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# RESERVATIONS TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN AND THE CONVENTION ON THE RIGHTS OF THE CHILD

WILLIAM A. SCHABAS\*

The Universal Declaration of Human Rights,<sup>1</sup> adopted by the United Nations General Assembly on December 10, 1948, constituted a "common standard of achievement."<sup>2</sup> The declaration, however, did not set out human rights norms that were binding in law—this was a bold step that the organization's members were unprepared to take at that time. Since 1948, the adoption of international treaties, whose ratification has become increasingly widespread, has been instrumental in fulfilling the promise of the Declaration. An example of the immense success of international human rights law can be seen in the rapid and virtually universal ratification of the Convention on the Rights of the Child.<sup>3</sup> Adopted at the end of 1989, this document is now binding upon virtually every state in the world, with the exception of the United States and Somalia.<sup>4</sup> The Convention on the Elimination of All Forms of Discrimination Against Women,<sup>5</sup> adopted in 1979, currently has an impressive 156 ratifications.<sup>6</sup>

Many states, however, have accompanied the ratification of these treaties with reservations. A reservation is a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, that purports to exclude or to modify the legal effect of certain

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\* William A. Schabas, M.A., LL.D., Professor of Law and Chair, Departement des Sciences Juridiques, Université du Québec à Montréal.

1. G.A. Res. 217 A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

2. *Id.* at 72.

3. G.A. Res. 44/25, U.N. GAOR 3d Comm., 44th Sess., U.N. Doc. A/RES/44/25 (1989) [hereinafter *Children's Convention*].

4. See *Multilateral Treaties Deposited with the Secretary General* at 198-213, U.N. Doc. ST/LEG/SER.E/14, U.N. Sales No. E.96.V.5 (1996) (providing the status of treaties through Dec. 31, 1995) [hereinafter *Multilateral Treaties*]. See also *infra* pp. 13-17 and notes 51-72; <<http://www.un.org/Depts/Treaty/>> (last modified May 12, 1997) (providing the texts of the most recent reservations, declarations and objections to human rights treaties deposited with the Secretary-General of the United Nations).

5. The Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter *Women's Convention*].

6. See *id.*, 1249 U.N.T.S. at 80-120 (providing list of signatory countries). See also *Multilateral Treaties*, *supra* note 4, at 167-83 (providing updated status of ratifications).

provisions of the treaty in their application to that State.<sup>7</sup> The practice of formulating reservations to multilateral human rights treaties emerged after the adoption of the first human rights treaty in the United States system, the Convention on the Prevention and Punishment of the Crime of Genocide, in 1948.<sup>8</sup> As this Convention had no provision expressly authorizing reservations, some states contested their validity.<sup>9</sup> States argued that because the reservations were, in their view, illegal, the reserving state was not a party to the treaty. The International Court of Justice issued an advisory opinion on the subject, declaring that "an objection to a minor reservation" should not have the effect of invalidating the ratification.<sup>10</sup> The court added, however, that the right to make reservations was not without limits, and that the reservations would only be acceptable if they were compatible with the "object and purpose" of the Convention.<sup>11</sup> This rule, along with other legal principles concerning the effect of reservations, was later codified in the Vienna Convention on the Law of Treaties.<sup>12</sup>

A perception has surfaced that the practice of entering reservations to human rights treaties has become quite excessive in recent years. Some states accompany their ratification with reservations that are so extensive that they render the ratification virtually meaningless. Observers fear that tolerating this practice will undermine the credibility and effectiveness of the treaties themselves. Critics note two responses to these concerns. First, several states parties to the treaties have reacted to abusive reservations by formulating objections. Although the Vienna Convention recognizes the technique of formulating an objection,<sup>13</sup> its application to human rights treaties appears to have a more political than a legal significance.<sup>14</sup> Second, bodies created by the

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7. Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, 1155 U.N.T.S. 331, 333 (art. 2 para. 1(d)) (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention].

8. The Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951).

9. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, at 24 (May 28, 1951).

10. *Id.*

11. *Id.*

12. Vienna Convention, *supra* note 7, at arts. 19-23, 1155 U.N.T.S. at 336-38.

13. *See supra* note 7, at arts. 20-22, 1155 U.N.T.S. at 337-38.

14. General Comment No. 24, U.N. GAOR, Hum. Rts. Comm., 52d Sess., at para. 17, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (concerning issues relating to reservations made upon ratification or accession to the Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant), *reprinted in* 15 HUM. RTS. L.J. 464, 467 (1994). *But see*, Legality of the Threat or Use of Nuclear

instruments have demonstrated an increasingly aggressive attitude against the making of reservations.<sup>15</sup> These treaty bodies have called on states to withdraw reservations and, in several cases, have plainly declared that certain reservations are incompatible with the object and purpose of the treaty in question.<sup>16</sup>

The World Conference on Human Rights, held in Vienna during June, 1993, requested that states avoid resorting to reservations and that they withdraw those that had already been made. The Vienna Declaration and Programme of Action<sup>17</sup> states:

26. The World Conference on Human Rights welcomes progress made in the codification of human rights instruments, which is a dynamic and evolving process, and urges the universal ratification of human rights treaties. All States are encouraged to accede to these international instruments; all States are encouraged to avoid, as far as possible, the resort to reservations.<sup>18</sup>

5. The World Conference on Human Rights encourages States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.<sup>19</sup>

On the subject of reservations, the Vienna Declaration made specific reference to the issue with respect to two international human rights treaties, the Convention on the Elimination of All

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Weapons, 1996 ICJ 93 (Jul. 8), at paras 59, 62 (last modified March 4, 1997), <<http://www.law.cornell.edu/icj/icj2/anw-coef.htm>> (a recent advisory opinion of the International Court of Justice that stresses the importance of objections in assessing the legality of reservations).

15. See William A. Schabas, *Reservations to International Human Rights Treaties*, 32 CAN. Y.B. INT'L L. 39, 66-71 (1995).

16. See *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee*, Hum. Rts. Comm., 53d Sess., at 3, U.N. Doc. CCPR/C/79/Add.50 (1995).

17. *Report of the World Conference on Human Rights*, U.N. GAOR, at 20, U.N. Doc. A/CONF.157/24,(1993) (part III, Vienna Declaration and Programme of Action), reprinted in 14 HUM. RTS. L.J. 352, 356 (1993) [hereinafter Vienna Declaration].

18. *Id.* at 28, reprinted in 14 HUM. RTS. L.J. at 356 (1993).

19. *Id.* at 32, reprinted in 14 HUM. RTS. L.J. at 356-57 (1993).

Forms of Discrimination Against Women<sup>20</sup> and the Convention on the Rights of the Child.<sup>21</sup> The Vienna Declaration affirms:

39. [. . . w]ays and means of addressing the particularly large number of reservations to the Convention [on the Elimination of Discrimination Against Women] should be encouraged. *Inter alia*, the Committee on the Elimination of Discrimination Against Women should continue its review of reservations to the Convention. States are urged to withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.<sup>22</sup>

46. [. . .] The World Conference on Human Rights urges States to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law.<sup>23</sup>

This paper will examine the reservations to these two important and heavily reserved conventions.

# I. THE PRACTICE OF RESERVATIONS

Article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women explicitly authorizes the possibility of reservations:

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.<sup>24</sup>

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20. Women's Convention, *supra* note 5.

21. Children's Convention, *supra* note 3.

22. Vienna Declaration, *supra* note 17, at 37, reprinted in 14 HUM. RTS. L.J. at 359 (1993).

23. *Id.* at 38, reprinted in 14 HUM. RTS. L.J. at 360 (1993). See also Report of the Fourth World Conference on Women, U.N.GAOR, at 96, 99, U.N. Doc. A/CONF.177/20/Rev1, (1996) (part I, Beijing Declaration and Platform for Action), paras. 218, 230c).

24. Women's Convention, *supra* note 5, at art. 28, 1249 U.N.T.S. at 23. See Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination*

Article 29, Paragraph 2,<sup>25</sup> also specifically allows states parties to make reservations to Article 29, Paragraph 1, of the treaty. That article provides that disputes between states parties should be settled by arbitration and, eventually, by the International Court of Justice.<sup>26</sup>

The Convention on the Rights of the Child also includes a provision, directly inspired by Article 28 of the Women's Convention<sup>27</sup> that authorizes reservations.<sup>28</sup> Article 51 of the Children's Convention declares:

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.<sup>29</sup>

Thus, both conventions incorporate the "object and purpose" test derived from customary law<sup>30</sup> and codified in Article 19 of the Vienna Convention on the Law of Treaties.<sup>31</sup>

*Against Women*, 85 AM. J. INT'L L. 281, 289-302 (1991); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 673-83 (1990).

25. Women's Convention, *supra* note 5, at art. 29, 1249 U.N.T.S. at 23.

26. *Id.*

27. *Question of a Convention on the Rights of the Child, Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. ESCOR, Hum. Rts. Comm., 44th Sess., at 43-44, U.N. Doc. E/CN.4/1988/28 (1988). See also THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 606-09 (Sharon Detrick ed., 1992) (providing the working group's considerations of Articles 24 and 29 of the Women's Convention).

28. See Children's Convention, *supra* note 3, at art. 51.

29. *Id.*

30. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 9, at 24.

