Reservations made by Saudi Arabia to CEDAW: Compliance of these reservations to the International Legal Framework on Reservations to Treaties

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Dla mojej babci Irenki, która zawsze jest w moim sercu....¹

¹ To my grandma, always in my heart.
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In international law, a reservation is a unilateral statement made by a State, when signing, ratifying, accepting, approving or acceding to a Treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in application to that State. Reservations allow a State to ratify an international Treaty without obligating itself to provisions it does not wish to undertake.

Reservations have played an important role in the formulation of a substantive legal regime for women’s rights. To date CEDAW has 186 party States. Of this States a great number has made reservations with the potential to modify or exclude most, if not all, of the terms of the Treaty. It is said that reservations undermine the effectiveness of Treaties and this applies to CEDAW too.

Reservations to CEDAW are often based on assertions of cultural and religious belief. Although art. 28 CEDAW does not allow reservations which violate the object and purpose of the Treaty; some countries have attached sweeping reservations. Saudi- Arabia is one of those countries which made a general reservation to CEDAW.

The reservations consist of the following:

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

Other States parties have filed objections to these kinds of reservations, like the one of Saudi- Arabia, stating that this type of broad reservations casts doubt on the commitment of the State to fulfil its obligations; the indefinite scope of reservations could make the Convention completely ineffective in Saudi- Arabia.

Reservations can be influenced in two situations, firstly by objections which are formal disapprovals of reservations and knowledge of them is essential for acquiring a correct

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picture of the legal relations between parties to a Treaty. For example, faced with ongoing criticism of the objecting States, the Maldives eventually dropped its offending reservation and replaces it with a more acceptable one.

The reservation can also be effected by the object and purpose of the Convention. Art. 28 (1) CEDAW states that it shall not be permitted when a reservation is incompatible with the object and purpose of the Convention.

However this thesis will focus on the broad reservations made by Saudi- Arabia to CEDAW it will also address the International Legal Framework on Reservations. The central research question is therefore: to what extent do the reservations made by Saudi- Arabia to CEDAW comply with the requirements of the International Legal Framework on Reservations to Treaties?

To be able to answer this question, the thesis will answer three sub questions; each one will be answered in one chapter.

The first sub question will focus on the International Legal Framework on Reservations to Treaties and will give an explanation of the traditional approach on reservations and the current International Legal Framework and which requirements it entails. The current International Legal Framework is compromised in the Genocide Convention case 1951 and the Vienna Convention on the Law of Treaties.

The absence of specific provisions for dealing with reservations in a number of human rights treaties, and the failure of the Vienna Convention on the Law of Treaties to specify the legal consequences of an impermissible reservation led that the Human Rights Committee adopted the General Comment 24 concerning reservations. This General Comment will also be discussed under the current International Legal Framework on Reservations. Furthermore in this sub- question also art. 27 Vienna Convention will be discussed.

The second sub question will focus on how the International Legal Framework on Reservations is established under CEDAW. The most important provisions of CEDAW for reservations will be discussed. Art. 28(2) CEDAW states that when a reservation is

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incompatible with the object and purpose of the present Convention, it shall not be permitted. This object and purpose test will also be discussed under the answer to this question.

The third sub question will focus on the reservations made by Saudi- Arabia. In this chapter the reservations will be explained one more time and also which effect the ratification of CEDAW had on the women rights in Saudi- Arabia.

If you want to know if Saudi- Arabia’s reservations do go too far or not, I very warmly recommend you to read further.
Chapter 2: International Legal Framework on Reservations to Treaties

§1. The Traditional Rule

The traditional rule governing reservations is otherwise known as the unanimity rule.¹²

Under this rule the acceptance by all signatory States of reservations to a multilateral Convention was necessary, in order to make this reservation admissible and to consider the reserving State to be a party to the Treaty. If the unanimous approval of the signatories could not be obtained, the reserving State had the alternative to withdraw the reservation or refrain from becoming a party to the Treaty.

