

# Women's rights: from bad to worse? Assessing the evolution of incompatible reservations to the CEDAW Convention

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## Keywords

International Treaty Law, Human Rights Treaties, Reservations, Severability Doctrine, UN Treaty Bodies, CEDAW Convention

## Abstract

The Convention on the Elimination of All Forms of Discrimination against Women is the most important international human rights instrument for the protection of women's rights worldwide. It is, however, also one of the main UN human rights treaties to which the largest number of reservations has been made. As far-reaching reservations to human rights treaties are detrimental to the effective protection of human rights, this gave rise to the debate on the need to apply a reservations system to such treaties that allows for the efficient protection of their integrity. More specifically, it resulted in the severability approach and treaty bodies claiming their competence to assess reservations' compatibility. This article aims to contribute to the academic research on reservations to the CEDAW Convention, by studying the evolution of reservation-making to this human rights treaty from a comparative perspective from its entry into force until the present. Through this analysis, the article aims to identify trends and shifts in this practice over time, allowing for a more detailed assessment of the increasing number of incompatible reservations, the Committee's progress towards a more active approach on reservations, and State's increasing willingness to object to reservations they find incompatible.

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## I. Introduction

Since its entry into force in 1981, the Convention on the Elimination of Discrimination against Women (CEDAW Convention) has been the most important international instrument for the protection of women's rights worldwide. Its provisions are far-reaching, covering all aspects of women's life, from their political participation and public life to education, employment, health and even marriage and family life. In addition, the Convention's non-discrimination clause provides for a very broad understanding of discrimination against women, referring to "any distinction, exclusion or restriction made on the basis of sex."<sup>1</sup> The CEDAW Convention is, however, also one of the main UN human rights treaties to which the highest number of reservations have been made by States parties. It is without doubt that reservations to the core obligations of a human rights treaty are detrimental to the effective implementation and protection of human rights. States' formulation of reservations that are incompatible with human rights treaties' object and purpose is nevertheless still a problematic practice today. The need for better protection of human rights treaties' integrity due to these treaties' particular characteristics led to two important developments in the area of reservations to human rights treaties, namely the emergence of the severability doctrine on the one hand, and the more active role played by treaty bodies on the other hand. Over the last three decades, there has been a gradual shift towards treaty bodies claiming their competence to determine the compatibility of reservations, instead of States parties. Since the *Belilos* case before the European Court of Human Rights,<sup>2</sup> the severability of incompatible reservations, resulting in the reserving State being bound by the treaty as a whole, has also gained in popularity. This approach thus places the need to protect the Convention's integrity above the will of the State not to be bound by certain provisions, by severing its incompatible reservation from the instrument of ratification.

The issue of reservations to human rights treaties,<sup>3</sup> and CEDAW in particular, has since long been the subject of academic research and debate. Important publications include those of Rebecca Cook, Christine Chinkin, Liesbeth Lijnzaad, Lars Adam Rehof and Hanna Beate Scöpp Schilling.<sup>4</sup> These scholars have discussed at length CEDAW's reservation clause, the Convention's object and purpose, and reservations made to this particular treaty. By doing so, they have demonstrated that a large number of reservations to the CEDAW Convention are incompatible, of unlimited scope or undefined character, and often relate to one of the core articles of the Convention. More recent academic research has also identified the problem of the large group of Islamic States formulating reservations to the Convention's core provisions upon accession, so that it applies only when in conformity with Sharia norms.<sup>5</sup>

This article aims to build on and add to the previous work of academics, first of all, by providing an updated overview and discussion of reservations and objections made to the CEDAW Convention and the work of the CEDAW Committee. Secondly, it aims to add to the existing research on this topic by studying the evolution of reservation-making to this human rights treaty from a comparative perspective from its entry into force until the present.<sup>6</sup> It thus goes beyond describing the number and scope of reservations at or after a particular point in time by providing a comparative analysis of all reservations and objections made over more than three decades, in addition to State practice and the CEDAW Committee's work on reservations. Through this analysis, the article aims to identify trends and shifts in this practice over time, allowing for a more detailed assessment of the increasing number of incompatible reservations, the Committee's progress towards a more active approach on reservations, and State's increasing willingness to object to reservations they find incompatible. In order to fully understand such trends in reservations to the CEDAW Convention, it is essential to take into account the two

1 CEDAW Convention Article 1

2 *Belilos v. Switzerland* ECHR 1988 Series A no 132.

3 See P Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de justice le 28 mai 1951* (Pedone, 1978); C Redgwell, 'Universality or integrity? Some reflections on reservations to general multilateral treaties' (1993) *British Yearbook of International Law* 245-282; J Ruda, 'Reservations to Treaties' (1975) *Recueil des Cours* 95-218; B Simma, 'Legal consequences of an impermissible reservation to a Human Rights Treaty : where do we stand ?' in *The law of treaties beyond the Vienna Convention* (Oxford University Press, 2011) 60-85.

4 See particularly C Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women' in J P Gardner (ed) *Human Rights as General Norms and a State's Right to Opt Out* (B.I.I.C.L. 1997); R Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643-716; M A Freeman, C Chinkin and B Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012); L Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers 1995); L REHOF, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers 1993); H B Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: an unresolved issue or (no) new developments?' in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff Publishers 2004).

5 See Z Luca, 'Reservations to the Women's Convention: A Muslim Problem Ill-Adressed?' in I Westendorp (ed), *The Women's Convention Turned 30* (Intersentia 2012); E Yahyaoui Krivenko, *Women, Islam and International Law Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Nijhoff 2009).

6 Previous works have mainly focused on reservations existent at a specific time or made within a specific period of the Convention's existence.

important developments in the area of reservations to human rights treaties in general as described above; the severability of incompatible reservations and assessment of incompatibility by treaty bodies. As these developments are essentially aimed at the better protection of human rights through the application of different procedural and substantial rules to decrease and prevent incompatible reservations, this article also aims to identify potential links between these and the shifts in the reservations made to the CEDAW Convention.

The starting point of a study as described above is inevitably the relationship between human rights treaties and the reservations regime codified by the 1969 Vienna Convention on the Law of Treaties. The article will therefore first discuss the specific characteristics of human rights treaties and why these are argued to justify the application of a special reservations regime to such treaties. Subsequently, the article will critically discuss the emergence of the severability doctrine, as well as the more active role played by treaty bodies in the assessment of the incompatibility of reservations to the treaties they were established to monitor. The following chapters will focus on reservations to the CEDAW Convention specifically, starting with a more general introduction to the Convention and its reservations clause. The article will then provide a comparative analysis of the CEDAW Committee's approach to reservations and the number and type of reservations and objections made since 1981. Finally, trends and shifts in State parties' formulation of reservations and objections will be identified and discussed, as well as the Committee's fight against incompatible reservations, with a particular focus on the effects of the severability approach and more active role played by treaty bodies.

## II. Human rights treaties and the Vienna reservations regime

Human rights treaties differ from other international treaties due to certain distinctive characteristics. The most important difference was identified by the International Court of Justice in its 1951 Advisory Opinion on Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.<sup>7</sup>

In other words, human rights treaties are of interest to States' citizens, not the State itself. Reciprocity therefore plays no - or a very small<sup>8</sup> - part in a human rights treaty; the obligations are of a general non-reciprocal nature.<sup>9</sup>

Taking into consideration the need for a more flexible system of reservations, the ICJ moved away from the unanimity rule and introduced a new reservations regime, which was later codified in the 1969 Vienna Convention on the Law of Treaties (VLCT). Its provisions on reservations (articles 19 to 23) provide that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty. As human rights treaties often do not explicitly prohibit or allow reservations to its provisions, paragraph (c) is particularly important for reservations to such treaties. Within twelve months following the reservation, other States parties have the option of raising an objection to the reservation. In other words, it is up to States to assess reservations' compatibility with the treaty's object and purpose. Such an objection does not preclude the entry into force of the treaty between the objecting and reserving State, unless the objecting State explicitly determines otherwise in its objection. If the treaty does enter into force between both States, the legal effect of the objection is merely that the provisions related to the reservation do not apply between the two States to the extent of the reservation.<sup>10</sup>

The Vienna reservations regime has been the subject of criticism as it is perceived not to provide a transparent regulation of reservations to human rights treaties, particularly with regards the determination of incompatibility and the legal effects

<sup>7</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 12.