31. See Vienna Convention, *supra* note 7, at art. 19, 1155 U.N.T.S. at 337. See generally KAYE HOLLOWAY, *LES RÉSERVES DANS LES TRAITÉS MULTILATÉRAUX* 177-80 (1958) (outlining the balancing adopted by the Court when it evaluated whether reservations to the Convention against Genocide comported with the purpose of the Treaty); PIERRE-HENRI IMBERT, *LES RÉSERVES AUX TRAITÉS MULTILATÉRAUX* 63-67 (1978) (describing the Court's analysis of the propriety of reservations as twofold: (1) define the object and the purpose of the treaty; and (2) determine whether the reservation undermines this purpose); Nisot, *Les Réserves aux Traités et la Convention de Vienne du 23 mai 1969*, in *REVUE GÉNÉRALE*

Thirty-nine states parties to the Women's Convention have made reservations to its substantive provisions.<sup>32</sup> Brazil, Canada, France, Ireland, Liechtenstein, New Zealand, Republic of Korea, and Thailand have since withdrawn some or all of their reservations.<sup>33</sup> Twenty-five have formulated only specific reservations to Article 29, Paragraph 1,<sup>34</sup> which directs states parties to conduct dispute settlement through arbitration and through the International Court of Justice. Seven of these specific reservations to Article 29, Paragraph 1, have been subsequently withdrawn.<sup>35</sup> Of the thirty-six states making substantive reservations to the other articles of the Women's Convention, fifteen are developed countries.<sup>36</sup> The most problematic reservations are those which seek to neutralize key provisions of the Convention, such as Articles 2 and 3,<sup>37</sup> or which neutralize the Convention as a whole by subjecting it to the constitutional law of the state party or to Islamic law. Eleven states have made this type of reservation: the Bahamas, Bangladesh, Egypt, Iraq, Kuwait, Lesotho, Libya, Malaysia, Maldives, Morocco, and Singapore.<sup>38</sup> For example, the reservation by Maldives affirms:

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DU DROIT INTERNATIONAL PUBLIC 200, 201 (1973) (Charles Rousseau & Charles Valleté, eds., 3d ed. 1973) (explaining that the state party must have the ability to make a reservation, and the other parties to the treaty must accept the reservation, in order for the reservation to stand); Gerard Teboul, *Remarques sur les Réserves aux Conventions de Codification*, in REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC 679, 695-701 (1982) (expanding upon the difficulty in determining the compatibility of a reservation with a treaty in light of the fact that "object" and "purpose" are amorphous terms and the fact that the underlying policy for a treaty is constantly evolving); D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67 (1976-77) (emphasizing the importance of the intent of the country to accept the treaty); John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980) (presenting a macroscopic view of the use of reservations by States parties, rather than concentrating on the legality of specific reservations).

32. See Multilateral Treaties, *supra* note 4, at 169-77.

33. See *id.* at 181-82.

34. See *id.* at 169-77.

35. See *id.* at 180 n.4 (Czechoslovakia), 181 n.12 (U.S.S.R., Belarus, Ukraine), n.14 (Bulgaria), n.17 (Hungary), 182 n.23 (Mongolia).

36. See Members of the Organization for Economic Cooperation and Development (OECD).

37. See Women's Convention, *supra* note 5, at arts. 2-3, 1249 U.N.T.S. at 16. Article 2 condemns discrimination against all women and provides that States parties will eliminate discrimination against women. *Id.* Article 3 provides that States parties shall take appropriate measures to ensure women's opportunities for full development and guarantee them the exercise and enjoyment of human rights and fundamental freedoms equal to men. *Id.*

38. See Multilateral Treaties, *supra* note 4, at 168-74.

The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded.<sup>39</sup>

Furthermore, the Republic of Maldives does not see itself bound by any provisions of the Convention that oblige it to change its Constitution and laws in any manner.<sup>40</sup> The Committee for the Elimination of Discrimination Against Women recently declared that such reservations are "incompatible with the object and purpose of the present Convention."<sup>41</sup>

Five states parties have formulated reservations to Article 5 of the Women's Convention,<sup>42</sup> which sets out an obligation to eliminate prejudicial or stereotypical attitudes towards women. In addition, eight states parties have reservations to Article 7,<sup>43</sup> which deals with political rights and discrimination in public life; fifteen states parties have reservations to Article 9,<sup>44</sup> which deals with nationality; one state party has a reservation to Article 10,<sup>45</sup> which provides for educational rights; eight states parties have reservations to Article 11,<sup>46</sup> which deals with employment; four states parties have reservations to Article 13,<sup>47</sup> which deals with economic matters; one state party has a reservation to Article 14,<sup>48</sup> which discusses rights for rural women; seven states parties have reservations to Article 15,<sup>49</sup> which recognizes equality before the law, the right to contract, and rights of mobility; and finally,

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39. *Id.* at 172.

40. *See id.*

41. *Report of the Committee for the Elimination of All Forms of Discrimination Against Women*, U.N. GAOR, 49th Sess., Supp. No. 38, at 13, U.N. Doc. A/49/38 (1994) [hereinafter 1994 CEDAW Report].

42. *See* Multilateral Treaties, *supra* note 4, at 170 (Fiji, France, India), 172 (Malaysia, New Zealand (Government of Cook Island).

43. *See id.* at 168 (Austria), 169 (Belgium), 170 (Germany), 171 (Israel, Kuwait), 172 (Luxembourg, Malaysia), 174 (Thailand).

44. *Id.* at 168 (Bahamas), 169 (Cyprus, Egypt), 170 (Fiji, France), 171 (Iraq, Jordan, Kuwait), 172 (Liechtenstein, Malaysia), 183 (Morocco, Republic of Korea), 174 (Tunisia), 176 (United Kingdom).

45. *See id.* at 174 (Thailand).

46. *See id.* at 168 (Australia, Austria), 171 (Ireland), 172 (Malta, Mauritius), 173 (New Zealand), 174 (Singapore), 176 (United Kingdom).

47. *See id.* at 169 (Bangladesh), 171 (Ireland), 172 (Malta), 176 (United Kingdom of Great Britain and Northern Ireland).

48. *See id.* at 170 (France).

49. *See id.* at 169 (Belgium), 171 (Ireland, Jordan), 172 (Malta), 173 (Morocco), 175 (Turkey), 176 (United Kingdom).



twenty-one states parties have reservations to Article 16,<sup>50</sup> which deals with marriage and the family.

The general reservations, as well as the reservations to Articles 7, 9, 11, 15 and 16, are suspect.<sup>51</sup> However, as the drafters of the Women's Convention envisioned the possibility of reservations to the substantive provisions of the Convention, they included Article 28 precisely for this reason. There is a strong argument that most of the specific reservations to the various articles are compatible with the object and purpose of the Convention as a whole.<sup>52</sup> Furthermore, states that accept the vast majority of the obligations in the Convention are permitted to ratify it, despite the fact that they are unwilling to accept one or a few of the specific norms in the treaty. This is surely part of the Convention's object and purpose.

With regard to the Convention on the Rights of the Child, fifty-six states parties have formulated reservations to substantive provisions of the instrument.<sup>53</sup> Twenty-five of these are European or other developed countries.<sup>54</sup> Nine states parties have made general reservations, whereby the Convention is deemed to be subject to the states parties' constitutional or Islamic laws. The states include: Brunei Darussalem, Djibouti, Indonesia, Iran, Malaysia, Qatar, Saudi Arabia, Syria, and Tunisia.<sup>55</sup> States parties have made reservations to twenty-two of the Convention's thirty-nine substantive articles (Article 2 through Article 40). Article 2, which deals with non-discrimination, has had reservations made by five states parties.<sup>56</sup> Other heavily reserved articles include: Article 6, which deals with the right to life and which has reservations by four states parties;<sup>57</sup> Article 7, which concerns the right to a name and nationality and which has

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50. See *id.* at 168 (Bahamas), 169 (Bangladesh, Egypt), 170 (India), 171 (Iraq, Ireland, Israel, Jordan, Kuwait), 172 (Lybia, Luxembourg, Malaysia, Malta, Mauritius), 173 (Morocco), 174 (Republic of Korea, Singapore, Thailand, Tunisia), 175 (Turkey), 176 (United Kingdom).

51. See Cook, *supra* note 24, at 687-706.

52. Members of the Committee on the Rights of the Child occasionally make declarations recognizing the legitimacy of certain reservations. See e.g., *Summary Record of the 132nd meeting*, Comm. on the Rts. of the Child, 6th Sess., 132nd mtg., at para. 40, U.N. Doc. CRC/C/SR.132 (1994) (discussing Pakistan); *Summary Record of the 226th meeting*, Comm. on the Rts. of the Child, 9th Sess., 226th Meeting, at para. 17, U.N. Doc. CRC/C/SR.226 (1995) (discussing Tunisia).

53. See *Multilateral Treaties*, *supra* note 4, at 199-208.

54. See *supra* note 36.

55. See *Multilateral Treaties*, *supra* note 4, at 201-03, 205-07.

56. See *id.* at 200 (Bahamas, Belgium), 205 (Malaysia), 207 (Syria, Tunisia).

57. See *id.* at 201 (China), 202 (France), 204 (Luxembourg), 207 (Tunisia).

reservations by eight states parties;<sup>58</sup> Article 9, which concerns contacts between parents and children and which has reservations by eight states parties;<sup>59</sup> Article 13, which concerns freedom of expression and which has reservations by seven states parties;<sup>60</sup> Article 14, which concerns freedom of religion and which has reservations by ten states parties;<sup>61</sup> Article 15, which concerns freedom of assembly and association and which has reservations by five states parties;<sup>62</sup> Article 17, which concerns the right to information and which has reservations by five states parties;<sup>63</sup> Article 21, which concerns adoption and which has reservations by thirteen states parties;<sup>64</sup> Article 22, which concerns refugees and which has reservations by six states parties;<sup>65</sup> Article 28, which concerns education and which has reservations by five states parties;<sup>66</sup> Article 37, which deals with procedural rights of juvenile offenders and which has reservations by nine states parties;<sup>67</sup> and Article 40, which deals with the detention of juvenile offenders and which has reservations by eight states parties.<sup>68</sup>

Some of the reservations to the Convention on the Rights of the Child seek neither to limit the obligations of the reserving state nor to set out interpretative principles. In several of the reservations states parties express their view that the Convention's terms are inadequate. Specifically, states parties do so with respect to Article 38, Paragraph 2, which sets fifteen

58. *See id.* at 204 (Kuwait, Liechtenstein, Luxembourg), 205 (Malaysia, Monaco), 206 (Poland), 207 (Thailand, Tunisia).

