

## **Reservations and the Effective Protection of Human Rights**

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## Abstract

Already since the first United Nations (UN) human rights treaties have been signed in 1966, it has been contested whether signatory states should be allowed to make reservations to different articles of the treaties. Many argue that reservation undermine the treaties and are not compatible with the universal application of human rights. One might hence ask whether reservations are compatible with human rights at all. Without disagreeing with these demurs, this essay will reverse the question: Is an effective protection of human rights possible without reservations? To answer this question, this essay will outline the current legal and practical framework on making reservations to UN human rights treaties in Part A. and will present a possible modification to this framework. In Part B. it will then demonstrate how reservations can be used to actually advance the effective protection of human rights. By being used as a starting point for the dialogue between the treaty bodies and the signatory state, reservations do not undermine human rights treaties, but support their purpose: the effective protection of human rights.

## A. Introduction

“[A] large number of reservations made by a great many States will turn a human rights instrument into a moth-eaten guarantee”.<sup>1</sup> This is indeed true when looking at extensive reservations as for example Saudi-Arabia’s to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>2</sup>, in which the country states that “[i]n 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”<sup>3</sup>. A similar reservation has been made by Mauritania. These far-reaching reservations clearly undermine the object and purpose of a Convention aimed at protecting women from discrimination.

Thus, one might ask whether reservations are compatible at all with the effective protection of human rights. As early as 1949, when the

<sup>1</sup> L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (1995), 3.

<sup>2</sup> *Convention on the Elimination of all Forms of Discrimination against Women*, 1 March 1980, 1249 U.N.T.S. 13-23 [CEDAW].

<sup>3</sup> *CEDAW, Ratification (with reservation) Saudi Arabia*, 7 October 2000, 2121 U.N.T.S. 342.

International Law Commission (ILC) was engaged in the codification of the law of treaties, it struggled with the question of reservations.<sup>4</sup> Although reservations were later considered a necessary evil, since “human rights treaties will continue to have uncomfortable alliances with reservations”<sup>5</sup>, reservations have been a topic of discussion again since the mid-1990s.<sup>6</sup> Indeed, Tyagi was right insofar as reservations are still allowed even in the most recent human rights treaties such as the Convention on the Rights of Persons with Disabilities (CRPD)<sup>7</sup> or the International Convention for the Protection of All Persons from Enforced Disappearance<sup>8</sup>. This is especially noteworthy since a range of other multilateral treaties especially in the field of environmental law, as for example the Vienna Convention for the Protection of the Ozone Layer<sup>9</sup> or the Convention on Biological Diversity,<sup>10</sup> prohibit any reservations.<sup>11</sup>

However, the question remains whether this “alliance” between human rights treaties and reservations is actually “uncomfortable”. There is no doubt that reservations to human rights are incompatible with the fundamental notion of human rights as being of universal application to every single human being. The overall aim is thus to reach a status in which there are no reservations to human rights treaties anymore, not because reservations are prohibited, but rather because they are no longer necessary.

Hence, when creating an *effective protection* of these human rights, the question is not whether reservations are incompatible with human rights;

<sup>4</sup> Jan Klabbers, ‘On Human Rights Treaties, Contractual Conceptions and Reservations’, in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), 149, 149 [Klabbers, Human Rights Treaties].

<sup>5</sup> Yogesh Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’, 71 *British Yearbook of International Law* (2000) 1, 181, 256.

<sup>6</sup> Klabbers, Human Rights Treaties, *supra* note 4, 151.

<sup>7</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 30 March 2007, Doc. A/61/611.

<sup>8</sup> *International Convention for the Protection of All Persons from Enforced Disappearance*, 6 February 2007, Doc. A/61/488. C.N.737.2008.TREATIES-12 and C.N.1040.2008.TREATIES-20.

<sup>9</sup> *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 293.

<sup>10</sup> *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79.

<sup>11</sup> Art. 18 Vienna Convention for the Protection of the Ozone Layer; Art. 37 Convention on Biological Diversity; United Nations Environment Programme, *Training Manual on International Environmental Law* (2006), 5.

one should rather ask whether an effective protection of human rights *without* reservations is possible at all.

In order to find a solution to a problem, one has to know what the problem exactly is and how it is defined. Only then a solution can be found. The same is true for human rights violations. The United Nations (UN) human rights treaty bodies need to know what the problem exactly is in order to be able to both exert pressure on the particular states parties and give helpful advice and support to them as they try to eliminate human rights violations in the respective countries. Reservations made by states parties pinpoint these violations of human rights and hence serve as a starting point for the Committees for their constructive dialogue with the states parties. As a result, reservations entail several important procedural elements, such as both the reserving state and the Committees being aware of the specific problematic aspects as well as the constructive dialogue between the state and the Committees.

Yet this approach operates on the premise that a reliable framework for the application of reservations is provided, in order to prevent human rights instruments from being completely undermined by excessive reservations such as Saudi-Arabia's and Mauritania's regarding CEDAW. Extensive and undefined reservations are of no help to the treaty bodies and are incompatible with the object and purpose of a human rights treaty. Thus, it is necessary to have a reliable framework within which reservations to human rights treaties do not undermine the respective treaty but help both the Committees and the states parties to effectively protect human rights.

To elaborate this approach, this paper will focus on the protection of human rights through the treaty bodies of the UN and their periodic review system.

## B. How to Treat Reservations

### I. Introducing a Reservation

First of all, the question arises what exactly a reservation is, and how it can be introduced into a state party's instrument of ratification.

## 1. Definition

Section Two of the Vienna Convention on the Law of Treaties (Vienna Convention)<sup>12</sup> is titled “Reservations”; this term is defined by the Vienna Convention itself as “a unilateral statement, [...] made by a state, [...] whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.<sup>13</sup> This includes namely substantive,<sup>14</sup> procedural,<sup>15</sup> and territorial<sup>16</sup> reservations.<sup>17</sup> Although technically derogations are also included,<sup>18</sup> for example statements limiting the legally binding effect of certain norms in state of emergency, these will be disregarded in this paper.

Entering into a treaty requires consent of the respective state. The scope of all human rights treaties is to implement human rights in domestic laws and practice. A state may support this general aim, but may not be able or willing to adjust every domestic law affected by the treaty. This will especially occur regarding treaties with a very broad scope, as for example the International Covenant on Civil and Political Rights (ICCPR)<sup>19</sup>, the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>20</sup> or the Convention on the Rights of the Child (CRC)<sup>21</sup>. In making a reservation, the state thus excludes a specific area from the treaties’ scope. Consequently, the reservation is part of the state’s consent; ignoring the reservation would therefore contravene with this consent and

<sup>12</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [Vienna Convention].

