any legal effects until the confirmation of that reservation.[46]

The Advisory Opinion of the ICJ was the foundation for what serves as the main legal basis that regulates reservations nowadays: the Vienna Convention on the Law of Treaties[47], also known as Treaty of Treaties, which provides us with the current codification of international customary law governing their creation, effects and interpretation of international treaties. Most of the current treaties simply adopt its resolution exactly the same, or if not explicit in such treaties, they are regulated by the residual rules of VCLT.

In regards to reservations in human rights treaties, there is a *draft guideline* from the International Law Commission,[48] which is still a work in progress. In its forty-fifth session the ILC decided that reservations needed to be clarified and developed, specially reservations towards human right treaties, without challenging the rules in the VCLT.

General Rules

46 Advisory Opinion of 28 May 1951, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, available at: http://www.icj-cij.org/docket/files/12/4283.pdf

47 Hereinafter VCLT.

48 Hereinafter ILC.

According to the VCLT the reservation can be formulated by the State at the moment of signature, ratification, acceptation, approval or accedence, unless the treaty strictly forbids the reservation which is being made; only allows specific reservation which does not include the reservation being made or if such reservation is against the objective and purpose of the treaty.[49]

Its acceptance does not need any further requirement to be fulfilled if such reservation is expressly allowed by the treaty.[50] On the other hand, the application of the treaty in its integrity depends on the acceptance of all parties – due to reasons of limited number of States negotiating, object and purpose – the reservation must be accepted by all parties.[51] Regarding treaties that constitute international organizations, reservations must be approved by the competent organ of the organization.[52] Other exceptional cases concerning reservations acceptance and objections are made by Article 20 (4). Finally, it is considered accepted the reservation that has had no objections after a period of twelve months.[53]

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49 The Vienna Convention on the Law of Treaties, 1969, art. 19.available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

50 The Vienna Convention on the Law of Treaties, 1969, art. 20 (1).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

51 The Vienna Convention on the Law of Treaties, 1969, art. 20 (2).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

52 The Vienna Convention on the Law of Treaties, 1969, art. 20 (3).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

53 The Vienna Convention on the Law of Treaties, 1969, art. 20 (5).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.p

The legal effect of the reservation somehow always involves the reserving State. It modifies the provision for the Reserving State[54], as well as modifies for other States in relation to the Reserving State[55], unless the other State has made an objection. In this case the reservation will not be applicable between the Reserving State and the Objecting State[56]. Reservations do not modify the provision for the other parties *inter se*.[57]

In regards to withdrawing reservations, unless it is expressly stated otherwise, the reserving State can withdraw them at anytime and without the consent of any other party.[58] The withdrawing of a reservation or of an objection only produces legal effect when the other party(ies) is notified.[59]

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54 The Vienna Convention on the Law of Treaties, 1969, art. 21 (1),a, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

55 The Vienna Convention on the Law of Treaties, 1969, art. 21 (1), a,.available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

56 The Vienna Convention on the Law of Treaties, 1969, art. 21 (3).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

57 The Vienna Convention on the Law of Treaties, 1969, art. 21 (2).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

58 The Vienna Convention on the Law of Treaties, 1969, art. 22 (1) and (2).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

59 The Vienna Convention on the Law of Treaties, 1969, art. 22 (3).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

At last, some procedures must be followed to guarantee the integrity of the reservations, such as: the expressly acceptance or objection must be formulated in writing and communicated to the other parties. A reservation made in the signing of the treaty must be confirmed in its ratification, approval or confirmation, although the acceptance or objection of such reservation by another State does not need to be confirmed; finally, the withdrawal of the reservation or the objection must be done in writing.[60]

Reservations in Human Rights Treaties

Regarding specifically to Human Rights treaties, even though the system of reservations in these treaties can hardly be considered consistent, the majority of the authors agree that reservations can be made as long as they do not concern to non-derogable provision. To make reservation to such provisions would eventually be incompatible to the purpose and object of the treaty.[61] The same was declared by The United Nations Human Rights Committee in its General Comment n.24[62]:

> "The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible

60 The Vienna Convention on the Law of Treaties, 1969, art. 24 (1), (2), (3) and (4).available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

61 CHINKIN and Others; *Reservations to Human Rights Treaties*, Ed. J.P. Gardner, 1997, p. 9,

62 UNITED NATIONS HUMAN RIGHTS COMMITTEE; *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.* 04/11/94. CCPR/C/21/Rev.1/Add.6, para. 10.