59. *See id.* at 201 (Bosnia and Herzegovina, Croatia), 202 (Germany), 203 (Iceland), 204 (Japan), 206 (Republic of Korea), 207 (Slovenia), 208 (Yugoslavia).

60. *See id.* at 200 (Algeria, Austria, Belgium), 203 (Holy See), 204 (Kiribati), 205 (Malaysia), 206 (Singapore).

61. *See id.* at 200 (Algeria, Bangladesh), 201 (Belgium, Brunei Darussalem), 203 (Holy See, Indonesia), 204 (Iraq, Jordan, Kiribati), 205 (Maldives, Morocco, Netherlands), 206 (Singapore), 207 (Syria Arab Republic).

62. *See id.* at 200 (Austria, Belgium), 203 (Holy See), 204 (Luxembourg), 205 (Malaysia).

63. *See id.* at 200 (Algeria, Austria), 203 (Indonesia), 206 (Singapore), 207 (Turkey).

64. *See id.* at 200 (Argentina, Bangladesh), 201 (Brunei Darussalam, Canada), 202 (Egypt), 203 (Indonesia), 204 (Jordan, Kuwait), 205 (Maldives), 206 (Republic of Korea), 207 (Spain, Syria Arab Republic), 208 (Venezuela).

65. *See id.* at 202 (Germany), 203 (Indonesia), 205 (Malaysia, Mauritius, Netherlands), 207 (Thailand).

66. *See id.* at 203 (Holy See), 204 (Kiribati), 205 (Malaysia), 206 (Samoa, Singapore).

67. *See id.* at 200 (Australia), 201 (Canada), 203 (Iceland), 204 (Japan), 205 (Malaysia, Netherlands), 206 (New Zealand, Singapore, United Kingdom of Great Britain and Northern Ireland).

68. *See id.* at 200-01 (Belgium), 201 (Denmark), 202 (France, Germany), 205 (Malaysia, Monaco), 206 (Republic of Korea), 207 (Tunisia).

years as the minimum age for military service. This Article was the subject of much controversy during the drafting of the Convention.<sup>69</sup> At the time of the treaty's ratification, Andorra, Argentina, Austria, Columbia, Ecuador, Germany, the Netherlands, Poland, Spain, and Uruguay all expressed the view that the Article provided insufficient protection for children and that the age should be set higher than fifteen.<sup>70</sup> With respect to the debate about abortion, an issue on which the Convention is prudently mute (aside from an intentionally ambiguous provision in the preamble),<sup>71</sup> several states parties have used declarations to express differing views on the subject. For example, Argentina, Ecuador, Guatemala and the Holy See insist upon protection for the unborn child.<sup>72</sup> In contrast, China, France, Luxembourg and Tunisia speak of the legitimacy of their own legislation permitting abortion.<sup>73</sup> The United Kingdom declares that the Convention only protects children from the moment of live birth.<sup>74</sup>

## II. OBJECTIONS BY STATES PARTIES

Both Conventions allow reservations in terms that evoke the relevant provision of the Vienna Convention on the Law of Treaties.<sup>75</sup> Nevertheless, the two instruments do not expressly incorporate the entire Vienna Convention reservations regime. To the extent that the Vienna Convention regime may be applicable to human rights treaties, the presumption arises that it is implicitly incorporated into the Women's Convention and the Children's Convention. If this is the case, the drafters ought to have entirely omitted any reference to reservations, recognizing, in effect, the application of general international law as set forth in the Vienna Convention. The fact that they did not omit any reference to reservations suggests that there is no role for the

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69. See Text as Adopted by the Working Group at Second Reading E/CN.4/1989/29/Rev.1, reprinted in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE TRAVAUX PREPARATOIRES* 549 (Sharon Detrick ed., 1992); Article 23 (Reports from States Parties) — Article 44, reprinted in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE TRAVAUX PREPARATOIRES* 551-60 (Sharon Detrick ed., 1992).

70. See Multilateral Treaties, *supra* note 4.

71. See Children's Convention, *supra* note 3, at preamble. The Convention states that a child "needs special safeguards and care including appropriate legal protection before as well as after birth." *Id.*

72. See Multilateral Treaties, *supra* note 4, at 200, 202-03.

73. See *id.* at 201-02, 204, 207.

74. See *id.* at 207.

75. See Vienna Convention, *supra* note 7, at arts. 19-23, 1155 U.N.T.S. at 336-38.

states parties in determining whether the reservations are valid. Another possible inference is that any reservation that is incompatible with the object and purpose of either of the Conventions is inadmissible, even if there is no opposition from another state party. The Vienna Convention itself lends support to the alternative view that reservations are only inadmissible when states parties object to them.<sup>76</sup>

Several states parties have formulated objections to reservations that they consider unacceptable. The general reservations to the Women's Convention, which subject the interpretation of the Convention to either national constitutional law or Islamic law, have provoked many objections. The general reservation made by the Republic of Maldives, which specifically subjects the Convention to the Islamic Shariah,<sup>77</sup> has been objected to by Austria, Canada, Finland, Germany, the Netherlands, Norway, Portugal and Sweden.<sup>78</sup> Denmark, Finland, Germany, Mexico, the Netherlands, Norway and Sweden also filed objections<sup>79</sup> to a similar reservation formulated by Libya.<sup>80</sup> In addition, Austria, Belgium, Finland, the Netherlands, Norway, Portugal and Sweden<sup>81</sup> objected to similar reservations by Kuwait.<sup>82</sup> Germany, Mexico, the Netherlands, and Sweden have objected quite regularly to reservations to various provisions of the Convention that they deem unacceptable. One or more of these countries has challenged the reservations formulated by Bangladesh, Brazil, Cyprus, Egypt, India, Iraq, Jamaica, the Republic of Korea, Malawi, Mauritius, Morocco, New Zealand, Thailand, Tunisia and Turkey.<sup>83</sup>

Several of the general reservations to the Children's Convention have provoked objections, but a limited number of states are responsible for the objections. One or more of the following countries — Austria, Belgium, Finland, Germany, Ireland, Norway, Portugal, Slovakia and Sweden — have challenged reservations made by Indonesia, Qatar, Syria, Iran, Bangladesh, Djibouti, Jordan, Kuwait, Tunisia, Pakistan, Malaysia and Myanmar.<sup>84</sup> Unlike the case of the Women's Convention, there

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76. See *id.* at art. 21, 1155 U.N.T.S. at 337.

77. See Multilateral Treaties, *supra* note 4, at 172.

78. See *id.* at 177-79.

79. See *id.*

80. See *id.* at 172.

81. See *id.* at 177-79.

82. See *id.* at 171.

83. See *id.* at 177-79.

84. See *id.* at 208-10.

have been virtually no objections to instances in which states have formulated single, specific reservations to distinct provisions of the Children's Convention.

In the case of both the Women's Convention and the Children's Convention, relatively few states parties have formulated objections to the reservations of other countries. Even of those that have done so, the practice is inconsistent. For example, Canada objected to the Republic of Maldives' reservation to the Women's Convention, but took no action with respect to a subsequent and comparable reservation by Kuwait.<sup>85</sup> The same inconsistency is apparent in the objections to reservations to the Children's Convention. Moreover, a states practice of objecting varies from one instrument to the other, as if a general reservation to the Women's Convention is more serious than one to the Children's Convention. This practice gives the impression that most objecting states are making perfunctory objections with no discernable policy.

The aforementioned perception confirms the observations of the Human Rights Committee, set forth in its General Comment Number 24, of an "unclear" pattern of objections that have only been "occasional[ly], made by some states but not others, and on grounds not always specified."<sup>86</sup> The Vienna Convention on the Law of Treaties provides that it is by objecting that states indicate their refusal to accept a reservation. Pursuant to Article 20, Paragraph 5 of the Vienna Convention:

. . . [U]nless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.<sup>87</sup>

Furthermore, pursuant to Article 21, Paragraph 3, "[w]hen a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."<sup>88</sup> Echoing the case law of the Inter-American Court of Human

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85. See *id.* at 177.

86. General Comment No. 24, *supra* note 14, reprinted in 15 Hum. Rts. L.J. 464, 467 (1994).

87. Vienna Convention, *supra* note 7, at art. 20, 1155 U.N.T.S. at 337.

88. *Id.* at art. 21, 1155 U.N.T.S. at 337.

Rights,<sup>89</sup> the European Commission of Human Rights,<sup>90</sup> and the European Court of Human Rights,<sup>91</sup> the Human Rights Committee concluded that the objections regime of the Vienna Convention is "inappropriate to address the problem of reservations to human rights treaties."<sup>92</sup> The Committee observed that objections are useful only to the extent that they "may provide some guidance to the Committee in its interpretation of compatibility with the object and purpose" of the treaty.<sup>93</sup> The Committee's position has met with opposition in the form of observations presented by the United States,<sup>94</sup> the United Kingdom,<sup>95</sup> and France.<sup>96</sup>

### III. ROLE OF THE TREATY BODIES

The classic view regarding the validity of reservations finds some support in the provisions of the Vienna Convention on the Law of Treaties as well as in the observations of the United

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89. See *Restrictions to the Death Penalty*, 1983 INTER-AM. CT. HUM. RTS., 83-86 (Arts. 4(2) & 4(4), American Convention on Human Rights, Advisory Opinion No. OC-3/83 of September 8); *The Effect of Reservations on the Entry into Force of the American Convention*, 1982 INTER-AM. CT. HUM. RTS., 13-25 (Arts. 74 & 75, Advisory Opinion No. OC-2/82 of September 24).