<sup>8</sup> It should be noted, however, that certain human rights treaties also include typically contractual clauses. See ILC, 'Second report on reservations to treaties by the Special Rapporteur, Mr. Alain Peller' (1996) UN Doc A/CN.4/477/Add. 1, para. 85.

<sup>9</sup> Other specific characteristics include that States are pushed to be more active through various procedures established by the treaty, such as reporting procedures and inquiry procedures. E Krivenko, *Women, Islam and International Law within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women* (Martin Nijhoff Publishers 2009) 112.

<sup>10</sup> Articles 19 to 23 VLCT.

thereof.<sup>11</sup> The lack of a direct interest for States suggests that such treaties belong to a specific regime, to which a different system of reservations should apply. In other international treaties, the objecting State can rely on the principle of reciprocity<sup>12</sup> which encourages States parties not to formulate far-reaching reservations. Due to the lack of such reciprocity in human rights treaties, the application of the Vienna reservations regime to these treaties results in the erosion of their integrity in order to ensure wide participation of States. In its 1951 Genocide Opinion, the ICJ opted for a flexible system of reservations with the aim of combining both the integrity of treaties and wide participation. As the Court itself pointed out, however, there is no balance between the obligations and rights in a human rights treaty.<sup>13</sup> Subsequently, the balance has shifted and too much emphasis is placed on the universality of human rights treaties, allowing for far-reaching reservations that are detrimental to the efficient protection of human rights. This tension between the degree of participation of States – necessary for treaties' effectiveness<sup>14</sup> – and the integrity of the convention, therefore forms a problem in international treaty law with regards to human rights treaties. It is from these considerations that the idea grew that a different reservations regime should be applied.<sup>15</sup>

### III. Determining the incompatibility of reservations: a more active role for treaty monitoring bodies

In 1951, the ICJ opted for the assessment of reservations' compatibility with the object and purpose by the States Parties individually.<sup>16</sup> It is that choice which is being questioned today. The role of treaty bodies<sup>17</sup> was not yet relevant at the time of the Genocide Opinion as the numerous multilateral human rights treaties with their monitoring bodies did not exist yet.<sup>18</sup> The attempts to adapt the reservations regime to the specific characteristics of human rights treaties today, is therefore not that surprising. The criticism does not relate to the use of the criterion of object and purpose itself, but to the lack of an objective evaluation of reservations based on that criterion. States may very well accept a reservation that is manifestly incompatible with the object and purpose of a human rights treaty due to political considerations or a general lack of interest. As human rights treaties' provisions most often remain silent on the procedure for the determination of reservations' compatibility, the establishment of treaty bodies raises the question whether such bodies are competent - and perhaps better suited - to perform that task.

Although human rights monitoring bodies initially adopted a wait-and-see attitude on the determination of reservations' incompatibility,<sup>19</sup> they have, since the 1980s, become more active in this regard. In the *Temeltasch* case,<sup>20</sup> dating back three decades, the European Commission of Human Rights declared that it had the competence to determine whether an interpretative declaration or reservation was made, as well as to determine their validity.<sup>21</sup> The same position was adopted by the Inter-American Court of Human Rights in its Advisory Opinion on *Restrictions to the Death Penalty*<sup>22</sup> and by the European Court of Human Rights in the *Belilos* case.<sup>23</sup> The chairpersons of the UN human rights treaty bodies have, since their fifth meeting in 1994, also pleaded for a more active role for treaty bodies.<sup>24</sup> An important development was the Human Rights Committee's General Comment No. 24, in which it reaffirmed treaty bodies' competence to assess the compatibility of reservations. It based such competence on two main arguments; that it is an inappropriate task for States

11 See, for example, M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 320-321.

12 It has the guarantee that it will not be bound by the provisions to which the reserving State has made a reservation, in its relationship to that reserving State.

13 [1951] ICJ Rep 12.

14 P-H Imbert, 'Reservations and Human Rights Conventions' (1981) *Human Rights Review* 28-29.

15 The differentiation between human rights treaties and other international treaties is not a new concept as it was included in the VCLT itself. Article 60 § 5 VCLT provides that in case of a material breach of a human rights treaty, this does not give other State Parties the right to suspend or terminate the treaty, which is allowed for other treaties. In other words, the special nature of human rights treaties justifies the application of special rules in this case.

16 [1951] ICJ Rep 24.

17 The term 'treaty bodies' and 'treaty monitoring bodies' in this article refers to both the UN treaty bodies and other monitoring bodies set up by a human rights treaty, such as the European Court of Human Rights. When reference is made to the UN treaty bodies, this will be explicitly mentioned as such.

18 UN human rights treaty bodies can be described as the mechanisms established to monitor the implementation of the core international human rights treaties. They are committees of independent experts, created in accordance with the provisions of the treaty that they monitor. 'Human Rights Bodies' < <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> > accessed 19 June 2013.

19 See, for example, the reserved position adopted by the Committee on the Elimination of Discrimination against Women regarding the assessment of reservations' scope, UN Committee on the Elimination of Discrimination against Women, 'Report on its third session' (1984) UN Doc. A/39/45, Vol. II, Annex III, 55.

20 *Temeltasch v. Switzerland* (1983) DR 120-153.

21 P-H Imbert, 'Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case' (1984) ICLQ 558-595.

22 *Restrictions to the Death Penalty*, Advisory Opinion OC 3-83, Inter-American Court of Human Rights Series A No 3.

23 The Secretary-General, as the depositary, had not made any remarks regarding the interpretative declarations of Switzerland when he notified the Member States of the reservations and interpretative declarations contained in Switzerland's instrument of ratification. In addition, not one of the other States Parties had requested further information from Switzerland, nor formulated an objection. *Belilos v. Switzerland* ECHR 1988 Series A no 132, para 47.

24 OHCHR, 'Report of the fifth meeting of persons chairing the human rights treaty bodies' (1994) UN Doc. A/49/537, para 30.

parties due to the lack of inter-state reciprocity in human rights treaties,<sup>25</sup> and that it is a task that the Committee cannot avoid in the performance of its functions, namely to examine States' compliance with the Convention.<sup>26</sup> However, Alain Pellet, an International Law Commission (ILC) Special Rapporteur, refuted the Committee's first argument stating that "this could at most be a ground for saying that it might be *desirable* for the permissibility of reservations to those instruments to be determined by an independent and technically qualified body, but that would not result in the existing machinery being vested with such competence if it was not provided for in the treaties by which the bodies were established."<sup>27</sup> Instead, Pellet further developed the Committee's second argument, based on the concept of *compétence de la compétence*: "treaty bodies have the competence that is vested in them by their own powers and could not perform the functions vested in them if they could not determine the exact extent of their competence vis-à-vis the States concerned, whether in examining applications by States or by individuals or periodic reports or in exercising a consultative competence."<sup>28</sup> It should also be noted that although Pellet identified the problem of coexistence of two types of control – by States and treaty bodies - it is this coexistence that was later reflected in the ILC's Guide to Practice on Reservations.<sup>29</sup> In addition, although Pellet's reasoning provides a solid base for the claim of treaty bodies to actively assess reservations' compatibility, it is important to take into account that the (non-)binding nature of such assessments depends on the nature of the monitoring body and the competences attributed to it, as explained further below.