> with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. [...]. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency [...]. Another reason is that derogation may indeed be impossible [...]. At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. [...]. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - [..]While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation"

Concerning the acceptance and legal effects of reservations and objections in the Human Rights treaties, the practice is quite broad. Trying to explain the current practice, the doctrine divided the acceptance and the legal effects in three categories:

1. first, when the Objecting States declare the incompatibility of the reservation and preclude the treaty relation with the Reserving State;
2. secondly, when Objecting States explicitly declare the incompatibility of the reservation but do not preclude the relation with the Reserving State;
3. and third, when the objecting States do not explicitly declare the incompatibility, instead use other lighter terms which do not produce any practical legal effect.[63]

At about this point a debate emerges in the doctrine on

63 CHINKIN and Others; *Reservations to Human Rights Treaties*, Ed. J.P. Gardner, 1997, p. 10.

whether the permissibility rule should be the main rule, or the opposability rule should take this role. For those who believe that the permissibility rule should be the principal stream, the acceptance by the other parties does not give compatibility of the reservation with the treaty, i.e. an impermissible reservation will not be effective just because it was accepted by the other parties. On the other hand, for those who believe in the opposability rule, the reservation produces legal effects as soon as accepted, i.e. the compatibility to the treaty is only important as a primary issue; if accepted by the other parties, the reservation may enter in force – even if it is incompatible.[64] In other words, Bowett has explained that "either the reservation is nullity, thus severable from the consent to be bound, or the impermissible reservation nullifies the reserving State's acceptance of the treaty as whole."[65]

As we can see, in practice, this second approach – the flexible system depending mainly on the approval of the States - is the most common, which leaves room for the discussion about the legal consequences of an impermissible reservation. In this regard, since the VCLT did not discuss this matter further, the States trying to avoid this reservation have resorted to one of the following procedures while drafting the Treaty[66]:

(I) isolation – through which the convention isolates the articles which may not be any reservation. This way the Convention already establishes which articles are the soul of the treaty, containing the objective and purpose of it;

(II) general prohibition – which states that no reservation can be made unless it is fully expressed by the treaty itself – and finally;

(III) collective or third party determination – which asserts that

64 CLARK, Belinda; *The Vienna Convention Reservation Regime and The Convention on Discrimination Against Women*, 85 AM. J. INT'L L.

65 BOWETT, D.W.; *Resevations to Non-Restricted Multilateral Treaties*, B.Y.I.L., (1976-1977), p.75.

66 CHINKIN and Others; *Reservations to Human Rights Treaties*, Ed. J.P. Gardner, 1997, p. 13.

to be accepted the reservation must be approved by the majority of the state parties.

In this last option the responsibility of determining the validity of the reservation is placed upon the States Parties. This approach was taken in the Convention on the Elimination of All Forms of Racial Discrimination[67] in its article 20 (2) which pronounces that a reservation will be considered incompatible if at least two-thirds of the State Parties of the Convention objects to it.[68]

We have to take in consideration that human rights treaties are the result of a cooperation process, not from a contractual process of law making. Because that usually concerns about general obligations of interest of all human being in the international community, providing protection to individuals and liability to the States. It is not their main intention to be a contractual reciprocal treaty, even though they can operate this way. That is why it has to be bound to the object and purpose, as stated by the ICJ in the Genocide Case and latter on in the VCLT, to become a valid reservation.

On the other hand, the extent of the object and purpose of a human rights treaty is arguable, since it cannot be seen through an objective standard, and no actual mechanism was installed by either sources above mentioned. Therefore the validity according to the purpose and object of the treaty once again falls to the hands of the States – the same ones that have all the duties to ensure human rights and none of the benefits – since the beneficiaries are the individuals – leaving room for political and economic dispute regarding those reservations. It must also be considered that human rights treaties usually stand for "utopian" patterns, in the sense that they establish universal goals that aim to change the practice of the states towards those rights. In this perspective, the integrity of the treaty is necessary to the accomplishment of their purpose and

67 Hereinafter CERD

68 Convention on the Elimination of All Forms of Racial Discrimination, 4 January 1969, available at: http://www2.ohchr.org/english/law/cerd.htm

object.