Prior to the First World War this was the practice. In some cases the consent of the other negotiating States to the making of the reservations was specifically recorded in a process verbal or protocol drawn up and signed on behalf of all the signatories and in other cases it was clear from the record that the reservation had been drawn to the attention of the other signatories and had been tacitly accepted.

This rule was also applied in the practice of the League of Nations. After the incident in which an attempt by Austria was taken to attach a reservation to the Second Opium Convention 1925, when the State had not participated in the negotiations leading up to the adoption and opening for signature of the Convention, the British Government addressed this in a memorandum to the Secretariat of the League of Nations. The British government proposed that the question of admissibility of reservation to general Conventions should be investigated by the Committee of Experts for the Progressive Codification of International Law.¹³

In March 1927, the Committee of Experts submitted a report. According to this report with no doubt it frequently happened that during the negotiations of a Treaty, agreement was reached between the contracting parties, regarding a reservation which is put forward by one of them and accepted by the others. In such a case the former party mentions and maintains its reservation and other contracting parties signify thereby that they have accepted the reservation, both appending their signatures to the Act.

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But when the Treaty declares that it permits signature by Powers which have not taken part in its negotiation, such signature can only relate to what had been agreed upon the contracting Powers. In order to make a reservation to a Treaty valid, it is essential that this reservation would be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of negotiations. If not, the reservation, like the signature to which it is attached, is null and void.\(^{14}\)

The unanimity rule was endorsed by the Committee of Experts. The Council of the League of Nation adopted this report and it asked the Secretary-General to be guided by the principles of the report regarding the necessity for the acceptance by all the Contracting States when dealing with reservations made after the close of the conference at which the Convention is concluded.

The practice of this resolution became the practice of the Secretariat of the League of Nations and also the Secretariat of the United Nations followed the League practice.\(^{15}\)

However when the international arena changed and became more diversified as a result of decolonization of Western powers, greater emphasis was placed on States consenting to the terms by which they would be bound.

The current approach to reservations is currently comprised in the advisory opinion of the International Court of Justice decision *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention Case)* and the *Vienna Convention on the Law of Treaties*.\(^{16}\)

§2. Reservations to multilateral Conventions: changing approach

The traditional unanimity rule governing the admissibility of reservations to the multilateral Conventions was closely linked with the traditional unanimity rule applying to the establishment of the text of Convention. Before the First World War, the text of a multilateral Convention also had to be adopted by unanimity, every State participating in the negotiations could be therefore assure that no provision would be accepted without their consent.


It must not be thought that this unanimity rule was universally acknowledged to be correct during the League of Nations period and the early post-war period. For example a small number of States, principally from the Eastern Europe were of the view that every State had the sovereign right to make reservations unilaterally and at will. In this view the State could become a party to the Treaties even if the reservations were objected by the other States.

Then there was the pan–American system of a larger group of countries from Latin America. This pan–American system was refined by the Governing Board of the Pan-American Union in 1932. It included three key elements. The first element stated that if States ratify a Treaty without reservations, the Treaty applies in the terms in which it was originally drafted and signed. Furthermore the second element states that if States ratify a Treaty with reservations, the Treaty applies in the form in which it may be modified by the reservations for those States which accepted these reservations. The third element stated that if States ratify a Treaty with reservations and States which, having already ratified, do not accept those reservations, the Treaty will not be in force.

Under this pan–American system a significant departure from the traditional unanimity rule can be found, as in this system a reserving State might become a party to an Inter–American Convention in spite of the objections of one or more States to its reservation; the Convention would however not, be in force as between the reserving and the objecting States.

§3. ICJ Genocide Convention case

The underlying difference of approach on the admissibility of reservations to multilateral Conventions came to the surface in 1950 when a number of States wanted to attach reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) adopted by the United Nations General Assembly on the 9th of December 1948.

