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Cultural Relativism and  
Reservations to Human Rights  
Treaties:  
The Legal Effects of the Saudi  
Reservation to CEDAW

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# Summary

Saudi Arabia ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 2000. The ratification was a step forward for the strict gender segregated country but could not be genuinely hailed due to a general reservation giving prevalence to Islamic Law in case of conflict with the provision of the Convention. Whereas it can be established that a sweeping reservation in those terms is contrary to the object and purpose of the Convention and thus prohibited in accordance with the Vienna Convention on the Law of Treaties and article 28(2) of CEDAW, the legal effects of incompatible reservations remain unclear. What obligations does Saudi Arabia have under CEDAW having in mind the undefined reservation? The question cannot be answered until the legal effects of incompatible reservations are established.

Many other States have formulated reservations in contravention to the object and purpose of human rights conventions and in particular CEDAW is plagued with incompatible reservations, a large number of them referring to Islamic or domestic law. Despite the fact that human rights have been declared universal, the many reservations witness about a strong cultural relativism as regards human rights, most notably the human rights of women. Numerous reservations aiming to withhold discrimination against women, and in the worst cases nullify many of CEDAW's provisions, seriously undermine the Convention and the quality of protection provided therein. It is of fundamental importance that the legal effects of those reservations are established in order not to let the reserving States maintain incompatible reservations with assumed legitimacy and thus devalue the Convention and the human rights of women.

The Vienna Convention provides the legal framework for reservations but is ambiguous as regards the legal effects of incompatible reservations. Three divergent consequences for a State who has formulated an incompatible reservation can be distinguished in doctrine and practice: *i*) the State remains bound by the treaty except for the provision to which the reservation is related (to the extent of the reservation), *ii*) the reserving State is no longer a party to the treaty, or *iii*) the incompatible reservation is severed and the reserving State is bound by the treaty as a whole (as if no reservation was made).

The focal point of the analysis is on the level of human rights monitoring bodies – how would a human rights court or a UN human rights treaty body, in this case the Committee on the Elimination of Discrimination against Women, determine the legal effects of an incompatible reservation? The first option mentioned above is relevant only in bilateral relations, not where a third body determines an individual human rights complaint, and consequently the thesis centres on the two latter options.

The last alternative, the so-called ‘severability doctrine’, is indeed preferable from a human rights perspective. But can a reservation be severed without the consent of the reserving State? The opponents claim that a State cannot be bound to treaty terms it has explicitly declined to accept, whereas certain jurisprudence and State practice point in favour of severability. The European Court of Human Rights has established a jurisprudence of severability but its applicability in international courts/human rights treaty bodies is much more controversial. The principle of State consent and State sovereignty still prevails over community and human rights interests and therefore it is hard to *de lege lata* reconcile the severability doctrine with international law. However, severability shall not be an excluded option but rather put in relation to the principle of State consent. Where the reserving State would have ratified a convention even without the reservation, i.e. where the reservation is not a *sine qua non* for ratification, the reservation can be severed.

Having in mind the traditionalist Islamic identity of Saudi Arabia much speaks against a Saudi consent to be bound by CEDAW without the *Shari’ah*-reservation. The *de lege lata* effects of the Saudi reservation must therefore be the invalidation of the treaty ratification. Such an outcome is undesirable from a human rights perspective and it is likely that the UN human rights treaty bodies, while e.g. concluding an individual complaint, take on the approach of the European Court of Human Rights and thus contribute to the development of severability as the automatic legal effect for incompatible reservations also on an international level.

# 1 Introduction

## 1.1 Subject and aim of the thesis

*'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'.<sup>1</sup>*

Despite the fact that human rights have been declared universal many States formulate reservations to human rights treaties indicating the opposite. In particular the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been plagued with substantive reservations, which evidence a resistance towards the universalism of human rights. Many reservations are a clear sign of a strong cultural relativism as regards the interpretation of the principle of equality between men and women. A particular problem arises with the large number of reservations which, by reference to Islamic law, aim to withhold cultural and religious diversities that contravene the universal idea of the human rights of women.

Reservations are not necessarily evil and are in general allowed for under the Vienna Convention on the Law of Treaties and the corresponding rules of international customary law. The possibility to formulate reservations facilitates ratification in a community with concurring cultural and political interests. However, not all reservations are permitted as this would threaten the essence and integrity of treaties. In other words, not all cultural diversities are accepted. Reservations which contravene the object and purpose of the treaty concerned are expressly prohibited both under the Vienna Convention and CEDAW. Many of the reservations which aim to restrict fundamental rights of women and attempt to withhold certain discriminatory behaviour towards women are certainly of questionable compatibility with the object and purpose of CEDAW. The question arises; what are the legal effects of a reservation that contravenes the object and purpose of the convention concerned?

It has repeatedly been stated that the issue of reservations is one of the most controversial subjects in international law. The law on reservations is unclear and the prevailing interpretation of the Vienna Convention on the Law of Treaties is that it is silent as to the effects of reservations in contravention of the object and purpose of the convention in question, i.e. incompatible reservations. The ambiguous law on reservations leads to a *de facto* situation where incompatible reservations are accepted and the

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<sup>1</sup> Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, (1993) para 5.

reserving State consequently deprive the individuals under its jurisdiction from rights with assumed legitimacy. This severely affects human rights treaties, which aim to spread universal values, and undermines the quality of protection provided in those treaties. There is a risk that the large number of reservations to CEDAW and the lack of clear denunciations in this respect, lead to a devaluation of the human rights of women.

Saudi Arabia ratified CEDAW in 2000 together with a reservation stating that Islamic law has prevalence over the provisions of the Convention. The aim of this thesis is to establish the legal effects of a reservation in those terms, having in mind the legal and political background of Saudi Arabia. *What are the legal effects of the Saudi reservation?* Is Saudi Arabia bound by the provisions of CEDAW only to the extent of the reservation? Is Saudi Arabia bound by CEDAW as if no reservation was formulated, i.e. the reservation can be severed? Or is Saudi Arabia not bound by CEDAW at all?

Out of the lacunae of the Vienna Convention a number of suggestions on how to deal with incompatible reservations to human rights treaties have developed in practice. Regional jurisprudence and State practice have developed in favour for a separate reservations regime for human rights treaties, which would allow human rights monitoring bodies to 'severe' incompatible reservations, i.e. the reserving State remains bound by the treaty without the reservation (the 'severability doctrine'). The opponents claim that the practise contravenes general principles of international law, namely the principle of State consent. A State cannot be bound to treaty terms it has explicitly declined to accept. Further, it is argued that the UN human rights treaty bodies are not competent to determine the validity and effects of reservations at all. The legal effects of the Saudi reservation to CEDAW will be analysed in both a *de lege ferenda* and a *de lege lata* perspective in light of the 'new' practices while taking into account the arguments of the opponents. Focus will be on the possibility to apply the severability doctrine to the Saudi reservation.

The problem with reservations is not only legal, but also moral and cultural. The larger part of the thesis focuses on the legal issues but it is important to also bear in mind the rationale behind a reservation in order to comprehend the width of the problem. An interrelated aim of the thesis is thus to depict the religious background of Saudi Arabia in order to illustrate the cultural complexity involved. In particular, knowledge about the rationale is necessary for the assessment of State consent and thus, the possible application of the severability doctrine.

After having spent four months in Riyadh, Saudi Arabia, it became evident that the implementation of the provisions of CEDAW is a complete failure. Being aware of the *Shari'ah* reservation the question naturally arose; what legal obligations does Saudi Arabia have under CEDAW? The question cannot be answered until the legal effects of the reservation are established.

## 1.2 Limitations and terminology

The thesis does not deal with the deficiency of the reservations regime in general, but is limited to the problems related to the legal effects of incompatible reservations. Only reservations to human rights treaties will be dealt with.

In order to avoid confusion as to a number of terms frequently used in the debate on reservations, a short clarification is needed. The thesis deals with the legal effects of *incompatible* reservations, meaning reservations that are contrary to the object and purpose of a specific treaty. However, the terms *invalid* or *inadmissible* reservations are applied in a synonymous manner to the first term. *Severability* signifies that a reservation is separated from a treaty ratification and without legal effects *in casu*.

## 1.3 Method and material

The outline of the thesis is established by means of a traditional juristic method, i.e. in a combined descriptive and analytical manner. The analysis is pursued both from a *de lege lata* and *de lege ferenda* perspective, but in large follows the traditional structure of applying the existing law on a defined problem.

The background parts on Saudi Arabia are construed in a combination of experiences *in situ* and local and international literature and journals on Saudi Arabia. As for the parts on reservations the sources consist of doctrinal texts, regional and international jurisprudence and UN instruments and documents. The doctrinal debate on reservations provides a large flora of divergent views, whereof, for practical reasons, only the most frequent perspectives have been included in this study.

## 1.4 Disposition

Chapter two and three provide the background material for the analysis. It is necessary to have knowledge about the provisions of CEDAW in order to evaluate the situation for women in Saudi Arabia from an international human rights perspective. It is likewise essential to get an overview of the legal and political system in Saudi Arabia, as well as the factual situation for women, in order to understand the rationale of the Saudi reservation and thus evaluate the Saudi consent; would Saudi Arabia accept to be bound by CEDAW without the *Shari'ah* reservation? Chapter four provides the legal framework for the analysis, i.e. the Vienna Convention on the Law of Treaties and its precedents. Whereas the applicable law to incompatible reservations is unclear, chapter five outlines the *de lege ferenda* attempts to fill the lacunae. In chapter six the legal effects of the Saudi reservation is analysed in light of the legal norms, or more correct; the 'new' practice.



# 2 The Convention on the Elimination of All Forms of Discrimination against Women

## 2.1 The human rights of women: Universalism versus cultural relativism

The faith in equal rights for men and women is proclaimed in the preamble of the Charter of the United Nations. Article 1(3) of the Charter sets out human rights and fundamental freedom for all without distinction on grounds of sex, as one of the purposes of the United Nations. Article 55(c) is to similar effect. The equal rights of men and women are confirmed in the Universal Declaration of Human Rights adopted in 1948 and enclosed in the two International Covenants in form of prohibitions against discrimination on grounds of sex<sup>2</sup> and likewise set out in all major regional human rights treaties.<sup>3</sup> While this seems to indicate the universal scope of the principle of equality between men and women, it is noteworthy that equality is subject to different interpretations dependent on the cultural and religious background of the interpreter. For example, Islamic declarations on human rights enclose provisions which guarantee the equal rights of men and women while giving the principle a meaning, both in theory and practice, that contravenes the international human rights law definition.

The argument reads that due to different cultural perspectives the content and interpretation of human rights varies a great deal and must therefore be regarded as culturally relative rather than universal. The cultural relativist argument is in particular strong when it comes to the human rights of women. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) involves highly sensitive political, economic, social and moral issues which is hard to reconcile with the cultural and religious backgrounds of many Member States. Criticism in this regard is sensitive and CEDAW has been cited as ‘one of the most political of all universal human rights conventions’.<sup>4</sup> The strong relativism as regards women’s right comes to an obvious expression not least in form of reservations, CEDAW being one of the most heavily reserved treaties among all multilateral treaties.<sup>5</sup> A large number of the reservations are

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<sup>2</sup> International Covenant on Civil and Political Rights, articles 2, 3 and International Covenant on Economic, Social and Cultural Rights, articles 2, 3.

<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedom, article 14, American Convention on Human Rights, article 1, African Charter on Human Peoples’ Right, article 2, Arab Charter on Human Rights, article 2.

<sup>4</sup> Rehof, L.A., *Guide to the travaux préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, Martinus Nijhoff Publishers, Dordrecht, 1993, p. vii.

<sup>5</sup> 57 reservations, 178 State parties. See, *Multilateral Treaties Deposited with the Secretary-General*, online available the 6 October 2004 at <http://untreaty.un.org>.

*prima facie* incompatible with the object and purpose of CEDAW. This clear sign of ‘resistance’ towards the basic human rights of women is serious and can be seen as an attempt to undermine the universalism of those rights.

The Vienna Declaration and Programme of Action, adopted subsequent to the Vienna Conference on Human Rights held in 1993, declared that all human rights are universal.<sup>6</sup> The same declaration comes to expression in the Universal Declaration of Human Rights and other international instruments. The Vienna Declaration clarifies that ‘the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights’.<sup>7</sup> At the same time, the Vienna Declaration recognises that ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’.<sup>8</sup> Sovereign States thus have a certain margin of appreciation as to its cultural particularities, which can indeed take form of reservations. Practices that are at variance with international standards might not always be seen as human rights violations on a national level. The question is to what extent the particularities can be accepted? A yardstick must be those particularities that ‘form part of the national culture and meet with genuine popular acceptance’.<sup>9</sup> Moreover, the particularities may not deviate from fundamental rights, among them the principle of non-discrimination.<sup>10</sup> A general practice of discrimination against women can thus never be accepted. In addition, it is most times likely that such practices are upheld by e.g. a religious traditionalist regime rather than on grounds of genuine (feminine) popular support. This thesis focuses on reservations that allow for practices which exceed the margin of appreciation.

Cultural relativist arguments must be taken seriously. Traditions and cultures form the identity of peoples and to change or modify customs involves serious difficulties, in particular when religion comes into play. Saudi Arabia is one of the most traditionalist Islamic countries in the world and Islam is deeply rooted in the minds of the population. Criticism must be put forth with a certain understanding and respect in order to be effective. The right to culture is also a human right. However, the universal human rights of the UN machinery do not impose one cultural standard, rather a legal standard of minimum protection necessary for the sake of human dignity. Universal human rights emerged with sufficient flexibility to respect and protect cultural diversity and integrity and only the absolutely necessary limitations are permitted. To require that reservations must not be incompatible with the object and purpose of a human rights treaty constitutes such a necessary limitation.

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<sup>6</sup> Vienna Declaration and Programme of Action, U.N.Doc. A/CONF.157/23, (1993) para 5.

<sup>7</sup> *Ibid.*, para 18.

<sup>8</sup> *Ibid.*, para 5.

<sup>9</sup> Alfredsson, G., “UNESCO and a common framework for ethics” in *Universal ethics – perspectives and proposals from Scandinavian scholars*, Martinus Nijhoff Publishers, The Hague, 2002, p. 53.

<sup>10</sup> Alfredsson, p. 54.

## 2.2 The Convention

### 2.2.1 Introductory remark

The Convention on the Elimination on All forms of Discrimination of Women was adopted by the General Assembly on the 18 December 1979 and entered into force on the 3 September 1981, after having reached the required number of twenty ratifications. The Convention has attracted a large number of signatures and is with its current 178 State parties the broadest ratified UN human rights treaty after the Convention on the Rights of the Child.<sup>11</sup>

This chapter outlines the substantive provisions of CEDAW and provides a short survey on the available supervisory mechanisms. The descriptive chapter provides the legal fundament in relation to which the Saudi reservation and the Saudi policy on women will later be assessed.

### 2.2.2 Substantive provisions

The Convention contains, in a legally binding form, a range of internationally accepted women's rights valid for women in all societies. A basic premise of the Convention is that women are entitled to the equal rights as men not only in the legal and political sphere, but as regards marriage, home and family life as well, which is uncommon to many regions and cultures of the world.

Article 1 of CEDAW provides the definition of discrimination against women. The term shall mean:

'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economical, social, cultural, civil or any other field'.

It is noteworthy that the definition covers discrimination in the public as well as in the private sphere. State parties are responsible to undertake a number of measures in order to secure that discrimination will not take place, neither by state nor private actors.

Article 2 and 3 provides the appropriate means to eliminate discrimination and ensure the full advancement for women, in particular in the political, social, economic and cultural fields.<sup>12</sup> The measures, inter alia, include; to

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<sup>11</sup> CRC has 192 State parties, see *Multilateral Treaties Deposited with the Secretary-General*.

<sup>12</sup> Also includes 'any other field', see art. 1.

embody the principle of equality in the national constitutions or other appropriate legislation as well as in practice, to adopt sanctions in case of violation of the prohibition of discrimination against women and to repeal all national penal provisions which constitute discrimination against women. State parties must act 'without delay' since the norm of non-discrimination does not allow for progressive realisation.

Article 5 contains an obligation for the State parties to take appropriate measures;

'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

The second paragraph of article 5 states that appropriate measures shall be taken to;

'ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.'

The positive obligation enclosed in the article pose a heavy burden on States where cultural patterns clearly allow for gender discrimination in a Convention perspective. Where obligations to change cultural patterns have been criticised as a sign of cultural imperialism it must be recognised that such an obligation is a necessity for the effective implementation of CEDAW.<sup>13</sup>

The second part of the Convention deals with the right to participate in public and political life. According to article 7 women shall be ensured, on equal terms with men, the right to vote, participate in the formation of government policy, hold public office and perform public functions at all levels of government. Article 9 contains the equal right for women to acquire, change or retain their nationality. In many Muslim countries a women who marries an alien, as well as their common children, loses the nationality and the provision is consequently heavily reserved by many of those countries. Article 10 provides for equal rights within the educational sphere. Women shall have the same opportunities as men for career, vocational guidance and access to studies. The right covers rural as well as urban areas and all forms of education from a pre-school level to all fields of higher education. Articles 11 and 12 aim to eliminate discrimination against women in the fields of employment and health care respectively. Article 13 concerns the right for women to participate in economic and social life on an equal basis as men. In particular, they shall be entitled the right to family benefits, bank loans and the right to participate in recreational activities,

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<sup>13</sup> Recommended reading, An-Na'im, A., "State responsibility under international human rights law to change religious and customary laws" in Cook, R., *Human rights of women – national and international perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp. 167-189.

sports and all aspects of cultural life. Article 14 urges State parties to take into account the particular problems faced by rural women.

The forth part of the Convention provides for equality between men and women before the law. In accordance with article 15 State parties shall accord women, in civil matters, a legal capacity identical to that of men and the same opportunity to exercise that capacity. The equal rights to conclude contracts, administer property and be equally treated before courts are particularly emphasised. The freedom of movement and freedom to choose residence or domicile shall be equally afforded men and women. Article 16 contains provisions on marriage and divorce. Women shall, inter alia, have the right to enter into marriage on an equal basis as men, be able to freely choose their spouse, have the same right to dissolve marriage, the same rights or responsibilities as regards the guardianship of children and the right to choose a family name, a profession and an occupation.

Despite the broad participation to CEDAW and the seemingly universal acceptance of the principle affording equal opportunities to men and women, many of the more detailed provisions presented above are not generally accepted in the cultural and religious systems of a number of State parties. Consequently, the ratifications are accompanied with more or less damaging reservations. Disregarding whether those countries ratify CEDAW as a result of international pressure and a will to be a 'member of the club' or for other reasons it is a fact that those half-hearted adhesions seriously undermine the value of the treaty. The international community is concerned with the increasing misapprehension that CEDAW should be in some way a less binding instrument than other treaties as a result of its cultural sensitivity.<sup>14</sup>

### **2.2.3 Supervisory mechanisms**

Initially, the implementation of CEDAW was monitored exclusively through a system of State reports. In accordance with article 18 the reports are to be made within one year after the entry into force of CEDAW for the State party concerned (*initial report*) and thereafter at least every four years (*periodic report*). Unfortunately it is common that States hand in the reports with significant delays.<sup>15</sup> A Committee on the Elimination of Discrimination against Women (the Committee) with the power to consider the reports was established at the entry into force of CEDAW in accordance with article 17. The Committee consists of twenty-three independent experts, who represent different legal systems and regions of the world. Since January 1994 the Committee adopts concluding comments on the reports.