3. The Protocol to the American Convention on Human Rights to Abolish the Death Penalty and the Brazilian reservation

The second protocol to the American Convention on Human Rights[69], regarding the abolition of the death penalty was adopted in June 8th, 1990 at Asunción, Paraguay. Following its "preceder", the Second Protocol to Covenant on Civil and Political Rights, aimed at the abolition of the death penalty[70], the Protocol prioritizes the right of life, established in article 4 from the ACHR[71] and the inalienability of such right, as well as states that the application of the death penalty has irrevocable consequences and precludes any possibility of changing and rehabilitating the convicted ones. It consolidates a growing tendency among the American States in favor of the abolition of death penalty, that had already being severely restricted by the article 4 of the ACHR – by only allowing States to apply such penalty in the most serious crimes; for people between the ages of 18 and 70 years old, exception to pregnant women; not allowing to be used against political offenses or common crimes and finally stating that once it is abolished it cannot be re-instated.[72]

In its first article the Protocol to the ACHR to Abolish the Death Penalty declares that the death penalty may not be used in their territory to any person in their jurisdiction.[73] In the second

69 Hereinafter ACHR.
70 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. available at: http://www2.ohchr.org/english/law/ccpr-death.htm
71 American Convention on Human Rights, 1969, art. 4 "".
72 Protocol to the American Convention on Human Rights to Abolish the Death Penalty , 8 June1990, Preamble. Available at: http://www.cidh.org/Basicos/English/Basic7.Death%20Penalty.htm
73 Protocol to the American Convention on Human Rights to Abolish the Death Penalty , 8 June1990, article 1. Available at:

article it establishes the only reservation that can be made, which is the right to apply the death penalty in wartime, in accordance to the international law, for serious crimes of military nature. It also establishes the procedures that shall be followed to make this reservation, as well as orders the Reserving States to notify the Organization of American States[74] about the wartime.[75] Articles three and four concern signature, ratification and entry in force of the Protocol.

The Protocol was deposited by the OAS General Secretary, the original document and the ratifications, and entered in force in August 28th, 1991. Brazil signed it on July 6th, 1994, making the following permitted reservation in the ratification of the Convention on July 31st, 1996.

> "In ratifying the Protocol to Abolish the Death Penalty, adopted in Asunción on June 8, 1990, make hereby, in compliance with constitutional requirements, a reservation under the terms of Article 2 of the said Protocol, which guarantees states parties the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature."[76]

There is no doubt that the reservation made by the Brazilian State is in full compliance with the object and purpose of the treaty, since the Convention itself resorted to the general prohibition procedure by establishing which kind of reservation could be made and how it should be made.

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http://www.cidh.org/Basicos/English/Basic7.Death%20Penalty.htm

74 Hereinafter OAS.

75 Protocol to the American Convention on Human Rights to Abolish the Death Penalty , 8 June1990, article 2. Available at: http://www.cidh.org/Basicos/English/Basic7.Death%20Penalty.htm

76 Protocol to the American Convention on Human Rights to Abolish the Death Penalty , 8 June1990, Brazilian Reservation. Available at: http://www.cidh.org/Basicos/English/Basic7.Death%20Penalty.htm

The debate arises on whether the reservation permitted by the convention itself would not defeat the purpose of the Convention. The reservation tries to conciliate Human Rights Law[77] and International Humanitarian Law[78], since they are complementary ramifications of international law, thus IHL becomes the predominate body of law in wartime situation and the reservation excludes HRL from this obligation. However, it fails to consider that even if IHL has the most appropriate set of rules to wartime, HRL is still applicable. HRL is not only applicable in peaceful times, which means that it does not have to exclude itself from the set of rules that will be applicable at wartime, since it is a part of the same international law that shall rule in case of a war.

In this way has pronounced Cançado by saying that:

> "The Protocol to the American Convention on Human Rights to Abolish the Death Penalty does not admit reservation, except penalties 'in wartime, in accordance with international law, for extremely serious crimes of a military nature'. still must be borne in mind that, in situations of armed conflict (international and 'non-international') and internal disturbances and tensions, characteristic from international humanitarian law, has been expressed strong prohibitive and restrictive tendency of the death penalty."[79]

Therefore it can be observed that there was no need for the Protocol to allow such reservation, since it is consistent in the international community that IHL shall rule during wartime and the death penalty may be applied according to the Geneva Conventions and its Protocols. And specially because it is a Optional Convention – optional being the keyword – that aims for the death penalty

77 Hereinafter HRL.
78 Hereinafter IHL.
79 CANCADO TRINDADE A.A., *El Brasil contra la pena de muerte*, Revista IIDH, vol. 19. p.550., 1994.

abolition, one wonders if the permissible reservation does not go against the primary idea of the Convention itself.