State practice shows that few States have objected to the emerging idea of treaty monitoring bodies' competence to assess the compatibility of reservations. Switzerland, for example, did not withdraw from the ECHR, although it initially threatened to do so.<sup>30</sup> The Committee of Ministers of the Council of Europe accepted the European Commission for Human Rights' decision in the Temeltasch case<sup>31</sup> and Guatemala equally accepted the Advisory Opinion of the Inter-American Court of Human Rights in the Death Penalty case.<sup>32</sup> Only three States - the US, the UK and France - explicitly criticised the Human Rights Committee's opinion expressed in General Comment No. 24.<sup>33</sup> In addition, their remarks were related to the Committee's views on the legal consequences of incompatibility rather than its competence to make such an assessment.<sup>34</sup> The UK, however, did express concern about the Human Rights Committee using the verb "determine" in connection with the Committee's functions towards the status of reservations. Regarding its functions described in articles 40 and 41 ICCPR, as well as article 5 of the Optional Protocol, it can, however, be stated with certainty that the Human Rights Committee does not have the competence to make binding decisions, including on reservations. Where a monitoring body does not have binding powers in the first place - such as the CEDAW Committee - it cannot be justified that it would have such competence with regards the determination of the compatibility of reservations. Moreover, it is crucial to take into account the difference between the assessment by UN treaty bodies, such as the CEDAW Committee, and the decisions made by regional bodies, such as the European Court of Human Rights. Not only does the latter have the competence to make binding decisions,<sup>35</sup> such a regional system is also characterised by a greater solidarity among States and close community ties. Such characteristics are, however, missing at the global level.<sup>36</sup>

25 The Committee stated that the VLCT's provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties, as there is no inter-state reciprocity in human rights treaties and States fail to consistently object to incompatible reservations, nor do they specify a legal consequence.

26 UN Human Rights Committee, 'General Comment No 24'(4 November 1994) UN Doc PR/C/21/Rev.1/Add.6, paras 17-18. The Committee does not question the applicability of the criterion of object and purpose as codified in the Vienna Convention either.

27 Pellet acknowledges that reciprocity is less present in human rights treaties, but also notes that reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime. The lack of reciprocity therefore results in the fact that one simply cannot say here that the reservation is "established with regard to another party." This, however, does not mean that the Vienna reservations regime does not apply, according to Pellet. ILC, 'Second Report on reservations to treaties by the Special Rapporteur, Mr. Alain Pellet', Addendum 1, (1996) UN Doc A/CN.4/477/Add.1, paras 204-205, .

28 Ibid., para 206.

29 Guideline 3.2 provides that both States parties as well as treaty monitoring bodies may assess, within their respective competences, the permissibility of reservations. ILC, "Guide to Practice on Reservations to Treaties" (2011) Guideline 3.2.

30 I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: the Belilos Case' (1990) GYIL 117.

31 Committee of Ministers, Resolution DH (83) 6 (24 March 1983), *Annuaire C.E.D.H.* 1980, 5.

32 C M Cerna, 'La Cour interaméricaine des Droits de l'homme - ses premières affaires' (1983) *Annuaire Français de Droit International* 312.

33 See observations on General Comment No 24 by the US, the UK (Report of the Human Rights Committee to the General Assembly (3 October 1995, UN Doc A/50/40) and France (Report of the Human Rights Committee to the General Assembly (16 September 1996, UN Doc A/51/40).

34 See, for example, the UK's remarks: 'The United Kingdom shares the analysis that the Committee must necessarily 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.' UN Doc A/50/40, § 11.

35 See ILC Guideline 3.2.1: "A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organisation. The assessment made by such a body in the exercise of this competence has *no greater legal effect* than that of the act which contains it" (emphasis added).

36 See ILC, 'Report on the work of its forty-ninth session' (1997) UN Doc. A/52/10 para 84.

#### IV. The severability doctrine

Human rights treaties that do not contain provisions on reservations are subject to the residuary rules of the Vienna Convention on the Law of Treaties as described above. Nevertheless, it frequently occurs that although a reservation is manifestly incompatible with the treaty's object and purpose, other States parties do not formulate an objection due to a lack of interest, lack of capacity or perhaps political motives. In addition, if the objection does not preclude the entry into force of the treaty, the effects of such an objection remain limited. The severability doctrine therefore moves away from the Vienna rules on the legal effects of incompatible reservations. In the *Belilos* case,<sup>37</sup> followed by the *Weber* and the *Loizidou* cases,<sup>38</sup> the European Court of Human Rights argued that an invalid reservation can be severed from the will of the State to become a party to the treaty. Subsequently, the reserving State remains a party without the benefit of the reservation.<sup>39</sup> The Human Rights Committee also adopted this view in its General Comment No. 24, stating that "the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a 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>40</sup>

The criticism voiced by France, the US, and the UK on the severability doctrine was very sharp. The US found it completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States.<sup>41</sup> France, on the other hand, noted that agreements are governed by the law of treaties, based on States' consent. As reservations are conditions which States attach to that consent; France argued that "it necessarily follows that if these are deemed incompatible with the purpose and object of the treaty, this consent is not valid and the only outcome is that these States cannot be considered parties to the treaty."<sup>42</sup>

The ILC describes the debate on the legal effects of incompatible reservations as a repetition of the debate in 1951 between the judges of the International Court of Justice. They are, however, fundamentally different: in 1951, the ICJ was confronted with the task of striking a balance between the integrity of the convention and a wide participation, resulting in a much more flexible system of reservations. Today the aim is to limit that flexibility which resulted in the severability doctrine: the reservation does not generate any legal consequences and the State remains bound by the treaty as a whole. In its Guide to Practice on Reservations to Treaties, the ILC adopted a more cautious approach towards the severability doctrine, stating that a State party may only be considered to be bound by the treaty as a whole if it has not (explicitly or implicitly) expressed a contrary intention.<sup>43</sup> In the author's opinion, this approach seems much more acceptable in light of the fundamental rules of international treaty law. It is possible that a State's ratification of a human rights treaty was dependant on its reservation made. In that case, the severability doctrine cannot be reconciled with the principle of State consent, which is considered to be the foundation of international treaty law.<sup>44</sup> In other words, the severability approach does not take into account the consensual character constituting the very essence of any treaty commitment.<sup>45</sup> Supporters of the severability theory argue that the will to become a party to the treaty prevails over the will to make a reservation.<sup>46</sup> It is however hard to imagine that another entity than the State itself can assess its intentions at the time the State made its reservation and can reach the conclusion that the reservation was no essential element for the State to accede to the treaty. Finally, the arguments raised under the previous chapter regarding the non-binding nature of UN treaty body decisions contrary to the binding decisions at regional level

<sup>37</sup> *Belilos v. Switzerland* ECHR 1988 Series A no 132. For an overview of cases in which the European Court of Human Rights, the European Commission of Human Rights and the Inter-American Court of Human Rights have applied this theory, see ILC, 'Second Report on reservations to treaties by the Special Rapporteur, Mr. Alain Pellet,' Addendum 1 (1996) UN Doc A/CN.4/477/Add.1, 4-5, footnotes 80 en 81.

<sup>38</sup> *Loizidou v. Turkey*, ECHR 1995 Series A no 310, para 96.