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<sup>14</sup> Clark, B. "The Vienna Convention reservations regime and the Convention on Discrimination against Women" in *American Journal of International Law*, 1991, vol. 85 (pp. 281-439), p. 286.

<sup>15</sup> Saudi Arabia ratified CEDAW in 2000 but has not yet submitted the initial report, which was due to the 7 October 2001. The next report is due to the 7 October 2005.

In 1999, two other monitoring procedures were presented through the adoption of an Optional Protocol by the UN General Assembly. The protocol entered into force in the end of 2000. The protocol has at present 67 State parties, only one from the Middle East and North Africa region.<sup>16</sup> The Protocol provides for a communications procedure, which allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights. The Protocol includes an "opt-out clause", allowing States upon ratification or accession to declare that they do not accept the inquiry procedure. Perhaps, for this reason it was possible to formulate an explicit prohibition to enter reservations.<sup>17</sup> At this point, none of the procedures provided for in the Optional Protocol have been taken into use.

## 2.3 CEDAW on reservations

The Convention on the Elimination of All forms of Discrimination against Women, together with the Convention on the Rights of the Child, has attracted more substantive reservations than any other treaty. 57 States have entered reservations.<sup>18</sup> A large number of reservations relate to provisions, which are generally considered to contain core obligations. 18 States refer directly or indirectly (by reference to domestic law) to Islamic Law in their reservations.<sup>19</sup>

The legality of reservations is regulated in articles 28-29 of the CEDAW. Article 28(2) provides that;

‘ A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’

Article 29(2) explicitly stipulates that reservations to the dispute settlement provision in paragraph (1) are allowed;

‘Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other State Parties shall not be bound by that paragraph with respect to any State Party, which has made such a reservation.’

Many States have formulated reservations that are *prima facie* in contravention of the object and purpose of CEDAW despite the prohibition

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<sup>16</sup> Libya acceded the Optional Protocol on the 18<sup>th</sup> of June 2004; status ratification to CEDAW, online available the 6 October 2004, at <http://www.un.org/womenwatch/daw/cedaw/sigop.htm>.

<sup>17</sup> Optional Protocol to CEDAW, article 17.

<sup>18</sup> See *Multilateral Treaties Deposited with the Secretary-General*.

<sup>19</sup> *Ibid.*, Algeria, Bahrain, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Malaysia, Maldives, Mauritania, Morocco, Pakistan (interpretative declaration), Saudi Arabia, Singapore, Syrian Arab Republic, Tunisia and Turkey.

in article 28(2). This is a serious problem impeding the effective implementation of the Convention. The problem raises not only legal problems but also partakes in a global debate on moral and social values and the universality of human rights.

The Vienna Conference on human rights in 1993 addressed the issue of reservations and demanded States to review their reservations on a regular basis with a view to withdraw them.<sup>20</sup> In the Vienna Programme of Action States are particularly called on to avoid reservations to CEDAW that are contrary to the object and purpose of the treaty.<sup>21</sup>

The Convention is unclear in the sense that it does not provide for a definition of the object and purpose and thus no guidelines to determine the compatibility of a reservation under article 28(2). However, some instructions can be identified in the official policy of the Committee. The Committee considers article 2 to be central to the object and purpose of the Convention; State parties must agree to eliminate discrimination by the strategies set forth in article 2(a)-(g), in order to be considered a sincere party.<sup>22</sup> The Committee has further stated that reservations against article 16 are to be considered incompatible with the object and purpose of the Convention, as the article constitutes a core provision.<sup>23</sup> Both articles are heavily reserved by Muslim countries. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, now the Sub-Commission for the Promotion and Protection of Human Rights adopted a resolution on reservations to CEDAW in 1991.<sup>24</sup> While it failed to pronounce specifically on reservations referring to Islamic law it indeed included a list of provisions to which reservations are particularly undesirable. The list includes articles 2, 7, 11, 15 and 16.

Reservations to human rights treaties that refer to domestic law or are of general or vague character are generally to be considered incompatible with the object and purpose of the treaty concerned. Further, reservations to provisions containing *jus cogens* norms or rules corresponding to internationally customary law are considered as non-allowed. Also reservations to provisions providing the supportive guarantees, i.e. the remedies to implement the rights, must be regarded as prohibited as those provisions create the necessary framework for securing rights.<sup>25</sup> A more

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<sup>20</sup> Vienna Declaration, para 39.

<sup>21</sup> *Ibid.*, paras 26, section I and 39, section II.

<sup>22</sup> General information on reservations, online available the 6 October, 2004, at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

<sup>23</sup> *Report of the Committee on the Elimination of Discrimination against Women*, 18<sup>th</sup>-19<sup>th</sup> session, 1998, *Statement on Reservations*, (U.N. Doc. A/53/38/Rev.1), Part II, Chapter I, Section A, p 34. See constructive dialogues w. e.g. Morocco, Egypt, Iraq or Kuwait

<sup>24</sup> Brems, E., *Human rights: Universality and Diversity*, Martinus Nijhoff Publishers, The Hague, 2001, p. 270, (UN Doc. E/CN.4/Sub.2/1991/65)

<sup>25</sup> See, *inter alia*, Human Rights Committee, General Comment 24(52), *General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relations to declarations under article 41 of the Covenant*, adopted by the Committee at its 1382<sup>nd</sup> meeting (52<sup>nd</sup> session) on 2 of November 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.6.

detailed discussion on the definition of object and purpose as regards CEDAW will be provided for in chapter 6.2.

The discussion on reservations in the Committee and among the CEDAW State parties has in much reflected the sensitive moral and cultural features of the Convention. Islamic countries have on occasion accused the Western States for cultural insensitivity and interference with their sovereign right to make reservations. At its sixth session in 1987 the Committee considered the State report submitted by Bangladesh and in connection with that expressed concern over the many reservations that appeared to be incompatible with the object and purpose of the Convention. The Committee thereafter decided to ask the United Nations ‘to promote or undertake studies on the status of women under Islamic laws and customs.’<sup>26</sup> The suggestion created considerable ill-feeling among many non-Western States and the Committee was accused for cultural imperialism and religious intolerance. The study was never performed. It is still obvious that reservations referring to religious laws create many-folded problems and leads the issue of reservations into controversies over cultural relativism and cultural imperialism. The debate involves morally and religiously complex issues and it is difficult for the Committee to balance the criticism as not to offend the Muslim State parties. For these reasons, the Committee has been rather silent on its stance on reservations that are rooted in diverging cultural and religious views.

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<sup>26</sup> *Report of the Committee on the Elimination of Discrimination against Women*, Sixth session, 1987, (U.N. Doc. A/42/38), decision 4, para 580.



# 3 The Saudi reservation to CEDAW

## 3.1 The Reservation

The Kingdom of Saudi Arabia ratified the Convention on the Elimination of All forms of Discrimination against Women on the 7<sup>th</sup> of September 2000. The ratification was a step forward on the path for women's advancement in Saudi Arabia but due to a sweeping reservation the sincerity of the ratification could not be genuinely hailed. The Saudi reservation reads;

- '1. In case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.
2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.'

Focus will remain on the first paragraph of the reservation.

A relatively small number of State parties to CEDAW, twelve States, have objected to the reservation on grounds that it stands in contrast to the object and purpose of the Convention.<sup>27</sup> A sample of the Swedish objection reads;

'The Government of Sweden is of the view that this general reservation, which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, raises doubts as to the commitment of the Kingdom of Saudi Arabia to the object and purpose of the Convention.'

The French objection is worded in even stronger terms;

'By stating that in case of contradiction between any term of the Convention and the norms of Islamic law, it is not under the obligation to observe the terms of the Convention, the Kingdom of Saudi Arabia formulates a reservation of general, indeterminate scope that gives other State parties absolutely no idea which provisions of the Convention are affected or might be affected in the future. The Government of the French Republic believes that the reservation could make the provisions of the Convention completely ineffective and therefore objects to it.'

In order to understand the meaning of the Saudi reservation it is necessary to have some knowledge about Islamic Law, i.e. *Shari'ah*. *Shari'ah* is not a static concept and different States can have different interpretations as to its content. The corpus of *Shari'ah* that exists today is a collection of juristic opinions and interpretations of the main sources of Islam; the *Quran* and the *Sunnah*, i.e. the words and actions of the Prophet Muhammad. To this come the sources of interpretations, namely *Hadith*, (narrations about the life of the Prophet), *qiyas*, (analogical extension of the *Shari'ah* law to new

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<sup>27</sup> Austria, Denmark, Finland, France, Germany, Ireland, The Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland, See *Multilateral Treaties Deposited with the Secretary-General*.

situations) and *ijtihad*, (independent interpretation of the sources of Islamic law made by religious scholars, the *Umma*).<sup>28</sup>

It is necessary to have basic knowledge about the legal and political system in Saudi Arabia to understand the Saudi interpretation of *Shari'ah* and thus the meaning of the reservation. The following chapter illustrates the prominent role of religion in Saudi society. The two subsequent chapters aim to depict the Saudi view on human rights and its *de facto* practices relating to women and in that way provide background understanding on the profoundness of the resistance towards the international human rights law definition of the principle of equality. Knowledge about the rationale of the Saudi reservation is further necessary in order to assess the Saudi consent, which in turn is necessary in order to assess the legality of severing the reservation.

## 3.2 Legal and political system in Saudi Arabia

### 3.2.1 “Wahabism”<sup>29</sup>

Saudi Arabia adheres to traditionalist Islamic political and legal norms in a much more manifest way than most Islamic states. The fact that the core of the country is historically unaffected by western colonial powers, contrary to its peninsula neighbours, is often put forward as one of the underlying explanations.<sup>30</sup> Further, Saudi Arabia is home to the two Holy Muslim Places Mecca and Medina, which makes it assume a responsibility to adhere to pure religious practice and to zealously uphold Islamic Law. The status of being the motherland of Islam also strengthens the position of the *Ulama*, the official clergy, who has a profound influence in the governance of the country and through their restrictive interpretation of *Shari'ah* maintain a conservative view of Islam.<sup>31</sup>

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<sup>28</sup> Around the beginning of the 10th century AD a consensus was reached among Sunni religious scholars that the all questions of interpretations of the sources of Islam had been settled and that consequently the right of *ijtihad* should therefrom be denied. This crucial event, known as ‘the closing of the doors of *ijtihad*’ has had devastating effects in particular for women. There is no confirm consensus as to the closing of the doors of *ijtihad* among Muslim scholars, but yet it is a fact that after the 10<sup>th</sup> century AD, Islamic law has developed little and reference to the classical authority has become a general rule. See, Brems, pp. 192-193 and Ali, S.S. *Gender and human rights in Islam and international law- equal before Allah, unequal before man?*, Kluwer Law International, The Hague, 2000, p. 247.

<sup>29</sup> This chapter is a short and much simplified introduction to wahabism, the prevalent ‘direction’ of Islam in Saudi Arabia. Wahabism is indeed controversial and what is described below is an explanation to the restrictive and complex society in Saudi Arabia, more commonly seen in the West than in Saudi Arabia itself.

<sup>30</sup> Vogel, F. E., “Islamic Governance in the Gulf: A Framework for Analysis, comparison and Prediction” in Sick, G.G. and Potter, L.G., (eds.), *The Persian Gulf at the Millennium – Essays in politics, economy, security and religion*, St Martin’s Press, New York, 1997, (pp. 248-295), p. 249.

<sup>31</sup> For further reading on the legal and political system in Saudi Arabia and the Saudi view on human rights, see inter alia International Commission for Jurists *Attacks on Justice 2002*

However, the widespread and profound adherence to conservative Islam has its primary explanation in a historical alliance concluded in the middle of the 18<sup>th</sup> century between Muhammed bin Saud, an ancestor to the Saudi Royal family, and Imam Muhammad bin Abdul Wahab. The latter was an advocator of a puritan interpretation of Islam and the founder of what has later been called *wahabism* and known for its stringent interpretation and implementation of Islam. Abdul Wahab's teachings are the fundamental stone of the traditions and social values prevalent in present Saudi society.

According to Abdul Wahab the true spirit of Islam had faded in Arabia and a period of *jahiliyya*, ignorance of the true religion, governed in the early 18<sup>th</sup> century. The *wahabist* movement aimed to revive the rightful religion with *tawhid* (the oneness of God) and adherence to the letters of the Qura'n as important fundamentals. Any worshipping or monuments in honour of the Prophet was banned and destroyed, including any festivities or celebrations. During the same period Muhammed bin Saud was struggling for becoming the ruler of a united Arabia and realised that this could only be achieved through co-operation with Abdul Wahab, who had already converted parts of the population. Abdul Wahab needed a political basis for a successful spread of his interpretation of Islam and bin Saud needed a religious base for his political conquest; Wahab had already converted large parts of the eastern and western Arabia and only through adherence to *wahabism* could bin Saud establish control over these territories. The alliance was initially successful but later collapsed under the Ottomans and Arabia returned to a state of inter-tribe violence and chaos.<sup>32</sup>

The alliance was not revived until the beginning of the 20<sup>th</sup> century, when a far relative to Muhammed bin Saud, known as Ibn Saud (son of Saud), restored the contacts with the wahabi movements. Ibn Saud had a vision to conquer Arabia and transform the tribe-based societies into a modern nation. Ibn Saud realised that a successful conquest could not be achieved without the support from *Ikhwan*; a brotherhood of wahabi Bedouin warriors<sup>33</sup>. *Ikhwan* had lived isolated in the desert for centuries and had a polarised view on all aspects of a society; either you are with us or against us – everything was black or white and the only true path was wahabi Islam. Due to the collaboration with the mighty warriors of *Ikhwan*, Ibn Saud succeeded to conquer province after province and had soon taken control over most parts of Arabia. However, Ibn Saud realised that he had meanwhile lost control over the *Ikhwan* who was eager to continue the conquest and the spread of wahabi Islam in the entire *umma*. Ibn Saud's attempt to restrain the brotherhood resulted in a rebellion where Ibn Saud was accused for religious infidelity and for being a worldly leader.

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– *Saudi Arabia, 11<sup>th</sup> edition*, online available the 6 October, 2004 at <http://www.icj.org/IMG/pdf/saudiarabia.pdf>,

<sup>32</sup> Rembe, M., *Saudiarabien – kungadöme i kris*, Världspolitikens Dagsfrågor, del 1, The Swedish Institute for International Affairs (Utrikespolitiska Institutet), Stockholm, 1998, pp. 3-8.

Ibn Saud was confronted with a dilemma; in order to create a modern nation he must defeat the *Ikhwan* but how would he defeat the precursors of wahabi Islam and at the same time maintain religious legitimacy? In order to receive moral and religious support for the necessary elimination of *Ikhwan*, Ibn Saud tried to convince the religious scholars, the *Ulama*, to join his side. With support from the prominent scholars, who were also convinced believers in wahabism, he could continue his strive to become the leader of a unified Arabia, without confrontations from the now religious population. The *Ulama* issued a *fatwa*, religious edict based on the Quran, stating that there was no right to revolt against the King and Ibn Saud could thus defeat the rebellion of *Ikhwan* and yet maintain religious legitimacy.<sup>34</sup> The *fatwa* from 1927 was a crucial point in Saudi history – the same way of consulting the wahabi *Ulama* in order to religiously sanction politics has been retained to our days. Consequently, no social or religious reforms or political decisions will be accepted in present Saudi Arabia without the approval from *Ulama*; the result is a society ruled by conservative interpretations of Islam.

Today the two sides of the alliance are so interrelated ideologically, financially and family-wise that a separation appears impossible. It is estimated that 80 percent of the Saudi population adheres to *wahabi* Islam.<sup>35</sup>

### **3.2.2 Governmental system**

Since its proclamation in 1932 Saudi Arabia has been a monarchy without elected representative institutions or political parties. The Government consists of the Council of Ministers, led and appointed by the King. Also the Crown Prince and another number of members of the Royal family have seats in the government. In 1992 King Fahd issued a royal decree, which established a Consultative Council, the *Majlis as-shura*, a 120 member Council appointed by the King and afforded with the powers of initiating, interpreting, rejecting and proposing amendments of legislation, international treaties and agreements.

Women's participation in the political field is non-existent. No women are among the 120 members in the *majlis as-shura* or the Council of Ministers.

#### **3.2.2.1 The *Ulama***

The royal power is anchored to the Council of Senior Islamic Scholars, the *Ulama*, who have a large influence in the governance of the country. The *Ulama* is a group of prominent religious scholars who as a result of their high religious knowledge are appointed by the King to represent the official clergy in Saudi Arabia. The Council has the role of a conservative force which the government can never afford to ignore because of the above

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<sup>34</sup> *Ibid.*, p. 3-6.

<sup>35</sup> Swedish Institute for International Affairs, Country info – Saudi Arabia, booklet series.

mentioned alliance.<sup>36</sup> The *Ulama* review the Government's policies compliance with *Shari'ah* and governmental decisions gain religious legitimacy only after consultation with the *Ulama*.

### 3.2.2.2 The *Mutawwayin*

A religious police, *mutawwayin*, supervise and enforce adherence to the *wahabi* rule among the citizens and foreigners in Saudi Arabia.<sup>37</sup> The Committee for promotion of Virtue and Prevention of Vice ensures, among other things, strict segregation of women, the prohibition of alcohol, partying, dancing and the obedience to the female dress codes. They can be seen frequently around praying hours, supervising the closure of all shops and restaurants and forcing in particular young men into the mosques for prayer.

### 3.2.3 Legal system

Saudi Arabia is among the few Muslim countries where *Shari'ah* still operates as the chief body of law.<sup>38</sup> Only a small number of areas, mainly related to administration, labour and commerce, have been codified as positive law and most fields remain under the direct application of *Shari'ah*, in particular areas concerning women.

Saudi positive law takes the form of Royal decrees, *marsum*, or regulations, *nizams*, which are only promulgated where they are needed as supplement to the Islamic Law and under condition that they do not offend the *Shari'ah*.<sup>39</sup> This system is necessary in order for the economy and society to function and has been accepted by the *Ulama* through a loophole in *Shari'ah* stating that such questions to which Allah is indifferent are open to State legislation.<sup>40</sup> Still, the modern Saudi society face deadlocks where they have to apply norms from the seventh, eight and ninth centuries on twentieth-century problems as no new laws may offend *Shari'ah*. The problems are often solved in a roundabout way. However, in the past years more and more areas have been codified as positive law, most recently the Criminal Procedural Law in 2002. All areas regarding family and social questions, i.e marriage, divorce, inheritance, are still entirely regulated

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<sup>36</sup> Vassiliev, A., *The History of Saudi Arabia; 1745-1994*, Saqi publishers, London, 1997, p. 439.

<sup>37</sup> See, *inter alia*, Human Rights Watch World Report on Saudi Arabia, 2003, online available the 6 October 2004 at <http://www.hrw.org/wr2k3/mideast6.html>.

<sup>38</sup> Most Muslim countries promulgated commercial, criminal and even civil laws and have often left only marriage, divorce and inheritance to be regulated by *Shari'ah*. A number of States, e.g. Tunisia and Turkey have even codified these issues, Vassiliev, p. 449.

<sup>39</sup> Vogel, p. 276.