This Convention did not contain any provision governing reservations. However a number of reservations were made to art. II jo art. IV jo art. VII jo art. VIII jo art. IX jo art. XI jo art. XII of the Genocide Convention by Albania, Algeria, Argentina, Bahrain, Bangladesh,

18 Idem, p. 57.
19 Idem, p. 57.
Belarus, Bulgaria, China, Czech Republic, Finland, Hungary, India, Malaysia, Mongolia, Morocco, Myanmar, Philippines, Poland, Portugal, Romania, Russian Federations, Rwanda, Singapore, Slovakia, Spain, Ukraine, USA, Venezuela, Vietnam and Yemen.  

A number of States objected to some of these reservations and the Secretary-General had become engaged in correspondence with those States as to the legal effect of their objections. The objecting States were Australia, Belgium, Brazil, China, Cuba, Denmark, Ecuador, Estonia, Finland, Greece, Ireland, Italy, Mexico, Netherlands, Norway, Spain, Sri Lanka, Sweden, and United Kingdom of Great Britain and Northern Ireland.

The General Assembly decided then to request an advisory opinion from the International Court of Justice relating to the reservations to the Genocide Convention. The advisory opinion was given on the following issues:

1. **Can the reserving State be regarded as being a party to the Convention while still maintaining its reservations if the reservations is objected to by one or more of the parties to the Convention but not by others?**

2. **If the answer to question 1 is affirmative: what is the effect of the reservation as between the reserving State and:**
   
   a. The parties which object to the reservations?
   
   b. Those which accept it?

3. **What would be the legal effect as regards the answer to Question 1 if an objection to a reservation is made:**
   
   a. By a signatory which has not yet ratified?
   
   b. By a State entitled to sign or accede but which has not done so?

The ICJ answered the first question by saying that a State which has maintained a reservation which has been objected to by one or more of the parties to the Convention but not

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by others, can be regarded as being a party to the Convention if the reservation is compatible with the *object and purpose of the Convention*; otherwise, that State cannot be regarded as being a party to the Convention.

Question 2 (a) was answered with the statement that if a party to the Convention objects to a reservation which it considers to be incompatible with the *object and purpose of the Convention*, the objecting States can in fact consider that there is no Convention between the reserving State and them. The answer to sub b of this question stated that if a party accepts the reservation as being compatible with the *object and purpose of the Convention*, the reserving State can in fact be considered as a party to the Convention between them.²⁵

The answer of question 3 (a) was that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect of being a party to the Convention or not being regarded as a party to the Convention. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State. Answer 3 (b) included that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.²⁶

The ICJ’s advisory decision in the *Genocide Convention case* differed in two major areas from the unanimity rule. First the ICJ did not require any more that all State parties assent to each State’s reservation. A State was therefore allowed to ratify the Treaty even though some States object to the reservation. Secondly, the ICJ established the *object and purpose test* as a standard for evaluating reservations in order to prevent States from using their own criteria for compatibility.²⁷

Although the ICJ established the *object and purpose test*, it has not specify what criteria to consider in determining whether a reservation goes against the *object and purpose* of the Treaty, the basis for this decision was left to each state’s own perception of the Treaty.²⁸

It may be that the difference of views between parties as to the admissibility of a reservation will not have any consequences. On the other hand, it may be that certain parties who consider that assent given by other parties to a reservation is incompatible with the

²⁵ Idem, p. 18.
²⁶ Idem, p. 19.
purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this difference of view and settle the dispute which thus arises either by special agreement or by the procedure laid down in art. XI of the Genocide Convention.

Further it can happen that a State, while not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but even so that an understanding between the State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

But also the Convention can be impaired both in its principle and in its application. Although the States have different views they would have to preserve intact at least what is essential to the object of the Convention. When this desire is absent the Convention itself would be impaired both in its principle and its application. 29

The ICJ remains the forum where disputes over a reservation’s compatibility must be brought. 30

§4. International Law Commission

The UN General Assembly requested not only he ICJ for its advisory opinion, but it also asked the International Law Commission, in the course of its work on the codification of the law of Treaties, to study the question of reservations to multilateral Conventions.