<sup>13</sup> Art. 2(1) *lit. d* Vienna Convention.

<sup>14</sup> *E.g.* Monaco regarding Art. 2(1) ICERD; Argentina regarding Art. 21 *lits b–e* CRC.

<sup>15</sup> *E.g.* Austria, France, and Germany regarding Arts 19, 21, 22 in conjunction with Art. 2(1) ICCPR.

<sup>16</sup> *E.g.* Netherlands regarding Art. 8(1) *lit. d* ICESCR.

<sup>17</sup> Dinah Shelton, ‘State Practice on Reservations to Human Rights Treaties’, *Canadian Human Rights Yearbook* (1983) 205, 207.

<sup>18</sup> Christoph Schreuer, ‘Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights’, 9 *Yale Journal of World Public Order* (1982-1983) 1, 113, 114.

<sup>19</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 [ICCPR].

<sup>20</sup> *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3 [ICESCR].

<sup>21</sup> *Convention on the Rights of the Child*, 2 September 1990, 1577 U.N.T.S. 3 [CRC].

violate the states' sovereignty, since "a State is free, in virtue of its sovereignty, to formulate such reservation as it thinks fit."<sup>22</sup>

## 2. Prohibition

According to Art. 19 of the Vienna Convention, reservations can be introduced throughout the different stages of entering into a contract, namely ratification, signature, and accession, but not after the state has become an official contracting party. Bahrain acceded to the ICCPR on 20 September 2006, but made its three reservations only on 4 December 2006. Thus, nine states<sup>23</sup> objected to these reservations; every country except Italy based its objections, inter alia, on the lateness of the reservation. Trinidad and Tobago chose another way: on 26 May 1998, it denounced the Optional Protocol to the ICCPR (OP1-ICCPR)<sup>24</sup> and immediately afterwards re-accessed to the Protocol<sup>25</sup>, but making a reservation concerning Art. 1 OP1-ICCPR for the right of appeal for prisoners on death row.<sup>26</sup> Although this procedure does not contravene the Vienna Convention or the OP1-ICCPR itself, it provoked two objections<sup>27</sup> as well as seven additional communications to the Secretary-General.<sup>28</sup> In 2000, Trinidad and Tobago ultimately denounced the OP1-ICCPR.

Art.19 Vienna Convention is formulated with a double negation, so that reservations are generally allowed, unless one of the three enumerated criteria for exclusion is given: the first two exclusions apply when either (a) every reservation is prohibited or (b) only specific reservations are expressly

<sup>22</sup> ILC Law of Treaties, Yearbook of the International Law Commission (1962), Vol. II, 27, 65, para. 9; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Art. 19, para. 9.

<sup>23</sup> Netherlands, Latvia, Portugal, Czech Republic, Estonia, Canada, Australia, Ireland, Italy.

<sup>24</sup> *ICCPR Optional Protocol*, 19 December 1966, 999 U.N.T.S. 302.

<sup>25</sup> *ICCPR, Accession by Trinidad and Tobago*, 26 May 1998, 1120 U.N.T.S. 488.

<sup>26</sup> Glenn McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol', 23 *Human Rights Quarterly* (2001) 3, 769, 771.

<sup>27</sup> *ICCPR Optional Protocol, Objection (to the reservation made by Trinidad and Tobago upon accession) Denmark*, 6 August 1999, 2077 U.N.T.S. 300; *ICCPR Optional Protocol, Objection (to the reservation made by Trinidad and Tobago upon accession) Norway*, 6 August 1999, 2077 U.N.T.S. 302.

<sup>28</sup> Netherlands (6 August 1999); Germany (13 August 1999); Sweden (17 August 1999); Ireland (23 August 1999); Spain (25 August 1999); France (9 September 1999); Italy (17 September 1999).

allowed by the respective treaty; if neither alternative applies, then a reservation is also illegal if it is (c) “incompatible with the object and purpose of the treaty”. Regarding the UN human rights treaties, Art. 19 *lit. a* Vienna Convention applies to the Optional Protocol to CEDAW (OP-CEDAW)<sup>29</sup> as well as to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (OP-CAT)<sup>30</sup> which both explicitly prohibit any reservations.<sup>31</sup> Art. 19 *lit. b* Vienna Convention only applies to the Second Optional Protocol to the ICCPR (OP2-ICCPR)<sup>32,33</sup>. Some treaties expressly state that reservations have to be compatible with the object and purpose of the treaty; these stipulations are merely a reference to Art. 19 *lit. c* Vienna Convention.

Regarding Art. 19 *lit. c*, the code adopts a finding by the International Court of Justice (ICJ). In this finding, the ICJ gave an advisory opinion about the legality of reservations to the Genocide Convention,<sup>34</sup> albeit originally the ICJ envisaged this rule not only to reservations, but also to objections.<sup>35</sup> However, it seems impossible to identify a universally valid definition of a treaty’s “object and purpose”. It is only possible to decide whether a specific reservation to a specific treaty is compatible,<sup>36</sup> considering the “character of a multilateral convention, its purpose, provisions, mode of preparation and adoption”.<sup>37</sup> Art. 31 Vienna Convention provides a list of places, where one might find indications for the object and purpose of a treaty, namely: the text including preamble and appendix; agreements and instruments relating to the conclusion of the

<sup>29</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 10 December 1999, 2131 U.N.T.S. 83 [OP-CEDAW].

<sup>30</sup> GA Resolution A/RES/57/199, 9 January 2003.

<sup>31</sup> Art. 17 OP-CEDAW; Art. 30 OP-CAT.

<sup>32</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 15 December 1989, 1642 U.N.T.S. 414 [OP 2-ICCPR].

<sup>33</sup> Art. 2(1) OP2-ICCPR.

<sup>34</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, 24.

<sup>35</sup> Massimo Coccia, ‘Reservations to Multilateral Treaties on Human Rights’, 15 *California Western International Law Journal* (1985) 1, 1, 30.

<sup>36</sup> Ulf Linderfalk, ‘On the Meaning of the “Object and Purpose” Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19’, 72 *Nordic Journal of International Law* (2003) 4, 429, 431.