<sup>39</sup> The Court had already considered the severability doctrine in the Certain Norwegian Loans case and the Interhandel case, but it was only judge Lauterpacht who expressed his preference for this theory in his separate opinions. See Certain Norwegian Loans Case (France v. Norway) (Preliminary Objections) [1957] ICJ Rep 56-59; ICJ, Interhandel Case (Switzerland v. United States of America) (Preliminary Objections) [1959] ICJ Rep 116-117.

<sup>40</sup> UN Human Rights Committee, 'General Comment No 24' (4 November 1994) para 18. The wording used by the Committee ("normal consequence" and "will generally be severable") indicates that there may be exceptions to this rule.

<sup>41</sup> UN Human Rights Committee, 'Report on its fifty-second, fifty-third and fifty-fourth session' (1995) UN Doc. A/50/40, 134, para 5.

<sup>42</sup> UN Human Rights Committee, 'Report of the Human Rights Committee' (1996) UN Doc A/51/40, 119, para 18.

<sup>43</sup> ILC, 'Guide to Practice on Reservations to Treaties', Guideline 4.5.3 § 2.

<sup>44</sup> F HORN, Reservations and Interpretative Declarations to Multilateral Treaties (North Holland 1988) 120; C TOMUSCHAT, 'Admissibility and legal effects of reservations to multilateral treaties - comments on Articles 16 and 17 of the International Law Commission's 1966 Draft Articles on the Law of Treaties' (1967) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 466; IGH, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 21.

<sup>45</sup> ILC, 'Second Report on reservations to treaties by the Special Rapporteur, Mr. Alain Pellet,' Addendum 1 (1996) UN Doc A/CN.4/477/Add.1, para 228. Article 38 of the ICJ Statute, for example, refers to 'international conventions, whether general or particular, establishing rules expressly recognised by the contesting states'.

<sup>46</sup> D BOWETT, 'Reservations to non-restricted multilateral treaties' (1976-1977) BYIL 76.

apply here as well. Nevertheless, this theory is highly favoured among treaty bodies today and the chance that their views on the matter will change in the near future is very small.

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

The first steps towards the CEDAW Convention, were taken in 1963, when the General Assembly (GA) adopted Resolution 1921 (XVIII), in which it requested the Economic and Social Council to invite the Commission on the Status of Women to prepare a draft declaration that would combine in a single instrument international standards articulating the equal rights of men and women.<sup>47</sup> Through the declaration, the GA aimed to implement the relevant provisions of the UN Charter, which provided for the equal rights of all persons regardless of their sex. Despite the increased awareness about the importance of the position of women in society, it was undeniable that discrimination against women remained an issue. Subsequently, the Commission on the Status of Women considered the drafting of a binding treaty in 1972, which would give normative strength to the provisions of the Declaration. Seven years later, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the GA and entered into force on 3 September 1981. Today, 187 States have ratified the Convention. Its added value, compared to previous treaties on the rights of women,<sup>48</sup> was that it aimed to regulate all aspects of women's life. The definition of "discrimination against women" as provided in the Convention contributes to this broad scope of the Convention, as it refers to "*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, economic, social, cultural, civil or any other field."<sup>49</sup> As a consequence, in cases not falling under one of the articles defining specific rights of women, it should be possible to grant protection on the basis of article 1 exclusively.<sup>50</sup>

Article 17 of the CEDAW Convention established the Committee on the Elimination of Discrimination against Women (the Committee), for the purpose of considering the progress made in the implementation of the Convention. The Committee consists of 23 experts on women's rights from around the world. It reports annually, through the Economic and Social Council, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties.<sup>51</sup> The Committee initially differed from other UN treaty bodies in that it held its meetings in New York and was serviced by the Division for the Advancement of Women, not the Office of the High Commissioner for Human Rights (OHCHR). It was not until 2008 that it moved to Geneva and was serviced by the OHCHR.<sup>52</sup> The Committee's monitoring tasks also expanded over time. Initially, the monitoring of the Convention's implementation was limited to an evaluation of States Parties' periodic reports on the legislative, judicial, administrative, or other measures which they have adopted to give effect to the provisions of the Convention and on the progress made in this respect.<sup>53</sup> The Optional Protocol to the Convention, which entered into force on 22 December 2000, introduced two new procedures; a communications procedure which allows women, or groups of women, to submit individual claims of violations of rights protected under the Convention to the Committee,<sup>54</sup> and an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights.<sup>55</sup>

Article 28 of the CEDAW Convention regulates the making of reservations. During the negotiations on this provision,

<sup>47</sup> UN General Assembly Resolution 1921 (XVIII). This declaration was adopted on 7 November 1967. The concept of "women's rights" emerged much earlier though. For an overview of the historic developments regarding women's rights, see A.S. Fraser, 'Becoming Human: the Origins and Development of Women's Human Rights' in B. Lockwood, *Women's rights: a 'Human rights quarterly' reader*, Baltimore, John Hopkins University Press, 2006, 3-56. For an overview of institutional developments within the UN, see E. Ridell-Dixon, "Ideas, institutions and the evolution of women's human rights" in R. Thakur, *International commissions and the powers of ideas*, Tokio, United Nations University Press, 2005, 246-265.

<sup>48</sup> Such as the 1951 Equal Remuneration Convention and the 1953 Convention on the Political Rights of Women.

<sup>49</sup> Article 1 CEDAW Convention. Emphasis added.

<sup>50</sup> E Krivenko (n 5) 26.

<sup>51</sup> Articles 17 and 21 CEDAW Convention.

<sup>52</sup> For a more detailed overview of this development, see I Boerefijn, 'Article 17' in M A Freeman, C Chinkin and B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, 2012); H B Schöpp-Schilling, 'Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination Against Women' (2007) *Human Rights Law Review* 201-224.

<sup>53</sup> Article 18 CEDAW Convention.

<sup>54</sup> Article 2 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted on 6 October 1999, entry into force on 22 December 2000) 2131 UNTS 83. States who become parties to the optional protocol recognise the competence of the Committee to receive and consider communications under the protocol (Article 1 Optional Protocol). Articles 3 to 7 further contain procedural rules and admissibility criteria of such individual communications, including that all available domestic remedies have to be exhausted.

<sup>55</sup> Articles 8 and 9 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

several proposals were on the table, including a Danish proposal to use the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as the basis for CEDAW's reservations provision.<sup>56</sup> In the end, it was decided to include an article on reservations based on article 19 VCLT, providing that "a reservation incompatible with the object and purpose of the present Convention shall not be permitted." The Convention's object and purpose was later clarified by the CEDAW Committee, namely "to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms."<sup>57</sup> The convention does not address the legal consequences of invalid reservations, nor the consequences of an objection based on reservations' incompatibility. Subsequently, the residual rules of the Vienna Convention apply. Contrary to the Convention, reservations are not permitted to the Optional Protocol,<sup>58</sup> which explains the opt-out clause in article 10.<sup>59</sup>

## VI. The CEDAW Committee's fight against reservations

### A. The Committee's statements and general recommendations on reservations

Initially, the Committee adopted a rather hesitant approach towards the large number of incompatible reservations. One of the reasons was the advice the Committee had received in 1984 from the UN Office of Legal Affairs, stating that "the functions of the Committee do not appear to include a determination of the incompatibility of reservations."<sup>60</sup> Since 1987 it has, albeit quite carefully at first, encouraged States to limit their reservations and called for the reconsideration of reservations with a view to withdrawing them.<sup>61</sup> The Committee adopted General Recommendations No. 4 (1987) and No. 20 (1992) on reservations and called for the particular withdrawal of reservations to article 16 in General Recommendation No. 21 on equality in marriage and family relations (1994).