90. See *Temeltasch v. Switzerland* (reservations and interpretative declarations), No. 9116/80, 5 Eur. H.R. Rep. 417, 420-22 (1983) Commission report; *Austria v. Italy*, 1961 Y.B. Eur. Conv. on H.R. 116, 141 (Eur. Comm'n on H.R.). See Pierre-Henri Imbert, *Les Réserves à la Convention Européenne des Droits de L'Homme devant la Commission de Strasbourg (Affaire Temeltasch)*, 1983 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC 580; William A. Schabas, *Article 64*, in *Convention Européenne des Droits de L'Homme*, Commentaire Article par Article 923, 939-40 (Louis-Edmond Pettiti et al. eds., 1995).

91. See *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A), para. 47 (1988). See also Frank Horn, *supra* note 31, at 156-58; Gerard Cohen-Jonathan, *Les Réserves à la Convention Européenne des Droits de L'Homme (à propos de l'arrêt Belilos du 29 avril 1988)*, 93 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC 273, 277-78 (1989).

92. General Comment No. 24, *supra* note 14, at para. 17.

93. *Id.* See also *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (indicating preliminary objections).

94. See *Observations by the United States of America on General Comment No. 24* (52), 16 HUM. RTS. L.J. 422 (1995) [hereinafter *U.S. Observations*] (observations transmitted by letter dated March 28, 1995). See also U.N. Doc. A/C.6/50/SR.18, 51 (providing the remarks of the Legal Advisor, Conrad Harper, to the Sixth Committee of the General Assembly).

95. See *Report of the Human Rights Committee (Submission of Reports and Additional Information by States Parties Under Article 40 of the Covenant During the Period of Review)*, U.N. GAOR, 50th Sess., Annex III, U.N. Doc. A/50/40 (1995) [hereinafter *United Kingdom Observations*] (stating the observations of the United Kingdom of Great Britain and Northern Ireland under Article 40, para. 5, of the Covenant), reprinted in 16 HUM. RTS. L.J. 424 (1995).

96. See *Report of the Human Rights Committee (Observations of States Parties under Article 40)*, U.N. GAOR, 51st Sess., Annex VI, U.N. Doc. A/51/40 (1996) (stating the observations of France under Article 40, para. 5, of the Covenant) [hereinafter *France's Observations*].

States and France to the Human Rights Committee's General Comment Number 24. Those who hold this view proffer that the determination of whether reservations are permissible falls exclusively to the states parties who express their views in the form of objections.<sup>97</sup> The modern view, however, is that the treaty bodies are competent to address the legality of reservations during their consideration of the states parties' periodic reports.<sup>98</sup>

Recently, The International Law Commission, which designated Professor Alain Pellet as rapporteur on the subject of reservations, considered the question of the validity of reservations. In his report, submitted to the 1995 session of the Commission, Professor Pellet wrote:

138. Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity, a concept difficult to transpose to the field of human rights or indeed to other fields. As they are intended to apply without discrimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-a-vis citizens of the reserving state.

139. Thus, in its General Comment No. 24 (52) of 2 November 1994, the Human Rights Committee considered that "Human rights treaties...and the [International] Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place . . ." and that ". . . the operation of the classic rules on reservations is [so] inadequate . . ."

140. More so than other treaties human rights treaties include monitoring mechanisms and the question is whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area because of the "objective obligations" deriving from the convention of Rome of 1950. Similarly, in its General Comment No. 24 (52), the Human Rights Committee considered that "[i]t necessarily falls to the Committee to

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97. See Vienna Convention, *supra* note 7; U.S. Observations, *supra* note 94; France's Observations, *supra* note 96.

98. See General Comment No. 24, *supra* note 14, at para. 18, reprinted in 15 HUM. RTS. L.J. at 467.

determine whether a specific reservation is compatible with the object and purpose of the covenant . . . in part because . . . it is an inappropriate task for States parties in relation to human rights treaties and in part because it is a task that the Committee cannot avoid in the performance of its functions.<sup>99</sup>

The treaty bodies set up under the human rights treaties of the United Nations system, including the Committee on the Rights of the Child, are entrusted with the examination of initial and periodic reports from states parties.<sup>100</sup> Within this sphere, the committees have been increasingly willing to raise the issue of reservations with states parties. In 1992, the chairpersons of the treaty bodies agreed that:

[T]reaty bodies should systematically review reservations made when considering a report and include in the list of questions to be addressed to reporting Governments a question as to whether a given reservation was still necessary and whether a State party would consider withdrawing a reservation that might be considered by the treaty body concerned as being incompatible with the object and purpose of the treaty.<sup>101</sup>

By 1994, the chairpersons had become considerably less equivocal, recommending "that treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law."<sup>102</sup>

Although General Comment No. 24 is applicable only to the Human Rights Committee, its discussion of the issue is relevant

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99. *First Report on the Law and Practice Relating to Reservations to Treaties: Alain Pellet*, U.N. GAOR, Int'l Law Comm., 47th Sess., at 64, U.N. Doc. A/CN.4/470 (1995). See also the remarks by Professor Pellet cited in the 1996 report of the International Law Commission on role of treaty bodies in judging the legality of reservations. See *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, Int'l Law Comm., 48th Sess., at paras. 128-32, U.N. Doc. A/51/10 (1996).

100. See AGNÈS DORMENVAL, *PROCÉDURES ONUSIENNES DE MISE EN ŒUVRE DES DROITS DE L'HOMME: LIMITES OU DÉFAUTS* (1991).

101. *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, Note by the Secretary General*, U.N. GAOR, 47th Sess., Agenda Item 97, at para. 36, U.N. Doc. A/47/628 (1992).

102. *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, Note by the Secretary-General*, U.N. GAOR, 49th Sess., Agenda Item 100, at para. 30, U.N. Doc. A/49/537 (1994).



to the work and the mandate of the other committees. The Human Rights Committee stated that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant."<sup>103</sup> For the Committee, "[b]ecause of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task."<sup>104</sup> In its observations on General Comment No. 24, the United Kingdom admitted 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 . . . ."<sup>105</sup>

The Vienna Declaration and Program of Action stated that "the Committee on the Elimination of Discrimination Against Women should continue its review of reservations to the Convention."<sup>106</sup> During its thirteenth session, in 1994, the Committee for the Elimination of Discrimination Against Women examined the matter of reservations. Noting that it had addressed the issue on several occasions in the past, and citing the Declaration of the Vienna Conference, the Committee decided "to bring again to the attention of the States parties the seriousness with which the Committee considers the problem of reservations and request[] that this concern be conveyed to the seventh meeting of States parties."<sup>107</sup> Furthermore, the Committee decided to amend its guidelines for the preparation of periodic reports. It required states parties that had entered substantive reservations to the Convention to provide information on the reservations in each of their periodic reports.

In reporting on reservations, the State party should indicate why it considered the reservation to be necessary and whether reservations the State party may or may not have entered on obligations with regard to the same rights in other conventions are consistent with the reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, as

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103. General Comment No. 24, *supra* note 14, at para. 18 (relating to reservations to the International Covenant on Civil and Political Rights).

104. *Id.*

105. *United Kingdom Observations*, *supra* note 95, at Annex III, reprinted in 16 HUM. RTS. L.J. at 425.

106. Vienna Declaration, *supra* note 17, at para. 39, reprinted in 14 HUM. RTS. L.J. at 359, para. 11.

107. 1994 CEDAW Report, *supra* note 41, at 13.

well as the precise effect of the reservation in terms of national law and policy. It should indicate the plans that it has to limit the effect of reservations and ultimately withdraw them and, whenever possible, specify a timetable for withdrawing them. States parties which have entered general reservations that do not refer to a specific article of the Convention or reservations to Articles 2 and 3 should make a particular effort to report on the effect and interpretation of them. The Committee considers these to be incompatible with the object and purpose of the present Convention.<sup>108</sup>

The Committee also requested that a special letter be sent by the Secretary-General to those states that had formulated substantive reservations, drawing their attention to the Committee's concern.<sup>109</sup> The Committee recommended that the Center for Human Rights and the Division for the Advancement of Women, via their programmes of advisory services, provide states parties with advice on the withdrawal of their reservations.<sup>110</sup> In addition, the Committee determined that it would include a section in which it expresses its views on the reservations as part of its concluding observations on the periodic reports of States parties that had entered substantive reservations to the Convention.<sup>111</sup> Finally, on the subject of objections, the Committee encouraged objecting States "to enter into a dialogue on a bilateral basis with the States to whose reservations they object with a view to finding a solution."<sup>112</sup> At its 1996 meeting, the Committee requested the Secretariat to prepare a report, in order "to facilitate a discussion on reservations to the Convention."<sup>113</sup> The report was to include a review of the discussions of United Nations Conferences and women's human rights non-governmental organizations on the subject.<sup>114</sup> It was to be a qualitative comparison of reservations to different treaties and an analysis of reservations "that are contrary to the object and purpose of the

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108. *Id.* The Committee later completed these comments with new guidelines for the preparation of periodic reports that describe the appropriate information on reservations. See *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 50th Sess., Supp. No. 38, at para. 652, U.N. Doc. A/50/38 (1995) [hereinafter *1995 CEDAW Report*].

109. See *1994 CEDAW Report*, *supra* note 41, at 13.

110. See *id.*

111. See *id.* at 13-14.

112. See *id.* at 14.

113. *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 51st Sess., Supp. No. 38, at para. 346, U.N. Doc. A/51/38 (1996) [hereinafter *1996 CEDAW Report*].