<sup>37</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, *supra* note 34, 22.

treaty;<sup>38</sup> as well as subsequent agreements or practice in the application.<sup>39</sup> Hence, a comprehensive survey of the whole treaty including relating texts and practices is necessary to determine the treaty's object and purpose. Only with the help of this overall view is it possible to interpret single articles and their respective object and purpose.

Regarding the treaties' text, both the stipulated rights as well as the interplay between these rights have to be taken into account; all of them taken together aim at creating "legally binding standards for human rights".<sup>40</sup> Identifying an overall object and purpose of a treaty is particularly difficult concerning comprehensive conventions, as for example the ICCPR or the ICESCR.

## II. Reacting to a Reservation

The Vienna Convention provides for three ways to react to a reservation: other states parties can either expressly accept a reservation, they can tacitly accept it, or they can object to it. Whereas states parties practically never explicitly accept reservations, they do occasionally object to incompatible reservations.

### 1. Objections

According to Art. 20(4) Vienna Convention, other states parties can either object to a reservation or accept the reservation expressly, as well as tacitly by not objecting within twelve months. In all cases, the reserving state will become a contracting party unless an objecting state expressly precludes the entry into force of the contract between the objecting and the reserving state itself.<sup>41</sup> However, this case has never occurred until now.

Human rights treaties differ from other multilateral treaties, since they are not reciprocal and do not imply a synallagma of duties between the contracting parties. The duty states parties oblige themselves to fulfill exists in fact not towards the other contracting parties, but towards their own

<sup>38</sup> Art. 31(2) Vienna Convention.

<sup>39</sup> Art. 31(3) Vienna Convention.

<sup>40</sup> UN Human Rights Committee (HRC), CCPR General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 6, 4 November 1994, para. 7.

<sup>41</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ, *supra* note 34, 25 *et seq.*

citizens. By signing a human rights treaty, a state undertakes to implement the respective human rights in its country and simultaneously acknowledges this same promise made by the other signatory states. The difference to other treaties lies in two points: First, the beneficiaries are not the other contracting parties, but each contracting state party's citizens. For example, a state party owes a duty to the children on its territory to actually "recognize that every child has the inherent right to life"<sup>42</sup>; to the other states parties, however, it owes to fulfil its promise to implement this right. Hence, although a state can only actually fulfil towards its citizens, it owes fulfilment to both the citizens and the other states parties. Second, although all states parties give a legally binding promise to the other contracting parties, these promises are not reciprocal but discrete. This means that fulfilment can be claimed by other states parties, but no state can refuse fulfilment on the grounds that another contracting party has not fulfilled its obligations yet. This discrepancy leads to the fact that states parties do not benefit from other parties' performance or non-performance. As a consequence, they also do not benefit from objecting to reservations.

Additionally, since every state is free to formulate reservations by virtue of their sovereignty, objecting to a reservation can, from a political point of view, also be perceived as an intervention in the respective state's domestic affairs.

Thus, between 1951 and the mid-1980s, the number of objections constantly decreased.<sup>43</sup> Since the 1990s, however, this has changed towards an increased trend to objecting to reservations. Especially Western European states are part of this development, although it is noteworthy that regarding ICERD, a number of non-European states also objected to reservations.<sup>44</sup>

## 2. Motivations

If a country enters a reservation to a specific article of the treaty, this article will not come into force to the extent that it is excluded by the reservation. If, now, another state objects to this reservation, Art. 21(3)

<sup>42</sup> Art. 6(1) CRC.

<sup>43</sup> Coccia, *supra* note 35, 34.

<sup>44</sup> Anja Seibert-Fohr, 'The Potential of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties', in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), 183, 198 *et seq.*

Vienna Convention rules that “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”. This leads to the unfortunate effect that, irrespective of whether an objection has been made, the reserving state will not be bound to the contract to the extent of the reservation. Hence, from a legal point of view, an objection to a reservation is superfluous, unless it additionally expressly excludes the treaty’s coming into force between the two respective states.<sup>45</sup> Consequently, objections are either made or omitted out of political reasons – or often with no specific reason at all.<sup>46</sup> From a legal point of view, however, objections seem rather irrelevant. France for example declared that Art. 27 ICCPR, which stipulates a minority’s right to practice its own culture, language, and religion, is not applicable as far as the Republic is concerned due to the nation’s laicism. Disregarding the question whether this “declaration” has to be considered as a reservation, Germany did not formally object to the declaration, but only formulated an interpretation of France’s declaration, stressing the “great importance attach[ed] to the rights guaranteed by article 27 [ICCPR]”. This reluctant behaviour, i.e. not formally objecting, can probably be attributed to political reasons: a formal objection would not have triggered any different legal consequence, but it would have had a different political meaning. Thus, the absence of an objection does not imply any indication, neither in favour of compatibility of the reservation with the object and purpose of the treaty, nor against it.<sup>47</sup> However, an objection to a reservation does serve as an indication for the treaty body, when determining a treaty’s object and purpose.

### III. How to Treat Reservations

Objections by states parties only have effect between the objecting and the reserving party and do not affect other states parties. Particularly, an objection on the ground of incompatibility with the object and purpose of a treaty does not put the reserving state in a different position compared to states parties who did not object.<sup>48</sup> First, this is inconsistent with the importance of the rights protected by human rights treaties. Additionally, it

<sup>45</sup> Jan Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’, 69 *Nordic Journal of International Law* (2000) 1, 179, 179.

<sup>46</sup> Coccia, *supra* note 35, 35.

<sup>47</sup> UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 17.

<sup>48</sup> Lijnzaad, *supra* note 1, 48.

also runs counter to the Vienna Convention itself, which prohibits reservations incompatible with the object and purpose of the treaty.

### 1. When Are Incompatible Reservations Void?

Art. 19 Vienna Convention stipulates that '[a] state may, when signing, ratifying, accepting, approving or acceding a treaty, formulate a reservation unless: [...] (c) [...] the reservation is incompatible with the object and purpose of the treaty.' Thus, a reservation incompatible with the object and purpose of the respective treaty is prohibited; the reservation hence does not come into force. Art. 20(4) *lit. a* Vienna Convention ("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") does not speak against this either. Whereas Art. 19 Vienna Convention deals with prohibited reservations, Art. 20 Vienna Convention relates only to permitted reservations, i.e. those reservations that do not fall under any provision of Art. 19 Vienna Convention.<sup>49</sup> Hence, it is not possible to make an incompatible reservation valid by accepting it. Art. 19 *lit. c* has been established in order to prevent states parties from undermining a treaty.<sup>50</sup> If a state party wishes to formulate reservations incompatible with the very object and purpose, its intention to fulfil the treaty becomes questionable. Allowing this by accepting such a reservation would contravene with the very nature of the treaty on the one hand, as well as Art. 19 *lit. c* on the other.