The Commission undertook this study immediately and reported it in 1951, by which time the Court already rendered its advisory opinion in the Genocide Convention case. The outcome of the Commission’s report was that the ‘compatibility test’, as formulated by the Court was too subjective and was not suitable for multilateral Conventions in general.

The Commission believed that parties regard the provisions of a Convention as an integral whole so the reservation to any of them deemed to impair its object and purpose. Following this idea, it said that as long as the application of the ‘compatibility test’ remained a matter of subjective discretion, in other words that some parties may accept a reservation and other may not, the status of the reserving State in relation to the Convention would remain unclear. 31 Furthermore questions could arise whether an instrument of a ratification or

29 ICJ 28th of May 1951 (advisory opinion), Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, (Genocide Convention Case), p. 27.
accession accompanied by a reservation to which some of the contracting States had objected should count towards the number of instruments and ratification or accession required to bring the Convention into force. The Commission therefore recommended revision to the traditional rule whereby unanimous consent was required to admit a State as a party to the Treaty subject to a reservation; however they did propose some minor modifications to the rule.

The outcome of the Commission’s 1951 report on reservation was divided. Despite this the Commission was entitled and required to keep the question of reservation to multilateral Conventions under review in the context of its continuing work on the law of Treaties in general.

The Special Reporteurs (Lauterpacht and Fitzmaurice) on the law of Treaties within the Commission, formulated proposals based on the traditional unanimity rule, but they incorporated a greater degree of flexibility into the system.

Fitzmaurice also made a distinction between bilateral, plurilateral and general multilateral Treaties, for the purpose of reservations. For bilateral and plurilateral Treaties, which were later named multilateral Treaties made between States for the purpose specifically interesting for those States, no reservation could be made unless the Treaty in terms so permitted or that all the other negotiating States expressly agreed to this.

A fundamental change in the Commission’s approach to reservation took place in 1961. Waldock was appointed as a Special Rapporteur on the law of Treaties. In his report, he proposed a flexible system whereby, in the case of multilateral Convention which was silent on reservations, a reserving State would be considered to be party to the Convention as well as the State that did not give notice of its objection to reservations.32

Under his proposed flexible system, as under the unanimity system, the essential interests of each individual State were to a very great extent safeguarded by two fundamental rules. The first rule stated that a State which within a reasonable time objected to a reservation was entitled to regard the Treaty as not being in force between it and the reserving State. The second fundamental rule included that a State which assented to another State’s reservation was nevertheless entitled to object to any attempt by reserving State to invoke against it the provisions of the Treaty from which the reserving State had exempted itself by its reservation.

The flexible system would not have detrimental effects on the drafting of multilateral Conventions; it might however tend in some measures to stimulate the formulation of

32 Idem, p. 59.
reservations, since the majority of reservations related to a particular point which a particular State for one reason or another found difficult to accept.

The Commission was influenced by these considerations and gave a broad approval to Waldock’s proposals. In its 1962 report to the General Assembly it reversed it stand that it had taken in 1951. 33

The Commission agreed that, where the Treaty deals with reservations, the matter is concluded by the terms of the Treaty. Reservations expressly or impliedly prohibited by the terms of the Convention are excluded, while those expressly or impliedly authorised not. So the problem only concerns the cases where the Treaty is silent in regard to reservations and here the Commission agreed that the Court’s principle of “compatibility with the object and purpose of the Treaty” is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral Treaties and of objections to them.

The difficulty lies in the process by which that principle is applied, and especially where there is no tribunal or other organ invested with the standing competence to interpret the Treaty.