<sup>40</sup> Vassiliev, p. 450. See articles 46-48 in the Saudi Basic Law, online available the 6 October 2004 at <http://www.saudinf.com/main/c541.htm>.

under *Shari'ah*. However, many of the restrictions facing Saudi women have mere traditional roots and lacks direct basis in *Shari'ah*.<sup>41</sup>

The legal system in Saudi Arabia can appear obscure for a person with roots in the European civil law system, as it can many times be difficult to separate religion, i.e. law, from tradition. The meaning of *Shari'ah* is to be determined by *qadis*, judges, and *the Ulama* who have been afforded the role as legislators in the sense of law-finders. The process leaves room for interpretation and the interpretation in turn is influenced by tradition.

### 3.2.3.1 The Saudi Basic Law

The constitution of Saudi Arabia is the Quran. In 1992, however, King Fahd declared the promulgation of the constitution-like Saudi Basic Law (*nizam*), fulfilling promises he and earlier Kings had many times postponed.<sup>42</sup> The Basic Law's relation to the Qur'an is clear; '(t)he regime derives its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws'.<sup>43</sup> The Basic Law makes reference to human rights in its article 26 stating that '(t)he state shall protect human rights in accordance with the Islamic *Shar'iah*. The privacy of homes and of communications, the freedom from arbitrary imprisonment and certain economic and social rights are explicitly guaranteed in the Law. However, there is no mention about any form of prohibition against discrimination. These rights, together with other non-mentioned fundamental human rights such as the ban on extra-judicial killings, torture or discrimination on basis of religion, are considered covered by the general article 26, i.e. *Shari'ah*. The law has been referred to as 'ambiguity codified'<sup>44</sup> or as 'empty reforms'.<sup>45</sup> While the law constitutes a significant steps towards codifying the largely unwritten legal system of the country, it fall far short of internationally recognized standards in their treatment of civil and political rights.

## 3.3 Saudi Arabia and human rights

### 3.3.1 General

The rationale of the Saudi reservation has its explanation in the general Saudi view on human rights, which in turn has its background in the legal and political system of the country.<sup>46</sup> In Saudi Arabia it is an established

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<sup>41</sup> Doumato, E.A., "The ambiguity of Shari'a and the politics of 'rights' in Saudi Arabia" in Afkhami, M. (ed.) *Faith and Freedom – women's human rights in the Muslim world*, I.B. Tauris Publishers, London, 1995, (pp. 135-161).

<sup>42</sup> Issued the 1 of March 1992 by Royal Order. See footnote 37.

<sup>43</sup> Saudi Basic Law, article 7.

<sup>44</sup> Doumato, p.143-145.

<sup>45</sup> Human Rights Watch, *Empty reforms: Saudi Arabia's new basic laws*, May 1992, online available the 6 of October at <http://www.hrw.org/reports/1992/saudi/>.

<sup>46</sup> The present chapter is limited to the 'official' view on human rights, i.e. the view of the Saudi regime.

premise that Islam prevails over international human rights. International human rights instruments are seen as enclosing secular rights and secularism is seen as something unislamic. Islamic human rights protection consist of divine injunctions and are seen as being of stronger force and more binding than the international human rights schemes.<sup>47</sup>

Saudi Arabia has shown a general reluctance towards international human rights, which inter alia takes expression in the absent ratifications of the two major legally binding human rights covenants.<sup>48</sup> The abstention from voting in favour of the Universal Declaration of Human Rights in the General Assembly 1948 indicates the strength of resistance.<sup>49</sup> A memorandum offered to official visitors to the Saudi Government declares the Saudi position in clear terms:

'First we must emphasise that Islam give man his natural rights, in a way unmatched by any secular law. (...) Human rights in Islam encompass positive aspects that are not touched upon in the International Declaration of Human Rights, while it advocated matters that are contrary to the teachings of Islam. That is why, the Kingdom of Saudi Arabia had reservations about the Declaration, and about the United Nations covenant on economic, social, cultural rights, which also contained provisions contrary to the teachings of Islam. Human rights as advocated by Islam are better than those advocated by the United Nations. But, human rights as decreed by Islam are divine injunctions, and those advocated by the United Nations are man made by some, designed to reflect the nature of their own societies'.<sup>50</sup>

Saudi Arabia does not reject human rights but rather put forward Islamic *Shari'ah* as an alternative system to international human rights law. This is the traditionalist view on Islam and human rights; Islam provides sufficient rights as it is. A more moderate view recognises that there are inconsistencies between Islam and human rights, but argues that the two are reconcilable through Islamic reform. A third view, secularism, denies that Islam and human rights can ever be compatible.<sup>51</sup> All three approaches exist within Saudi Arabia itself, whereas the official approach remains traditionalist.

Neither of the first two views has proved adequate to the task of responding to international criticism from the UN or non-governmental human rights

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<sup>47</sup> Brems, p. 186.

<sup>48</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

<sup>49</sup> Saudi Arabia, South Africa and the Soviet bloc abstained voting, bringing the results to forty-eight in favour of UDHR and eight abstentions. Saudi Arabia made an isolated claim that freedom to marry and to change one's religion were western ideas ill suited for universal application. See Glendon, M.A., *A world made new – Eleanor Roosevelt and the universal declaration of human rights*, Random House Trade Paperbacks, New York, 2001, p. 169 and 222.

<sup>50</sup> *Security and Human Rights in the Kingdom of Saudi Arabia*, official information material handed out by the Consultative Council, May 2004. See similar views in *Statement by the assistant deputy foreign minister for political affairs of Saudi Arabia before the Human Rights Commission*, Geneva 17 March 2004, (U.N. Doc. E/CN.4/2004/SR.7).

<sup>51</sup> For further discussion, see Brems pp. 183-294, also Halliday, F., *Islam and the myth of confrontation – religion and politics in the Middle East*, I.B. Tauris Publishers, London, 1995, pp. 137-138.

organisations. As a result, Islamic States which propagate those approaches have found it necessary to invoke *relativism* or *particularism*, i.e. the cultural, religious and historical specifics of their society, in order to reject the widespread criticism of their human rights record.<sup>52</sup> Hence, at the same time as Saudi Arabia argues that Islam provides sufficient protection of human rights it is necessitated to defend for example its treatment of women as expressions of a particular, distinct way of life. The Saudi regime does not want to see a worldwide prohibition on women driving but argues only that in Saudi Arabia and for Saudi women, it is inappropriate to drive.

Despite evident reluctance there has lately been a small opening in the field of human rights in Saudi Arabia. In February this year the first independent human rights organisation ever was recognised by the Saudi regime.<sup>53</sup> A *National Human Rights Association* with forty members, whereof ten women, will deal with the country's human rights problem in their personal capacity. The Association was directly criticised for being interlinked with the Government, but yet hailed as a first step to create a human rights culture within the country.<sup>54</sup> Time will show whether the criticism is legitimate. Second, the Saudi regime organised a conference on human rights in peace and war in mid October last year. The conference ended in the adoption of the Riyadh Declaration on Human Rights in Peace and War, which *inter alia* states that '(m)ankind himself is honoured by Allah without discrimination regardless of his gender, colour, race or religion.'<sup>55</sup> The conference called for an active role for women in society but in ways that did not violate the teachings of Islam and once again the traditionalist human rights view was confirmed.<sup>56</sup>

### 3.3.2 List of rights

The Islamic human rights are those provided for in the *Quran* and the *Sunnah*. The list of rights varies from country to country, from interpreter to interpreter.<sup>57</sup> The Saudi basic law fails to set out many of the most fundamental human rights and it remains ambiguous what exactly falls under the general reference to human rights protection in article 26. An often-cited author in Saudi Arabia ranges a number of Islamic human rights in his much published pamphlet *Human Rights in Islam*.<sup>58</sup> A number of rights not spelled out in the UN instruments are included, i.e. the respect for the chastity of women, the protection of honour and the right to avoid a sin.

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<sup>52</sup> Halliday, p. 137.

<sup>53</sup> Ghafour, A., "First independent human rights organisation established", Arab News, 3 March, 2004.

<sup>54</sup> See, *inter alia*, Human Rights Watch, *Saudi Arabia: Local rights group should speak out*, Pressrelease, 5 August, 2004, online available the 6 October at; <http://hrw.org/english/docs/2004/08/04/saudia9187.htm>

<sup>55</sup> Riyadh Declaration on Human Rights in Peace and War adopted at the Human Rights in Peace and War Conference held in Riyadh, the 14-15<sup>th</sup> October 2003, para 3.

<sup>56</sup> Qusti, R., "Conference end with call to stress Islam's protection of human rights", Arab News, 16 October, 2003.

<sup>57</sup> For examples of rights, see Brems, pp. 188-190.

<sup>58</sup> Mawdudi, A., *Human Rights in Islam*, The Islamic Foundation, London, 1976/1980.



Saudi Arabia is a party to a number of Islamic declarations on human rights, which list the rights recognised by Muslim States. The most prominent of the instruments are the Universal Islamic Declaration on Human Rights (UIDHR) and the Cairo Declaration on Human Rights in Islam (the Cairo Declaration).<sup>59</sup> None of the instruments are legally binding and cannot be regarded as regionally corresponding to the human rights schemes of Africa, the Americas or Europe. The Declarations contain rather extensive lists of rights, which will not be detailed here due to space limits.

The UIDHR states that ‘all persons are equal before the law and are entitled to equal opportunities and protection of the law’, while the Cairo Declaration declares that ‘all men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of (..) sex’.<sup>60</sup> Whereas this seems to indicate support for the principle of equality between men and women the Declarations have been criticised for being obscure and written in a convoluted style.<sup>61</sup> The framework set out for the Declarations is *Shari’ah* law and the exact meaning of equality remains unclear, i.e. the Declarations do not prohibit any human rights violation that is allowed for under *Shari’ah*.<sup>62</sup> A whole thesis could be written on the concept of equality within *Shari’ah*, probably with the conclusion that certain interpretations of the Islamic legal framework provides for equality between men and women, and others not. Here, however, only the Saudi interpretation will be provided for.

The Wahabi influence and its consequent stringent interpretation of *Shari’ah* in Saudi Arabia have shaped a society where women are given fewer opportunities than men. Through the lens of international human rights law Saudi women are victims of exclusions, restrictions and distinctions and thus, by reference to the definition provided in CEDAW, discriminated against.<sup>63</sup> Saudi Arabia, on the other side, dismisses allegations of gender discrimination and claims that it treats women equally,

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<sup>59</sup> The UIDHR was adopted in 1981 by the London-based Islamic Council for Europe, a non-governmental organisation affiliated with the Muslim World League. The Cairo Declaration was adopted in 1990 by the Organisation of the Islamic Conference. See also The Arab Charter, adopted by the League of Arab Nations in 1994, as amended in May 2004. Although all parties have at least an important Muslim population and Islamic principles partly influenced the drafting of the Charter, the Arab Charter is not included in the debate on Islam and human rights.

<sup>60</sup> Article III (a) UIDHR, see also (b) and (c) ‘All persons shall be entitled to equal wage for equal work’, ‘No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language’. Article 1(a) the Cairo Declaration.

<sup>61</sup> Mayer, pp. 106-120.

<sup>62</sup> Cairo Declaration Articles 24-25. UIDHR, explanatory note 3 (only English version); ‘In the exercise and enjoyment of the rights referred to above every person shall be subject only to such limitations as are enjoyed by the Law for the purpose of securing the due recognition of, and respect for, the rights and freedom of others and meeting the just requirements of morality, public order and the general welfare of the Community (*Ummah*)’.

<sup>63</sup> Article 1, CEDAW.

although differently.<sup>64</sup> What are viewed by the United Nations as inequalities are viewed in Saudi Arabia as the proper Islamic balance of rights and responsibilities between men and women. The following chapter clearly illustrates that the Saudi interpretation of women's rights according to *Shari'ah* stands in contradiction to the international human rights of women and in large parts nullifies the provisions of CEDAW.

### 3.4 Women in Saudi society

Women in Saudi Arabia are confronted with serious restrictions in many areas. Intermingling between the sexes is seen as sinful and has resulted in a man-biased segregation of a large number of public places in society. Men are normally given full opportunities and from that point of departure women's rights are restricted where intermingling is found unsuitable. The different treatment is on certain occasions claimed to be the natural outcome of the inherent (biological) difference between man and woman, e.g. women are restricted from work or education in certain areas considered only suited to males, such as engineering and architecture. Foremost, however, the difference in treatment is justified as safeguarding the chastity and purity of women.<sup>65</sup>

Women are seen as representing the emblem for morality and family values, an emblem which is given particular importance in Islamic and Arab societies.<sup>66</sup> Intermingling between the sexes is believed to augment the risks for sinful acts and is to be avoided to the maximal extent. There is a principle in Islam known as *sad althara'a*, enclosing the idea that situations which may lead to improper relations, sin or wrongdoing must be avoided.<sup>67</sup> Many of the restrictions facing Saudi women can be related to Saudi Arabia's strict interpretation of the principle. Today the prohibition of intermingling between the sexes is institutional policy and even part of the educational curricula. Sex segregation is to be found in all schools and universities, restaurants, hospitals, banks, museums, libraries, public transports etc. The same idea underlies the prohibition against women driving or travelling alone and the unwritten imperative that Saudi women must be accompanied by a male legal guardian, *mahram*, in order to fulfil a number of daily undertakings.<sup>68</sup> The permission and accompaniment from a guardian is needed to issue a passport or identity card, to travel, to open a

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<sup>64</sup> See, *inter alia*, "We will not accept outside pressure, says Prince Turki", Arab news, 18 March, 2004, which refer to the *Statement by the assistant deputy foreign minister for political affairs of Saudi Arabia before the Human Rights Commission*, Geneva 17 March 2004, (U.N. Doc. E/CN.4/2004/SR.7).

<sup>65</sup> AlMunajjed, M., *Women in Saudi Arabia Today*, Macmillan Press, London, 1997, p. 34.

<sup>66</sup> *Ibid.*, p. 34.

<sup>67</sup> Dr Batarfi, K.M., "Women rights revisited", Arab News, 6 July, 2003.

<sup>68</sup> The legal guardian for a woman is her *mahram*, generally her father, husband or brother. Only a person with whom it would be considered unlawful for the woman to marry due to marital or blood relationship constitutes *mahram*.

business, to get medical treatment and in all errands with governmental and judicial officials.<sup>69</sup>

In late 2001 Saudi women were granted their proper personal identity cards for the first time.<sup>70</sup> Previously, they had been listed in the identity document of their legal guardian only by name. As most reformist regulations in Saudi Arabia, the identity cards are voluntary in order to prevent unbearable protests from the conservatives. Permission from the legal guardian is required for the issuance of the ID-cards and consequently women in conservative families are still prevented to take part of the new reform.

*Hidjab*, what Western debate present as the headscarf, is a common sight in many Islamic societies, while the whole-covering veiling (body, face, hands, feet) imperatives prevails only in a few countries, among them Saudi Arabia. Again, customs and traditions of modesty and the preservation of honour can be put forward as the explanation for the strict Saudi interpretation. Many women bear the *abbaya* voluntarily and regard it as synonymous with being a decent and respectable woman. However, the problem lies within the fact that it is not voluntary; it is a prerogative, and it is exclusively applicable to one gender.

Different treatment is existent also within the sphere of marriage, divorce and heritance.<sup>71</sup> *Inter alia*, polygamy (four wives) is permitted for men. Women must demonstrate legally specified grounds for divorce, but men may divorce without giving a cause. In doing so, men are required to immediately pay an amount of money agreed upon at the time of the marriage, which serves as a one-time alimony payment. Women who demonstrate legal grounds for divorce are still entitled to this alimony.

Lacking direct foundation in *Shari'ah* the differential treatment compiled above should be regarded as a traditional more than a religious policy. Islam *per se* does not necessary dictate strict segregation between the sexes, which becomes clear both by looking to practices in other Muslim States and also in early Islamic history.<sup>72</sup>

Lately, Saudi Arabia has allowed certain progress in women's development. First of all it is important to note that the discussion on women's rights take place publicly in the daily newspapers and is expressed on conferences and

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<sup>69</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2002/52, *Integration of the human rights of women and the gender perspective violence against women*, 27<sup>th</sup> of February, 2003, U.N. Doc. E/CN.4/2003/75/Add1, paras 809-816

<sup>70</sup> See, *inter alia*, Human Rights Watch 2003 World Report on Saudi Arabia, see footnote 37 above.

<sup>71</sup> See further, *Integration of the human rights of women and the gender perspective violence against women*, footnote 73 above.

<sup>72</sup> For a discussion on the Saudi veiling imperative's origins, see AlMunajjed, pp. 47-58.

national dialogues.<sup>73</sup> Recently, a number of projects for women's advancement have been initiated, including a Cabinet plan to create jobs for women, industrial cities for women, women factories, women universities, women's chambers of commerce, business licences for women and possible licences for women to work as lawyers.<sup>74</sup> While women are given more opportunities to enter the employment field, the segregation imperatives are obviously retained. However, with risen independency and capacities follow demands for further reform.

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<sup>73</sup> In 2003 Crown Prince Abdullah initiated a Center for National Dialogue as a means to offer a platform for dialogue between all sides of the spectrum of opinion. The third forum was held 12-13 June 2004 and focused on issues as segregation and women driving.

<sup>74</sup> Ghafour, A., "9-point plan to create jobs for women", Arab News, 1 June, 2004, Ghafour, A., "Jeddah to have first industrial city for women", Arab News, 3 June, 2004, Al-Rakan, N., "Hussa opens RCCI Women's branch", Arab News, 5 June, 2004, Jawhar, S.S., "Women earn right to obtain business licenses on their own", The Saudi Gazette, 20 April, 2004, Avancena, J., "Female lawyers await word on legal license", The Saudi Gazette, 22 April, 2004.

# 4 Reservations in International Law

## 4.1 Introductory remark

Whereas the chapters above have defined the problem and the rationale of the Saudi reservation a shift will take place in the following in order to concentrate on the legal aspects of the reservation. First, the legal norms applicable to reservations *de lege lata* will be outlined.

## 4.2 Definition and function

A reservation is defined in the Vienna Convention on the Law of Treaties as a "unilateral statement... (which) purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".<sup>75</sup> The Vienna Convention allows States to make reservations when signing, ratifying, accepting, approving or acceding to a treaty, unless the treaty in question provides otherwise.<sup>76</sup> Some treaties explicitly state which reservations are allowed while others prohibit reservations *in toto*.<sup>77</sup> In such cases the right to make reservations under the Vienna Convention does not come into play as a result of its subsidiary character.<sup>78</sup> More common, however, is that the treaty remain silent on the issue of reservations or that its reservations clause is unspecific, e.g. it prohibits reservations that violates the object and purpose of the treaty. This thesis focuses on the latter treaties.

The right to make reservations is in general a manifestation of State sovereignty. A State may choose not to be bound by a certain provision, which is not in line with its national interests. The sovereign right to formulate reservations contributes to the aim of universal participation to multilateral treaties; if diverging political, economic, social, cultural and religious interests would not be taken into due account in the treaty-making process it would be difficult to ever reach consensus as to the content. Allowing for reservations promotes international co-operation despite diverging social systems and thus, satisfies the aim for universality.

However, the universality cannot be achieved at the expense of the integrity of the treaty, i.e. the *ratio contrahendi* (ground of covenant). A treaty full of loopholes and exceptions, which apply differently in relation to every State party, will obviously loose its value. While the mere definition of a

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<sup>75</sup> Article 2(1)d.

<sup>76</sup> *Ibid.*

<sup>77</sup> See, *inter alia*, the Statute of the International Criminal Court (article 120), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (article 21).