In 1995, the Committee further clarified its position on reservations in its report on the Fourth World Conference on Women, in which it noted that primary among substantive reservations are those relating to article 2, the core provision of the Convention. Nevertheless, the Committee's wording remains quite cautious as it states that "some reservations thus indeed *appear* to be inconsistent with the Convention's object and purpose". (emphasis added) Further on in the report, the Committee even considers that the pattern of reservations is a manifestation of the Convention's significance as an instrument of change that living up to its standards requires an unusual level of national and cultural self-examination and response and notes that even reserving States are brought within its monitoring system.<sup>62</sup> With regards to the ability for the Committee itself to assess reservations' compatibility with the convention's object and purpose, the Committee stated that it had noted with approval General Comment No. 24 by the Human Rights Committee (No. 24). Nevertheless, it went on to say that it "considers that it *may* be up to the Committee itself to make this determination."<sup>63</sup>

The Committee also adopted a statement on reservations on the occasion of the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights in 1998. The Committee reiterated the importance of the withdrawal of reservations, particularly those to articles 2 and 16. With regards to the first, the Committee stressed that it is central to the objects and purpose of the Convention.<sup>64</sup> Regarding article 16, on marriage and family life, the Committee expressed particular concern about reservations to this article in combination with a reservation to article 2. More specifically, it noted that

56 L REHOF, Guide to the *Travaux Préparatoires* of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Martinus Nijhoff Publishers 1993) 236. Article 20 § 2 ICERD provides that "A reservation incompatible with the object and purpose of this Convention shall not be permitted, ... A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."

57 Committee on the Elimination of Discrimination against Women, 'General Recommendation 25' (2004) UN Doc A/59/38(SUPP) Annex I, para 4.

58 Article 17 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

59 Article 10 § 1 Optional Protocol provides that "Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognise the competence of the Committee provided for in articles 8 and 9" (the inquiry procedure).

60 Legal opinion submitted by the Office of Legal Affairs concerning the implementation of article 28 of the Convention (1984) UN Doc. CEDAW/C/2001/II/4 (2001), Annex VI, 33-34.

61 The fact that it was not until 1987 that the Committee issued a General Recommendation on reservations was partly caused by the Cold War's impact. There was disagreement on the meaning of article 21 CEDAW, regarding the possibility to make suggestions and general recommendations to the General Assembly, even though these should be independent. Subsequently, the Committee could not for a long time make general recommendations. H B Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: an unresolved issue or (no) new developments?' in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff Publishers 2004) 13-14.

62 Committee on the Elimination of Discrimination against Women, 'Report on the Fourth World Conference on Women' (1995) UN Doc A/CONF.177/7 paras 48 and 52.

63 *ibid.* Emphasis added.

64 Committee on the Elimination of Discrimination against Women, 'Report on its nineteenth session' (1998) UN Doc. A/53/38/Rev.1 para 16.

“reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.”<sup>65</sup> It further discussed its own role regarding reservations and its responsibilities as the body of experts charged with the consideration of periodic reports submitted to it, thereby referring to the views of the Special Rapporteur who considers that control of the permissibility of reservations is the primary responsibility of the States parties. Although the Committee then expressed concern regarding States’ reluctance to withdraw reservations after they have been objected to by other States Parties, it did not question that it is indeed States individually who are to assess the compatibility of reservations and formulate objections.<sup>66</sup>

In 2010, the Committee issued General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. The Committee herein explicitly states that it considers reservations to article 2 or to subparagraphs of article 2 to be, in principle, incompatible with the object and purpose of the Convention and thus impermissible under article 28, paragraph 2.<sup>67</sup> Finally, in 2013 the Committee addressed the issue of reservations again in its most recent General Recommendation No. 29 on the economic consequences of marriage, family relations and their dissolution (article 16).<sup>68</sup> Although it mainly referred to its earlier remarks on reservations to article 16 in its 1998 statement on reservations, its reiteration of the incompatibility of such reservations is not that surprising considering the significant increase in reservations to this particular provision in the last decade, as will be discussed further below.

#### *B. The Committee’s views on reservations in its concluding observations*

During the evaluation of States’ periodic reports, the Committee enters into constructive dialogue with the State party and makes concluding comments routinely expressing concern at the entry of reservations to articles 2 and 16 or the failure of States parties to withdraw or modify them.<sup>69</sup> During the early stages of its evaluation of State reports, however, the Committee again was rather hesitant in assessing reservations’ compatibility with the Convention’s object and purpose. At its sixth session in 1987, for example, the Committee expressed concern about reservations made by the Republic of Korea, France,<sup>70</sup> and Bangladesh.<sup>71</sup> Regarding the reservation made by Spain under article 7, the Committee merely hoped it would be reconsidered soon.<sup>72</sup> Although France’s reservation related to one of the core provisions as well and other States parties objected to the reservation made by Bangladesh, the Committee only considered the reservation made by the Republic of Korea to be incompatible with the Convention’s object and purpose.<sup>73</sup>

Despite a cautious start, practice shows that the Committee did adopt a more active approach with regard to reservations, particularly those to the core provisions of the convention. The Committee has, during the review of many periodic reports, determined that reservations to articles 2, 7, 9 and 16, as well as general reservations,<sup>74</sup> are incompatible with the Convention’s object and purpose.<sup>75</sup> Several States have, subsequent to such an assessment, reviewed and withdrawn (part of) their reservations.<sup>76</sup> In its concluding comments on Morocco’s combined third and fourth periodic reports, for example, the Committee “encouraged the State party to continue to take the necessary steps for the withdrawal of all its remaining declarations and reservations to articles 2 and 16 to the Convention which, in the opinion of the Committee, go against the object and purpose of the Convention, in order for Moroccan women to benefit from all the Conventions’ provisions.”

65 ibid para 12.

66 ibid. para 19.

67 Committee on the Elimination of Discrimination against Women, ‘General Recommendation 28’ (2010) para 41.

68 Committee on the Elimination of Discrimination against Women, ‘General Recommendation 29’ (2013) paras 54-55.

69 ibid. para 23.

70 Report of the Committee on the Elimination of Discrimination on its sixth session (1987) UN Doc A/42/38, para 394.

71 ibid. para 512.

72 ibid. para 260.

73 ibid. para 134.

74 See the Committee’s consideration of Libya’s initial report: Report of the Committee on the Elimination of Discrimination against Women on its thirteenth session (1994) UN Doc A/49/38, para 179.

75 See the Committee’s concerns regarding Morocco’s reservation to article 2: Report of the Committee on the Elimination of Discrimination against Women on its fortieth session (2008) UN Doc A/ 63/38(SUPP) para 226; see the Committee’s concern regarding the Maldives’s reservation to article 7 (a): Report of the Committee on the Elimination of Discrimination against Women on its thirty-seventh session (2007) UN Doc. A/62/38(SUPP) para 217; see the reservation made by Syria to article 9: Report of the Committee on the Elimination of Discrimination against Women on its thirty-eighth session (2007) UN Doc. A/62/38(SUPP) 161, para 122; Consideration by the Committee on the Elimination of Discrimination against Women of the combined initial and second periodic reports of Bahrain, Concluding Comments (2008) UN Doc. CEDAW/C/BHR/CO/2, para 16; Report of the Committee on the Elimination of Discrimination against Women on its fortieth session (2008) UN Doc. A/63/38(SUPP), para 226.

76 Libya, for example, modified its general reservation the year after the Committee had found its reservation incompatible.