114. See *id.*

Convention or which are otherwise incompatible with international treaty law."<sup>115</sup>

In 1994, the Committee on the Rights of the Child adopted a recommendation in which it stressed the importance of a "holistic approach" to the Convention and reservations thereto.<sup>116</sup> The Committee noted that some of the reservations and declarations actually strengthened the norms of the convention, such as those dealing with the minimum age for military service. On the other hand, it also observed that some of the reservations were based on a rather restrictive view of the provisions of the Convention.<sup>117</sup> In addition, it determined that the question of reservations should be considered in the course of the dialog undertaken with states parties during presentation of their periodic reports.<sup>118</sup>

Both the Committee for the Elimination of Discrimination Against Women and the Committee on the Rights of the Child are charged with examining the periodic reports of States parties. To do this they must establish the obligations that those States parties have assumed. For example, pursuant to the Women's Convention, the Committee must consider the legislative, judicial, administrative or other measures adopted by states parties "to give effect to the provisions of the present Convention and on the progress made in this respect"<sup>119</sup> Under the Children's Convention, periodic reports by states parties "shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned."<sup>120</sup> It would seem impossible for the Committees to carry out these responsibilities without considering the issue of reservations.

During the presentations of periodic reports, members of the Committee for the Elimination of Discrimination Against Women have often questioned states parties about their reservations to the Convention on the Elimination of All Forms of Discrimination

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115. *Id.*

116. *Report of the Committee on the Rights of the Child*, U.N. GAOR, 49th Sess., Supp. No. 41, at para. 528, U.N. Doc. A/49/41 (1994)

117. *See id.* at para. 527.

118. *Id.* at para. 529-34.

119. Women's Convention, *supra* note 5, at art. 18.

120. Children's Convention, *supra* note 3, at art. 44.

Against Women.<sup>121</sup> At its 1996 session, for example, the Committee "noted" as a "principal subject of concern" that Cuba did not intend to withdraw its reservation to Article 29, Paragraph 2.<sup>122</sup> Also at its 1996 session, during consideration of the report of the Committee "noted with concern the reservation of the Government as to the exclusion of women from the military."<sup>123</sup> Australia's reservation concerning paid maternity leave has been criticized by the Committee, which has urged that it be withdrawn.<sup>124</sup> Australia has told the Committee that as a result of revised employment policies, it would "adjust" its reservation.<sup>125</sup> Belgium informed the Committee of its intention to withdraw reservations to Articles 7 and 15 of the Convention, given the adoption of new legislation enabling women to exercise royal powers and changes in the Constitution rendering void the reservation relating to marriage law. Belgium also said that its reservations to all human rights treaties were being revised, in keeping with the Vienna Declaration and Program of Action.<sup>126</sup> The Committee commended Belgium for this undertaking.<sup>127</sup> Several experts had done the same the previous year when Mauritius announced that it was withdrawing its reservations to Articles 11.1(b), 11.1(d) and 16.1(g) of the Convention.<sup>128</sup> The Committee made no comment, however, on the fact that Mauritius was not withdrawing its reservation to Article 29, Paragraph 2 of the Convention.

The presentation of Tunisia's combined initial and second reports, in January 1995, provoked considerable reaction from members of the Committee. Among its many reservations,

121. See *Report of the Committee for the Elimination of Discrimination Against Women*, U.N. GAOR, 39th Sess., Supp. No. 45, at para. 190, Vol. II, U.N. Doc. A/39/45 (1985) (discussing the initial report of Egypt); *Report of the Committee for the Elimination of Discrimination Against Women*, U.N. GAOR, 44th Sess., Supp. No. 38, at para. 74, U.N. Doc. A/44/38 (1990) (discussing the initial report of Ireland); *Report of the Committee for the Elimination of Discrimination Against Women*, U.N. GAOR, 44th Sess., Supp. No. 38, at para. 273, U.N. Doc. A/44/38 (1990) (discussing the initial report of Belgium).

122. 1996 CEDAW Report, *supra* note 113, at para. 214.

123. *Id.* at para. 43. This comment is puzzling, because the only reservation formulated by Cyprus concerns nationality. "The Government of the Republic of Cyprus wishes to enter a reservation concerning the granting to women of equal rights with men with respect to the nationality of their children, mentioned in Article 9, Paragraph 2 of the Convention. This reservation is to be withdrawn upon amendment of the relevant law." Multilateral Treaties, *supra* note 4, at 169.

124. See 1995 CEDAW Report, *supra* note 108, at para. 596.

125. See 1994 CEDAW Report, *supra* note 41, at para. 379. See also *id.*, at para. 390.

126. See 1996 CEDAW Report, *supra* note 113, at para. 166.

127. See *id.* at para. 174.

128. See 1995 CEDAW Report, *supra* note 108, at paras. 163, 187-88. Mauritius' reservations to Articles 11 and 16 had provoked objections from Germany, Mexico, the Netherlands and Sweden. See Multilateral Treaties, *supra* note 4, at 172.

Tunisia had made a general declaration stating that it would not take "any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution."<sup>129</sup> Members of the Committee expressed concern about the declaration, as well as specific reservations or declarations aimed at Articles 9, 15 and 16.<sup>130</sup> The Tunisian representative replied that the Convention "had been ratified in a particular socio-political context, which was marked by rising fundamentalism, conservative traditions and related issues."<sup>131</sup> Moreover, "[t]he general declaration, however, did in no way intend to detract from the Government's commitment to the Convention. It was only made to explain the reservations entered."<sup>132</sup>

In 1994, when Libya presented its initial report, members of the Committee expressed "[g]eneral and serious concern about the reservation that had been entered at the time of accession and about the fact that the reservation was not at all touched upon in the report."<sup>133</sup> The Committee declared that it went counter to the object and purpose of the Convention.<sup>134</sup> Libya was also asked whether it had considered the objections made by many other states to the reservations.<sup>135</sup> Members of the Committee reminded Libya of its claim that the Shariah gives women equality and asked if this was the case why the reservation was necessary.<sup>136</sup> The members of the Committee observed that:

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129. Multilateral Treaties, *supra* note 4, at 174.

130. See 1995 CEDAW Report, *supra* note 108, at paras. 222 and 266.

131. *Id.* at para. 222.

132. See *id.*

133. 1994 CEDAW Report, *supra* note 41, at para. 130. The reservation, produced at the time of accession on May 15, 1989, states: "1. Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic Shariah relating to determination of the inheritance portions of the estate of a deceased person, whether female or male. 2. The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic Shariah." Multilateral Treaties, *supra* note 4, at 172. On 5 July 1995, Libya filed what it called the "new formulation of its reservation to the Convention, which replaces the formulation contained in the instrument of accession." *Id.* at 182, n. 21. The new declaration states: "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah." *Id.* Note that the Vienna Convention, *supra* note 7, art. 19, states that reservations must be made at the time of accession.

134. See 1994 CEDAW Report, *supra* note 41, at para. 179.

135. See *id.* Objections were produced by Denmark, Finland, Mexico, the Netherlands, Norway and Sweden. See Multilateral Treaties, *supra* note 4, at 177-78. In 1996 Finland filed a second objection in response to the amended reservation. See <<http://www.un.org/Depts/Treaty/>>, *supra* note 4.

136. See 1994 CEDAW Report, *supra* note 41, at para. 130.

... the reservation was very much related to the question of interpretation of the Shariah. They felt that the Shariah was very supportive of women's equality, rights and dignity. However, it had come into force 1,500 years ago and was not immutable. The Shariah itself gave equality to women, but the problem that had to be overcome was that of interpretation. Religions should evolve over time, but the evolution or the *ijtihad*, the interpretation of the Shariah, had come to a standstill three centuries ago. The thinking about some religious roles had not evolved from that time and it was not proper to apply a standard that had applied several centuries ago to the present world. In some countries the Shariah had been interpreted in a more progressive way, as a result of the political will of the Government. The Koran permitted the *ijtihad* for the interpretation of the Islamic religion. Therefore, efforts should be made to proceed to an interpretation of the Shariah that was permissible and did not block the advancement of women. The Government was urged to take a leading role in its interpretation of the Shariah as a model for other Islamic countries. Reservations that were incompatible with the goals of the Convention were not acceptable.<sup>137</sup>

The Libyan representative replied that such reservations had been entered by Islamic countries "in order to avoid embarrassment in view of the literal meaning of legal texts."<sup>138</sup>

The Committee on the Rights of the Child initially was hesitant in its treatment of reservations. For example, in presenting its initial report, Egypt stated that "The Egyptian Government recorded its reservation regarding the right to adoption when it ratified the Convention. Adoption is illegal in Islamic Shariah."<sup>139</sup> Following examination of the Egyptian report in 1992, the Committee made no comment whatsoever on this point in its observations.<sup>140</sup> However, during consideration of the

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137. *Id.* at para. 132.

138. *Id.* at para. 131. See also *id.*, at para. 174 (Libya claimed that, as women received their inheritance without commitments, the provision of the Shariah that directed female children to receive half of what male children would receive was not discriminatory against women).

139. *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Egypt)*, Comm. on the Rts. of the Child, at 31, U.N. Doc. CRC/C/3/Add.6 (1992).

140. See *Concluding Observations of the Committee on the Rights of the Child: Egypt*, Comm. on the Rts. of the Child, 3d Sess., U.N. Doc. CRC/C/15/Add.5 (1992); see also *Provisional Agenda and Annotations, Note by the Secretary-General*, Comm. on the Rts. of the Child, 1st Sess., U.N. Doc. CRC/C/1 (1991).

report, member Yuri Kolosov said he was aware that the Shariah was the fundamental source of legislation governing the Arab States, but noted that Egypt had made no specific reference to differences between the sexes in its reservation to the Convention, that it must now strictly uphold.<sup>141</sup> In effect, Kolosov appears to have been condemning the Egyptian reservation as being vague and to have been suggesting that the consequence of such vagueness was the convention's full application.