Besides that, taking in consideration the agreed consensus that IHL will prevail during wartime, the reservation, although permissible, becomes obsolete. The same criticism can be applied to the Optional Protocol to the International Covenant on Civil and Political Rights Aiming the Abolition of the Death Penalty, which makes essentially the same reservation at its article 2 (1).[80]

In this way, the Commission on Human Rights has been pronouncing itself in its latest sessions, as stated expressively in the Resolution 2005/59 of 20 April 2005 "that condemns the continuing application of the death penalty on the basis of any discriminatory legislation, policies and practice,[81] as well as calls upon the States that still maintain such penalties to abolish and in the meantime establish moratoriums"[82], which basically means not to take action in any of the convictions. Without making exception to the rule of abolition to the death penalty, the UN General Assembly following the above Resolution calls upon States that still maintain the death penalty to abolish it *completely*,[83] and to establish moratorium on the executions.

4. The Rome Statute

The Rome Statute[84] was adopted on July17, 1998, entering

80 The Second Optional Protocol on the Covenant on Civil and Political Rights, adopted in 15 December 1989, art. 2(1) "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." available at:
81 Human Rights Resolution 2005/59, art. 2.
82 Human Rights Resolution 2005/59, art. 5 (a).
83 62/149. Moratorium on the use of the death penalty, Resolution adopted by the General Assembly, 18 December 2007.
84 Hereinafter RS.

into force on July 1, 2002. It establishes The International Criminal Court[85] as a permanent Court that shall have jurisdiction over people for the most serious crimes of international concern[86].

The RS results from the concerns of an international community after two World Wars and major conflicts led by individuals, which brought to surface serious crimes that threaten the peace, security and well-being of the world. The statute is determined to end impunity by establishing an international Court to judge *individuals* – as perpetrators of these crimes – and preventing those crimes. It emphasizes the duty of the States over the criminals responsible for international crimes within their jurisdiction, and establishes the Court as a complementary jurisdiction.

In its article 5 (1), the RS sets its jurisdiction over most serious crimes that concerns the international community as a whole, establishing in its letter 'c' the jurisdiction over war crimes.[87] Furthermore in the article 8 (2), the Statute defines war crimes as grave breaches to the Geneva Conventions; other serious violations of laws and customs applicable in international armed conflicts, within the established framework of international law; serious violations of common article 3 to the four Geneva Conventions in case of a armed conflict not of international character; and finally, other serious violations of the laws and customs applicable in armed conflicts not of an international character.[88]

In the jurisdiction matter the RS states that it may only

85 Hereinafter ICC.

86 Rome Statute of the International Criminal Court, art. 1 "An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."

87Rome Statute of the International Criminal Court, art. 5 (1) c.

88 Rome Statute of the International Criminal Court, art. 8 (2).

exercise its jurisdiction over the crimes prescribed in article 5 of the Statute, and with regard to crimes committed after the entry into force of the Statute. The jurisdiction may be exercised in crimes that have happened in one of the States Parties – including on board of a vessel or aircraft – or if the person accused of a crime is national from a State Party.[89] It is important to highlight that the ICC, even though it is a complementary jurisdiction, may request the arrest or the surrender of a person to the Tribunal, and the States Parties, shall in accordance comply with such request.[90]
Regarding the penalties sentenced by the ICC, the applicable penalty may not exceed the imprisonment for over 30 years, or in exceptional cases – due to the extreme gravity of the crime and the individual circumstances of the convicted person – a lifetime imprisonment may be established. Fines and forfeiture of proceeds, property and assets are also applicable.[91]

The Brazilian State has participated in the creation of the Rome Statute, ratified it on June 20, 2002, and inserted it in its Constitution through a Constitutional Amendment n. 45, in the article 5, paragraph 4, stating that "Brazil enters under the jurisdiction of the International Criminal Court whose creation has manifested adherence".[92] This article deals with the Fundamental Rights and Guarantees, which is the venal focus of the Constitution. The 1988 Constitution is seen as a mark in the Brazilian society since it focuses mainly in the affirmation and guarantee of a society based on democratic human rights. Placing the ICC jurisdiction in such article is an important statement.