Although Morocco indicated in its reports that it had the intention of withdrawing certain reservations, it made no mention of a potential withdrawal of its reservation to article 2.<sup>77</sup>

#### C. The Committee's views on reservations in the individual complaints procedure

In 2008, the Committee adopted Decision 41/I, in which it explicitly recognized its competence to determine the permissibility of reservations not only in relation to the reporting procedure under article 18 of the Convention, but also in relation to the individual communication and inquiry procedures under the Optional Protocol.<sup>78</sup> Unlike the Human Rights Committee,<sup>79</sup> however, the CEDAW Committee has not addressed the question of the consequences of invalid reservations. It had the opportunity to address the issue on several occasions within the individual complaints procedure, but has so far neglected to do so. In an individual complaint against France, for example, the authors based their complaint on the violation of the rights provided in article 16 § 1 (g) to which France had made a reservation. The Committee concluded that the provision did not apply to the authors as the provision's beneficiaries are only married women, women living in de facto union and mothers, which the authors were not. The Committee therefore did not consider it necessary to address the issue of the reservation to article 16, paragraph 1 (g), entered by France.<sup>80</sup> It is thus still uncertain what approach the Committee will adopt regarding incompatible reservations within the framework of the individual complaints procedure; particularly whether the Committee will take into account impermissible reservations or rather consider the State to be bound by the treaty in its entirety.

### VII. Analysis of reservations to the CEDAW Convention

#### A. The number of reservations made upon ratification, accession or succession

With the emergence of the severability doctrine and the more active role taken up by treaty bodies, one could expect States to be less likely to formulate reservations to a human rights treaty. A comparison of the number of reservations made upon accession during the first decade subsequent to the adoption of the CEDAW Convention and the last decade, however, shows that this has not been the case.<sup>81</sup> From 1980 to 1990, a hundred States became a party to the Convention, of which 38 States formulated a reservation. Fifteen reservations related only to article 29 (1) of the Convention, and can, therefore, be considered permissible, as will be explained further below. In comparison, from 2002 to 2012, 20 States became a party to the CEDAW Convention, of which no less than half made a reservation. Only one reservation was made only to article 29 (1).<sup>82</sup> The number of reservations formulated by the States Parties in total, however, practically remained the same: 38 percent of States parties had formulated a reservation in 1980, while 38.5 per cent of all States parties have formulated a reservation in 2012.<sup>83</sup> The most recently acceded States parties are thus clearly more inclined to formulate reservations to the Convention's provisions. The application of discriminatory customary law or religious norms in the group of States that have ratified the treaty in the last decade has much to do with this trend. This topic has, however, falls outside the scope of this article.

As Cook noted in 1990, "reservations to one article of the CEDAW Convention are more questionable when made by states that have also reserved other articles."<sup>84</sup> An overview of reservations made, however, shows a trend of States parties who formulate a reservation to one of the core provisions, more frequently making a reservation to one or more of the other core provisions as well. Between 1980 and 1990, 10 out of 38 reservations were made to more than one core provision, whereas

77 Report of the Committee on the Elimination of Discrimination against Women on its fortieth session (2008) UN Doc A/ 63/38(SUPP) para 226.

78 Committee on the Elimination of Discrimination against Women 'Decision 41/I' (2008), UN Doc. A/63/38, Part II, Ch 1.

79 See the case of *Kennedy v. Trinidad and Tobago*, in which the Human Rights Committee applied the severability rule to the reservation made by Trinidad and Tobago.

80 Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention, Communication No 12/2007 (2007) UN Doc. CEDAW/C/44/D/12/2007, 14 para 11.10. The Committee came to a similar conclusion in a second complaint against France based on a violation of article 16 § 1 (g): Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention, Communication No 13/2007 (2007) UN Doc. CEDAW/C/44/D/13/007, 12-13. See also the Committee's Communication No 38/2012 (UN Doc. CEDAW/C/53/D/38/2012), regarding a complaint against the UK. The author based its complaint in part on a violation of article 9, to which the State had made a reservation. As the Committee found that the author had failed to exhaust domestic remedies and had not established that the application of remedies in the State party was unreasonably prolonged or unlikely to bring effective relief, it did not elaborate on the legal effects of the reservation either.

81 All reservations made to the CEDAW Convention, as well as objections that are discussed here are available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

82 The percentage of States parties formulating a reservation upon accession thus increased from 38 per cent between 1980 and 1990, to 50 per cent between 2002 and 2012.

83 This number does not take into account withdrawals of reservations between 1980 and 2012. These will be discussed further below.

84 "For example, reservations to article 16 on family life are more suspect when made by states that have reserved article 2 on general obligations, article 9 on nationality, and article 15 on legal capacity." Cook (n 3) 706.

between 1995 and 2012, 14 out of 24 reservations related to more than one core provision.

#### B. *The types of reservations*

It is important not only to consider the number of reservations made, but also the type of reservations. Many States, for example, have formulated a reservation to article 29 (1) regarding the submission to arbitration (and potentially the ICJ) of disputes on the application of treaty provisions. As article 29 (2) explicitly allows for States to make reservation to the first paragraph, these reservations are compatible with the Convention's object and purpose. General reservations, on the other hand, cannot be considered compatible.<sup>85</sup> The scope of such reservations is very unclear and therefore its consequences for the implementation of the Convention are very unpredictable. In Saudi Arabia's reservation, for example, it states that "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".<sup>86</sup> Since the Convention's entry into force, 17 States parties formulated such a general reservation.<sup>87</sup> From 1991 to 2001, 6 out of 24 reservations were general reservations.<sup>88</sup> From 2002 to 2012 another 3 out of 10 reserving States formulated a general reservation.<sup>89</sup> Considering that between 1980 and 1990, only 8 out of a total of 38 reservations were general reservations, this demonstrates a considerable increase in the number of general reservations in relation to the total number of reservations made during the last decade.

An increasing number of States parties also formulated a reservation based on the fact that all, or certain provisions of, the Convention contradict with national legislation or practice. The problem that arises here is not necessarily that the reservation relates to the Convention as a whole, but that they conflict with the principle that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>90</sup> Nevertheless, such reservations have been made numerously by the most recent ratifying States. Between 2002 and 2012, 9 out of 10 reservations referred to the States' internal laws and customs, six of which made reference to the Islamic Sharia.<sup>91</sup> When referring to national legislation or practice, the exact scope of the reservation is often debatable as well. As Norway points out in its objection to the reservation made by the Libyan Arab Jamahiriya, "a reservation by which a State party limits its responsibilities under the Convention by invoking religious law (Shariah), which is subject to interpretation, modification, and selective application in different states adhering to Islamic principles, may create doubts about the commitments of the reserving state to the object and purpose of the Convention."

As mentioned above, the Committee also finds reservations to the core provisions of the Convention to be incompatible with its object and purpose. It therefore noted in its reporting guidelines that "States parties that have entered general reservations which (...) are directed at articles 2 and/or 7, 9 and 16 should report on the interpretation and the effect of those reservations."<sup>92</sup> Despite the Committee's calls to withdraw reservations to article 2 and its reiteration of this provision's importance several statements and General Recommendations, there still remain 19 reservations to article 2 today. Out of 38 reserving States, 6 formulated a reservation to article 2 from 1980 to 1990, whereas 6 out of 10 reserving States made such a reservation from 2002 to 2012. A significant increase can also be identified in reservations to articles 9 and 16, with 70 per cent of reservations made between 2002 and 2012 relating to these core provisions. During that same period, 7 out of 10 States parties made a reservation to article 16, in spite of the CEDAW Committee's 1998 statement on reservations as described above.

#### C. *Modifications and (partial) withdrawals of reservations*

As became clear from the Committee's statements on reservations, its aim was not only to prevent incompatible reservations, but also to encourage States to re-evaluate and withdraw existing reservations. Since its entry into force, 40 Member States have partially withdrawn, completely withdrawn or modified their reservation to the CEDAW Convention. It should be

<sup>85</sup> n 70.