Objections hence have a declarative character. Still, they are important indicators when it comes to defining a particular treaty's object and purpose. This approach concurs with the one by the ILC's *special rapporteur* on the issue, Alain Pellet, who stated that Art. 21(3) Vienna Convention is not applicable to human rights treaties.<sup>51</sup> This interpretation gives consideration to the fact that human rights treaties do not have a reciprocal character but that the rights and duties stipulated there exist between the states parties on the one hand, as well as their respective people on the other.

The Human Rights Committee follows another path; however, its approach has not found any support by the different states parties. In

<sup>49</sup> Villiger, *supra* note 22, Art. 20, para. 2.

<sup>50</sup> Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988), 121.

<sup>51</sup> ILC The Law and Practice relating to Reservations to Treaties, Yearbook of the International Law Commission (1996), Vol. II Part 1, 65, para. 155.

particular the United States, the United Kingdom and France, as well as *special rapporteur* Pellet, have criticized its approach.<sup>52</sup> In its *General Comment N° 24*, the Human Rights Committee declares itself competent to “determine whether a specific reservation is compatible with the object and purpose of the Covenant”.<sup>53</sup> The Human Rights Committee points out that states parties object to reservations out of political, rather than legal, reasons; Cyprus for example objected three times<sup>54</sup> and every time only to reservations made by Turkey. Yet, the Committee sees it as essential to have a legal inspection of the different reservations and, most importantly, to trigger legal effects with this inspection. Additionally, it argues that this task accompanies the traditional Committees’ work,<sup>55</sup> as can be seen in various *Lists of Issues*, where the Committee integrates questions about reservations in its work, e.g. regarding Poland,<sup>56</sup> Egypt,<sup>57</sup> or the United States.<sup>58</sup> Hence, the Human Rights Committee legitimises itself not only to examine the reservations regarding their compatibility, but also to nullify incompatible reservations.<sup>59</sup>

However, there is no legal basis for the Committee’s declaration. Human rights treaties are multilateral treaties and therefore are concluded by the states parties among each other for the benefit of citizens and not between one state and the Human Rights Committee. It would have been

<sup>52</sup> Roslyn Moloney, ‘Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent’, 5 *Melbourne Journal of International Law* (2004) 1, 155, 165.

<sup>53</sup> UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 18.

<sup>54</sup> ICCPR, *Objection (to the reservation made by Turkey upon ratification) Cyprus*, 26 November 2003, 2232 U.N.T.S. 266; ICESCR, *Objection (to the reservation made by Turkey upon ratification) Cyprus*, 26 November 2003, 2232 U.N.T.S. 264; CERD, *Objection (to the reservation made by Turkey upon ratification) Cyprus*, 5 August 2003, 2223 U.N.T.S. 201.

<sup>55</sup> Elena Annette Baylis, ‘General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties’, 17 *Berkeley Journal of International Law* (1999) 2, 277, 299.

<sup>56</sup> UN Committee against Torture, List of Issues to Be Considered During the Examination of the Fourth Periodic Report of Poland, UN Doc CAT/C/POL/Q/4/Rev. 1, 26 February 2007, para. 37.

<sup>57</sup> UN Committee on Migrant Workers (CMW), Consideration of Reports Submitted by States Parties Under Article 73 of the Convention, UN Doc CMW/C/EGY/Q/1, 7 November 2006, para. 7.

<sup>58</sup> UN CERD, Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth, and Sixth Periodic Reports of the United States of America, UN Doc CERD/C/USA/6, 18 February – 7 March 2008, para. 4.

<sup>59</sup> UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 18.

possible to allocate adjudicative powers to the Committee in the ICCPR. Yet the Covenant's drafters chose not to do so except in cases where states parties separately agree to such a power, as for example regarding inter-state controversies<sup>60</sup> or regarding the later introduced possibility of individual complaints.<sup>61</sup> At present, the Committee is merely allowed to "study the reports submitted" as well as to "transmit [...] general comments".<sup>62</sup> All other international tribunals, e.g. ICJ, Inter-American Court of Human Rights, or European Court of Human Rights (ECtHR), also only have jurisdiction, if the parties have expressly consented to this jurisdiction.<sup>63</sup>

In its *General Comment N° 24*, the Committee therefore argues from a functional point of view. Although it is in fact unnecessary to legitimise a person or institution to nullify incompatible reservations, since reservations are void by Art. 19 lit. c Vienna Convention, the Committee as well as the other treaty bodies indeed have a very important function. Through both their General Comments on different human rights and their instructive dialogue with the states parties within the scope of the periodic review system, the Committees evolve and define the respective treaties' object and purpose. Their work thus strongly influences the question which reservation is compatible and which is incompatible with the object and purpose of the particular treaty.

## 2. To what Extent Are Reservations Void?

It remains unclear to what extent incompatible reservations are void. Both the ICJ and the ECtHR apply the so-called "severability-doctrine", according to which incompatible reservations are "severed" from the reserving state's ratification. Thus, the reserving state becomes a state party to the treaty without benefiting from the incompatible reservation.<sup>64</sup> The ICJ did not consider the issue of severing incompatible reservations directly until today, although on two occasions, Judge Hersch Lauterpacht commented on this topic in his dissenting opinions. In both the *Case of Certain Norwegian Loans* and the *Interhandel Case*, Lauterpacht on the one hand stated that invalid reservations shall be severed from the rest of the instrument of ratification; on the other hand, he limited this rule to those

<sup>60</sup> ICCPR, 19 December 1966, Art. 41(1), 999 U.N.T.S. 171, 182.

<sup>61</sup> ICCPR *Optional Protocol*, 19 December 1966, Art. 1, 999 U.N.T.S. 302.

<sup>62</sup> ICCPR, 19 December 1966, Art. 40(4), 999 U.N.T.S. 171, 182.

<sup>63</sup> Baylis, *supra* note 55, 296.

<sup>64</sup> Moloney, *supra* note 52, 160.

reservations that are not essential to the reserving state's consent.<sup>65</sup> Although Lauterpacht is right in paying regard to the state's consent, he goes too far with this limitation. Applying the rule of good faith, one has to assume that a state ratifying a treaty consents with the treaty's object and purpose; otherwise one would impute the respective state bad faith when ratifying the treaty. Hence, reservations which are essential to the reserving state's consent and at the same time incompatible with the treaty's object and purpose are in fact not worthy of protection: either, the reservation is not essential and can thus be severed; or the reserving state is not in good faith since it ratifies a treaty without the will to actually support its core elements. Limiting the severability-doctrine to inessential reservations is therefore superfluous.