Where the Treaty is an instrument of an international organization, the Commission agreed that the question is one for determination of its competent organ. 34 Furthermore when a Treaty is one that is concluded between a small group of States, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication.

However regarding the reservations to multilateral Treaties which are not constituent instruments of international organizations and have no provisions in regard to reservations, the Commission was divided. 35

Some members of the Commission considered it essential that the effectiveness of a reservation to a multilateral Treaty should be depended on at least some measure of common acceptance of it by the other States concerned. 36 On the other hand the other part of the Commission was of the view of the detrimental effect of reservations. 37

At the Commission decided that there were insufficient reasons to make a distinction between multilateral Treaties of a general character and not of this character, therefore the

33 Idem, p. 60.
35 Idem, p. 179, par. 10.
36 Idem, p. 179, par. 11.
37 Idem, p. 179, par. 12.
rules proposed by the Commission cover all multilateral Treaties with the exception of those concluded between small numbers of States, for which the unanimity rule retained. 38

This system is now incorporated in a specific Convention; the Vienna Convention on the Law of Treaties 1969. 39

§5. Developments at the Vienna Conference

The final set of Draft Articles on reservations submitted by the Commission in 1966 differed only in minor respects from the preliminary proposals adopted on first reading 1962. There was one significant change; in 1962 the Commission suggested that the ‘compatibility’ criterion was applicable to objects as well as reservations. However, several Governments had indicated that very often objections to reservations were made to a reservation not on the ground that the reservation was incompatible with the object and purpose of the Treaty, but on other grounds. To explain this position the Commission dropped the ‘compatibility’ criteria to objections, although an objection to a reservation normally indicates a refusal to enter into Treaty relations on the basis of reservations, objections are sometimes made for reasons of principle or policy without the intention of precluding the entry into force of the Treaty between the objecting and reserving States. 40

Art. 17 of the Draft Articles which were submitted in 1966 included the acceptance of and the objection to reservation. Art. 17 (4) of the Draft Articles 1966, contains the three basic rules of the “flexible” system which are to govern the position of the contracting States in regard to reservations to any multilateral Treaties not covered by the preceding paragraphs. 41

The preceding paragraphs covered; cases where a reservation is expressly or impliedly authorized by the Treaty; in other words, where the consent of the other contracting States has been given to the Treaty (art. 17 (1) Draft Articles 1966). 42 Art. 17 (2) Draft Articles 1966, makes a distinction between a large group of States and Treaties concluded between a limited number for the purpose of the application of the “flexible” system of reservations to multilateral Treaties. The acceptance of all parties of a reservation may be necessary “when it appears from the limited number of negotiations States and the object and purpose of the

40 Idem, p. 61.
42 Idem, p. 207, par. 18.
Treaty that the application of the Treaty is in its entirety between all the parties is an essential condition of the consent of each one to be bound by a Treaty”. 43

Art. 17(3) of the Draft Articles 1966, lays down a special rule in the case of a Treaty which is a constituent instrument of an international organization and states that reservations require the acceptance of the competent organ of the organization unless the Treaty otherwise provides. 44

Art. 17 (4) (a) of the Draft Articles 1966 provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the Treaty in relation to that State if or when the Treaty is in force. However contracting State’s objection precludes the entry into force of the Treaty as between the objecting and reserving States, unless contrary intention is expressed by the objecting State (art. 17 (4) (b) Draft Articles 1966).

Although an objection to a reservation normally indicated a refusal to enter Treaty relations on the basis of a reservation, objections are sometimes made to reservations for reasons of principle of policy without the intention of precluding the entry into force of the Treaty between the objecting and reserving States.

Furthermore an act expressing the consent of a State to be bound and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation (art. 17 (4) (c) Draft Articles 1966).