By 1994, the Committee on the Rights of the Child showed signs of increasing boldness in challenging reservations to the Convention. Its new attitude was soon demonstrated when it considered Pakistan's initial report. Pakistan had formulated an "Islamic reservation"<sup>142</sup> that drew objections from several States parties.<sup>143</sup> Committee members were harsh in their criticism.<sup>144</sup> They stated bluntly that the reservation was contrary to the purpose of the Convention and thus inadmissible.<sup>145</sup> The representative of Pakistan agreed to forward the Committee's views to his government, "if they represented the unanimous views of the Committee,"<sup>146</sup> something of which he was promptly reassured.<sup>147</sup> The Committee concluded that the reservation raised "deep concern as to its compatibility with the object and purpose of the Convention."<sup>148</sup>

Morocco's reservation to Article 14, which grants children freedom of religion, explains that "the religion of the State is Islam."<sup>149</sup> Thomas Hammarberg asked Morocco why it had made the reservation given that other Islamic countries in the same region had seen no need to do so.<sup>150</sup> Morocco's representative

141. See *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, Comm. on the Rts. of the Child, 3d Sess., 66th mtg., at para. 40, U.N. Doc. CRC/C/SR.66 (1992).

142. Stating that the "[p]rovisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values." *Multilateral Treaties*, *supra* note 4, at 206.

143. See *id.* at pp. 208-10 (Finland, Ireland, Netherlands, Norway, Portugal and Sweden).

144. See *Summary Record of the 132nd meeting*, Comm. on the Rts. of the Child, 6th Sess., at paras. 8, 9, and 18, U.N. Doc. CRC/C/SR.132 (1994) (discussing Pakistan).

145. See *id.* at paras. 12, 13.

146. *Id.* at para. 15.

147. See *id.* at para. 16.

148. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Pakistan)*, Comm. on the Rts. of the Child, 6th Sess., at para. 9, U.N. Doc. CRC/C/15/Add.18 (1994).

149. *Summary Record of the 317th meeting*, Comm. on the Rts. of the Child, 30th Sess., 317th mtg., at para. 31, U.N. Doc. CRC/C/SR.317 (1996) (discussing Morocco).

150. See *id.* at para. 41. See also *id.* at paras. 40, 47, 51, 54, and 60.

explained that Moroccan laws were based on religious law, and that there was no possibility that a person born a Muslim might change religion because this would be contrary to the principles of basic Muslim law.<sup>151</sup> In its conclusions, the Committee included an increasingly more common response there might be "questions about the compatibility of the reservation with the object and purpose of the Convention."<sup>152</sup>

The Committee challenged Tunisia's reservations, particularly to Article 2.<sup>153</sup> Tunisia replied that it had preferred an approach of honesty and coherence.<sup>154</sup> Yuri Kolosov explained that the Committee had set an "ambitious goal" of eliminating all reservations and declarations, and suggested that Tunisia might be the first state to undertake the process.<sup>155</sup> The Committee concluded that Tunisia's reservation raised concern about its compatibility with the object and purpose of the Convention.<sup>156</sup> The Committee confronted religious arguments from another religious perspective when it challenged the reservations made by the Holy See. Like its Islamic counterparts, the Holy See invoked religious imperatives and said that its reservations were necessary because of the teachings of the Catholic church.<sup>157</sup>

In late 1994, when the United Kingdom presented its report on Hong Kong, the delegation informed the Committee that after a review it had decided to maintain its declarations and reservations to the Convention.<sup>158</sup> During the discussion, Thomas Hammarberg asked whether the issue of reservations had been discussed with the Chinese.<sup>159</sup> The delegation told the Committee

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151. *See id.* at para. 57.

152. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Morocco)*, Comm. on the Rts. of the Child, 13th Sess., at para. 7, U.N. Doc. CRC/C/15/Add.60 (1996).

153. *Summary Record of the 226th meeting*, Comm. on the Rts. of the Child, 9th Sess., at paras. 8, 21, 30 and 31, U.N. Doc. CRC/C/SR.226 (1995) (discussing Tunisia).

154. *See id.* at para. 29.

155. *Summary Record of the 227th meeting*, Comm. on the Rts. of the Child, 9th Sess., 227th mtg., at para. 42, U.N. Doc. CRC/C/SR.227 (1995) (discussing Tunisia).

156. *See Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Tunisia)*, Comm. on the Rts. of the Child, 9th Sess., at para. 6, U.N. Doc. CRC/C/15/Add.39 (1995).

157. *See Summary Record of the 225th meeting*, Comm. on the Rts. of the Child, 10th sess., 255th mtg., at para. 37, U.N. Doc. CRC/C/SR.255 (1995) (discussing Holy See).

158. *See Summary Record of the 329th meeting*, Comm. on the Rts. of the Child, 13th Sess., at para. 5, U.N. Doc. CRC/C/SR.329 (1996) (discussing the United Kingdom).

159. *See id.* at para. 28.



that this was indeed the case.<sup>160</sup> Interestingly, China itself had only formulated one reservation to the Convention in contrast with the four reservations the United Kingdom formulated for Hong Kong.<sup>161</sup> The Committee made no comment on the admissibility of the reservations, but said that it was "a matter of regret" that the reservations were not being withdrawn.<sup>162</sup>

The Committee has expressed concern about "the broad nature of the reservations" made by New Zealand, which it said raises questions as to their compatibility with the object and purpose of the Convention.<sup>163</sup> The Committee contested Jordan's reservations to Articles 14, 20 and 21, stating that the reservations "may raise questions about the compatibility of the reservations with the object and purpose of the Convention."<sup>164</sup> Occasionally, using an original terminology, the Committee has suggested that reservations may be incompatible "with the principles and provisions of the Convention."<sup>165</sup>

Frequently, the Committee demands that States parties withdraw their reservations, "in the spirit on the World Conference on Human Rights," even when it does not suggest that the reservations actually violate the object and purpose of the Con-

160. See *id.* at para. 76.

161. See *Summary Record of the 331st meeting*, Comm. on the Rts. Of the Child, 13th Sess., 331st mtg., at para. 56, U.N. Doc. CRC/C/SR.331 (1996) (discussing the United Kingdom of Great Britain and Northern Ireland); *Report on the Twelfth Session*, at para. 128, U.N. Doc. CRC/C/54 (1996).

162. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: United Kingdom)*, Comm. on the Rts. of the Child, 30th Sess., 331st mtg., at para. 10, U.N. Doc. CRC/C/15/Add.63 (1996).

163. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: New Zealand)*, Comm. on the Rts. of the Child, 14th Sess., at para. 8, U.N. Doc. CRC/C/15/Add.71 (1997).

164. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Jordan)*, Comm. on the Rts. of the Child, 6th Sess., at para. 9, U.N. Doc. CRC/C/15/Add.21 (1994). Objections to these reservations have been made by Finland, Ireland and Sweden. See *Multilateral Treaties*, *supra* note 4, at 177-79.

165. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Republic of Korea)*, Comm. on the Rts. of the Child, 11th Sess., at para. 8, U.N. Doc. CRC/C/15/Add.51 (1996); *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Slovenia)*, Comm. on the Rts. of the Child, 13th Sess., at para 10, U.N. Doc. CRC/C/15/Add.65 (1996).

vention.<sup>166</sup> The discussions go well beyond the perfunctory and on several occasions members of the Committee have debated at length about the scope of the reservations and the possibility that they be withdrawn with representatives of the States parties. In the case of Argentina, reservations were made to several paragraphs of Article 21, because "before they can be applied, a strict mechanism must exist for the legal protection of children in matters of inter-country adoption, in order to prevent trafficking in and the sale of children."<sup>167</sup> Argentina argued before the Committee that the provisions reinforced the principle of the child's best interests and therefore extended, rather than limited, the scope of the Convention.<sup>168</sup> One of the Committee members, Marta Santos Pais, urged Argentina to withdraw the reservation and simply interpret Article 21 in a way that would give effect to its concerns.<sup>169</sup> Thomas Hammarberg also took Argentina to task for its somewhat enigmatic declaration relating to Article 24.<sup>170</sup> After hearing the reply of Argentina's representative, however,<sup>171</sup> he said it seemed to him that the policy of the Argentina government was precisely the policy that the Convention hoped to promulgate.<sup>172</sup> The Committee concluded by encouraging Argentina to review its reservation to Article 21 with a view to withdrawing it.<sup>173</sup>

The Committee also sharply criticized Canada for its reservations to Article 21, in which Canada invoked concerns for aboriginal children by stating that customary forms of care might conflict with the provision.<sup>174</sup> The Canadian representative said

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166. *Summary Record of the 177th meeting*, Comm. on the Rts. of the Child, 7th Sess., at para. 4, U.N. Doc. CRC/C/SR.177 (1994) (inviting the Argentina delegation to respond to questions regarding the implementation of the Convention).

167. *Multilateral Treaties*, *supra* note 4 at 200.

168. See, e.g., *Summary Record of the 177th Meeting*, Comm. on the Rts. of the Child, 7th Sess., 177th mtg., at paras. 8, 29-31, and 53-55, U.N. Doc. CRC/C/SR.177 (1994) (discussing Argentina).

169. See *id.* at para. 15. See also *id.* at paras. 44, 47 (remarks of Thomas Hammarberg) and para. 48 (remarks of Yuri Kolosov).

170. See *Summary Record of the 179th meeting*, Comm. of the Rts. of the Child, 7th Sess., 179th mtg., at para. 3, U.N. Doc. CRC/C/SR.179 (1994) (discussing Argentina).

171. See *id.* at para. 9.

172. See *id.* at para. 15.

173. See *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Argentina)*, Comm. on the Rts. of the Child, 8th Sess., at para. 14, U.N. Doc. CRC/C/15/Add.35 (1994).