The ECtHR has also dealt with the issue of severing incompatible reservations, on two occasions. First in *Belilos v. Switzerland* and later in *Loizidou v. Turkey* the Court held that the reserving states, i.e. Switzerland and Turkey, are parties of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) without benefiting from their respective incompatible reservations.<sup>66</sup> The Court did not give any reasons for its decision.

Since severing a reservation infringes the reserving state's consent, it is important not to sever more parts of the reservation than necessary to protect the treaty's object and purpose.

Erasing the entire reservation would violate the state's consent, since this consent did not cover ratifying the treaty without this particular reservation. On the other hand, leaving an incompatible reservation in virtue infringes the object and purpose of the treaty and therewith the human rights of individuals. Hence, in order to find a compromise, one could apply a solution used in German consumer protection law. Regarding illegal clauses in general terms and conditions, a so-called "blue-pencil-test" is applicable, which veers towards the Human Rights Committee's approach of reservations being "specific and transparent".<sup>67</sup> According to this test, one crosses out – with a blue pencil – exactly and only that part of a reservation

<sup>65</sup> *Case of Certain Norwegian Loans (France v. Norway)*, Separate Opinion of Judge Sir Hersch Lauterpacht, Judgement, ICJ Reports 1957, 34, 56-57; *Interhandel Case (Switzerland v. United States of America)*, Dissenting Opinion of Sir Hersch Lauterpacht, Judgement, ICJ Reports 1959, 95, 116-117.

<sup>66</sup> *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, 23, para. 60; *Loizidou v. Turkey*, ECHR (1995) Series A, No. 310, 27, para. 97.

<sup>67</sup> UN HRC, CCPR General Comment N° 24, *supra* note 40, para. 19.

that is illegal. The deleted part is then void, whereas the rest of the reservation remains valid, as long as it remains a correct sentence making full sense.<sup>68</sup> If, however, the remaining part does not constitute a grammatically correct sentence, the whole reservation has to be considered void. Applied to the striking example of the above-mentioned reservation by Saudi-Arabia to CEDAW, the whole reservation is void. If, on the contrary, Saudi-Arabia had phrased its reservation in a more detailed way, naming all the different relevant clauses of CEDAW as well as of its domestic law, only those parts would be null which are incompatible with the object and purpose of CEDAW. Although every reservation to a substantive guarantee implies a violation of human rights, not every reservation is completely incompatible with the object and purpose of a treaty. Hence, this “blue-pencil-test” not only constitutes a compromise between the state’s consent and the protection of human rights; it also induces the reserving states to think about their reservations in a more detailed manner. Since it is to their advantage to formulate very detailed reservations, the states are likely to make use of this technique and with it become more aware of which reservations they really want and need and which reservations might constitute a violation of the object and purpose of the treaty. Evoking this awareness of the different reservations and their particular severity is a first step towards abolishing every single reservation, since awareness of a problem is essential for solving it.

It is however not advisable to carry out a compatibility test prior to the introduction of reservations. This bears the risk of leading to a kind of “horse-trading” over human rights, since the state might use its accession to the treaty as a pressurising medium in order to push through its reservations. However, the Office of the High Commissioner could provide a counsel for the formulation of reservations.

The fact that incompatible reservations to human rights treaties are void results from Art. 19 lit. c Vienna Convention. The blue-pencil-test, however, cannot be found in the Vienna Convention or any other treaty yet. Since the test concerns the execution of Art. 19 lit. c Vienna Convention, rather than its legal effect, it suffices to regulate the test as a mere guideline. It would be appropriate to introduce the blue-pencil-test into the ILC’s guidelines on reservations to human rights treaties. Since 1993, the ILC deals with the issue of reservations to human rights treaties on a regular

<sup>68</sup> Otto Palandt & Peter Bassenge, *Bürgerliches Gesetzbuch: Kommentar*, 68th ed. (2008), Art. 307, para. 11.

basis. It decided that amending both the Vienna Convention and the different human rights treaties by concluding a new treaty dealing with reservations and objections to human rights treaties would lead to legal uncertainty. Thus, the Commission started to formulate guidelines regarding this issue.<sup>69</sup> To date, a range of rules have been prepared, but the guidelines are not yet complete.<sup>70</sup> They particularly do not regulate the question to what extent incompatible reservations shall be void, although they already stipulate that reservations incompatible to the object and purpose of a treaty are prohibited.<sup>71</sup> It is therefore possible to introduce the blue-pencil-test as one of these guidelines.

## C. How to Achieve Effective Protection of Human Rights

### I. Admitting Reservations...

Admittedly, it is quite idealistic to think that advisedly chosen reservations in combination with constant reminding by the different Committees lead to full implementation of human rights and thus to a status where reservations are not necessary anymore. At the same time, however, it is also more realistic than protecting human rights by blindly prohibiting any reservation. First of all, with environmental multilateral treaties in mind, which mostly prohibit any reservations, it becomes clear that a range of states still do not consider themselves thoroughly bound to the respective treaties. Some states make declarations upon accession which in fact amount to reservations. Chile for example made a declaration to the Convention on Biological Diversity, in which it excluded pine-trees from the scope of the Convention. The Sudan went even further by declaring that “no state is responsible for acts that take place outside its control even if they fall within its judicial jurisdiction and may cause damage to the environment of other states or of areas beyond the limits of national judicial jurisdiction.” A nominal prohibition of reservations is thus evaded by simply allowing de-facto reservations as “declarations”. Furthermore, a human rights treaty

<sup>69</sup> ILC The Law and Practice relating to Reservations to Treaties, Yearbook of the International Law Commission (1995), Vol. I, 171, para. 42.

<sup>70</sup> Villiger, *supra* note 22, Articles 19-23: Subsequent Developments, para. 11, 326.

<sup>71</sup> Guidelines N°3.1. (c) and N° 3.1.3 in Villiger, *supra* note 22, Articles 19-23: Subsequent Developments, para. 11, 334.

prohibiting reservations will discourage many states and thus prevent them from acceding to the treaty. Yet, it is very important to reach a broad coverage of human rights. Every ratification not accomplished imports a range of different rights not guaranteed to many individuals. Finally, a reform in law and practice becomes even more unlikely, since the instructive dialogue with the Committee and other states parties on the one hand, as well as political and legal pressure on the other hand are missing.