<sup>78</sup> Article 19(1)a and b.

reservation reveals that the provisions of the treaty will be undermined, a limit must be set out. Universality may not transgress integrity, as it would result in content-ridden treaties. Likewise, the integrity cannot be rigidly upheld, as it would detract States from becoming parties. The ‘universality versus integrity dilemma’ has been giving rise to all reservations regimes. Since its inception, the law on reservations has hovered between the two extremes trying to strike a balance. The traditional approach upheld the integrity of the treaty at any cost while at present the strive for universality seems to overstep integrity and thus undermining the value of the treaties.

## 4.3 The law on reservations prior to the Vienna regime

### 4.3.1 The unanimity rule

Traditionally the right to make reservations was governed by the so-called *unanimity rule*.<sup>79</sup> A reservation to a treaty, no matter its character, was only allowed as long as all other State parties accepted it. The idea was based on the law of contracts; an objecting State was not to be bound by a fact to which it had not consented. The reservation was to be regarded as a counter-offer, which required new acceptance and in this way the absolute integrity of the treaty could be safeguarded.<sup>80</sup>

Prior to the creation of the League of Nations in 1914 the unanimity rule was the sole rule applied to determine the validity of reservations. During the period of the League, however, the practice began to show a lack of constancy. Whereas Western Europe considered the rule to be settled as international customary law, Eastern Europe and the States of the Pan-American union, later the Organisation of American States, were of a contrary view. Eastern Europe emphasised the principle of State sovereignty and gave States the right to make reservations unilaterally and at will, non-regarding objections from the co-parties.<sup>81</sup> They argued that reservations do not impose obligations on the contracting State parties and should therefore not require acceptance.

The Pan-American approach emphasised the universality at the expense of the integrity of the treaty and permitted a reserving State to become a party in relation to non-objecting States with the full effect of the reservation.<sup>82</sup> The reservation was not in force as between the reserving State and the objecting parties. Provided that at least one State accepted the reservation,

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<sup>79</sup> Brownlie, I. *Principles of public international law*, Oxford University Press, New York, 2003, 6<sup>th</sup> ed., p. 584.

<sup>80</sup> There were no other limitations on the right to make reservations, implying that a reservation contrary to the object and purpose of a treaty could be regarded as valid under the condition that it was unanimously accepted.

<sup>81</sup> Clark, p. 289.

<sup>82</sup> Clark, p. 290.

the reserving State could become a party to the treaty in question, but only in relation to accepting parties. The advantage of the flexible Pan-American approach was that it combined the possibility of maximal participation with the respect of the principle of State consent; reservations could not be imposed on objecting State parties. The proposal was criticised in European doctrine as unsuitable for normative human rights treaties, where the integrity of the treaty ought not to be infringed at any price. Europe continued to regard the unanimity rule as the accurate regime to regulate the validity of reservations until the 1950s.<sup>83</sup> The rule was officially practised by the League of Nations, and later the United Nations, though, with a rising number of derogating views among the member States.

### 4.3.2 The Reservations Case

The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 gave rise to a controversy on the admissibility to make reservations to the Convention, which itself contained no provision on the matter. The question arose when the UN Secretary-General, acting as depository, should count the instruments of ratification and accession. A number of twenty instruments were required for the entry into force of the Convention and it was unclear whether some of the instruments accompanied with reservations were countable. The core query was whether a reserving State could be regarded as a party if the reservation was met by objections and, if answered in affirmative, what were the legal effects of the reservation. The General Assembly referred the matter to the International Court of Justice for an Advisory Opinion in 1950.<sup>84</sup>

By seven votes to five the Court rejected the unanimity rule by arguing that the special characteristics of the Genocide Convention made the rule unfit to govern the right to make reservations in the present case.<sup>85</sup> The Court noted that the underlying principles of the Convention are binding upon all nations even without any conventional obligation. The contracting parties have no individual advantages or disadvantages nor interests of their own of the Convention. Its purpose is humanitarian and civilising and it is a common interest of the international community to respect it. Hence, the Court reasons that “the object and purpose of the Convention imply that it was the intention of the General Assembly and the States which adopted it, that as many States as possible should participate.”<sup>86</sup> The Court argued that the very object and purpose would be defeated if an objection to a minor reservation should lead to the complete exclusion of the reserving State from the Convention. At the same time it was not the intention of the State parties that the integrity of the treaty should be sacrificed in favour of a desire to secure the maximum number of participants. From this the Court concluded that the reservation’s compatibility with the object and purpose

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<sup>83</sup> Clark, p 251.

<sup>84</sup> GA Res. 478(V); 16 November 1950.

<sup>85</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May, 1951, ICJ Reports 1951, pp. 15-69.

<sup>86</sup> *Ibid.*, p. 24.

of the Convention must be the criterion to determine its validity. Such a criterion would be a compromise between universal participation and the absolute integrity of the treaty. By preventing reservations contrary to the object and purpose, the integrity of the treaty could be upheld. At the same time minor reservations would not impede the strive for universal participation.

Naturally the question arises as to who determines the compatibility of a reservation. The Court confirmed the general rule that no State can be bound by a reservation without its consent. Therefore, “each State, (...) will or will not, on the basis of its individual appraisals within the limits of the criterion of the object and purpose, consider the reserving State as being a party to the Convention”.<sup>87</sup> The Court assumes that the contracting parties are “desirous of preserving intact at least what is essential to the object of the Convention”.<sup>88</sup> In other words, it is up to the State parties, in good faith, to determine whether a particular reservation is compatible with the object and purpose of the Convention. Accordingly, States also decides the legal effects of reservations. A State, which objects to a reservation as incompatible with the object and purpose of the Convention, will consider the reserving Party as a non-party to the Convention, whereas a party that accepts the reservation as compatible will consider the reserving State as still being a party to the Convention. If there is disagreement as to the compatibility of a reservation the Court recommended recourse to dispute settlement.<sup>89</sup>

The Court declared that the questions referred to it were abstract in character and on that account could not be given an absolute answer and thus the appraisal of a reservation and the effect of objections depend upon circumstances of each individual case.<sup>90</sup> This statement was apparently disregarded and successively the opinion of the Court gained approval in regard to all multilateral treaties, not only those that shared characteristics with the Genocide Convention. However, the opinion was not directly welcomed by the International Law Commission (ILC), who had been occupied with the question of reservations since 1949. The ILC rejected the “compatibility test” as too subjective, and continued to insist on the rule of unanimous consent for another decade.<sup>91</sup>

In 1952, the General Assembly requested the UN Secretary-General to conform its practice to the opinion of the Court. He was instructed to, in respect to all future Conventions under the auspices of the United Nations, act as a depositary without commenting on the legal effects of reservations, but to leave the matter to States themselves.<sup>92</sup> In 1959, the General Assembly reaffirmed its previous statement as valid for all UN Conventions, i.e. with retroactive effect, as long as the treaty concerned did not provide

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<sup>87</sup> *Ibid.*, p. 26.

<sup>88</sup> *Ibid.*, p. 27.

<sup>89</sup> *Ibid.*.

<sup>90</sup> *Ibid.*, p. 21.

<sup>91</sup> Yearbook of the International Law Commission, 1951, vol. 2, p. 128, para. 24.

<sup>92</sup> GA Res. 598(VI), 12 January 1952.



otherwise.<sup>93</sup> Not until 1962 the ILC followed the General Assembly line and admitted the impracticality of the unanimity rule in a time where the number of potential parties to multilateral treaties was under increase. After extensive discussions the ‘compatibility test’ was finally to be incorporated in the ILC Draft on the Law of Treaties and the support for the unanimity principle waned.

## **4.4 The Vienna Convention on the Law of Treaties**

### **4.4.1 Introductory remark**

The Vienna Convention on The Law of Treaties was signed in 1969 and entered into force in 1980. Saudi Arabia became a party on the 14th of April 2003. The Convention is in many parts a reflection of international customary law and its codification was seen as an attempt to clarify the law on treaties and make it more readily available. Whereas the Vienna Convention is clear in many aspects its rules on reservations has remained diffuse.

Articles 19-23 enclose the rules on reservations. Focus will be on the validity and effects of reservations and the rules on withdrawals and the procedural requirements will be disregarded.<sup>94</sup>

### **4.4.2 Article 19(c): the compatibility test**

Whereas it may be doubted if all the articles on reservations contained in the Vienna Convention constitute international customary law, it is clear that the ‘object and purpose test’ provided for in article 19(c) has attained customary status.<sup>95</sup>

Article 19 of the VCLT provides that reservations are permissible 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.

Article 19(a) and (b) are not relevant for the purpose of this thesis and will be disregarded in the following. Article 19(c) reflects the 1951 ICJ Advisory Opinion in the *Reservations case*, but fails to clarify how the provision is workable in practice. The contemporary controversies on the article focus on how the object and purpose shall be determined in each particular case.

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<sup>93</sup> GA Res. 1452B(XIV), 7 December 1959.

<sup>94</sup> See Vienna Convention on the Law of Treaties, articles 22-23.

<sup>95</sup> See, *inter alia*, *Rawle Kennedy v. Trinidad and Tobago*, admissibility decision of 2 November 1999, CCPR/C/67/D/845/1999, para 6.5.

Who is competent to make the determination? Is the object and purpose of a treaty a subjective or objective criterion?

The debate in doctrine is concentrated to two schools, namely the ‘permissibility’ school and the ‘opposability’ school. The former divides compatibility into two separate notions, where a reservation contrary to the object and purpose is impermissible *ipso facto* and does not fall under the scrutiny of the States. In other words, a reservation that fails the first notion of admissibility cannot proceed to the second notion of opposability, i.e. objections and acceptances. The adherents to the latter school regard compatibility as one single notion, whose determination solely depends on the acceptability of the contracting States.<sup>96</sup>

If acceptability alone would govern the validity of a reservation the good faith of the contracting States parties becomes a crucial factor. If States accept a reservation in bad faith, i.e. despite considering it to be contrary to the object and purpose, the value of article 19(c) would be in doubt. The contrary view, that admissibility and acceptability are two independent notions, gives the provision more worth. It asserts that only compatible reservations may be subject to state acceptance or objection. An incompatible reservation is a nullity and a contracting party, which does not refute it, is in breach of the Vienna Convention. This latter view has the drawback that the system may not be workable in practice. How will the compatibility of a reservation be determined if not through the acceptances or objections of the contracting States?<sup>97</sup>

Most scholars agree that the ‘object and purpose’ of a treaty is an objective criterion, which exists independently from the attitudes of States. Likewise, they agree that it lies within the competence of the State parties to determine the compatibility of a reservation in relation to this object and purpose, thus, giving the objectivity a sense of subjectivity. The Advisory Opinion in the *Reservations case* supports this view. ICJ trusted in the good faith of the State parties; they were not to accept incompatible reservations. The same trust seems to be embedded in article 19(c). The essentially subjective approach can be avoided if there is a dispute settlement provision in the treaty concerned, as was also suggested in the Advisory Opinion. However, those provisions are often plagued with (permissible) reservations and the determination will in the vast majority of cases fall on the States.

#### 4.4.3 The legal effects of a reservation

The consequences of acceptances and objections are governed by article 20 of the Vienna Convention. The first paragraphs of article 20 turn to specific

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<sup>96</sup> See, *inter alia*, Redgewell, C. “Universality or integrity? Some reflections on reservations to general multilateral treaties” in *The British Yearbook of International Law*, 1993, vol LXIV, (pp 245-283), p. 263.

<sup>97</sup> Klabbers, J. “On human rights treaties, contractual conceptions and reservations” in Ziemele, I. (ed.), *Reservations to human rights treaties and the Vienna Convention regime – conflict, harmony or reconciliation*, Martin Nijhoff Publishers, Leiden, 2004, p. 178

cases such as where certain reservations are expressly authorised or where the treaty is a constituent instrument of an international organisation.<sup>98</sup> The last paragraph states that an objection must be presented within a period of twelve months to have effect.<sup>99</sup> Despite being contrary to the object and purpose many reservations are tacitly accepted under this paragraph, either by political or leisurely implication. The fourth paragraph encloses the basic rules, relevant to the present study.

Article 20.4 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.

Article 20.4 breaks down the multilateral treaty into a number of bilateral relations. In accordance with sub-paragraph (a) a State accepts the reservation with the consequence that the reserving and the accepting States are parties to the treaty vis-à-vis. The same consequence may follow from sub-paragraph (b), leaving the treaty relation intact despite the reservation having been objected. The same paragraph also provides for the possibility to definitely express the preclusion of treaty relations with the reserving State. Sub-paragraph (c) clarifies that the acceptance of one individual State makes the entry into force of the treaty for the reserving State possible.

Objections are relatively common, in particular to human rights treaties, but definite expressions precluding the entry into force of the treaty are rare, not least because of vulnerable political relations.<sup>100</sup> A State which objects to a reservation, but yet do not refute its entry into force is a full party vis-à-vis the reserving state in the same manner as a State which wholly accepts the reservation.

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<sup>98</sup> See article 20.1-3.

<sup>99</sup> Article 20.5 reads; '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'.

<sup>100</sup> Aust, A., *Modern treaty law in practice*, Cambridge University Press, 2000, p. 115. One rare example is the Swedish objection to the reservation made by the Maldives to CEDAW, where Sweden stated that '(t)he Government of Sweden objects to these reservations and considers that they constitute an obstacle to the entry into force of the Convention between Sweden and the Republic of Maldives', see Status of *Multilateral Treaties Deposited with the Secretary-General*, vol. 1, 2003, p 257.

This becomes clearer by application of article 21, which provides the legal effects of reservations;

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
  - (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
  - (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Paragraph 1 and 2 seem to reflect the principle of State consent; a contracting State is only bound to the extent it has consented. According to paragraph 1 the reservation is in force reciprocally as between the reserving and accepting State. The same is true for the effects stipulated in paragraph 3 concerning reservations which are met by objections. The treaty relations between the other contracting parties rest unaffected *inter se* in accordance with paragraph 2. Paragraph 3 seems to depart from the consensual nature of treaty relations by giving no legal effect to an objection unless the entire entry into force of a treaty has been opposed. The rule was applied in the Anglo-French Continental Shelf Case, where the arbitration tribunal confirmed that:

‘the combined effect of the French reservations and their rejection by the United Kingdom is neither to render article 6 (of the Geneva Convention on the Continental Shelf, 1958) inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto* as the United Kingdom primarily contends. It is to render the article inapplicable as between the two countries to the extent of the reservation.’<sup>101</sup>

The reserving State is always the victorious as the effects are the same no matter if a State accepts or objects to the reservation.<sup>102</sup> It has been pessimistically stated that ‘..il revient à donner à l’objection la valeur d’une geste purement théorique, sans conséquences juridiques.’<sup>103</sup> (The objection has come to be a purely theoretic act without any legal consequences.) It is argued that the main function of objections is to preclude a particular interpretation of the treaty to gain influence.<sup>104</sup>

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<sup>101</sup> Decision of the UK-France Court of Arbitration of 30 June 1977, Cmnd 7438(1979), p. 45.

<sup>102</sup> Greig, D.W. “Reciprocity, Proportionality, and the Law of Treaties” in *Virginia Journal of International Law*, 1994, vol 34 (pp 295-403), p. 328.

<sup>103</sup> Chaumont, C., “Cours general de droit international public” in *Hague Academy of International Law, Collected Courses* 333, 1970–I, vol. 129, p. 448 as cited in Greig, D.W. “Reservations: Equity as a balancing factor?” in *Australian Year Book of International Law*, 1995, vol 16 (pp 21-173), p. 149.

<sup>104</sup> Lijnzaad, L. *Reservations to human rights treaties – Ratify and ruin?*, Martinus Nijhoff Publishers, Dordrecht, 1995, p. 54.

#### 4.4.4 An unresolved issue

A major unresolved issue stems from the fact that the Vienna Convention on the Law of Treaties fails to directly address the legal effects of reservations *incompatible* with the object and purpose of the treaty. The *Reservations case* also leaves room for varying interpretations. It is unclear whether the legal effects as provided for in articles 20-21 are applicable also to incompatible reservations. The dilemma can be related to the two contesting views presented in 4.3.2, namely the ‘permissibility’ and the ‘opposability’ school. Either a reservation is (i) incompatible *per se* or (ii) dependent upon its acceptance by other States. Contemporary debate is divided and there are no clear answers to rely on.

The permissibility approach provides that a reservation in breach of article 19(c) is incompatible *ipso facto* and that articles 20 and 21 are not applicable at all to incompatible reservations. If a reservation is made contrary to the object and purpose of a treaty it fails the compatibility test and the rules on legal effects never become applicable. Article 20 and 21 are to be applied to reservations, which are permissible in accordance with article 19, but are objected to on other grounds.<sup>105</sup> The acceptance of an incompatible reservation is theoretically impossible and a contracting State, which accepts such a reservation, is in breach of article 19(c) of the Vienna Convention.<sup>106</sup> The incompatibility of a reservation is to be determined on objective grounds and is independent from the acceptance or objection from State parties.<sup>107</sup> The permissibility approach does not provide any clear answers as to the legal effects of an incompatible reservation. Two alternative approaches can be distinguished in doctrine and practise, namely that the entire treaty ratification is void (*Reservations Case*) or that the reservation is void, i.e. the ‘severability doctrine’.<sup>108</sup> According to the latter alternative the invalid reservation is ‘severed’ from the treaty and the reserving State becomes bound by the treaty as a whole. This approach will be discussed more in detail below.

The contrasting ‘opposability’ approach emphasises the principle of State sovereignty and argues that States are the only legitimate subjects to determine the compatibility of a reservation. States will react explicitly or tacitly to reservations in accordance with articles 20-21 of the Vienna Convention. The system implies that one State is free to accept a reservation that another State has deemed incompatible. The problem embedded in this

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<sup>105</sup> Redgewell, p. 257. However, other argues that States has a duty to accept compatible reservations, see, *inter alia*, Schabas, W. A. “Reservations to human rights treaties: Time for innovation and reform” in *The Canadian Yearbook of International Law*, 1994, vol. XXXII, (pp 39-83), p. 64 and Clark, p. 303 and Lijnzaad, p. 51.

<sup>106</sup> Redgewell, p. 257.

<sup>107</sup> Seibert-Fohr, A., “The potentials of the Vienna Convention on the Law of Treaties with respect to reservations to human rights treaties” in Ziemele, I. (ed.), *Reservations to human rights treaties and the Vienna Convention regime – conflict, harmony or reconciliation*, Martin Nijhoff Publishers, Leiden, 2004, p. 204.

<sup>108</sup> UN Special Rapporteur on the Law of Treaties Françoise Hampson, *Reservations to human rights treaties*, Final working paper, Sub-Commission for the Protection and Promotion of Human Rights, 2004, (UN. Doc. E/CN.4/Sub.2/2004/42), para 15.

system is that it is impossible to know if a State acts in good faith or with underlying political or other motives. The ultimate ideal is that States precludes treaty relations vis-à-vis the State that enters an incompatible reservation. States object, without precluding treaty relations, to reservations on other grounds than incompatibility and they accept compatible reservations. The ideal is obviously a reverie. The acceptance of incompatible reservations occurs frequently and most objections to such reservations do not go as far as to preclude the treaty relations in whole.