This provision is important as it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the Treaty. 45

The rules under art.17 (4) of the Draft Articles 1966 establish a relative system of participation in a Treaty, which envisages the possibility of every party to a multilateral Treaty not being bound by the Treaty vis-à-vis every other Party. They have the result that a reserving State may be a party to the Treaty vis-à-vis State X but not State Y, although States X and Y are themselves mutually bound. However in the case of a Treaty drawn up between a large number of States, the Commission considered it to be preferable to allowing State Y by its objection to prevent the Treaty coming into force between the reserving State and State X which accepted the reservation. 46

Art. 17 (5) of the Draft Articles 1966 completes the rules regarding acceptance of and objecting to reservations. This article states that for the purposes of paragraphs 2 and 4 a

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43 Idem, p. 207, par. 19.
44 Idem, p. 207, par. 20.
46 Idem, p. 207-208, par. 22.
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. In this case we speak about tacit acceptance of it.

That the principle of implying consent to a reservation from the absence of objection has been admitted into State practice cannot be doubted. The Court itself spoke in the Genocide Convention of very great allowance being made in international practice for tacit assent to reservations.

This decision of the ICJ has been codified by the Vienna Convention on the law of Treaties and makes a contracting party’s silent response to a reservation tantamount to an acceptance.

Parties to a Treaty have twelve months to object to a State’s reservation, or, if they fail to object, the Vienna Convention presumes that they have accepted the reservation (tacit acceptance) (art. 20 (5) Vienna Convention).

§6. The Vienna Convention on the law of Treaties

The regime of this Convention on reservations is incorporated in articles 19-23 of this specific Convention. Art. 19(a) jo art. 19 (b) of the Vienna Convention establishes that States are entitled to formulate a reservation on signature or ratification of a Treaty or accession thereto unless the Treaty prohibits the reservation or provides that only specified reservations, which do not include the reservation in question, may be made.

In other cases, States are entitled to formulate a reservation unless the reservation is incompatible with the object and purpose of the Treaty (art. 19 (c) Vienna Convention). This is of course the test laid down in the Genocide Convention case.

The Vienna Convention, like the Genocide Convention, assume that an objection by another contracting State to a reservations does not preclude the entry into force of the Treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State (art. 20 (4) (b) Vienna Convention).

47 Idem, p. 208, par. 23.
Art. 21 (3) of the Vienna Convention indicates that when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. If the Treaty contains specific criteria by which to judge the reservation’s compatibility, the combination of the Vienna Convention and the Treaty could yield an objective approach to evaluate reservations. However, when the Treaty is silent on reservations, like CEDAW, the determination of the compatibility of a reservation with the object and purpose of the treaty is left to the individual States. This allows for a certain amount of subjectivity on the application of the compatibility criterion, but provides a flexible system that promotes universality.

§7. Universality under the Multilateral Treaties

Formulating a rule on reservations is difficult due the constant tension between the articulated objectives of integrity and universality. The object of integrity encourages uniformity of obligation and preserves the purpose of a Treaty. The integrity objective is based on the contractual nature of Treaties. The concern for the preservation of integrity arose because reservations that alter or limit the effect of a Treaty may undermine the substantive agreement of the parties and destroy the Treaty’s objective. Thus such a reservation would shatter the consensus of intention in the Treaty and break down its binding effect. The agreement would amount to no more than an illusion in which the shared expectations of the participants are transformed into a mere conglomeration of unilateral statements.

Universality is the goal aimed at achieving widespread participation in multilateral Treaties. It is based on the realization that the international community is made up of diverse sovereign entities. Multilateral Treaties are formulated by consent between nation representing and pursuing individual interests and ideologies. These nations have the sovereign right to determine the extent to which they will be bound by an international agreement. The ability to limit or modify the Treaty is essential to encouraging broader

53 Idem, p. 300.
perceptions in and a more universal application of the Treaty. The principle of sovereignty may constrain some States in their ability to enter into foreign agreement. 54

Any rule designed to govern the use and effect of reservations in Treaties must strike a balance between the need for unanimous agreement on the Treaty provisions and the fact that parties to Treaties are independent sovereignties.