According to this same article, there shall not have death penalty implemented, unless in case of declared war, that shall be

89 Rome Statute of the International Criminal Court, art. 11 and 12.
90 Rome Statute of the International Criminal Court, art. 89.
91 Rome Statute of the International Criminal Court, art. 77.
92 Constituição Federal Brasileira de 1988. (Brazilian Constitution). Art, 5, para. 4. available at:
http://www.planalto.gov.br/ccivil_03/constituicao/constituiçao.htm

authorized by the Congress and declared by the President, and shall be ruled in accordance to international law. This happens because the international conventions are directly implemented by transposition in Brazil, which means that once the State adheres to the treaty, this treaty has the same degree as any other legal rule of genuine national origin.[93] Since Brazil is bound not only by the Protocol to the American Convention on Human Right to Abolish the Death Penalty, but also with other resolutions at regional and world level, such as the four Geneva Conventions and its Additional Protocols, the country has to apply the international law for such crimes.

According to the Brazilian doctrine "its (ICC) jurisdiction will, obviously, focus only in rare cases, when the country's internal measures prove insufficient or lacking in regards to the development and trial of the accused, as well as breaching the criminal law and procedural internal".[94] Since Brazil does not have an internal legislation appropriate to war crimes, and as previously stated it is bound by international law to apply it, and also since as received in its Constitution the jurisdiction of the ICC, this will fundamentally leads any war crime directly to that jurisdiction.

5. The Issue of Conflicting Rules

When it comes to reservations, on one side there is this flexible system that allows the States to accept a reservation in accordance to their interpretation of the object and purpose, resulting in a larger adherence to the treaty. However, there is no way to ensure that this interpretation will not be political or

93 TOMUSCHAT, Christian. *Human Rights – Between Idealism and Realism*. 2nd Edition. Oxford University Press, 2008, p. 111.
94 *O direito internacional e o direito brasileiro: homenagem a José Francisco Rezek*/Org. Wagner Menezes, editora Rio Grande do Sul, editora Unijuí, 2004, p. 235.

extralegal motivated.[95] Also, since a State can still be a party of the treaty even though other States object to their reservation – according to the opposability virtue allowed by the flexible system – the integrity of the treaty is obviously in line. The system therefore enlarges the universal participation, although it is controversy with the universal integrity of the treaty.

On the other hand, it is surreal to go back to the perspective that human rights treaties should be accepted in their integrity; it is an overpass situation, and in practice it would neither fulfill the goal of the treaties – ensure human rights – nor have a universal participation. The unanimity idea to pursue the integrity of the treaty, by arguing that otherwise reservations would essentially conflict with the purpose or object of the treaty, is already overcome.

The current challenge is to establish mechanisms that were not included neither developed by the VCLT to ensure that reservations will not be used in a way for States to excuse themselves from their duties. Such mechanisms should clearly ensure that the purpose and object of the treaties are not lost by the acceptance or non-objections of impermissible reservations. These mechanisms should also not allow States to use human rights as political bargains.

In concern to the death penalty legislation, as previously seen, the Brazilian Constitution in its article 5, XLVII, does not allow death penalty except in cases of declared war. Still, in the Constitution, according to article 84, XIX, it is from the President Private Competence to declare war in case of foreign invasion, once the Congress has authorized it. Also, one should keep in mind the paragraph 4 of article 5 that establishes the ICC as the appropriate jurisdiction to war crimes.[96]

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95 CLARK, Belinda; *The Vienna Convention Reservation Regime and The Convention on Discrimination Against Women*, 85 AM. J. INT'L L.

96 Constituição Federal Brasileira de 1988. (Brazilian Constitution). Art, 5: "All persons are equal before the law, without any distinction whatsoever,

It has also been stated that International Conventions once ratified by the Brazilian State are transposed to the national level being applied at the same level as national law. This means that after the approval they can be applied directly by the judicial bodies. In this scope, the Brazilian State has the Four Geneva Conventions and its Additional Protocols, as well the Protocol on the ACHR to Abolish the Death Penalty, and also the Rome Statute as an international treaty that can be directly applied.