174. See *Summary Record of the 214th meeting*, Comm. on the Rts. of the Child, 9th Sess., 214th mtg., paras. 26, 30-31 and 58, U.N. Doc. CRC/C/SR.214 (1995) (discussing Canada). See *Multilateral Treaties*, *supra* note 4, at 201.

that the perceived need for a reservation had arisen during the ratification process after consultations with indigenous communities.<sup>175</sup> Thomas Hammarberg explained that in his view, a reservation was not necessary, and that Canada might easily have produced a declaration explaining how it intended to implement the Convention.<sup>176</sup> Canada explained that while it would look further into the issue, it would make no undertaking to modify the reservations.<sup>177</sup> The Committee also challenged Canada for its reservation to Article 37(c), concerning the separation of juvenile and adult offenders.<sup>178</sup> The Committee concluded that Canada should consider withdrawing its reservations and added that Canada should keep the Committee "informed of developments on this fundamental matter."<sup>179</sup>

France's reservation to Article 30 of the Convention, dealing with ethnic, religious and linguistic minorities, echoed a similar declaration it produced with respect to Article 27 of the International Covenant on Civil and Political Rights.<sup>180</sup> Marta Santos Pais urged France to reconsider its reservation to article 30.<sup>181</sup> Yuri Kolosov questioned the French delegation as to whether the statement really was a reservation or a declaration.<sup>182</sup> Indeed, France's periodic report spoke of a reservation, whereas the official records of the United Nations refer to the statement as a declaration.<sup>183</sup> The French representative answered that France had indeed made a reservation to Article 30. He explained that under French law, the notion of "minority had always been viewed as running contrary to principles of non-discrimination."<sup>184</sup> He added, however, that despite legal differences in approach to

175. See *Summary Record of the 214th meeting*, Comm. on the Rts. of the Child, 9th Sess., 214th mtg., at paras. 59-60, U.N. Doc. CRC/C/Sr.214 (1995).

176. See *id.* at para. 62.

177. See *id.* at para. 64.

178. See *id.* at paras. 12, 32 and 58. For Canada's replies, see *id.* at paras. 65-66; *Summary Record of the 215th meeting*, Comm. on the Rts. of the Child, 9th Sess., 215th mtg., at paras. 37, 46, U.N. Doc. CRC/C/SR.215 (1995) (discussing Canada).

179. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Canada)*, Comm. on the Rts. of the Child, 9th Sess., at para 18, U.N. Doc. CRC/C/15/Add.37 (1995).

180. See International Covenant on Civil and Political Rights, Declarations and Reservations: France (last modified May 12, 1997) <<http://www.un.org/Depts/Treaty>>.

181. See *Summary Record of the 139th meeting*, Comm. on the Rts. of the Child, 6th sess., 139th mtg., at para. 25, U.N. Doc. CRC/C/SR.139 (1994) (discussing France).

182. See *id.* at paras. 24, 26. See also *id.* at para. 29. Kolosov later opined that the statement was only a declaration. *Id.* at para. 33.

183. See *id.* at para. 27.

184. *Id.* at para. 30.

the problem, France accorded the same guarantees to individuals.<sup>185</sup>

Croatia,<sup>186</sup> Norway,<sup>187</sup> and Mauritius<sup>188</sup> have informed the Committee that they are considering withdrawal of their reservations. Others, such as Denmark,<sup>189</sup> Indonesia,<sup>190</sup> Pakistan,<sup>191</sup> the Republic of Korea,<sup>192</sup> and Slovenia<sup>193</sup> have stated that they are

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185. See *Summary Record of the 139th meeting*, Comm. on the Rts. of the Child, 6th sess., 139th mtg., at para. 30, U.N. Doc. CRC/C/SR.139 (1994) (discussing France). See also *id.* at para. 35.

186. See *Summary Record of the 281st meeting*, Comm. on the Rts. of the Child, 11th sess., 281st mtg., at para. 68, U.N. Doc. CRC/C/SR.281 (1996) (discussing Croatia); *Summary Record of the 279th meeting*, Comm. on the Rts. of the Child, 11th Sess., 279th meeting, at para. 14, U.N. Doc. CRC/C/SR.279 (1996); *Consideration of Reports Submitted by States Parties under article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Croatia)*, Comm. on the Rts. of the Child, 11th Sess., para. 3, U.N. Doc. CRC/C/15/Add.52 (1996).

187. See *Summary Record of the 149th meeting*, 6th Sess., 149th mtg., at para. 7, U.N. Doc. CRC/C/SR.149 (1994) (discussing Norway); *Summary Record of the 151st meeting*, Comm. on the Rts. of the Child, 6th Sess., 151st mtg., at para. 41, U.N. Doc. CRC/C/SR.151 (1994) (discussing Norway); *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Norway)*, Comm. on the Rts. of the Child, 6th Sess., at paras. 5 and 13, U.N. Doc. CRC/C/15/Add.23 (1994).

188. See *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Mauritius)*, Comm. on the Rts. of the Child, 13th Sess., at para. 3, U.N. Doc. CRC/C/15/Add.64 (1996).

189. See *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee: Denmark)*, Comm. On the Rts. Of the Child, 8th Sess., at para. 24, U.N. Doc. CRC/C/15/Add.33 (1995).

190. See *Summary Record of the 79th meeting*, Comm. on the Rts. of the Child, 4th Sess., at paras. 30, 36 and 52, U.N. Doc. CRC/C/SR.79 (1994) (discussing Indonesia); *Summary Record of the 80th meeting*, Comm. on the Rts. of the Child, 4th Sess., 80th mtg., at para. 54, U.N. Doc. CRC/C/SR.80 (1993); *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Preliminary Observations of the Committee: Indonesia)*, Comm. on the Rts. of the Child, 4th Sess., at para. 4, U.N. Doc. CRC/C/15/Add.7 (1993).

191. See *Summary Record of the 132nd meeting*, Comm. on the Rts. of the Child, 6th Sess., at paras. 9, 11, U.N. Doc. CRC/C/SR.132 (1994) (discussing Pakistan).

192. See *Summary Record of the 276th meeting*, Comm. on the Rts. of the Child, 11th Sess., 276th mtg., at paras. 8, 14, U.N. Doc. CRC/C/SR.276 (1996) (discussing the Republic of Korea); *Summary Record of the 277th meeting*, Comm. on the Rts. of the Child, 11th sess., 277th mtg., at para. 60, U.N. Doc. CRC/C/SR.277 (1996); *Summary Record of the 278th meeting*, Comm. on the Rts. of the Child, 11th Sess., 278th mtg., at para. 40, U.N. Doc. CRC/C/SR.278 (1996) (Republic of Korea); *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Republic of Korea)*, Comm. on the Rts. of the Child, 11th Sess., at para. 6, U.N. Doc. CRC/C/15/Add.51 (1996).

193. See *Summary Record of the 337th meeting*, Comm. On the Rts. of the Child, 13th sess., 337th mtg., at para. 8, U.N. Doc. CRC/C/SR.337 (1996) (discussing Slovenia); *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations of the Committee on the Rights of the Child: Slovenia)*, Comm. on the Rts. of the Child, 13th Sess., at para. 20, U.N. Doc. CRC/C/15/Add.65 (1996).

reconsidering them. The Committee has congratulated Myanmar for the withdrawal of its reservations to Articles 15 and 37 of the Convention.<sup>194</sup>

In at least a few cases, the persistence of the Committee on the Rights of the Child on the subject of reservations has borne fruit. During presentation of its initial report in 1994, Indonesia's numerous reservations, invoking the national Constitution to limit obligations under the Convention, were aggressively questioned by members of the Committee.<sup>195</sup> The Indonesian representative promised that they "might be reviewed and withdrawn at a later stage."<sup>196</sup> However, even if the questioning seemed somewhat equivocal, the Committee's conclusions were harsh: "the broad and imprecise nature of these reservations raises serious concern as to their compatibility with the object and purposes of the Convention."<sup>197</sup> A year later, in a follow-up presentation to the Committee, the Indonesian representative explained that the reservations had been misunderstood, and that they were really only intended to be interpretative declarations.<sup>198</sup> Thomas Hammarberg suggested that Indonesia send a new letter to the Secretary-General clarifying its position, and stating that there were in fact no reservations to the Convention.<sup>199</sup> No such declaration, however, has been produced.

Individuals may also attack reservations in the context of litigation in which they invoke the rights that are enshrined in the various international human rights instruments. This litigation may take place before international tribunals such as

194. See *Summary Record of the 79th meeting*, Comm. on the Rts. of the Child, 4th Sess., 79th mtg., at paras. 17, 20, 21, 24, 26, 27, 43, 45, 47, 49 and 53, U.N. Doc. CRC/C/SR.79 (1994) (discussing Indonesia). Finland, Ireland, the Netherlands and Sweden have objected to the Indonesian reservations. See *Multilateral Treaties*, *supra* note 4, at 208-10.

195. See *Summary Record of the 79th meeting*, Comm. on the Rts. of the Child, 4th Sess., 79th mtg., at paras. 17, 20, 21, 24, 26, 27, 43, 45, 47, 49 and 53, U.N. Doc. CRC/C/SR.79 (1994) (discussing Indonesia). Finland, Ireland, the Netherlands and Sweden have objected to the Indonesian reservations. See *Multilateral Treaties*, *supra* note 4, at 208-10.

196. *Summary Record of the 79th meeting*, Comm. on the Rts. of the Child, 4th Sess., 79th mtg., at para. 29, U.N. Doc. CRC/C/SR.79 (1994) (discussing Indonesia).

197. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Preliminary Observations of the Committee on the Rights of the Child: Indonesia)*, Comm. on the Rts. of the Child, 4th Sess., at para. 7, U.N. Doc. CRC/C/15/Add.7 (1993).

198. See *Summary Record of the 161st meeting*, Comm. on the Rts. of the Child, 7th Sess., 161st mtg., at para. 2, U.N. Doc. CRC/C/SR.161(1995) (discussing Indonesia).

199. See *id.* at para. 9.

the European Court of Human Rights.<sup>200</sup> Although the Human Rights Committee has implied that it may also be possible to attack reservations in the course of individual communications filed under the Optional Protocol to the International Covenant on Civil and Political Rights,<sup>201</sup> there have yet to be any such cases. As no comparable individual communication procedure exists in the case of the Women's Convention and the Children's Convention, the question does not arise. Discussions, however, are currently underway with a view to create such mechanisms.