Switzerland was the very first country whose (although disguised) reservation has been ruled invalid by a competent institution, in this case the ECtHR. In consequence of the decision in *Belilos v. Switzerland*, the respective Swiss cantons reformed their cantonal laws to make them accord with the ECHR.<sup>72</sup> The reservation itself has also been withdrawn, although only in 1998 and hence ten years after the Court's ruling.<sup>73</sup> Thus, the ECtHR's decision to sever Switzerland's reservation to Art. 6(1) ECHR from the State Party's instrument of ratification showed effect. One could argue that hence an institution like the ECtHR is necessary in order to protect the different treaties' object and purpose. Though, the combination of the periodic review system of the UN human rights treaty bodies together with the described interpretation of the Vienna Convention as well as the introduction of the blue-pencil-test can indeed have the same power and desirable effect. Also a broad range of its reservations to different UN human rights treaties have been withdrawn by Switzerland, although there was no court that officially declared the respective reservations void.

Switzerland had and still has a range of reservations to four UN human rights treaties.<sup>74</sup> To date, Switzerland has withdrawn several reservations to three of these treaties. The withdrawals took place during a tentative reform process. The first withdrawal of a reservation took place earlier, in 1995, when Switzerland withdrew its reservation to Art. 20(2) ICCPR in which it postponed introducing hate crimes into its criminal code. Indeed, a law prohibiting incitement to discrimination and violence out of

<sup>72</sup> *Botschaft zur Änderung des schweizerischen Strafgesetzbuches (Allgemeine Bestimmungen, Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht*, 21 September 1998, BBI 1999, 1979, 2161.

<sup>73</sup> Eidgenössisches Justiz- und Polizeidepartement, 'Vorbehalte zu Art. 6 EMRK sollen zurück gezogen werden', Press Release (15 June 1998) available at <http://www.admin.ch/cp/d/35851808.7281@mbox.gsejpd.admin.ch.html> (last visited 19 July 2010).

<sup>74</sup> Art. 12(1), Art. 20, Art. 25 *lit. b*, Art. 26 ICCPR; Art. 2(1) *lit. a*, Art. 4 ICERD; Art. 15(2), Art. 16(1) *lits g, h* CEDAW; Art. 10(1), Art. 37 *lit. c*, Art. 40 CRC.

hate has been introduced and came into force in 1995, as Art. 261*bis* of the Swiss Criminal Code. Through this new law, Switzerland attended to its duty under the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>75</sup>. In 2004, Switzerland withdrew several reservations. First, in January, it withdrew reservations to Art. 14(3) *lits* d and f ICCPR as well as to Art. 40(2) *lit.* b sublit. vi CRC, and second, in April, it went on with reservations to Art. 7 *lit.* b CEDAW and to Art. 5 CRC. All these reservations have in common that the respective Committees reminded the government to withdraw these reservations during the various sessions. The Human Rights Committee mentions Art. 14 ICCPR in its concluding observations considering the state party's second periodic report;<sup>76</sup> the Committee on the Rights of the Child even expressly reminds Switzerland to "[e]xpeditiously as much as possible the process for the withdrawal of the reservation regarding [...] Art. 40(2) (b) (vi)" and urges "to withdraw as soon as possible the reservation to Art. 5".<sup>77</sup> Although the Committee on the Elimination of Discrimination against Women records the reservation to Art. 7 *lit.* b CEDAW,<sup>78</sup> it only refers implicitly to this point again by stating that "[t]he Committee is concerned about the persistence of entrenched, traditional stereotypes regarding the role and responsibilities of women".<sup>79</sup> The last wave of withdrawals took place in May 2007, when Switzerland withdrew its reservations to Art. 10(2) *lit.* b and Art. 14(1) and (5) ICCPR as well as to Art. 7(2) and Art. 40(2) CRC. Also these reservations have been mentioned by the Human Rights Committee<sup>80</sup> as well as the Committee on the Rights of the Child.<sup>81</sup> Of the 24 reservations Switzerland had all in all, eleven have been withdrawn, ten of them within the last four years. One cannot prove whether this extent of law reform would also have taken place if, from the beginning, Switzerland had not made any reservations. However, it is at least doubtful whether such a wave of new laws concerning the protection of human rights

<sup>75</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195.

<sup>76</sup> UN HRC, Concluding Observations of the Human Rights Committee: Switzerland, UN Doc CCPR/CO/73/CH, 12 November 2001, para. 12.

<sup>77</sup> UN CRC, Concluding Observations of the Committee on the Rights of the Child: Switzerland, UN Doc CRC/C/15/Add.182, 7 June 2002, para. 7 *lit.* a.

<sup>78</sup> UN CEDAW, Switzerland: Concluding Comments of the Committee, UN Doc A/58/38(PART I), 20 March 2003, para. 100.

<sup>79</sup> *Id.*, para. 114.

<sup>80</sup> UN HRC, Concluding Observations Switzerland, *supra* note 76, paras 12, 14.

<sup>81</sup> UN CRC, Concluding Observations Switzerland, *supra* note 77, para. 7 *lits* b, d *et seq.*

would have taken place without the constant reminders of the different Committees.

## II. ...to Universally Applicable Human Rights

Although this was not the case with Switzerland, other states often defend their reservations by denying that human rights are universal and claiming that in their culture, the respective aspect is no human right. Therefore, the question arises whether human rights actually are universal.

Since the end of the Cold War, a holistic approach to human rights has evolved. According to this approach, the different human rights cannot be separated from each other, since every right also has effect on other rights. Most importantly, the rights guaranteed in the ICCPR as well as in the ICESCR have to be treated not as rights of the so-called first and second generation,<sup>82</sup> but as complementing and affecting each other. In a holistic approach, human rights can be seen as the different knots of a huge net. In this picture, violating a right means untightening one of these knots. But even one single loose knot makes the net as a whole less stable and particularly affects the surrounding knots and thus other human rights. If, for example, a girl cannot go to school, not only her rights to primary education and to equal treatment compared to boys of her age are violated. She will not be able to apply for jobs in which she has to read, write, and calculate; she will not be able to read medical information; she can easily be defrauded when buying or selling something; and she will not be able to fully participate in political life or even vote – to name just a few consequences. Thus, all these rights are part of human dignity, which is in itself indivisible, since the different constitutive pieces affect each other. As a consequence, human rights are also indivisible.<sup>83</sup>

Hence, a certain standard of human rights has to be regarded as universal and inherent in every culture, applying to every human being in the world. Excluding certain rights in certain regions also violates those rights which are said to be guaranteed in this region; thus, a reservation saying that certain rights do not apply in certain countries is a violation of human rights. Reservations are therefore incompatible with human rights.