<sup>86</sup> (emphasis added)

<sup>87</sup> It should be noted that Germany, the Netherlands and Spain also formulated a general declaration.

<sup>88</sup> These were formulated by Lesotho, Malaysia, Mauritania, Pakistan, Saudi Arabia and Singapore.

<sup>89</sup> These were formulated by Brunei Darussalam, the Cook Islands and Oman.

<sup>90</sup> Article 27 VCLT.

<sup>91</sup> These States parties are Bahrain, Brunei Darussalam, Oman, Qatar, Syrian Arab Republic and United Arab Emirates.

<sup>92</sup> Reporting guidelines of the Committee on the Elimination of Discrimination against Women, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/AnnexI.pdf>.

noted, however, that not all modifications have been accepted by all States parties, leaving the initial reservation unchanged.<sup>93</sup> Fifteen States have withdrawn their reservation entirely and 25 have modified or partially withdrawn their reservation, several of which on more than one occasion. From 1980 until 1990, 7 States parties partially or completely withdrew their reservation(s), from 1991 to 2001 another 31 States parties did so, and finally from 2002 to 2012, a total of 18 States parties withdrew (part of) their reservations.<sup>94</sup> In other words, there has been a considerable increase in modifications and withdrawals of existing reservations in the last two decades. Although it is particularly from the 1990s onwards that States have started to withdraw or modify their reservations, the largest number of withdrawn or modified reservations are those that were formulated by the first States parties to the Convention. More precisely, close to two thirds of reservations made between 1980 and 1990 have been (partially) withdrawn or modified. In comparison, only 14 of the reservations made during the two following decades have so far been withdrawn or modified.

Despite the importance of article 2 as the very essence of the obligations of States parties under the Convention,<sup>95</sup> only three states have so far reconsidered their reservations to this article; Malaysia, the Cook Islands and Lesotho. The first two withdrew their reservations to article 2 (f) in 1998 and 2007 respectively. The latter modified its reservation to article 2, yet its reservation to the article still remains in the sense that the State does not consider itself bound by it to the extent that it conflicts with its constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship. It thus seems that the Committee's calls to reconsider reservations to this provision seem to have had little effect so far.

## VIII. Analysis of States parties' objections

### A. The number of objections

States Parties have the option of accepting a reservation – explicitly or implicitly – or to formulate an objection to it, thereby potentially excluding the entry into force of the convention between itself and the reserving State.<sup>96</sup> The CEDAW Committee itself recognizes and appreciates the positive impact that the use of this procedure can have in encouraging States to withdraw or modify reservations and the empowering effect these objections have for women in the State party. It even noted that it is optimistic that more States parties will rigorously review and object to impermissible reservations to the Convention. As the ILC's Special Rapporteur, Alain Pellet, points out: 'objections by States are not only a means of exerting pressure on reserving States, but also serve as a useful guide for the assessment of the permissibility of a reservation by the Committee itself.'<sup>97</sup>

The majority of States Parties to the CEDAW Convention, however, do not consistently formulate objections to incompatible reservations. Only 24 out of 187 States parties to the Convention have formulated objections against reservations by other States. Together, they have formulated 223 objections to reservations made by 36 States parties. In other words, as 72 States in total formulated a reservation to the Convention, objections were only made to half of them. In addition, many objecting States object to one reservation they find incompatible, yet not to another – very similar – reservation, which other States Parties do find incompatible.<sup>98</sup> This shows the relativity of the criterion of object and purpose when determined by States Parties individually. Nevertheless, the number of objections made to reservations to CEDAW has increased immensely. From 1980 to 1990, 7 States formulated 49 objections to incompatible reservations. From 2002 to 2012, 23 States together formulated 116 objections. The number of objecting States has thus more than tripled. The increase in objections is also

93 Withdrawing reservations, even partially, is allowed at any time (see article 28 § 3 CEDAW). Modifications, however, are deemed to be new reservations made after ratification as they may equally expand the scope of the reservation rather than limit it. The Secretary-General therefore circulates the text of the modified reservation to all States Parties and it will only be accepted if no objections are made within 90 days. In other words, all States parties need to (tacitly) accept the modification. This was the case for the modifications by Malaysia and the Maldives. Objections were made to both, yet the objection to the Maldives' modification was made after the time limit of 90 days had expired. The objection by France, however, to the modification by Malaysia, resulted in the modification not formally being accepted.

94 It should be noted that although several States (partially) withdrew their reservations at several times, they were counted only once within each time period of ten years.

95 Committee on the Elimination of Discrimination against Women, 'General Recommendation 28' (2010) para 41.

96 In addition, there are notifications and communications of the Secretary General; reactions by States formulated after the time limit of 12 months, which will further not be taken into account for the analysis of objections to CEDAW unless explicitly stated. These can be found in the United Nations Treaty Series under "end notes" instead of objections. Their content and form, however, is hardly any different from objections. Communications are actual objections that were formulated too late (reference is made to the word "objects" or "objection"). Krivenko (n 5) 192. These reactions to reservations do not have the same legal consequences as an actual objection. ILC, 'Report of the International Law Commission on the work of its sixtieth session' (2008) UN Doc A/63/10, 221.

97 Committee on the Elimination of Discrimination against Women, 'Report on its nineteenth session' (1998) UN Doc. A/53/38/Rev.1, paras 21-22.

98 Belgium, for example, formulated an objection to Brunei's, Oman's and Kuwait's reservations, stating that they are incompatible with the object and purpose of the Convention, yet fails to formulate objections to the many similar reservations made by other States.

striking considering that from 2002 to 2012, a much smaller number of States ratified the convention.

#### B. *The types of objections*

Nearly all objecting States specify that they find the reservation to which they object to be incompatible with the object and purpose of the treaty. Only three States have refrained from doing so: Denmark,<sup>99</sup> France<sup>100</sup> and the United Kingdom of Great Britain and Northern Ireland.<sup>101</sup> It is only the latter, however, who has not made any reference to the reservations' compatibility with the object and purpose of the Convention in any of its objections. The lack of a more detailed assessment of reservations' compatibility in its objections is particularly remarkable considering its criticism on the views of the Human Rights Committee regarding the competence of treaty bodies to make such an assessment.

An analysis of the content of objections shows that States' motivation to formulate an objection varies and has evolved over time. States have become much more specific in their objections and have more often identified their reasons for the objection. Of the objections made between 1980 and 1990, only Germany, Mexico and Norway clarified that they found the reservation too general and therefore its extent unclear.<sup>102</sup> In addition, only Mexico specified in all its objections that the reservation would inevitably lead to discrimination against women in practice. Finally, only Denmark noted in its objection to the reservation made by the Libyan Arab Jamahiriya that the reserving State may not invoke the provisions of its internal law as justification for failure to perform a treaty. Between 2002 and 2012, on the other hand, all objecting States specified in several or all of their objections that they find the reservation's extent to be unclear. In addition, 11 out of 23 objecting States noted in one or more of their objections that the reservation would lead to a situation of discrimination against women in practice. Three objecting States – Finland, Norway and Poland – clarified that a reserving State may not invoke internal law as justification to not comply with the Convention's provisions.<sup>103</sup> Another reason frequently referred to in States' objections since 2000 is the fact that the reservation is incompatible as it relates to the Convention's "core provisions."