Individuals have also challenged reservations before domestic courts in states where international conventions have direct application. In Switzerland, the Second Civil Court of the Federal Tribunal declared as inoperative a reservation by Switzerland to the European Convention of Human Rights,<sup>202</sup> despite the fact that no state party had formulated an objection.<sup>203</sup> The position of the Swiss court is consistent with the object and purpose of international human rights treaties, which is to protect individuals. If a state makes reservations that are illegal, then individuals should be entitled to contest the validity of such reservations when they are before appropriate tribunals. The approach of the Swiss court shows that the legality of reservations is not a matter to be left to the States parties as is suggested by the ill-suited objections regime proposed by customary law and the Vienna Convention on the Law of Treaties.

#### IV. CONSEQUENCES OF ILLEGAL RESERVATIONS

According to the Vienna Convention on the Law of Treaties, "[w]hen a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."<sup>204</sup> Although not strictly necessary in light of this provision, States

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200. See *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988); *Weber v. Switzerland*, 177 Eur. Ct. H.R. (ser. A) (1990); *Chorherr v. Austria*, 266-B Eur. Ct. H.R. (ser. A) (1993); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (indicating preliminary objections).

201. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

202. See Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

203. See Jean-François Flauss, *Le Contentieux de la Validité des Réserves à la CEDH devant le Tribunal Fédéral Suisse: Requiem pour la Déclaration Interprétative Relative à L'Article 61*, in 5 REVUE UNIVERSELLE DES DROITS DE L'HOMME 297, 302-03 (1993).

204. Vienna Convention, *supra* note 7, at 337.

parties objecting to reservations to the Women's Convention and the Children's Convention have indicated that they consider the treaty to be in force as between them and the reserving state.<sup>205</sup> More infrequently, states have indicated that, as required by the Vienna Convention, the objection prevents the Convention from entering into force between them and the reserving state.<sup>206</sup>

This interpretation is not a satisfactory solution to the problem of the consequences of invalid reservations. If the question is viewed as an objective that affects all state parties and that is susceptible to determination by the treaty bodies in the examination of periodic reports, by individual communications where such procedures exist, or by international and domestic tribunals, then it is essential to determine the effect of invalid reservations even in the absence of objections. The prevailing view, supported by judgments of the European Court of Human Rights, is that a determination must be made as to whether the reservation is "severable."<sup>207</sup> If the reservation is severable, then the provisions of the treaty will be in force, including the provisions to which invalid reservations have been made.<sup>208</sup> If it is not, then the reservation compromises the ratification of the treaty as a whole and it should be deemed not in effect.<sup>209</sup>

In order to establish whether a reservation is severable, the intent of the reserving state must be established.<sup>210</sup> Where a state's reservation was a *sine qua non* of ratification, and where it would never have consented to be bound by the treaty without the reservation, then the reservation cannot be severed.<sup>211</sup> In many cases, however, various indications of the state's intent, including statements it has made and the *travaux préparatoires* of the ratification process, will indicate that it intends to be bound by the treaty even if a court deems its reservation to be invalid.<sup>212</sup> This was the conclusion reached by the European Court of Human Rights in cases involving Switzerland and

205. See Multilateral Treaties, *supra* note 4, at 177-80, 208-21.

206. See *id.*

207. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (Ser. A) (1995) (indicating preliminary objections).

208. See Bowett, *supra* note 31, at 69.

209. See *id.*

210. See *Switzerland v. United States (Interhandel)*, 1959 I.C.J. 6, 117, (March 21); *France v. Norway (Norwegian Loans)*, 1957 I.C.J. 9, 43-66 (July 6) (Lauterpacht, J., dissenting).

211. See Vienna Convention, *supra* note 7, at art. 44, 1155 U.N.T.S. at 337; *France v. Norway*, 1957 I.C.J. 9, at 59.

212. See *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988).

Turkey.<sup>213</sup> Switzerland had declared that even if the court declared its reservations invalid, it intended to remain bound by the European Convention on Human Rights, including the provision in contention.<sup>214</sup> Turkey took the opposite view, but the court invoked various manifestations of the state's practice to conclude that the impugned reservation was severable, and that Turkey was still bound.<sup>215</sup>

"In principle, the will which ought to prevail is the will to accept the treaty," wrote D.W. Bowett.<sup>216</sup> Professor Bowett noted a "patent contradiction" in the will of a state that would ratify a treaty while attaching an illegal condition to it.<sup>217</sup> Bowett further noted that determining a state's intent is "a question of construction."<sup>218</sup> The Human Rights Committee has taken the same view and has provided that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party."<sup>219</sup> The Committee has also stated that "such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of reservation."<sup>220</sup> The United States, France, and the United Kingdom, have reacted vigorously to the Human Rights Committee on this point in their observations. The United States has stated, "[s]ince this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some helpful clarification could be made."<sup>221</sup> The United States also stated that its reservations are "integral parts of its consent to be bound by the Covenant and are not severable."<sup>222</sup> It has further indicated that "[i]f it were to be determined that any one or more of them were ineffective, the

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213. *See id.*; *See also* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (indicating preliminary objections).

214. *See Verbatim record of the public hearings held on 26 October 1987*, C. of E. Doc. No. 87 at 237, 45.

215. *See* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (indicating preliminary objections).

216. Bowett, *supra* note 31, at 76.

217. *Id.* at 75.

218. *Id.* at 77.

219. General Comment No. 24, *supra* note 14, at para. 18, *reprinted in* 15 HUM RTS. L.J. at 467 (relating to reservations to the International Covenant on Civil and Political Rights).

220. *Id.*

221. *U.S. Observations*, *supra* note 94, at 423. *See also* U.N. Doc. A/C.6/50/SR.13, at 52 (1995) (stating the comments of the Legal Advisor, Conrad Harper, to the Sixth Committee).

222. *U.S. Observations*, *supra* note 94, at 423.



ratification as a whole could thereby be nullified."<sup>223</sup> The United States argues that "[t]he general view of the academic literature" is that reservations are an essential part of a State's consent, and "cannot simply be erased."<sup>224</sup> It has stated that "[a] state which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it."<sup>225</sup> As has previously been indicated, this position is at odds with the evolving case law of such bodies as the European Court of Human Rights.

## V. CONCLUSION

The Convention for the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child are among the most recent of the universal international human rights instruments. Some years ago, their very existence was a subject of considerable controversy, but they have quickly become among the most widely ratified. This popularity, however, has had a price: many of the ratifications have been accompanied by reservations that significantly reduce and in some cases effectively eliminate any obligations being assumed by the ratifying state. Participants at the Vienna Conference on Human Rights singled out for special attention the exceptional problem of reservations in the case of these two treaties.<sup>226</sup>

In terms of geographic distribution, the reservations come more or less equally from developed and developing countries. In many cases, these reservations are quite precise and limited, and leave most of the instrument intact. Although some may argue that most if not all reservations to substantive provisions of these treaties are incompatible with their object and purpose, the fact that reservations are specifically allowed in provisions of the instruments indicates that their drafters did not by any means seek to exclude the possibility of reservations. Indeed, their intent was to allow such minor reservations specifically in order to encourage widespread ratification, and this goal has been accomplished. The question remains whether the great and rapid success of these Conventions, in terms of the number of States

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223. *Id.*

224. *Id.* at 424.

225. *Id.*

226. See Vienna Declaration, *supra* note 17, at paras. 39,46, reprinted in 14 HUM. RTS. L.J. at 359, 360.

parties, would have been the same were the possibility of reservation treated more pejoratively.

Nevertheless, both treaties are hampered by the phenomenon of general reservations, which usually take the form of a reference to the reserving state's constitutional law or to dicta of the Shariah. The offenders on this count are Brunei Darussalem, the Bahamas, Bangladesh, Djibouti, Egypt, Iraq, Iran, Kuwait, Lesotho, Libya, Malaysia, the Republic of Maldives, Pakistan, Qatar, Saudi Arabia, Singapore, Syria, and Tunisia.<sup>227</sup> The question may well be asked as to whether the offensive reservations are merely part of a more general strategy aimed at weakening and undermining the spread of universal human rights norms. On the specific subject of reservations, these states have found a rather curious ally in the United States of America which, while it has not yet ratified either the Women's or the Children's Convention, favors the same subversive approach to international human rights treaties. The United States has formulated similar reservations to the four treaties it has accepted: the Convention for the Prevention and Punishment of the Crime of Genocide,<sup>228</sup> the International Covenant on Civil and Political Rights,<sup>229</sup> the International Convention for the Elimination of All Forms of Racial Discrimination,<sup>230</sup> and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.<sup>231</sup>

Bolstered by declarations, such as those of the Vienna Conference, the international courts, commissions, and treaty bodies have been increasingly vigilant on the subject of reservations. Both the Committee for the Elimination of Discrimination Against Women and the Committee on the Rights of the Child

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227. See Multilateral Treaties, *supra* note 4, at 168-75.

228. Convention for the Prevention and Punishment of the Crime of Genocide, *supra* note 8 (the Convention was first proposed when President Truman was in office). See also Nicholas F. Kouris & Joseph M. Titlebaum, *International Convention on the Prevention and Punishment of the Crime of Genocide: United States Senate Grant of Advice and Consent to Ratification*, 1 HARV. HUM. RTS. Y.B. 227 (1988); Jordon J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90 (1989).

229. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOK. J. INT'L L. 277 (1995).

230. International Convention for the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

231. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, U.N. GA. Res. 39/46, Annex. 39, U.N. GAOR, Supp. No. 51, at 197 U.N. Doc. E/Cn. 4/1984/72 (entered into force June 26, 1987).

have adopted what now seems to be a unanimous approach. Their fervor, however, has since been challenged in observations by the United States, the United Kingdom, and France, and it appears to have met with a lukewarm reception in both the International Law Commission and the Sixth Committee of the General Assembly. These observations leave the law in an uncertain state at present, tempers somewhat the triumph of the two treaties, and mitigates the vital protection that they provide to women and children.