The law of reservations has had to incorporate both of these principles in determining when reservations may be attached, who can make them, who may object or accept the reservations and what affects these reservations causes. Rules of reservations focusing on the preservation of integrity of the Treaty generally allow fewer reservations to the Treaty. Reservations rules promoting universality are more flexible in allowing reservations in order to encourage participation. 55

The objectives of universality and integrity generally have been viewed as mutually exclusive, requiring different legal principles to govern reservations law depending on the objective selected. This view however is only a short-term perspective and when the objectives are viewed in the context of the role that reservations play in the development of international law, they appear as successive and interdependent.

The structural changes that have occurred in the international community have given rise to new dimensions of international law. There has been the horizontal expansion of the international community to non-Western spheres, increasing the number of States claiming legal sovereignty. This has not only increased the number of participants, but has also resulted in a more diverse makeup of international society. Democratization of political systems has led to a more open discussion of international relations in political debates, the press and other public opinion forums. Increasing concern over social and economic issues has necessitated active international cooperation above and beyond traditional matters of foreign relations. 56

These structural changes led to an increase in the body of international law as new subjects addressed in international law. The majority of this new body of law has been derived through articulate law-making in international Conventions. As universal concerns expand, participation in international Conventions increases. This is reflected in the vertical expansion of international law from States to international organizations and institutions.

The traditional international law of diplomatic coexistence with its primary source in custom has gradually been expanded toward a cooperative international law with its primary

54 Idem, p. 301.
55 Idem, p. 302.
56 Idem, p. 303.
source in multilateral Treaties. This has been articulated as a move from the international law of reciprocity toward the international law of cooperation.  

Multilateral Treaties have gradually expanded the scope of modern international law. The ability of multilateral Treaties to generate uniform rules and principles is limited by the extent of a Treaty’s acceptance by the sovereign nations within the international community. Treaties make law for any States that are parties to them. Thus, it is necessary to adopt universality as the primary objective in the law of reservations. Reservations provide the means for States to overcome minor difficulties in joining a Treaty and lead to a wider acceptance of Treaty’s rules. As more Treaties are formed with stronger consensual force, substantive international law will develop. This development will eventually preserve the integrity of Treaties, as the increase in cooperative law minimizes areas of disagreement. This process is necessary for the future development of international law. To ignore the flexible needs of the international community at this time would be to halt the evolution of international law.

Interaction and interdependence among States decreases isolation. New legal norms are created to govern the ensuing relationships. This development also consequently limits States’ freedom to act and restricts their ability to exercise sovereignty. Thus it will reduce action bases primarily on sovereignty and encourages international cooperation.

The principles of sovereignty and nationalism are not decreasing in value, but States are recognizing the need to promote global stability and an international social order. The problems facing the global community today require international laws. The increase in international law arising from Treaties demonstrates that ideological and cultural differences can be overcome and utilitarian relationships and regulations can be established on the international level.

§8. *The ILC’s Draft Guidelines on ‘Reservations to Treaties’*

On the 9th of December 1993 the General Assembly endorsed the decision of the International Law Commission to include in its agenda the topic “Reservations to Treaties”. This agenda topic is not meant to revise the reservations provisions of the *Vienna Convention on the Law of Treaties* but to clarify controversial areas. Its main objective is to provide States

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57 Idem, p. 304.
58 Idem, p. 305.
59 Idem, p. 306.
with coherent answers to the whole range of questions they might raise with regard to reservations. The International Law Commission also appointed a Special Rapporteur (A. Pellet) for the topic, which submits Draft Guidelines and commentaries.

The Draft Guidelines generally follow the provisions of the *Vienna Convention* relating to reservations. For the purpose of assessing the validity of reservations the Draft Guidelines define ‘the object and purpose’ of the Treaty as “the essential provision of the Treaty”. 60 The Draft Guidelines are not yet approved by the General Assembly and it is not in the form of a Convention that binds States. 61

§9. General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under art.41 of the Covenant.