<sup>82</sup> Brigitte I. Hamm, 'A Human Rights Approach to Development', 23 *Human Rights Quarterly* (2001) 1, 1005, 1006.

<sup>83</sup> Mac Darrow & Amparo Tomas, 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation', 27 *Human Rights Quarterly* (2005) 2, 471, 502 *et seq.*

Yet, one recurring point of discussion is reservations to the CEDAW with reference to Islamic law. Thus, the question arises whether equal treatment of women is a rather Western notion and not universally applicable. A strong argument against this is the mere fact that the CEDAW is, with 186 states parties, the treaty with the second most ratifications or accessions of all UN human rights treaties. Furthermore, not every state party with a predominantly Muslim population has made a reservation to CEDAW stating that the Convention was only applicable if not in contradiction with the *Sharia*.<sup>84</sup> This shows that also states parties with a predominantly Muslim population consider equal treatment of men and women as a universal human right. In addition to that, some members of the Committee on the Elimination of Discrimination against Women also have a Muslim background and still criticize reservations with reference to the *Sharia*. Ms. Meriem Belmihoub-Zerdani from Algeria for example consistently remarks when reservations or laws in the respective country referring to Islamic law are, according to the *Quran*, not strictly necessary. For example, she did so regarding Bahrain and Arts 9-15 CEDAW,<sup>85</sup> or Morocco and Arts 15-16 CEDAW.<sup>86</sup> Sometimes, she also makes proposals on how the respective state party could solve the problem without neglecting its Islamic culture. In one case, she acknowledged that the *Quran* concedes to women only half of a man's share in matters of inheritance. Thus, she requested Bahrain to "promulguer des lois qui permettraient aux parents de léguer des montants égaux de leur richesse à leurs fils et à leurs filles."<sup>87</sup> This is an interesting solution in order to harmonise requirements of both *Sharia* and CEDAW. Nonetheless, according to Art. 4(1) CEDAW, such measures can only be allowed as interim solutions, they "shall in no way entail as a consequence the maintenance of unequal or separate standards".<sup>88</sup> Finally, an unequal treatment of men and women leads to violations of those rights, which are allegedly guaranteed in the respective

<sup>84</sup> Indonesia, Turkey and Yemen did not enter reservations referring to Islamic law; see also Jane Connors, *The Women's Convention in the Muslim World*, in Christine Chinkin *et al.* (eds), *Human Rights as General Norms and a State's Right to Opt Out* (1997), 85, 89 *et seq.*

<sup>85</sup> UN CEDAW, Quarante-deuxième session, 861<sup>e</sup> séance, 30 octobre 2008, à 15 heures, UN Doc CEDAW/C/SR.861, para. 53.

<sup>86</sup> UN CEDAW, Twenty-ninth session, 627<sup>th</sup> meeting, 15 July 2003, at 3 p.m., UN Doc CEDAW/C/SR.627, para. 22.

<sup>87</sup> UN CEDAW, Quarante-deuxième session, 861<sup>e</sup> séance, 30 octobre 2008, à 15 heures, UN Doc CEDAW/C/SR.861, para. 63.

<sup>88</sup> Art. 4(1) CEDAW.

countries. A range of states parties<sup>89</sup> made for example reservations with reference to Islamic law to Art. 9 CEDAW which guarantees women equal rights with men to acquire, change, or retain their nationality (para. 1) and equal rights with men with respect to the nationality of their children (para. 2). This reservation, however, has further consequences and violates also other rights. If an alien woman marries a citizen of the respective country and thus has to give up her own nationality and obtain her husband's nationality, she will lose several rights in her original home country. She will for example not be allowed to vote or to run for office; furthermore, she might lose claims regarding subsidy or pensions; finally, she may also have difficulties to visit her home country and her family without special visas. The same can become true for her children, if the father has the sole right to decide upon their nationality. Although the reserving countries do not explicitly or even willingly violate these rights, they do so by making a reservation to Art. 9 CEDAW. Thus, excluding certain rights from universal application leads to violating rights which are universally accepted.

Nonetheless, one has to bear in mind the huge differences between the different cultures. By formulating mere goals instead of ways of reaching these goals, the UN human rights treaties leave enough room for regional diversity. States parties are thus free to implement the different rights according to their particular cultural conditions.<sup>90</sup>

The existence of regional human rights treaties such as the ECHR or the African Charter on Human and Peoples' Rights does not contradict with the notion of universally applicable human rights. Human rights themselves exist on a global level, inherent to every human being in the world. Yet, rights alone do not suffice. In order to realize these rights, it is necessary to establish mechanisms through which one can call for the corresponding duties and monitor their implementation. Rights therefore have to be transformed into duties. To achieve this goal, the different regional and global human rights treaties exist, since only these treaties give a reliable basis on which states parties can be held accountable.<sup>91</sup> It is, however,

<sup>89</sup> Reservation to Art. 9(1), (2) CEDAW: Iraq, United Arab Emirates; reservation only to Art. 9(2) CEDAW: Bahrain, Brunei Darussalam, Jordan, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Tunisia; not counted are those reservation which either do not name any specific article or reservations to Art. 2 CEDAW.

<sup>90</sup> Douglas Lee Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards', 27 *Stanford Journal of International Studies* (1990-1991) 1, 345, 386.

<sup>91</sup> Hamm, *supra* note 82, 1013 *et seq.*

important to note that human rights themselves exist irrespective of these treaties; the treaties merely transform the intangible rights into contractual and thus enforceable duties.