On one hand we have the national rules and the Protocol to the ACHR to abolish the Death Penalty that are essentially against the death penalty, even though they recognize that in exceptional specific cases this rule can be overwhelmed. On the other we also have the Protocol to the ACHR to Abolish the Death Penalty and the Geneva Conventions and its Additional Protocols that restricts the area where the death penalty can be used, and also establishes that international law should rule these cases. And finally, there is this relatively new international jurisdiction recognized by the Brazilian State as the appropriate jurisdiction for war crimes, ruling out the death penalty.

In this matter, the idea of consolidating all the kinds of rules present nowadays in the Brazilian legislation would eventually mean to prioritize one over the other. And following the past two decades' policies regarding death penalty, it is possible to conclude that some

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Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

XLVII - there shall be no punishment: a) of death, save in case of declared war under the terms of article 84, XIX; Para. 4: Brazil shall be submitted to the jurisdiction of International Penal Tribunal to which creation it had manifested agreement."

"Art. 84: "The President of the Republic shall have the exclusive power to: XIX - declare war, in the event of foreign aggression, authorized by the National Congress or confirmed by it, whenever it occurs between legislative sessions and, under the same conditions, to decree full or partial national mobilization."

of the rules have become useless in practice.

6. Conclusion

It is remarkable that reservation has evolved great matters within the last century. It was born in a unanimous perspective, back in the beginning of the XX century, when to be considered valid a reservation had to be accepted by all the State Parties from the multilateral treaty – which created large obstacles for the larger adherence of the treaty. Now it has developed into this complex yet flexible system that ensures not only the large adherence of the treaty as well as the integrity of the treaty, by allowing reservations that are not in conflict with the essence of the treaty.

The Advisory Opinion in the Reservation on Genocide Case by the ICJ was clearly a turning point in the interpretation of reservations, leading the doctrine and practice to leave aside the predominant idea of whole integrity and unanimity to embrace a rather most fair system. It brought up criteria to help to ensure a larger participation of the States in the Treaties, without needing to be completely consensual, but also without corrupting the *raison d'etre* of the treaty.

Purpose and object criteria managed to make the international community realize that the conservative system that required unanimity was already exceeded; it could not support the development of the international community and the need to increase the participants in the multilateral treaties as well bound them with universal values.

The VCLT came almost twenty years after the Advisory Opinion, inter alia, to consolidate, in a legal multilateral writing bounding convention, this well-established flexible system based on the purpose and object criteria, which was, by then, a common practice. Since the VCLT is the applicable law in regards to all kinds of international treaties, not only human rights treaties, it could not avoid the need for some more definite mechanisms in human rights

treaties to ensure that reservations will not be in conflict with the convention were not made.

Those mechanisms are still a controversial discussion in the doctrine, since, as we could see, a part of the doctrine believes that the aspiring nature of the human rights are part of the purpose of such treaties, and allowing reservations in theses treaties would necessarily mean a conflict with the purpose and object of the treaty. On the other hand most of the doctrine stands that only important and numerous reservations would actually affect the integrity of the human rights treaties.

In relation to the death penalty reservation in the Protocol on the ACHR to Abolish the Death penalty, it is possible to conclude that the Brazilian State has always demonstrate its aspiration to completely abolish this kind of penalty, and the reasons that lead the State to make the allowed reservation back when they first signed the Protocol was to line up the Protocol with our Constitution, that had the exception for war crimes. Which fundamentally leads us to question why a State clearly against death penalty would include such exception in their Constitution.

To answer this question we have to bear in mind that this Constitution was drafted in the early eighties, while the Cold War was still in effect, and when the IHL and the customary law were not such a tangible reality to the States. It surely had its binding rules, but the incertitude towards the actual practice made most States include in their national law exception rules, trying to secure themselves.

However, taking in consideration not only the exception in the Constitution, but mainly the current situation, where the State has numerous times stated its position against the death penalty not only in regional assemblies (OAS level) or worldwide assemblies (UN level), but also the consensus jurisprudence against death penalty, the writing resolutions and agreements regarding the abolition of death penalty, and specially the recognition of the ICC as the appropriate jurisdiction to war crimes, it is possible to come

to the conclusion that reservation made in 1994 to the Protocol on the ACHR the Abolition of the Death Penalty have become obsolete, since there are no practical effects whatsoever.

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