#### 4.4.4.1 Conclusive remark

The dilemma of the applicability of articles 20-21 of the Vienna Convention has remained unresolved. The only conclusion so far must thus be that the Convention is silent, or at least unclear, on the legal effects of incompatible reservations. Three options can be singled out from the permissibility and opposability approach respectively;

- i) *the State remains bound by the treaty except for the provision to which the reservation is related (to the extent of the reservation)*
- ii) *the reserving State is no longer a party to the treaty*
- iii) *the incompatible reservation is severed and the reserving State is bound by the treaty as a whole*

The alternatives will be elaborated in the subsequent chapter, where in particular the third alternative will be analysed in respect to human rights treaties. At this point, it is not possible to come to a general conclusion as regard the effects of incompatible reservations to multilateral treaties. However, a *practical* conclusion of the problem can be drawn.

There seems to be consensus that the Vienna Convention, in line with the *Reservations case*, provides that *States* are competent to determine the validity of reservations. The reality is that if there is no competent ‘third party’ to determine compatibility, or if the competence of such a party is not recognised, States act at will. States objects and accepts incompatible reservations for one reason or another, which result in a bundle of different bilateral relationships. States often express the reservation’s incompatibility with the object and purpose of the treaty in their objections, but fail to pronounce on its legal effects. It is common that objecting States explicitly states that the objection does *not* prevent the entry into force of the treaty vis-à-vis the reserving State. Recent trends contain State objections propagating the severability doctrine, thus claiming that the reservation is without legal effects. The reactions to *prima facie* incompatible reservations are incoherent and the result is that the effects of incompatible reservations ‘hang in the air’. One State’s reaction cannot be decisive. The *de facto* outcome is that the reserving States maintain their reservations and self-confidently limit their obligations under the treaty concerned to the extent of the reservation.

# 5 A new reservations regime for human rights treaties?

## 5.1 Introductory remark

The ambiguity of the Vienna Convention has particularly negative consequences for human rights treaties to which the *de facto* results of the regime on reservations has devastating effects, in particular for the integrity of the treaty. No other multilateral treaties have been plagued with so many reservations as human rights treaties. The integrity of non-reciprocal treaties which aim to spread universal values is of particular importance and a system where incompatible reservations are objected to by some and accepted by others is not reasonable. In fact, the entire objections regime seems unsuitable to non-reciprocal treaties. Therefore, new practice as to the legal effects of incompatible reservations has developed and there is at current an increasing demand for a separate regime to govern reservations to human rights treaties. The criticism towards the Vienna Convention presented below departs from the *de facto* regime on reservations, i.e. States object and accept freely and the consequences follow from articles 20-21, creating bundles of bilateral relationships.

## 5.2 The Vienna regime and human rights treaties

### 5.2.1 Non-reciprocity

It has repeatedly been claimed that the special character of human rights and humanitarian treaties necessitates other rules on reservations than those provided for in the Vienna Convention.<sup>109</sup> Unlike the majority of treaties, human rights treaties do not create reciprocal relationships between the contracting parties, but rather constitutes an objective regime of values. Already the International Court of Justice, in its Advisory Opinion in the Reservations case, emphasised the ‘objective’ character of humanitarian treaties when stating that ‘the contracting States do not have any interests of their own; they merely have, one and all, a common interest’.<sup>110</sup> Both the European Commission and Court on Human Rights has constantly recalled the specific nature of the European Convention on Human Rights and defined its aim to ‘establish a common public order of the free democracies

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<sup>109</sup> See *inter alia*, Goodman, R., “Human rights treaties, invalid reservations and state consent” in *American Journal of International Law*, 2002, vol. 96 (pp. 531-561), Korkelia, K., “New challenges to the regime of reservations under the International Covenant on Civil and Political Rights” in *European Journal of International Law*, 2002, vol.13, No. 2, (pp. 437-479) Lijnzaad and Schabas.

<sup>110</sup> See footnote 85.

of Europe'.<sup>111</sup> Treaties with humanitarian purposes aim to spread universal values to the direct benefit of the *individual*. In the words of the Human Rights Committee such treaties are not 'a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights'.<sup>112</sup> The Vienna Convention itself confirms the non-reciprocal nature of human rights treaties in its article 60.5, which provides that the right to reciprocally breach a treaty is not applicable to 'treaties of humanitarian character'. It can be added that not all provisions lack reciprocity, see e.g. provisions on inter-State complaints.

It is argued that the lack of reciprocity in human rights treaties makes it unreasonable to apply the Vienna Convention's reservations regime in relation to those treaties.<sup>113</sup> The Vienna Convention is created to suit reciprocal treaties and views the inter-State relations merely as a bundle of bilateral relations, which becomes clear from the wording of articles 20 and 21. The Vienna Regime is outlined after a contractual concept; States arrange its inter-State relations through objections and acceptances in line with its State interests, having in mind that reservations have reciprocal effects. An acceptance and an objection of a reservation have reciprocal effects, meaning that the reserving State as well as the reacting State may invoke the reservation. The problem is that human rights treaties, which aim to protect the interest of the individual, not the State, have no benefits from such reciprocal rearrangements. The objections regime might be suitable to certain multilateral treaties, but when it comes to non-reciprocal treaties its significance is vain.

It would be absurd if the effects of an objection would be applied reciprocally to a treaty that aims to protect the individual.<sup>114</sup> Imagine that the 'objections by various European States to the United States reservation on the death penalty discharge them from their obligations under article 6 and 7 as concerns United States.'. <sup>115</sup> There seems to be agreement both in practice and doctrine that the reciprocal function of objections is not applicable to provisions of non-reciprocal nature.<sup>116</sup> For example, it is

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<sup>111</sup> E.g. *Temeltasch v. Switzerland*, Commission's report of 5 May 1982, DR 31, application no. 9116/80, pp. 120-153, paras 62-63, *Loizidou v. Turkey*, (preliminary Objections), judgment of 23 March 1995, European Court of Human Rights, Series A, no. 310, paras 65-98, para 93.

<sup>112</sup> Human Rights Committee, General Comment 24(52), *General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relations to declarations under article 41 of the Covenant*, adopted by the Committee at its 1382<sup>nd</sup> meeting (52<sup>nd</sup> session) on 2 of November 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para 17.

<sup>113</sup> See footnote 109 above.

<sup>114</sup> It has even been argued that the Vienna Convention prohibits States to evoke such consequences. Article 41 provides that two parties to a multilateral treaty may not modify or suspend a provision between them if this action is incompatible with the object and purpose of the instrument, see Schabas, p. 65. See also Korkelias, p. 440 and Clark, pp. 318-319.

<sup>115</sup> Schabas, p. 65.

<sup>116</sup> See, *inter alia*, Lijnzaad, p. 407, Pellet, p. 268. See also, *France v. Turkey*, European Commission for Human Rights, application no. 9940/82, 1983, Y.B.Eur.Conv. on H.R. 1, para 140;



unreasonable that a reservation, which is territorial in scope, would have reciprocal effects.<sup>117</sup> How would the reciprocal effects for a State that objects to a reservation by France, stating that its overseas territories are excluded from application by a certain treaty, be defined?

It is argued that the lacking reciprocal effect of State objections discourages States to react, even to incompatible reservations. The contracting parties are not affected by the reservation, which only concern the individuals under the reserving State's jurisdiction, and therefore have no interest to object.<sup>118</sup> The absence of reciprocal gain and the absence of *direct* consequences of reservations for other than the reserving State, leads to States accepting all reservations.<sup>119</sup> Hence, States do not preclude treaty relations with States that have entered incompatible reservations; they do not even object them. Conclusively, the Vienna rules on objections are ineffective as concerns non-reciprocal human rights treaties.

This line of argument has been most clearly expressed by the Human Rights Committee in its General Comment 24. The Committee goes as far as to state that it is an inappropriate task for States to determine the validity of reservations as regards human rights treaties. 'Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.' The Committee limits the role of State objections to provide some guidance to the treaty bodies in their interpretation of the compatibility of a reservation.<sup>120</sup>

Applying the Vienna regime on reservations to non-reciprocal treaties also has detrimental consequences for the integrity of those treaties. Human rights treaties aim to protect a *common interest*, not the interests of States. They aim to spread universal values and create a standard-setting base for both the State parties and the international community as a whole and a system that results in a bundle of bilateral relations is therefore undesirable. This would weaken the possibilities to protect the common interest and the quality of the protection of the rights set forth in the treaty would be undermined.

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' (...) the general principle of reciprocity in international law and the rule, stated in Article 21(1) of the Vienna Convention on the Law of Treaties, concerning bilateral relations under a multilateral treaty do not apply to the obligations under the European Convention on Human Rights which are 'essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.'

<sup>117</sup> Pellet, A., (ILC Special Rapporteur on the Law of Treaties), *Second report on reservations to treaties* ILC Special Rapporteur on the law of treaties, (U.N. Doc. A/C.4/477/Add.1), 13 of June 1996, para 269.

<sup>118</sup> Korkelia, p. 439-441.

<sup>119</sup> Lijnzaad, p. 112.

<sup>120</sup> Human Rights Committee General Comment 24(52), para 17.

### 5.2.2 Extra-legal factors

There are a number of other reasons why the Vienna Convention's objections regime is particularly disadvantageous in respect to human rights treaties. The value-based character of human rights influences the way States react to reservations. It is true that such influence is a general problem that concerns many multilateral treaties, not only human rights treaties. However, the problem occurs more often and more acutely with human rights treaties as they must reconcile not just different national policies but different religious and social systems. The argument is feeble in a legal sense but is often put forth to give additional strength to the argument that it is inappropriate for States to determine the validity of reservations by way of acceptances or objections.

Human rights treaties promote universal values, but there is not always agreement as to the meaning of these values. Cultural and religious standards may interfere when States determine the compatibility of a reservation under article 19(c) and the determination risks being biased. Weighty political reasons are also involved; it is rare to condemn the behaviour of an ally. Mexico did not object to a reservation entered by Brazil to CEDAW although it objected to all seven of the similar reservations made by Latin-American states.<sup>121</sup>

The underlying aim for universality, which is in particular strong when it comes to human rights treaties, would be deviated if treaty relations were terminated and therefore work as an impeding factor to cut off treaty relations. Likewise, the opportunities and legitimacy to persuade the reserving State to conform its practices to the treaty or to withdraw the reservation would wane. If a reserving State were to be precluded from the treaty it would as well escape the supervisory mechanisms.<sup>122</sup>

For ideological reasons or not, the reality is that States object incoherently, which is not unexpected as there is no legal requirement that States must examine and comment on the validity of reservations formulated by the contracting parties. As the Human Rights Committee puts it: '...the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable'.<sup>123</sup>

### 5.2.3 Conclusive remark

There is certainly no consensus among legal scholars as to the suitability of the Vienna regime in relation to human rights treaties. Human rights treaties

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<sup>121</sup> See *Multilateral Treaties Deposited with the Secretary-General*, vol. 1, 2003.

<sup>122</sup> Lijnzaad, p. 407.

<sup>123</sup> Human Rights Committee General Comment 24(52), para 17. See also Simma, B., "Reservations to human rights treaties: Some recent developments" in Hafner, G. *et al.* (eds.), *Liber Amicorum – Prof. Seidl-Hohenveldern in honour of his 80<sup>th</sup> birthday*, Kluwer, The Hague, 1998, p. 664; 'the general picture of inter state reactions is clearly one of gross inadequacy'.

are treaties concluded between States and just as with any other treaties the logical conclusion should perhaps be that the Vienna Convention on the Law of Treaties is applicable (States decide on compatibility).<sup>124</sup> At the same time there is much support to the opposite in practice as well as in doctrine and the demands for a regime that adequately address the common interest of the international community rather than the reciprocal interest of States are increasing. The desirable solution is to let the monitoring human rights treaty bodies perform the determination of the validity and effects of reservations in place of the subjective valuation of States. The object and purpose could then be objectively identified and the common interests and the integrity of the treaty be upheld. In that manner, the bundle of bilateral relations, giving reservations differing legal effects (including acceptance of incompatible reservations), could be avoided. At the level of monitoring mechanisms the legal effects of incompatible reservations are limited to the nullification of the treaty ratification or severability. New questions arise. Do the monitoring treaty bodies have such a competence? Do States want to give up their sovereignty? The answers must be looked for in the body of practice which has developed in this respect.

### 5.3 New practice

New practice as regards reservations to human rights treaties has developed in two respects. First, a departure from the original rule that States are the only competent organ to determine the validity of a reservation can be distinguished. Second, invalid reservations are severed from the treaty concerned and the reserving State remains bound by the treaty as a whole. This chapter will outline the ‘new’ jurisprudence in order to provide a basis for the subsequent evaluation of the legitimacy of the two suggestions in chapter 5.4 and 5.5.

#### 5.3.1 The European Commission and Court of Human Rights

The *Temeltasch Case* constitutes the first departure from the general rule that States have an exclusive competence to determine the validity of a reservation.<sup>125</sup> The European Commission of Human Rights stated that

‘even if an acceptance or an objection formulated with respect to a reservation to the Convention can be seen as having any value, that does not mean that the Commission does not have any competence to express an opinion regarding the conformity with the Convention of any given reservation or interpretative declaration’.<sup>126</sup>

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<sup>124</sup> Melander, G., “Reservations to human rights treaties – setting the stage: Wishful thinking or prospects for development” in Ziemele, I. (ed.), *Reservations to human rights treaties and the Vienna Convention regime – conflict, harmony or reconciliation*, Martin Nijhoff Publishers, Leiden, 2004, p. xxiv.

<sup>125</sup> *Temeltasch v. Switzerland*, see footnote 111 above.

<sup>126</sup> *Ibid.*, para 61.

Despite no States having objected to the reservation the Commission found itself competent to consider the validity. Six years later the view was confirmed by the European Court of Human Rights in the *Belilos Case* and has since then become routine jurisprudence.<sup>127</sup>

In the *Temeltasch case* the competence was based on ‘the very system of the Convention’.<sup>128</sup> The Commission referred to the objective character of the Convention and its role as an instrument of European *ordre public*.<sup>129</sup> Further, it referred to its mission under the Convention to ‘ensure the observance of the engagements undertaken by the High Contracting Parties’.<sup>130</sup> The Court has also based its competence on its functions, e.g. article 45, which provides that the Court has jurisdiction over the interpretation and application of the Convention.<sup>131</sup> The requirements for the validity of a reservation are laid down in article 57, former article 64, of the Convention and in interpreting and applying the article the Court must necessarily determine the validity of a reservation.<sup>132</sup>

The Court has gone further than to consider the validity of reservations. It also regards itself competent to pronounce on the legal effects of a reservation, as was first seen in the *Belilos Case*.<sup>133</sup> Switzerland had entered an interpretative declaration which limited the scope of the right to a fair trial as provided for in article 6.1 of the Convention. The interpretative declaration, which was regarded as a true reservation in the opinion of the Court, failed to meet the requirements set out in article 64 and was determined invalid. The Court then went on to pronounce on the legal effects of the reservation and simply concluded that it was ‘beyond doubt that Switzerland is, and regards itself as, a party irrespective of the validity of the reservation’.<sup>134</sup> By weighing the will to remain a party to the Convention versus the will to maintain the reservation the Court gave primacy to the former. The question was however not crystal clear. There was in fact an attempt in the Swiss Council of States to denounce the Convention on grounds of the Court’s decision. The denunciation was rejected with only one vote.<sup>135</sup> The view presented by the Swiss Counsel during the public hearing was, however, that Switzerland intended to be bound by the Convention as a whole and the Court, relying on that statement, could easily come to a conclusion.

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<sup>127</sup> See also, *Chorherr v. Austria*, judgment of 25 August 1993, Series A no. 226-B, *Chrysostomos and Others v. Turkey*, admissibility decision of 4 March 1991, application nos. 15299, 153000 and 15318/89, *Ilascu and Others v. Moldova and the Russian Federation*, admissibility decision of 4 July 2001, application no. 48787/99, *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 117.

<sup>128</sup> *Temeltasch v. Switzerland*, para 65.

<sup>129</sup> *Ibid.*, para 63.

<sup>130</sup> Former article 19.

<sup>131</sup> Present article 32.

<sup>132</sup> *Belilos v. Switzerland*, judgment of 29 April 1988, Series A no. 132, para 50.

<sup>133</sup> See also, *inter alia*, *Chrysostomos and Others v. Turkey* and *Weber v. Switzerland*.

<sup>134</sup> *Belilos v. Switzerland*, para 60.

<sup>135</sup> *Korkelia*, p. 466.

A more dubious determination of a State's intention to be bound by the Convention without the reservation was made by the Court in the *Loizidou v. Turkey Case*.<sup>136</sup> Turkey had entered a reservation, which excluded certain territories (Northern Cyprus) from the jurisdiction of the Commission and the Court. The Court found the reservation to be contrary to the object and purpose of the treaty.

'(If) substantive or territorial restrictions were permissible (..) under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, (..) would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order ("ordre public"). (..) (H)aving regard to the object and purpose of the Convention system, (..) the consequences for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for.'<sup>137</sup>

By reference to the *Beilos Case* the Court declared that the invalid reservation was to be severed from the treaty.<sup>138</sup> Despite the Turkish delegate having declared that the reservation was a *sine qua non* for its acceptance of the right to individual petition the Court held the contrary. The explanation given was that Turkey;

'(ran) the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations (to be bound by the treaty) themselves. Seen in this light, the *ex post facto* statements by Turkish delegates cannot be relied upon to detract from the respondent government's basic – albeit qualified-intention to accept the competence of the Commission and Court'.<sup>139</sup>

In short, Turkey entered the reservation *knowing* that it might be severed. This apparently sufficed not to accept the Turkish claims that there was a lacking consent to be bound by the treaty without the reservation.<sup>140</sup>

### 5.3.2 Inter-American Court of Human Rights

The Inter-American Court of Human Rights has indicated that it regards itself as competent to determine the validity of reservations in two early Advisory Opinions including the subject.<sup>141</sup> In the *Restrictions to the Death Penalty Case*, the absence of objections to Guatemala's reservation did not prevent either the Inter-American Commission of Human Rights or the Inter-American Court from examining the matter. The outcome of *The Effect of Reservations on the Entry into Force of the American Convention*

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<sup>136</sup> *Loizidou v. Turkey*, see footnote 122 above.

<sup>137</sup> paras 75-76.

<sup>138</sup> paras 93-95.

<sup>139</sup> para 95.

<sup>140</sup> See also, *Chrystosmos and Others v. Turkey* to the same result.

<sup>141</sup> *The Effect of Reservations on the Entry into Force of the American Convention*, Ser. A, No. 2, Advisory Opinion OC-2/82 of 24 September, 1982. *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Ser. A, No. 3, Advisory Opinion OC-3/83 of 8 September, 1983.

Case speaks to the same point. The following statement clarifies the standpoint of the Court;

'It is (...) impossible to interpret the treaty correctly, with respect to the reserving State, without interpreting the reservation itself. The Court concludes, therefore, that the power granted it under article 64 of the Convention to render advisory opinions interpreting the Convention or other treaties (...) of necessity also encompasses jurisdiction to interpret the reservations attached to (this) instrument.'<sup>142</sup>

The Court has however not clearly pronounced on the legal effects of incompatible reservations and there seem only to be vague support for the severability regime in the regional jurisprudence of the Americas. It has been argued that the Court's insistence in the *Effect of Reservations on the Entry into Force of the American Convention Case* that the Convention may enter into force without acceptance of reservations would seem to presuppose that unacceptable reservations may eventually be severed from the consent to be bound without affecting that consent.<sup>143</sup>

### 5.3.3 The Human Rights Committee

In 1994 the Human Rights Committee adopted a General Comment on issues relating to reservations in which it clearly declared its support both for the severability regime and for the Committee's competence to determine the validity of reservations.<sup>144</sup> It stated that 'it necessary falls to the Committee to determine whether specific reservations is compatible' as 'it is an inappropriate task for the States in relation to human rights treaties and (...) because it is a task that the Committee cannot avoid in the performance of its functions'. The special character of human rights treaties requires other subjects than States to examine the validity of reservations as it necessarily must be done in an objective manner. The determination is further a necessary part of the Committee's function as it would be unfeasible to examine state reports and individual complaints without taking a view on the validity and effects of a reservation.