It is striking that withdrawals of reservations with reference to Islamic law, except for those by Pakistan, always took place promptly before or after the particular state party presented its periodic state report and faced the Committees' questions. All in all, explicitly *Sharia*-based reservations have been withdrawn by four states parties to the CEDAW<sup>92</sup> and by four states parties to the CRC<sup>93</sup> plus withdrawals by Pakistan of such reservations made to the ICESCR and to the CRC. Since the conflict between Islamic family law on the one hand, and regulations in international human rights treaties concerning family law on the other hand has always been a contentious issue, it is remarkable that these of all reservations have been withdrawn shortly after the periodic review by the treaty bodies had taken place. Bangladesh withdrew its reservations to Art. 13 *lit. a* and to Art. 16(1) *lit. f* CEDAW on 23 July 1997 while the 17<sup>th</sup> session was held, in which also Bangladesh took part. Kuwait was not as quick as Bangladesh in withdrawing its reservation to Art. 7 *lit. a* CEDAW, but did so in 2005, one year after it attended the treaty body's 30<sup>th</sup> session and was urged to withdraw particularly this reservation.<sup>94</sup> Jordan withdrew its reservation to Art. 15(4) CEDAW very recently, in May 2009, after it had faced the Committee's question in the 39<sup>th</sup> session.<sup>95</sup> Although the Libyan Arab Jamahiriya did not withdraw the reservation in 1995 but "replace[d] the formulation", it is still noteworthy that the state party limited its very extensive reservation ("[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic *Shariah*.") to reservations concerning inheritance portions as well as Art. 16 *lits c* and *d* CEDAW. The Libyan Arab Jamahiriya, however, gave an account of the situation regarding women's rights to the Committee one year earlier in 1994. Furthermore, it is noteworthy that the depositary, i.e. the Secretary-General of the UN,<sup>96</sup> seems to have accepted this "new

<sup>92</sup> Bangladesh, Kuwait, Libyan Arab Jamahiriya, Jordan.

<sup>93</sup> Egypt, Indonesia, Morocco, Qatar.

<sup>94</sup> UN CEDAW, Kuwait: Summary Record of the 634<sup>th</sup> Meeting, UN Doc CEDAW/C/SR.634, 15 January 2004, paras 3, 30, 35, 38, 39; Kuwait: Summary Record of the 642<sup>nd</sup> Meeting, UN Doc CEDAW/C/SR.642, 22 January 2004, para. 34.

<sup>95</sup> UN CEDAW, Jordan: Summary Record of the 806<sup>th</sup> Meeting, UN Doc CEDAW/C/SR.806(A), 2 August 2007, para. 25.

<sup>96</sup> Art. 25(2) CEDAW.

formulation”, although it is in fact not possible under the CEDAW or any other UN human rights treaty to modify a reservation. Concerning the CRC, the same pattern can be detected. Except for Morocco, which needed three years to withdraw its reservation to Art. 14 CRC, Egypt, Indonesia, and Qatar all withdrew their *Sharia*-based reservations promptly before or after they had presented their periodic state reports and had answered the Committee’s questions. Whereas there lay two years between Egypt being interrogated at the 26<sup>th</sup> session in 2001 about its reservation to Arts 20 and 21 CRC<sup>97</sup> and the withdrawal of the reservation, it took Indonesia only one year to withdraw a broad range of reservation it had to the CRC in 2005, namely to Arts 1, 14, 16, 17, 21, 22, and 29 CRC. Qatar, on the other hand, withdrew its extensive reservation a few months before it had to appear before the Committee in 2009, which most likely was due to the otherwise upcoming questions by the Committee members.

Since reservations with reference to Islamic law to aspects of family law within the CEDAW or the CRC have always been heavily contested, it is remarkable that these reservations in particular have been withdrawn in a temporal relation with the periodic dialogue with the respective Committee. Family law is the main bastion that Islamic states do not want to submit to international standards. Thus, especially in this issue, the constructive dialogue proves to be fruitful. The respective reservations serve as a guideline for the Committee members, of where to apply pressure and which questions to ask in order to eliminate human rights violations.

## D. Conclusion

Reservations are substantially incompatible with the comprehensive and universal protection of human rights; but, at the same time, the procedural elements that reservations entail are essential for the effective protection of human rights. One has to distinguish human rights themselves from the *effective protection* of human rights. The aim is to achieve a status where no reservations to human rights exist; not because they are forbidden, but because they are not necessary. To reach this state of human rights without reservations, reservations are not only allowed, but can even be helpful.

<sup>97</sup> UN CEDAW, Egypt: Compte rendu analytique de la 679 séance, UN Doc CRC/C/SR.679, 15 January 2001, para. 14; Egypt: Summary Record of the 680<sup>th</sup> Meeting, UN Doc CRC/C/SR.680, 15 January 2001, paras 20, 88.

The first step is to raise the respective government's awareness that in its own country, specific laws do not comply with human rights. If a state accedes to a human rights treaty prohibiting reservations, the government might know that its laws are "not perfect", but it will not think about it in detail. If, on the contrary, the government has to formulate detailed reservations, mentioning the exact contravening law, it will become aware of where the problems really are. This, indeed, only functions with a strict framework for reservations. By declaring broad and non-transparent reservations invalid pursuant to Art. 19 *lit. c* Vienna Convention, states parties are urged to find well-thought-out and detailed formulations for their reservations, which have to comply to the so-called "blue-pencil-test". Additionally, a given state party may become aware that it is only a matter of one or two regulations that have to be changed in order to comply with the respective human rights treaty, while at first glance, it may have seemed as if a huge law reform was necessary and this deterred the government from even trying to find a solution. Later, reservations will also fulfil a constant warning function, admonishing the state party of its domestic laws still violating human rights. Furthermore both pressure and advice by the respective treaty bodies in the course of the periodic reviews will be more effective and accurate if the Committee members know exactly where the problems are; a detailed reservation gives the treaty body precisely this information. Reservations help the Committees to review a state party's report and to ask the right questions. Without reservations, it is easier for the contracting state to hide the areas in which it does not comply with the respective treaty. A reservation on the other hand, although it discharges the state party from a legal point of view, will provoke precise questions by the Committee as to why this reservation exists, which impact it has on the country's citizens, and when the state will reform its domestic laws. The political and factual pressure the Committee exerts by these recurring questions outweighs the legal advantage a reservation might imply for the state party. This pressure can then lead to a law reform, hopefully also including a change in practice, although the latter cannot be achieved merely by allowing or prohibiting reservations. After a successful law reform, the state party can withdraw its reservation and thus take a further step towards the main aim of guaranteeing human rights without any reservations.

It is therefore not advisable to blindly prohibit any reservations to multilateral human rights treaties. Instead, Art. 19 *lit. c* Vienna Convention should be interpreted closer to both letter and spirit of the law, according to which reservations incompatible with the treaty's object and purpose are

prohibited. In addition to that, the blue-pencil-test should be introduced as a guideline in order to guide the states parties when formulating their reservations. Through these two minor changes, the protection of human rights will become more effective and reservations will not undermine human rights treaties anymore, but support their purpose: the effective protection of human rights.