As explained above, when objecting to a reservation, States parties have the option to preclude the entry into force of the treaty between themselves and the reserving State. Most States objecting to reservations to the CEDAW Convention, however, explicitly state that the reservation is not an obstacle for the entry into force of the Convention. Only Denmark, Finland, Norway<sup>104</sup>, France,<sup>105</sup> and Sweden,<sup>106</sup> remained silent on this matter. It should be noted that the objection does not preclude the entry into force of the treaty between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State. So far, only Sweden has done so in its objection against the reservation made by the Republic of the Maldives. Nevertheless, despite the lack of reciprocity and self-interest for States when it comes to human rights treaties, many objecting States refer in their objections to the fact that it is in their common interest that treaties to which they have chosen to become parties also are respected, as to object and purpose, by other parties. Sweden also points out that:

The reason why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations, made in respect of the Convention on the elimination of all forms of discrimination against women, do not only cast doubts on the commitments of the reserving states to the objects and purpose of this Convention, but moreover, contribute to undermine the basis of international contractual law.<sup>107</sup>

It becomes clear from the objections made, that objecting States are also increasingly considering incompatible reservations to be severable. In fact, 71 of the objections made since 1980 implicitly or explicitly follow the severability approach. They are formulated by 15 of the 24 objecting States.<sup>108</sup> A large number of objecting States note that the Convention "will enter

99 Cf. its objection of 3 July 1990 to the initial reservation made by the Libyan Arab Jamahiriya.

100 Cf. its objections of 26 June 2001 and 4 March 2002 to reservations made by Saudi Arabia and the Democratic People's Republic of Korea respectively.

101 It should be noted, however, that States do not have the obligation to clarify their motivation to object to a reservation.

102 These are the objections made by Germany and Mexico.

103 Finland made such a clarification in almost all of its objections formulated during that period.

104 In their objections to Libya's reservation.

105 In its objection to the reservation made by the Democratic Republic of Korea.

106 In its objections to reservations made by Thailand, Tunisia, Bangladesh, Brazil, Egypt, Mauritius, Jamaica, Republic of Korea, New Zealand, Iraq, Malawi, Libya, Jordan, Kuwait, Lebanon and Niger.

107 See Sweden's objections against reservations made by Thailand, Tunisia, Bangladesh, Brazil, Egypt, Mauritius, Jamaica, Republic of Korea and New Zealand in 1986.

108 These objecting States are Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, Greece, Latvia, the Netherlands, Norway, Portugal, Slovakia, Spain and Sweden.

into force in its entirety,” while others add that this will occur “without the reserving State benefiting from the reservation. Certain objecting States also mention that the incompatible reservation is “null and void” or has “no legal force.” It is striking that every single one of these objections date from after 1994. Certain objecting States, however, consider the incompatible reservation severable in one objection, while they remain silent on the matter in other objections. In the case of Estonia, for example, this could be due to the fact that the State has only recently decided to support such severability in its objections, as it has only stated that the Convention will enter into force “in its entirety” in its last objection formulated in 2010 to the reservation made by Qatar. For certain other States, however, this is not the case. Belgium, for example, noted that the reserving State “will not benefit from its reservation” in its objections in 2007 formulated against reservations made by Brunei Darussalam and Oman. Three years later, in its objection to the reservation made by Qatar, Belgium merely notes that the reservation “shall not preclude the entry into force of the Convention between the Kingdom of Belgium and Qatar.”<sup>109</sup> The Netherlands, on the other hand, a Member State who has objected to many incompatible reservations, has only referred to the reserving State not benefiting from its reservation in its objection to the reservation made by the United Arab Emirates. And although Germany has formulated a large number of objections as well, it has so far never specified the legal effects of an invalid reservation.

## IX. Conclusion

The overview of the CEDAW Committee’s fight against reservations shows that it has become more active regarding the assessment of reservations’ incompatibility, albeit not to an extent which compares to the active approach adopted by the Human Rights Committee. The wording used by the CEDAW Committee in its 1995 report on the Fourth World Conference on Women is particularly striking and reflects its initial hesitation regarding its competence in this regard. Although it did not immediately express agreement with the claims of other treaty bodies regarding the need to change the reservations system and the assessment of incompatibility by States individually, its work does demonstrate a gradual shift towards a more consistent determination of reservations’ incompatibility in its statements, general recommendations, and concluding observations. That shift is particularly well reflected in its Decision 41/I, when it finally explicitly recognized its competence to determine reservations’ permissibility. In other words, the CEDAW Committee has slowly but surely taken up a more active role with regard to reservations and today makes its views on this issue very well known to States parties. It has firmly and consistently reiterated the importance of the Convention’s core provisions and the need for States parties to withdraw incompatible reservations various times, particularly since the late nineties. Its recent General Recommendations (No 28 and No 29), in which it emphasizes that reservations to articles 2 and 16 of the Convention are impermissible, also show that the issue of reservations remains high on the Committee’s agenda today. Regarding the consequences of incompatible reservations, however, the Committee has not been as outspoken as certain other treaty bodies. In fact, it has neglected to address the question of the legal consequences of impermissible reservations altogether. Although it had the opportunity to make its views on this issue clear within the framework of the individual complaints procedure, it chose not to do so.

Whether the change in the Committee’s approach to reservations has been sufficient to solve the problem of incompatible reservations to the CEDAW Convention is a different question. The analysis of reservations above clearly demonstrates that new States parties have not become more willing to refrain from making far-reaching reservations upon accession. On the contrary, not only has the number of reservations in relation to the number of ratifying States increased significantly, so have the reservations made to the core provisions, which constitute the *raison d’être* of the Convention. In addition, many of the most recent States parties formulate general reservations, making it impossible to determine the extent to which such States undertake the obligation to comply with the treaty’s provisions. As such reservations have become even more problematic since the beginning of the 21<sup>st</sup> century, it is obvious that the newly claimed competence of treaty bodies to determine the incompatibility of reservations has not had much of an effect on new States parties to the CEDAW Convention. Nevertheless, it can be argued that the CEDAW Committee’s determination of reservations’ incompatibility has had a positive impact on those States who ratified the Convention during the two decades after its entry into force. Its work has resulted in many more withdrawals and modifications of reservations since the 1990s, as well as an enormous increase in objections made by other States parties.

<sup>109</sup> The same can be said for objections made by Finland: although it has stated in multiple previous objections that the convention will enter into force “without the reserving State benefitting from the reservation,” it did not do so in its objection to the reservation made by Qatar. Greece as well, explicitly stated that the Convention would enter into force “in its entirety” between itself and Bahrain in 2003, but has not done so in its later objections to reservations made by the Syrian Arab Republic, the United Arab Emirates, Oman and Brunei Darussalam.

Although the number of States parties formulating objections to reservations they find incompatible still remains quite limited, this group of States has, since 2002, formulated three times as many objections as they did during the first ten years subsequent to the Convention's entry into force. The analysis of objections also shows States parties increasingly following the severability approach in their objections, which provide that the Convention will "enter into force in its entirety" or "without the State benefiting from its reservation(s)." The fact that certain States, however, object to one reservation in this manner, yet do not seem to apply the severability principle in other objections, once again shows the relativity that is inherent to a system of evaluation by States parties individually.

The overall evolution of reservations to the CEDAW Convention, taking into account the severability doctrine and the more active role played by the Committee, is thus characterized by both a positive and a negative trend. On the one hand, reservations made shortly after its entry into force are being reconsidered by States parties more frequently, while a number of States have themselves also become much more active in objecting to incompatible reservations. On the other hand, these positive effects are countered by the large number of far-reaching reservations made recently by States upon accession. Although it has been argued by treaty bodies and scholars that the assessment of reservations' compatibility is not an appropriate task for States, it cannot be denied that more and more States have taken up their responsibility in the current system of reservations by objecting to reservations and clarifying the legal effects when doing so. Perhaps a coexistence of these two forms of control therefore not necessarily poses a problem, but rather an opportunity where States and treaty bodies' assessments can become a useful and complementary guide for each other. ■