The Committee further expresses its support for the severability of invalid reservations; '(t)he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect for the reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'.<sup>145</sup> The most important instance where the Committee has applied this approach is *Kennedy v. Trinidad and Tobago*.<sup>146</sup> Subsequent to a decision by the Judicial Committee of the Privy Council that keeping a person under the death sentence for more than five years constituted

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<sup>142</sup> *The Effects of Reservations on the Entry into Force of the American Convention*, paras 335-336.

<sup>143</sup> Klabbers, p. 189.

<sup>144</sup> See footnote 112 above.

<sup>145</sup> *Ibid.*, para 18.

<sup>146</sup> *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, admissibility decision 2 November 1999, U.N. Doc. CCPR/C/67/D/845/1999. Final views adopted on 26 of March 2002, U.N. Doc. CCPR/C/74/D/845/1998.

inhuman or degrading punishment or treatment, Trinidad and Tobago withdrew its ratification to the Optional Protocol to the ICCPR only to immediately re-accede with a reservation precluding the right to individual petition for persons under the death sentence. After the reservation had been formulated Mr. Rawle Kennedy, a person sentenced to death, filed an individual complaint. The Committee initially affirmed its competence to determine the compatibility of the reservation. It continued to state that the reservation constituted discrimination and thus

‘runs counter to some of the basic principles embodied in the Covenant and its protocol, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The Consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.’<sup>147</sup>

The reservation was severed without further explanation.

The conclusion of the Human Rights Committee did not pay respect to the principle of State consent. It should perhaps have been regarded as evident that Trinidad and Tobago did not consent to be bound without the reservation; ‘(d)id not the conduct of the State party, through its denunciation and immediate re-accession with a reservation, make clear that Trinidad and Tobago wanted to be a party to the Optional Protocol only as conditioned by the reservation?’<sup>148</sup> An answer in affirmative was confirmed by the definite denunciation by Trinidad and Tobago of the Optional Protocol in March 2000. The denunciation was obviously a protest to the Human Right Committee’s conclusion in the *Kennedy case* and the Committee has been criticised for doing more harm than good to the cause of human rights.<sup>149</sup>

The Committee has confirmed the severability approach while considering State Reports at least on one occasion.<sup>150</sup> Severance has also been proposed in dissenting opinions to cases where the majority opinion of the Committee has declared the reservation permissible, see e.g. *Francis Hopu and Tepoaitu Bessert v. France*.<sup>151</sup>

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<sup>147</sup> *Kennedy v. Trinidad and Tobago*, para 6.7.

<sup>148</sup> Scheinin, p 50, see also dissenting opinion of Committee members Nisuke Ando, Prafulachandra N. Bhagwati, Eckart Klein and David Kretzmer, para 17, U.N. Doc. CCPR/C/67/D/845/1999.

<sup>149</sup> Tomuschat, C., *Human rights –Between idealism and realism*, Oxford University Press, New York, 2003, p 162.

<sup>150</sup> Consideration of the Kuwaiti initial report, wherein Kuwait had made an interpretative declaration declaring that domestic law prevails over articles 2 and 3. ‘The Committee finds that the interpretative declaration regarding articles 2 and 3 contravenes the State party’s essential obligations under the Covenant and is therefore without legal effect and does not affect the powers of the Committee’. (U.N. Doc. CCPR/CO/69/KWT), also reproduced in the *Annual Report of the Human Rights Committee 2000*, A/55/40 paras 452-497.

<sup>151</sup> *Francis Hopu and Tepoaitu Bessert v France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1.

### 5.3.4 The Committee on Discrimination against Women

The other UN Treaty Bodies have made more discreet attempts to proclaim the competence to determine the validity and effects of reservations than the Human Rights Committee. However, the Chairpersons of the Human Rights Treaty Bodies have expressed firm support for the view reflected in General Recommendation 24 and all Committees have expressed the seriousness of the problem of reservations in different ways and urged their withdrawal.<sup>152</sup> At the same time however, those bodies have proved to be more pragmatic and less dogmatic than the text of the General Comment 24 might suggest. They are more inclined to encourage States to withdraw certain reservations than to appreciate their validity. Due to space limits only the competence of the Committee on the Elimination of Discrimination against Women will be outlined here.<sup>153</sup>

The Committee has dealt with the issue of reservations since its inception but has yet not taken a clear stance on neither the competence to determine the validity of reservations nor the legal effects of incompatible reservations.<sup>154</sup> There has been a number of General Recommendations, Suggestions and Guidelines where the Committee has underlined the seriousness of the problem of reservations in general, but an all over clear standpoint on the matter is lacking.<sup>155</sup> A legal opinion from the Treaty Section of the Office for Legal Affairs of the United Nations in 1984 stated that ‘the functions of the Committee do not appear to include a determination of the incompatibility of reservations (..)’.<sup>156</sup> As a natural result, the Committee has been initially cautious in its pronouncements on reservations. However, in its more recent concluding comments on State reports the Committee spells out the incompatibility of certain reservations and thus clearly echoes the position of the Human Rights Committee in its General Recommendation 24. Moreover, the competence is expressed in a common view adopted by the chairpersons of the Committees, wherein it was recommended that the ‘treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the

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<sup>152</sup> *Report of the 9<sup>th</sup> meeting of persons chairing the human rights treaty bodies*, 1998, (U.N. Doc. A/53/125), para 18. For an overview of Committee reactions, see inter alia *Ways and means of expediting the work of the Committee*, 25<sup>th</sup> session, (U.N. Doc. CEDAW/C/2001/II/4), chapter III.

<sup>153</sup> As known, the Convention on the Elimination of all forms of Racial Discrimination (CERD) provides that if, and only if, two thirds of the State parties to the Convention object to a reservation it can be declared invalid. Thus, in the case of CERD the competence obviously remains with the State parties.

<sup>154</sup> Recommended reading for detailed outline on the work of the Committee as regards reservations; Clark, pp. 282-289, Cook, R. “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women “ in *Virginia Journal of International Law*, 1990, Vol. 30, (pp 643-712), Lijnzaad pp 298-371, Schöpp-Shilling, H.B., “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: An unresolved issue or (no) new developments?” in Ziemele, pp 3-41.

<sup>155</sup> See e.g. General recommendations, 4, 20 and 21 and *Compilation of guidelines on the form and content of reports to be submitted by the States parties to the international human rights treaties*, 2003, (U.N. Doc. HRI/GEN/2/Rev.1/Add.2).

<sup>156</sup> (U.N. Doc. A/39/45), Vol. II Annex II.



object and purpose of those instruments and consequently incompatible with treaty law'.<sup>157</sup>

The Committee's focus is however on voluntary withdrawals of incompatible reservations on the side of the reserving State, which has also been emphasised time over time in concluding observations and recommendations. To focus on withdrawals rather than to get involved in legal struggle with all reserving States insisting that some of their reservations are without legal effect is understandable, as this might well distract State parties from the main purpose of the treaty, i.e. the implementation of rights.<sup>158</sup> However, States rarely conform to the Committee conclusions and few incompatible reservations have been withdrawn. The view of the Committee on this point is rather pragmatic; it considers reports and expresses condemnations as if no reservations were at hand.

A suggestion that has been put forth in doctrine<sup>159</sup>, and also by other organs including the Committee itself, is to refer the issue of the validity and effects of reservations to the International Court of Justice for an Advisory Opinion.<sup>160</sup> This supports the view that the Committee itself does not have a clear opinion on the matter or even that it has no competence itself to pronounce on the validity and effects of reservations. The Committee is not competent to seek such an opinion itself but would have to persuade ECOSOC either via the Commission on the Status of Women or the Sub-Commission on Human Rights.<sup>161</sup> The particular concern was for an opinion that might assist governments to reconsider their reservations with a view to withdrawing them. No Advisory Opinion has yet been sought.

### 5.3.5 State objections

The severability regime has come to expression in some recent trends of State objections. In particular the Nordic States have begun to pronounce on the legal effects of invalid reservations in this direction when formulating their objections. By expressly stating that the reservation is 'null and void' or 'is devoid of legal effect' the objecting State declare its dissatisfaction with the effects provided for in the Vienna regime's article 21, according to which the effects are limited to the preclusion of treaty relations or leaving

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<sup>157</sup> See e.g., *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, 1994, (U.N. Doc. A/49/537).

<sup>158</sup> Originally the words of CERD, see ILC Special Rapporteur's Eight report on reservations, para 20.

<sup>159</sup> Lijnzaad, p. 334, Cook, pp. 710-712.

<sup>160</sup> *Report of the Committee on the Elimination of Discrimination against Women*, 12<sup>th</sup> session, 1994, (U.N. Doc. A/48/38), paras 3-5, 'the Committee therefore decided that it should support steps taken in common with other human right treaty bodies to seek an advisory opinion of the international court of justice that would clarify the issue of reservations to human rights treaties and thereby assist state parties in their ratification and implementation of those international instruments.'

<sup>161</sup> See article 96.2 U.N. Charter and GA Res. 89(1), 11 December 1946.

the reservation in force. The Nordic States clearly express in a number of objections that in cases where incompatible reservations had been formulated the treaty must become operative without the reserving State benefiting from the reservation. Also the Council of Europe's Committee of Ministers has recommended States to use the 'no benefit' formula when objecting. The following model concluding statement is one out of six proposed;

d) The Government of (State X) therefore objects to the aforesaid general reservations made by the Government of (State Y) to the (relevant Convention). This objection does not preclude the entry into force, in its entirety, of the (relevant Convention) between (State Y) and (State X). The Convention thus becomes operative between (State X) and (State Y) without (State Y) benefiting from these reservations.<sup>162</sup>

That the Committee of Ministers of the Council of Europe recognise severability as one possible option as to the legal effects of invalid reservation could at best be seen as an *opinio iuris* in favour for a practice of severability.

Recently, also non-Nordic States have formulated 'no-benefit'-objections in response to incompatible reservations, e.g. Austria in response to the Saudi reservation to CEDAW or Belgium in response to Singapore's reservation to CRC.<sup>163</sup>

## 5.4 The competence to determine the validity and effects of a reservation

The prevailing interpretation of the Vienna Convention, as well as the outcome of the *Reservations case*, stipulate that only *States* have the power to determine the validity and effects of reservations. This view stems from the principle of State sovereignty and State consent, which still must be seen as the governing principles of the existing regime on reservations. The monitoring bodies initially accepted this view. The unequivocal statement by the Director of the Human Rights Division of the Office of Legal Affairs and the Legal Counsel of United Nations that neither CERD nor CEDAW had a competence to determine the validity of reservations certainly played a role in this respect.<sup>164</sup> However, the last decades have seen a change of

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<sup>162</sup> Council of Europe Committee of Ministers Recommendation No. R (99) 13 *Of the Committee of Ministers to the Member States on responses to inadmissible reservations*, Adopted by the Committee of Ministers on 18 May 1999 at the 670th meeting of the Ministers' Deputies.

<sup>163</sup> *Multilateral Treaties Deposited with the Secretary-General*. The Belgian objection reads; 'the Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law'.

<sup>164</sup> 'The Committee (Committee on the Elimination of Racial Discrimination) must take the reservations made by State parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision – even a unanimous decision – by the

course and ‘new’ jurisprudence indicates that those bodies consider themselves competent to a certain extent. The present chapter will focus on the competence of the regional and international human rights monitoring bodies, leaving behind the already established competence of the traditional mechanism, i.e. the international Court of Justice or arbitral courts.

It is argued that due to the special characteristics of human rights treaties a different regime on reservations should be applied; objective treaties must be subjected to objective determination and thus, the monitoring bodies must be considered competent to decide on the admissibility and effects of reservations. The Human Rights Committee has taken the lead with its General Recommendation 24, declaring that it is an all-over inappropriate task for State parties to determine the validity of reservations in relation to human rights treaties. The Chairpersons of the Human Rights Treaty Bodies have expressed their ‘firm support for the approach reflected in the General Recommendation 24 although having remained rather timid on the matter in practice and instead focused on the withdrawal of incompatible reservations.’<sup>165</sup> The European Court of Human Rights has repeatedly stressed the character of the European Convention as grounds for its competence to determine the validity of reservations. Also the Inter-American Court has been firm in highlighting the objective character of the American Convention in its advisory opinions.<sup>166</sup>

The debate partakes in a wider controversy between supporters of the interests of the international community and the supporters of State sovereignty and is a part of the general debate on the legal fragmentation of international law. The body of practice presented above indicates that human rights monitoring bodies step aside the Vienna Convention rule that only States are competent to pronounce on the validity and effects of reservations. Are human rights instrument to be differentiated from other instruments of international law?

A number of States have shown a stark reluctance towards the idea proposed by the Human Rights Committee. It appears unlikely that States will give up their sovereignty to this extent. In its observation to the General Recommendation 24, the United States rejects the idea and declares that ‘the Committee’s position runs contrary to the Covenant scheme and international law’.<sup>167</sup> No other rules than those provided for in the Vienna

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Committee that a reservation is unacceptable could not have any legal effect’. Report of the Committee to the General Assembly, 1978, (U.N. Doc. A/33/18), para 374. The decision as regards CEDAW has been cited above, see footnote 171.

<sup>165</sup> See, *inter alia*, *Report of the 9<sup>th</sup> meeting of persons chairing the human rights treaty bodies*, see footnote 152 above.

<sup>166</sup> ‘(m)odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings (...)’, *The effects of reservations on the entry into force of the American Convention*, see footnote 141 above, paras 29-30.

<sup>167</sup> *Observations by the United States of America on General Comment Number 24(52)*, 1994-1995, (U.N. Doc. A/50/40), Vol. 1, Annex VI, or as reproduced in Gardner, J.P. (ed.),

Convention are applicable and thus, States are the only legitimate subject to determine the validity and effects of reservations. Also France and the United Kingdom reject the Committee's proposals on a transfer of competence.<sup>168</sup> The International Law Commission clearly rejects the idea of a special regime applicable only to human rights treaties.<sup>169</sup>

*De lege lata* there are no clear rules which admit that international human rights treaties would be treated differently from other multilateral treaties as regards the competence to determine the validity of reservations. It is merely wishful thinking that States would accept to give up their sovereign rights, which clearly takes expression in the observations mentioned above.<sup>170</sup> Although it is desirable to place the determination of reservations to human rights treaties under objective scrutiny, States still have the authority to accept or object reservations and monitoring bodies shall in general not play a role in this respect. Current State practice shows a clear tendency to allow contracting States to raise or not to raise objections. The development cannot be said to have come so far as to recognise a departure from the principle of sovereignty in this respect. In the words of the ILC Special Rapporteur; 'the fact that the existing mechanism (of objections and acceptances) may be questionable does not mean that the alternative system would be legally acceptable. In particular, the criticism of the effectiveness of the Vienna regime is, in fact, tantamount to challenging the very bases of contemporary law.'<sup>171</sup>

While the competence of the monitoring bodies cannot be recognised on the grounds of the special character of human rights treaties, another option remains. It is a recognised general principle of international law that the organs have such competence that is vested in them by their own powers, i.e. the competence that can be derived from the treaty in question.<sup>172</sup> The European Convention of Human Rights explicitly confer to the Court the powers to 'ensure the observance of the engagements undertaken by the High Contracting Parties' and extend its jurisdiction to 'all cases concerning the interpretation and application of the present Convention'.<sup>173</sup> Accordingly, the Court has a competence on 'functional grounds'. The Inter-American Court is vested with the same competence.<sup>174</sup> As regards the European and the Inter-American Courts the competence has in fact been rather undisputed. The European jurisprudence in this respect

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*Human rights as general norms and a State's right to opt out*, The British Institute of International and Comparative Law, London, 1997, Appendix III, p 200, para 1.

<sup>168</sup> *Observations by the United Kingdom of Great Britain and Northern Ireland on General Comment Number 24(52)*, 1994-1995, (U.N. Doc. A/50/40), Vol.1, Annex VI, or as reproduced in Gardner (ed.), Appendix II, p. 193. *Observations by France on General Comment Number 24(52)*, 1995, (U.N. Doc. A/51/40), Annex VI, or as reproduced in Gardner (ed.), Appendix IV, p. 204.

<sup>169</sup> See, *inter alia*, *Second Report on the Law of Treaties*, see note 131 above.

<sup>170</sup> Melander, p. xxiv.

<sup>171</sup> *Second Report on the Law of Treaties*, para 205.

<sup>172</sup> *Ibid.*, para 206.

<sup>173</sup> Article 19 and article 32 of the American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, on the 22 November 1969.

<sup>174</sup> See, *inter alia*, articles 33 and 62 of the Inter-American Convention on Human Rights.

has reached such an extent that the Court's competence to determine the validity and effects of reservations must now be considered as beyond question.<sup>175</sup> Focus will consequently be on the competence of the UN human rights treaty bodies.

The competence of the UN human rights treaty bodies is more problematic. The UN human rights treaties do not explicitly provide the bodies with the power to determine the validity and effects of reservations. However, if an instrument creates a treaty body whose mission is to study and comment upon the measures which State parties have adopted to give effect to the rights set forth in the treaty concerned then the treaty body must inevitably examine just what norms actually bind the state party. Further, if a monitoring body is vested with the power to receive individual complaints it must necessarily consider and give effect to the reservation as a part of the admissibility procedure.

A reservation affects the scope of the reserving State's commitment and thus affects the scope of the jurisdiction of the treaty body concerned, whichever of its functions it exercise, and a judicial or quasi-judicial body has an inherent jurisdiction to determine the scope of its jurisdiction.<sup>176</sup> In other words, also the UN treaty monitoring bodies have a competence to determine the validity and effects of reservations on grounds of *functional necessity*.<sup>177</sup> The functions of the treaty bodies, as provided for in their respective treaties, in practice necessitate them to take steps not explicitly mentioned in the treaties.<sup>178</sup> The task is relevant both in respect to the reporting procedure and the hearing of individual complaints.

The functional competence of the treaty bodies to determine the validity of reservations must be considered as recognised in international law. The ILC Special Rapporteur on the Law of Treaties admits that the competence 'is a prerequisite for the exercise of the general monitoring functions with which they (the treaty bodies) are invested'.<sup>179</sup> The competence was expressly confirmed in the *Preliminary Conclusion of the ILC on reservations to multilateral treaties, including human rights treaties*.<sup>180</sup> The UN Special

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<sup>175</sup> See list of cases, footnote 142 above. Switzerland did not denounce the European Convention although it contemplated doing so, see *Belilos* and *Weber*, nor did Turkey in the *Loizidou* case. The Committee of Ministers of the Council of Europe approved the solution adopted by the European Commission in the *Temeltasch* case, (See Resolution DH (83) 6 of 24 May 1983, online available the 6 October at <https://wcm.coe.int/rsi/CM/index.jsp>).

<sup>176</sup> Hampson, para 37.

<sup>177</sup> Korkelia, p. 454.

<sup>178</sup> Opsahl, T., "The Human Rights Committee" in P. Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal*, Clarendon, Oxford, 1992, p. 369.

<sup>179</sup> *Second Report on the Law of Treaties*, para 252.

<sup>180</sup> 'The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them.' *Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including human rights treaties*, Report of the International Law Commission on the work of its forty-ninth session, 1997, (U.N. Doc. A/52/10), para 5.

Rapporteur on the law of Treaties confirms the view in her conclusions and recommendations of the Final working paper *Reservations to human rights treaties*; ‘a human rights treaty body has the jurisdiction to determine the validity of a reservation’.<sup>181</sup> Even United Kingdom has expressed support for such a competence in its observations to the General Comment 24; ‘the Committee must necessary be able to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant’.<sup>182</sup>

While there is consensus in respect to the competence of treaty bodies to determine the *validity* of reservations, there is however a predominant reluctance to recognise a similar competence to determine the *effects* of reservations. It is argued that the fact that the treaty bodies cannot deliver legally binding decisions hinders a conclusion to this end.<sup>183</sup> The lack of a competence to take binding decisions must however be seen as a separate issue in relation to reservations just as in relation to other questions. Treaty bodies pronounce on violations of rights etc. without having the competence to take binding decisions. The functional necessity argument reasonably must cover also the competence to determine the consequences of a reservation.<sup>184</sup> How else would a treaty body establish the obligations of a State party and for example be able to come to a conclusion on the admissibility of an individual complaint? In relation to the consideration of State reports the treaty bodies will generally restrict themselves to a dialogue where the desire for withdrawal of incompatible reservations will be clearly expressed, without pronouncing on the legal effects.<sup>185</sup> As regards individual complaints however, a finding on the legal effects will be a *necessary part* of the admissibility procedure.<sup>186</sup> Despite controversies on the matter this latter view will be accepted for the subsequent analysis of the thesis. If a Committee is competent to consider an individual complaint it is hard to see how it would not also have the competence to determine whether e.g. a valid reservation makes the complaint inadmissible – or the opposite. The fact that it, in the end, is up to the reserving State to conform or not to conform to the findings, is a separate issue.

### 5.4.1 Conclusive remark

The treaty bodies’ functional competence to determine the consequences does not challenge the applicability of the Vienna principle that States are competent to decide on compatibility.<sup>187</sup> The different methods must be seen as correlating not concurring. The competence of the Committees must be seen as residual and States are in charge of the compatibility of reservations

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<sup>181</sup> See footnote 133 above, para 3.

<sup>182</sup> See footnote 181 above, para 11.

<sup>183</sup> Korkelia, p. 456.

<sup>184</sup> Lijnzaad, p. 417, Scheinin, p. 51.

<sup>185</sup> See exceptionally the Human Rights Committee consideration of Kuwait’s State report, see footnote 150 above.

<sup>186</sup> Scheinin, p. 51.

<sup>187</sup> *Second Report on the Law of Treaties*, para 64.

that are not under the scrutiny of a Committee. In fact, not all UN human rights treaties have established committees with the power to receive individual petitions.

Whereas the Regional Human Rights Courts are competent to determine the legal effects of a reservation with binding effect, this is not the case with the treaty bodies. The result of a treaty body determination thus becomes a mere guideline or a recommendation. However, in ratifying a treaty the State parties undertake to execute it in good faith, which implies that the States will also examine the bodies' comments and recommendations in good faith. The Special Rapporteur argues that a State is eager to preserve its international image and therefore will not remain indifferent to the findings of a treaty body.<sup>188</sup> In addition; whilst not binding, the conclusion of a treaty body has considerable persuasive force, not least because it is likely to reach similar conclusions with regard to similar reservations.<sup>189</sup> A reserving State can either; withdraw the incompatible reservation, modify the reservation so as to make it compatible with the object and purpose of the treaty, or denounce the treaty (where this is possible).<sup>190</sup>

It must be noted that a decision or a concluding observation on the validity and effects of a reservation only is 'effective' *in casu*.<sup>191</sup> Cases before the human rights Court will have the force of *res judicata* and only impose an obligation on the defending state in relation to the applicant. Concluding observations of individual complaints will merely have the status of recommendations directed to the reserving State in relation to the petitioner. However, too much importance should not be attached to these technical considerations. 'It is scarcely conceivable that a State is anxious to observe the law – and to preserve its international image – would adopt such a restrictive position.'<sup>192</sup> If a reservation has been declared incompatible *in casu* the State must necessarily realise that if the reservation is not withdrawn it risks future confrontations.

## 5.5 The severability doctrine

The issue of severability is a controversial topic in the current debate on reservations in international law. The matter has been particularly debated in relation to human rights treaties. Despite being clearly recognised by the European Court of Human Rights and the Human Rights Committee, the idea of severing invalid reservations from treaties has however met with much criticism.<sup>193</sup> It is argued that severing reservations obviously stands in contrast to the principles of State sovereignty and State consent. It is argued

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<sup>188</sup> *Ibid.*, para 242.

<sup>189</sup> Hampson, para 18.

<sup>190</sup> See, *inter alia*, Draft resolution of the international law commission on reservations to normative multilateral treaties including human rights treaties, attached to the *Second Report on the Law of Treaties*, para 6.

<sup>191</sup> Hampson, para 41.

<sup>192</sup> *Second Report on the Law of Treaties*, para 242.

<sup>193</sup> Also internal criticism within the Human Rights Committee, see dissenting opinion in *Kennedy v. Trinidad and Tobago*, see footnote 148 above.

that a State cannot be bound by treaty terms that it explicitly declined to accept.

The United Kingdom, France and the United States entirely reject the concept of severability as 'incompatible with the law of treaties'<sup>194</sup>, 'completely at odds with established legal practise and principles'<sup>195</sup> or as 'deeply contrary to the principle (..) that international conventions establish rules expressly recognised by the contracting States'<sup>196</sup>, in their observations to the General Comment 24. United States argues that 'reservations cannot simply be erased. This reflects the fundamental principle of the law of treaties: obligation is based on consent. A State which does not consent to a treaty is not bound by a treaty. A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it'<sup>197</sup>.

The criticism put forth has however not been consistent. The Nordic States seem to take another stance and recent trends of State objections among those countries indicate support for the severability regime. Initially, the ILC Special Rapporteur argued that the 'no-benefit' objections could not be regarded as rightful objections but later changed his mind and proposed an amendment of the definition of objections as to include also the 'new' objections.<sup>198</sup> It is diffuse whether this willingness to amendment implies a possible support for the severability regime. It can however be noted that the Council of Europe's Committee of Ministers recommends 'no-benefit' objections as an alternative for model responses to inadmissible reservations.<sup>199</sup> Moreover, when the Sixth Committee of the General Assembly considered the work of the International Law Commission's 55<sup>th</sup> session, which *inter alia* included the topic of reservations, support was expressed for a definition of objections which would include both the legal effects of an objection and the intention of the objecting State *and* it was pointed out that the possibility of not applying articles of a treaty between the parties should not be precluded.<sup>200</sup>

The prevailing approach is that the Vienna Regime is silent or unclear on the consequences of invalid reservations. The logical conclusion would then be to turn to State practice and Court jurisprudence for answers.<sup>201</sup> Although the outcome of the *Reservations case* as well as the ILC Special Rapporteur's statements in his Second Report on the Law of Treaties limit the discussion on consequences of incompatible reservations to the preclusion of the entire treaty ratification, the possibility to include

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<sup>194</sup> France, see footnote 168 above, p. 106.

<sup>195</sup> United States, see footnote 167 above, para 5.

<sup>196</sup> United Kingdom, see footnote 168 above, para 14.

<sup>197</sup> United States, see footnote 167 above, para 5.

<sup>198</sup> The ILC Special Rapporteur *Eight report on reservations to treaties*, 2003, (U.N.Doc. A/CN.4/535/Add.1), para 97. Proposal for amendment, see *Ninth report on reservations to treaties*, 2004, (U.N. Doc. A/CN.4/544).

<sup>199</sup> See footnote 162 above.

<sup>200</sup> General Assembly Sixth Committee, Summary of work, 58<sup>th</sup> session, online available the 6 October 2004, at <http://www.un.org/law/cod/sixth/58/sixth58.htm>.

<sup>201</sup> Simma, p. 663.



severability in the Vienna regime should not be excluded. It is hard to see how the Convention's silence can exclude a particular interpretation. The answers must be found through a 'holistic reading of the Vienna Convention', and by 'trying to understand it as a reflection of norms of international customary law and leaving room for solutions emanating from international and State practice as to the consequences of impermissible reservations'.<sup>202</sup>

There is growing support for the concept of severability both in practice and doctrine.<sup>203</sup>

The *option* to sever an invalid reservation has been supported by the UN Special Rapporteur on the Law of Treaties Françoise Hampson.<sup>204</sup> The Human Rights Committee has so far only resorted to severability in one individual complaints procedure, but has clearly expressed its support for the concept in its General Comment 24.<sup>205</sup> The strongest and most consistent support is however evidenced by the jurisprudence of the European Court of Human Rights.<sup>206</sup>

### 5.5.1 The principle of State consent

Ultimately, the divergent opinions on severability stem from the dilemma of weighing State sovereignty versus community interests; a dilemma that occurs frequently in debates on international law, not least as regards human rights. The major inconvenience of the severability regime is that while it is to the apparent benefit for the promotion of human rights and thus the international community as a whole, it put the contractual concept of State consent at large risk.

The leading precedents on severability and State consent are two dissenting opinions by Judge Sir Hersch Lauterpacht. In the classical, well-supported dissenting opinions in the *Norwegian Loans* and *Interhandel Cases* Lauterpacht declared that a State could not be bound by a Convention if it would not have ratified it, knowing its reservation was illegal.<sup>207</sup> The question is; how to know if a reservation was a *sine qua non* for the State's consent to be bound by the treaty? The European Court of Human Rights has introduced a method of weighing the consent to be bound by the treaty versus the consent to be bound by the reservation. How to secure a correct

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<sup>202</sup> Scheinin, p. 45.

<sup>203</sup> For support in doctrine, see, *inter alia*, Scheinin, Schabas, Goodman, Simma, Bowett.  
<sup>204</sup> para 15.

<sup>205</sup> In its advisory opinion on the *Legal consequences of the construction of a wall on the occupied Palestinian territories*, the International Court of Justice clearly expressed the view that the interpretations of the UN treaty bodies must be attached weight *Legal consequences of the construction of a wall on the occupied Palestinian territories*, Advisory Opinion of the 9 July 2004, paras. 109, 110, 136.

<sup>206</sup> See chapter 5.3.1 above.

<sup>207</sup> *Norwegian Loans Case (France v. Norway)*, judgment of 6 July 1957 (preliminary objections), ICJ Reports 9, 1957, p. 43 and *Interhandel Case (Switzerland v. Untied States)*, judgment of 21 March 1959, IVJ Reports 6, 1959, p. 117.

analysis? In the *Loizidou Case* the Court seemed to ignore the express statement by the Turkish delegate that it did not intend to be bound by the Convention without the disputed reservation. The line of argument is that the principle of state consent can be reconciled with severability if the reserving State is presumed to have tacitly agreed, i.e. accepted the risk, that if its reservation was found incompatible it could end up being bound by the treaty as a whole. This line of reasoning seems to be legally correct having regard to the precedents of the European Court. In addition, the Court leans on arguments that relate to the specific character of the European Convention. The Convention is a constitution for the European *ordre public* and consequently the Court takes on a human rights-friendly position; the *ordre public* must be upheld at almost any price and thus interpretations in favour of severability are indeed preferable.<sup>208</sup>

It has been argued that non-essential or accessory reservations could be severed as such reservations are most unlikely a *sine qua non* for the ratification of the treaty.<sup>209</sup> It is argued that for fairly straightforward reasons, a state, whether counting on other states not to object to its reservations or discounting the cost of such objections, may include incompatible conditions in its package of reservations.<sup>210</sup> In such a case it would be detrimental for a State's consent to be excluded from treaty relations. However, it seems reasonable to presume that the majority of reservations that are contrary to the object and purpose of a treaty are essential.<sup>211</sup>

All criticism put forth in respect of the severability doctrine highlights its apparent infringement on the principle of State consent. What is neglected, however, is that severing a reservation might very well be *in line* with a State's consent.<sup>212</sup> It has even been argued that it should be presumed that a State's intent to be bound by a treaty prevails over the intent to be bound by the reservation.<sup>213</sup> This presumption is particularly argued for in relation to human rights treaties, which will be further elaborated on below. In any case, it must be admitted that there is a *possibility* that a situation occurs where a State party would prefer its reservation being severed before the preclusion of the treaty as a whole. In other words, the severability regime is not *per se* in breach of the principle of State consent.<sup>214</sup>

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<sup>208</sup> Korkelia, p. 467-468.

<sup>209</sup> Baratta, R. "Should invalid reservations be disregarded?" in *European Journal of International Law*, 2000, Vol. 11, No. 2 (pp. 413-425), p. 423, Goodman, p. 537.

<sup>210</sup> Goodman, p. 537.

<sup>211</sup> Klabbers, p. 189.

<sup>212</sup> See Schabas, W., "Invalid reservations to the International Covenant on Civil and Political Rights: Is the United States still a party?" in *Brooklyn Journal of International Law*, 1995, Vol. 21 (pp 277-325), p. 317, where he assesses the US intent to be bound by the ICCPR without its incompatible reservation to articles 6 and 7 to outweigh the intent not to be bound at all.

<sup>213</sup> D W Bowett "Reservations to non-restricted multilateral treaties" in *British yearbook of international law*, 1967-77, Vol. 48 (pp. 67-93), p. 76.

<sup>214</sup> '(..) there is nothing legally impossible or dogmatically flawed about the severability doctrine as such'; Simma, p. 667.

### 5.5.2 Conclusive remark

Whereas it can probably be established that there is a regional practice in favour of severability within the European system, this is not the case on the international level. The Special Rapporteur of the ILC, in the specific context of severance of an invalid reservation, has suggested that the case law of the European Court of Human Rights should be viewed as a form of regional customary law, not having an impact on the customary law on reservations generally.<sup>215</sup> I do not intend to come to a conclusion on this point. It suffices to conclude that there is not yet a corresponding established practice of severability within the UN human rights treaty body system.

In lack of coherent practice it is difficult to come to a conclusion on the legitimacy of severability on the international level. The Human Rights Committee is in favour of severability while the International Law Commission, United Kingdom, France and United States have clearly expressed the opposite in relation to the Committee's powers. Only some States have expressed support for the severability doctrine in their objections. The doctrinal debate is divided.<sup>216</sup>

At first sight the severability regime appears to stand in contrast with the principle of State consent and thus general principles of international law. At the same time there seems to be nothing that prevents treaty bodies, while considering an individual complaint, to sever an invalid reservation from a treaty where this is obviously not in contrast to the consent of the reserving State. The conclusion can be drawn that on instances it *might be* in conformity with the principle of State consent to sever an invalid reservation. Severability is not the automatic effect of an incompatible reservation, just as much as it is not an excluded option *per se*.

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<sup>215</sup> Report of the International Law Commission on the Work of its Forty-ninth session, 1997, (U.N. Doc. A/52/10), para 84.

<sup>216</sup> In favour: *inter alia*, Goodman, Schabas, Scheinin. In opposition: *inter alia*, Baratta, Korkelia.

# 6 Conclusion: The legal effects of the Saudi reservation

## 6.1 Introductory remark

The Saudi reservation is a clear sign of a strong cultural relativism as regards the human rights of women. Saudi Arabia regards women as equal to men but their interpretation of equality is obviously at variance with the international definition. In other words, while Saudi Arabia regards the principle of equality between men and women as universal it maintains that the interpretation of the principle is culturally relative. The Saudi reservation cannot reasonably fit within the margin of appreciation for particularities afforded to sovereign States. Due to its reservation it continues to perform its practices as regards women with assumed legitimacy. Accordingly, women in Saudi Arabia are deprived their basic rights and the negative stereotypes are withhold. It is clear that reservations in these terms are detrimental for the integrity of CEDAW and it is indeed desirable to find a conclusion on the problem of the legal effects of this, and the many other, incompatible reservations attached to the Convention. The Vienna Convention is unclear in this regard and the answers must thus be looked for in contemporary jurisprudence. A debate on severability has developed in practice and doctrine. Whereas a European customary law allowing for severability can be identified, the legality of severing incompatible reservations in an international context is much more controversial. This last chapter will assess the legality of applying the severability doctrine to the Saudi reservation.

In order to establish the legal effects it is necessary to first determine whether the Saudi reservation is compatible with the object and purpose of CEDAW. On this point, practice and doctrine seems to be relatively clear.

## 6.2 Compatibility

It is difficult to exactly define the object and purpose of CEDAW and to distinguish which provisions allow for reservations and which do not. Some conclusions can be drawn from the Committee's earlier statements in recommendations and in connection with State reports and there are also a number of guidelines from the Sub-Commission on the Promotion and Protection of Human Rights and the Human Rights Committee.<sup>217</sup> In the case of the Saudi reservation, however, it is not a question about distinguishing which provisions are reservable or not, as the essential reservation is of general character and relate to *all* provisions of CEDAW. Although the conclusion that articles 2, 7, 11, 15 and 16 are core provisions that does not allow for reservations would suffice to determine the Saudi

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<sup>217</sup> See chapter 2.3 above.

reservation as invalid, it must be emphasised that the fact that the reservation is general makes it questionable *per se*. As regards article 9(2) it has been questioned in doctrine whether equal treatment in relation to the nationality of the offspring is of such importance that it is essential to the object and purpose of CEDAW.<sup>218</sup> The discussion will not be pursued any further as focus will be on the general character of the first section of the Saudi reservation.

General reservations have consistently been held as contrary to the object and purpose of any human rights treaty.<sup>219</sup> An unspecific reservation cannot reasonably be seen as fulfilling the required certainty for the creation of a valid legal obligation.<sup>220</sup> Such reservations often render ineffective most rights provided by the treaty due to its unspecific character and, in the words of the Human Rights Committee: '(n)o real international rights or obligations have thus been accepted.'<sup>221</sup> The prohibition against general or vague reservations has been explicitly stated in article 57(1) of the European Convention on Human rights, which analogously give strength to the argument at an international level.

Reservations referring to Islamic law without providing an exact definition of the law and without indicating to which provisions the reservations relate constitute by definition a general reservation. It is rather unreasonable to require State parties to have full insight into all domestic (or religious) laws of the co-contractants. What obligations remain after applying the Saudi reservation is indeed ambiguous when the interpretation of *Shari'ah* itself is not static. In relation to which articles, when and to what extent does *Shari'ah* apply? Only the reserving State knows the content of the reservation and other State parties may only presume it by looking to the implementation, or lack of implementation, of the Convention in the reserving State.

It is argued that although it is not explicitly stated in international law that reservations must be specific in terms this follows from a logical interpretation of article 19(c) of the Vienna Convention, and thus, article 28(2) of CEDAW. If the meaning of the reservation is unclear, how can it then be weighed against the object and purpose of the Convention?

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<sup>218</sup> Lijnzaad, p. 312.

<sup>219</sup> Chinkin, C., "Reservations and objections to the Convention on the Elimination of All Forms of Discrimination against Women" in Gardner, (ed.), *Human rights as general norms and a State's right to opt out – reservations and objections to human rights conventions*, The British Institute of International and Comparative Law, London, 1997, p. 70, Hampson, para 56, Lijnzaad, p. 320, Schabas, *Reservations to human rights treaties: Time for innovation and reform*, p.57, Seibert-Fohr, p. 207.

<sup>220</sup> See, *inter alia*, *Reservations to The Convention on the Elimination of All Forms of Discrimination against Women*, 16<sup>th</sup> session, 1997, (U.N. Doc. CEDAW/C/1997/4); 'These reservations (which refer to Islamic Law) have been viewed by some as imprecise and indeterminate and thereby contrary to the certainty required for the acceptance of a clear legal obligation.

<sup>221</sup> Human Rights Committee General Comment 24(52), para 12.

The Human Rights Committee is particularly clear when stating in its General Recommendation 24 that;

‘reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other State parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.’<sup>222</sup>

State objections support this view and ten of the twelve objecting States to the Saudi reservation have explicitly declared that the reservation is contrary to the object and purpose of the Convention on grounds of its vagueness.<sup>223</sup> A statement by the Committee when amending the guidelines for initial and periodic reports, clearly points out its opinion on general reservations;

‘State parties which have entered general reservations that do not refer to a specific article of the Convention or reservations articles 2 and 3 should make a particular effort to report on the effect and interpretation of them. The Committee considers these to be incompatible with the object and purpose of the present Convention.’<sup>224</sup>

Moreover, the imperative to formulate narrow reservations have been expressed in General Assembly resolutions, including one specifically designated to CEDAW;

‘Encourage States to consider limiting the extent of any reservation they lodge to the Convention, to formulate any reservations as precisely and as narrowly as possible and to ensure that no reservation is incompatible with the object and purpose of the convention or otherwise contrary to international law.’<sup>225</sup>

Drawing from the consensus above it can be concluded that the Saudi reservation to CEDAW fails the compatibility test on grounds of its vague and general character.<sup>226</sup> The uncertainty as to its content risks to undermine the effectiveness of the Convention’s provisions.

The assessment of the compatibility of the Saudi reservation could alternatively be made from a human rights perspective. By looking to how *Shari’ah* is implemented in relation to Saudi women the reservations seems to stand in obvious contrast to the object and purpose of CEDAW.

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<sup>222</sup> Human Rights Committee General Comment 24(52), para 19.

<sup>223</sup> Austria, Denmark, Finland, France, Ireland, Norway, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland.

<sup>224</sup> *Report of the Committee on the Elimination of Discrimination against Women*, 16<sup>th</sup> session, *Guidelines for preparations of reports*, (U.N. Doc. CEDAW/C/7/Rev.3), para 9. See also Statement by the Committee on the Rights of the Child on the Saudi reservation in its concluding observations on the Saudi initial report; the Committee is concerned that the broad and imprecise nature of the general reservation potentially negates many of the Convention’s provisions and raises concern as to its compatibility with the object and purpose of the Convention’; (U.N. Doc. CRC/C/15/Add.148), para 7.

<sup>225</sup> GA Res. 49/164, *Convention on the Elimination of All Forms of Discrimination against Women*, adopted on the 23 December, 1994, (U.N. Doc. A/RES/49/164).

<sup>226</sup> It is therefore not necessary to discuss whether it also fails the test because it relates to provisions of customary norms, which might well exceed the mandate of the UN human rights treaty bodies.

However, it is understandable that the rejection of ‘Islamic’ reservations is made on grounds of treaty law, rather than from a content-related human rights law perspective, which could indeed be understood as religiously offending.

## 6.3 Effects

Three different options as to the effects of the Saudi reservation can be singled out;

- ii) *the State remains bound by the treaty except for the provision to which the reservation is related (to the extent of the reservation),*
- iii) *the reserving State is no longer a party to the treaty, or*
- iv) *the incompatible reservation is severed and the reserving State is bound by the treaty as a whole.*

Two different levels of determination of the effects of a reservation can be distinguished when it comes to human rights treaties.<sup>227</sup> First, the determination on a State level, i.e. State Parties *inter se*. Second, the determination by monitoring human rights bodies, in this case the Committee on the Elimination of Discrimination against Women, or other dispute settlement organs, e.g. the International Court of Justice. On the latter level, State reactions cannot be taken into account as it would result in a bundle of bilateral decisions. A human rights treaty body will come to *one single* conclusion as concerns the validity and effects of a reservation, valid between the reserving State and the individuals under its jurisdiction. Alternative *i*) presented above comes into play on the first level.

The dispute between the opposability and permissibility school will be left unconcluded and therewith also the legality of accepting incompatible reservations. However, as long as States have the primary competence to determine the validity and effects of reservations the *de facto* result is a bundle of bilateral inter-State relations, each of them giving different effects to the reservation and none of them being decisive. Before reaching the level of ‘objective determination’ under the scrutiny of monitoring bodies or traditional mechanisms, the compatibility and effects of the Saudi reservation will ‘hang in the air’.

The subsequent analysis will focus on the level of the monitoring bodies and consequently be limited to the two last alternatives.

### 6.3.1 *Ut res valeat quam pereat*

In a human rights context it is never desirable to invalidate entire treaty ratifications. The treaty relations are *de facto* between Saudi Arabia and all individuals within its territory and subject to its jurisdiction and not between

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<sup>227</sup> Pellet, para 211; Pellet distinguishes four levels (States, monitoring bodies, traditional dispute settlement organs and national courts). For practical reasons they are here limited to two.

States *inter se*. Those individuals will be deprived their rights in case Saudi Arabia cannot be considered as a party to CEDAW. Moreover, it is desirable to keep Saudi Arabia within the system of human rights diplomacy and the supervisory system of CEDAW.

Having in mind those negative aspects of invalidating ratification, the starting point for determining the legal effects of an incompatible reservation to a human rights treaty will lean towards severability. The legitimacy for such a biased point of departure stems from a general principle of international law, namely *ut res valeat quam pereat*, (the thing may rather have effect than being destroyed).<sup>228</sup> It is preferable to let the treaty remain in force rather than to invalidate the entire ratification. Also the fact that all States in their objections to the Saudi reservation to CEDAW has expressly stated that they wish to maintain treaty relations with Saudi Arabia must be taken into account. Five States have expressed that the Convention becomes operative without Saudi Arabia benefiting from the reservation.<sup>229</sup>

Whereas the European Court of Human Rights and the Human Rights Committee have both come to the conclusion that the reservation was not a *sine qua non* for the consent to be bound by the treaty in all cases where severability has been an issue, Judge Lauterpacht argued to the opposite in his separate opinions in the *Norwegian Loans* and *Interhandel Cases*. In those cases the reservations of France and the United States respectively were to be regarded as 'essential' for the acceptance of certain provisions and the reservations could not be severed, the legal effect being that the reserving States were not bound. Lauterpacht also mentions the *ut res valeat quam pereat* principle but seems to argue for a result, which is not in line with the principle.<sup>230</sup> However, Lauterpacht states that the nature of the instrument is an influential factor when determining whether a reservation is severable or not.<sup>231</sup> It must be noticed that the *Norwegian Loans* and *Interhandel Cases* did not concern human rights treaties. There are compelling reasons for applying the principle in relation to human rights treaties on grounds of the nature of those instruments.<sup>232</sup> By looking to European practice this seems to be clear. A statement in favour of this interpretation was made by the European Court in the *Loizidou Case*;

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<sup>228</sup> See, *inter alia*, Schabas, *Reservations to human rights treaties: Time for innovation and reform*, p. 74.

<sup>229</sup> Austria, Denmark, Finland, Norway and Sweden. See *Multilateral Treaties Deposited with the Secretary-General*, last updated the 5 October 2004.

<sup>230</sup> *Norwegian Loans*, p. 57 (*Utile non debet per inutile vitiari*).

<sup>231</sup> *Norwegian Loans*, p. 57; 'That general principle of law is that it is legitimate-and perhaps obligatory-to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument.'

<sup>232</sup> Schabas, p. 75.



‘the special character of the Convention regime (...) militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured’.<sup>233</sup>

And was even clearer in the *Chrystostomos* case;

‘The Commission notes in this context (severability) a principle frequently applied in the interpretation of legal instruments where parts are found to be invalid. This rule is expressed in the Latin phrase "ut res magis valeat quam pereat"’.<sup>234</sup>

It has been argued that ‘reservations to human rights treaties should be presumed to be severable unless for a specific treaty there is evidence of a ratifying state’s intent to the contrary.’<sup>235</sup> The rights of individuals as beneficiaries of human rights treaties should govern the application of a human rights treaty by the monitoring body of such a treaty. Therefore, it is not for the treaty body to refuse to treat a State as a party to the treaty, as long as the State itself has not drawn that conclusion.<sup>236</sup>

Another argument states that when determining the possibility for severability, standards of human rights must prevail over the sovereign States. ‘If there is a conflict between the two requirements (the international community’s need for contracting parties to remain bound as far as possible by international standards on human rights, and the intent of one of those parties to eschew the legal impact of such a standard), the former must prevail.’<sup>237</sup>

Although desirable, this view seems to stand in contrast with the general principles of State consent and would lead to a further risk of fragmentation of international law.<sup>238</sup> There is certainly an international debate on the issue of legal differentiation of human rights law, but the argument for a differential treatment for human rights treaties as regards the rules on reservations on an international level have yet not found sufficient approval. There is no clear international practice speaking for this result, although the jurisprudence of the regional Human Rights Courts and the Human Rights Committee’s is of important weight in international law and the Nordic practice indicates a strong support. Even the Human Rights Committee itself seems to leave room for the principle of State consent to play a role when determining the effects of an incompatible reservation. It states in its General Comment 24 that an invalid reservation ‘will *generally* be severable’. The formulation implies that there are cases where an

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<sup>233</sup> *Loizidou*, paras 93-96.

<sup>234</sup> *Chrystostomos*, para 47.

<sup>235</sup> Goodman, p. 531.

<sup>236</sup> Scheinin, p. 51.

<sup>237</sup> Cassese, A., *International Law*, Oxford University Press, New York 2001, p. 131.

<sup>238</sup> For further reading which includes the topic of reservations in the general debate, see Craven, M., “Legal differentiation and the concept of the human rights treaty in international law” in *European Journal of International Law*, 2000, Vol. 11, No. 3 (pp. 489-519) or Koskeniemi, M. and Leino, P., “Fragmentation of International Law? Postmodern anxieties” in *Leiden Journal of International Law*, 2002, Vol. 15, No. 3 (pp. 553-580), p. 567.

incompatible reservation to a human rights treaty will not be severed.<sup>239</sup> Yet, severability cannot be the automatic effect.

Conclusively, the present status of international law must be seen as requiring the determination of the legal effects of an incompatible reservation to take into account the reserving State's consent. In other words; in order for a reservation to be severed it must be established that it is in accordance with the consent of the reserving State.

### 6.3.2 The Saudi consent

Severability cannot come into play when it is abundantly clear that the reserving state's agreement to becoming a party to the Covenant is dependent on the acceptability of the reservation. It must thus be established whether Saudi Arabia regarded the reservation as a *sine qua non* for the ratification of CEDAW or not. The line of analysis normally requires reliance of the views expressed by Saudi Arabia concerning its intent. In lack of explicit statements, resort will be had to implicit factors.

Saudi Arabia is a traditionalist Islamic State which adheres to Islamic law on all levels in society.<sup>240</sup> It refers to Islam as being the Constitution of the country in the first article of the Saudi Basic Law. In all regional human rights declaration to which Saudi Arabia is a signatory, the prevalence of Islam over other standards is spelled out. Saudi Arabia has not signed some of the major UN human rights treaties for reasons that certain provisions in those treaties stand in contrast to principles of Islamic law.<sup>241</sup> To those treaties which it has adhered to, it has attached reservations similar to the reservation made in respect to CEDAW. Both in relation to the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child, Saudi Arabia has formulated reservations that give prevalence to *Shari'ah* law in case of contradiction with the provisions of the conventions.

In fact, there seems to be little that speaks in favour of a consent on the side of Saudi Arabia to adhere to CEDAW without having the possibility to refer to *Shari'ah* law. Saudi Arabia recognises the principle of equality between men and women but refuses to depart from its culturally relative interpretation of the principle. The reservation aim to make possible another interpretation of equality than the one provided for in international human rights law. The conclusion must be that Saudi Arabia would not be ready to accept any other interpretation of women's rights than the one that is encompassed in Islam. Conclusively, the reservation must be regarded as an essential part of the ratification of CEDAW.

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<sup>239</sup> *Kennedy v. Trinidad and Tobago*, dissenting opinion, U.N. Doc. CCPR/C/67/D/845/1999, para 16.

<sup>240</sup> See chapter 3 above.

<sup>241</sup> See *Security and Human Rights in the Kingdom of Saudi Arabia*, Official information material handed out by the Consultative Council, May 2004.

The only argument to be put forward in favour for a Saudi consent to be bound by CEDAW without the reservation is the impact of international pressure and diplomacy. With the rising terrorism threat in the world, and in particular since the majority of the hijackers in the 9/11 incident were Saudi citizens, Saudi Arabia is in the spotlight of the international community. The spotlight does not only enlighten terrorist issues but human rights questions in general, not least women issues. Saudi Arabia, as any other country, is eager in avoiding criticism to its human rights record. The easier way out of the uncomfortable sphere of criticsers might perhaps be to accept the severability of the reservation. There is always the option to remain a member of the club and enjoy the symbolic benefit of the ‘new’ ratification, i.e. without the incompatible reservation, while anyway disregarding it.

However, the clear consistency in giving prevalence to Islamic Law in all instances must be the practice from where the conclusion of the Saudi intent is drawn. This coherent practice weighs heavier than a hypothetical reasoning on fear for international criticism.<sup>242</sup> Accordingly, the conclusion is that the incompatible reservation is a sine qua non for Saudi Arabia’s ratification of CEDAW and consequently it cannot be severed as a decision to that end would stand in contrast to the principle of State consent. Conclusively, Saudi Arabia cannot be regarded as being a party to CEDAW.<sup>243</sup> This seems to be the *de lege lata* legally correct conclusion, however, not implying that a UN human rights treaty body would ever come to a finding in those terms.

### 6.3.3 International Court of Justice

The Committee on the Elimination of Discrimination against Women has a residual competence to determine the validity and the effects of reservations, a competence that is based on a functional rather than a legal basis. If a case involving incompatible reservations is not submitted to the Committee in form of an individual complaint it is hard to see how the functional necessity argument comes into play.

The analysis of the effects of the Saudi reservation presented above is only hypothetical. Saudi Arabia has not signed the Optional protocol and the Committee can consequently not examine any individual complaint from subjects under Saudi jurisdiction. Until such a possibility occurs, which is rather unlikely within a recent period of time, the competence to determine the effects of the reservation remain with the States. Lacking a competent independent body which can make a determination of the validity and effects of a reservation with erga omnes effect the legitimacy of the Saudi

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<sup>242</sup> In addition, Saudi Arabia must be careful not to ‘offend’ the religion having in mind both the conservative *Ulama* and not least the ongoing internal struggle with Islamic extremists.

<sup>243</sup> Saudi Arabia would probably still be bound by the principle of non-discrimination on grounds of sex according to international customary law. Unclear, however, which of the more specific rights provided for in CEDAW that constitutes customary norms and Saudi Arabia would certainly escape obligations under many of them.

reservation, or any other incompatible reservation, will ‘hang in the air’. The outcome in reality is consequently that the State determinations create a bundle of bilateral relationships. The Saudi reservation is at present objected to by some and accepted by others. Some States have expressed that the reservation shall be severed, others remain silent on the effects. Many have expressed that treaty relations will not be terminated between themselves and the reserving State, leaving the effects of the reservation ambiguous, however implying severability. No State has cut off treaty relations. In other words, until the Committee will obtain the possibility to duly consider the Saudi reservation, or any other incompatible reservation, the effects of the reservation varies from treaty relation to treaty relation. Accordingly, the incompatible Saudi reservation will be *de facto* accepted. This is exactly the result which human rights treaties cannot afford. The integrity of those treaties becomes ruined. In particular the integrity of CEDAW, which has been plagued with such a large number of substantive reservations, risks being seriously undermined.

An alternative at this point would be for the Committee to turn to the International Court of Justice for an Advisory Opinion. The Court would be referred the questions relating to validity and effects of incompatible reservations and would hopefully, as a part of answering those questions, also address the problem of permissibility versus opposability. However, it is likely that ICJ, in line with the *Reservations case*, would come to the conclusion that it is States who decides on compatibility and that a State which has formulated an incompatible reservation is not a party to the treaty concerned. It is unlikely that the ICJ adapts the ‘human rights-friendly’ approach of the European Court of Human Rights. It will apply current international law, where the principle of State sovereignty and State consent cannot yet be succeeded by community interests as regards reservations. A ‘conservative’ or restrictive interpretation of the object and purpose test, i.e. an opposability interpretation (States decide the validity and effects), will be detrimental for the achievements of the goals set out in CEDAW. Such an Opinion would ruin the *acquis* of CEDAW and limit the already cautious steps that the Committee, and other UN human rights treaty bodies, have taken or may take in the future as regards competence and severability and should therefore not yet be considered a desirable option.

## 6.4 Conclusive remark

In light of general principles of international law, the legal effects of incompatible reservation must take into account the intent of the reserving State. In the case of Saudi Arabia, the strong traditionalist Islamic identity speaks against an intent to be bound by CEDAW without the reservation and the *de lege lata* effects must accordingly be the invalidation of the treaty ratification. Assumingly, most States that enter reservations incompatible with the object and purpose of a treaty will regard them as inseparable from the intent to be bound by the treaty. In particular, it can be concluded with relative certainty that reservations formulated as a result of

strong cultural (religious) relativist arguments, which falls outside the margin of appreciation afforded to sovereign states, are unlikely to be separable from the reserving State's intent to be bound by the treaty.

This conclusion is unfortunate. The universality versus integrity dilemma surfaces; is it better to 'keep' the reserving State at the cost of the integrity of the treaty than to invalidate the treaty ratification at the cost of universality? I answer in affirmative, however, with great dissatisfaction. A consistent, even automatic, use of severability on incompatible reservations is definitely the preferable solution as it would be a triumph both for the universality and the integrity of treaties. At the same time, however, severability would be a drawback for State sovereignty. The latter principle is continuously strong and currently State consent constitutes the largest impediment for the development of severability as the automatic legal effect of an incompatible reservation in relation to human rights treaties. The jurisprudence of the European Court of Human Rights indicates, however, that such a conclusion is possible and gives reasons to be optimistic in prospects for a similar development on an international level. In order to promote such developments the Human Rights Committee will assumingly continue to work in the direction of severability and broader competence despite the criticism. It is unlikely, having in mind the strive for universality within the human rights field, that the Committee would come to a finding where a reserving State is no longer a party to the Covenant. Successively, other treaty bodies will follow suit and with time a customary norm of severability might develop also at the international level. The same argument is valid for the broadening of the competence of the UN human rights treaty bodies in respect to the determination of validity and effects of reservations.

In sum, severability is not the *de lege lata* established legal effect of incompatible reservations on the international level (State consent is still the decisive factor), whereas from a *de lege ferenda* perspective such a development within a not too far away future cannot be excluded. Not least do the Nordic States' more and more coherent practise of 'no-benefit' objections and the Council of Europe's Committee of Ministers Recommendations to the same result support such a development. Moreover, a development in this direction is necessitated for the benefit of the spread of universal human rights and is therefore not likely to go any other way than forward, despite risks for legal differentiation.

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