The issue of reservations is also a concern of other Human Rights Treaty bodies and at the fifth meeting of Chairpersons of Human Rights Treaty Bodies in 1994 the recommendation was made that the Treaty Bodies should require States parties to explain their reservations. At that meeting it was also recommended that Treaty Bodies should clearly state that certain reservations were incompatible with the Treaty law. 62

The absence of specific provisions for dealing with reservations in a number of Human Rights Treaties and the failure of the *Vienna Convention on the law of Treaties* to specify the legal consequences of an impermissible reservation, led the Human Rights Committee to adopt the *General Comment 24* concerning reservations. In paragraph 8-11 of the principles of international law are identified that apply to the making of reservations and those reservations which the Human Right Committee regards as contrary to the object and purpose of the Covenant. 63

*Reservations incompatible with the ‘object and purpose’ test*

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61 Idem, p. 15.
63 Idem, par. 23.
The absence of a prohibition on reservations does not mean that any reservation is permitted; CEDAW is one of the Conventions that don’t include the prohibition of reservations. Art.19 (3) of the Vienna Convention provides relevant guidance and it stipulates that where a reservation is not prohibited by the Treaty or it falls within the specified permitted categories, a State may make a reservation which is not incompatible with the object and purpose of the Treaty.  

Reservations that offend peremptory norms would be incompatible with the object and purpose of the Covenant. Although Treaties that are mere exchanges of obligations between States allow them to reserve application if rules of general international law, this is different when we speak about Human Rights Treaties, like CEDAW, which are for the benefit of persons in a jurisdiction. Provisions that represent customary international law may not be subjected to reservations.

Reservations denying people the right to determine their own political status and to peruse the economic, social and cultural development would be incompatible with the object and purpose of the Covenant. A reservation to the obligation to respect and ensure the rights and to do so, on a non-discriminatory basis would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant.

The Committee also considered the non-derogable rights. Certain rights have been considered so important that they are non-derogable. Art. 15 (2) ECHR states that there will be no derogation from Art. 2 ECHR (right to life), except in respect of deaths resulting from lawful acts of war, or from Art. 3 (1) ECHR (right to be free from torture and other inhumane or degrading treatment or punishment, art. 4 (1) ECHR (right to be free from slavery) or art. 7 ECHR (the right to be free from retroactive application of penal laws) shall be made.

The Committee in particular considered whether reservations to non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency.

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65 Idem, par. 8.
66 Idem, par. 9.
67 Idem, par. 10.
However there is no automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant, it is hard for a State to justify such a reservation. 68

The Covenant consists not just of specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. 69

These guarantees in part II of the Convention. In particular art.2 of the ICCPR shows these guarantees. This article indicates the following: each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art.2 (1) ICCPR). Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant (art. 2 (2) ICCPR). Under art.2 (3) ICCPR each State Party to the present ensures that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (art. 2 (3) (a) ICCPR; ensures that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy (art. 2 (3) (b) ICCPR); ensures that the competent authorities shall enforce such remedies when granted (art. 2 (3) (c) ICCPR).

States parties must therefore immediately guarantee the enjoyment of rights in the ICCPR for people within its territory and jurisdiction without discrimination. States parties must ensure that the rights in the ICCPR are protected by domestic laws and other measures. Furthermore the States must ensure that a person who has suffered a breach of his or her

69 Idem, par. 11.
rights has access to an effective domestic remedy in respect of that breach. And a last States parties should ensure that the domestic remedy is properly enforced.\textsuperscript{70}

The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. States parties must provide information regarding the actual role of women in society so that the Committee may ascertain what measures, in addition to legislative provisions, have been or should be taken to give effect to these obligations, what progress has been made, what difficulties are encountered and what steps are being taken to overcome them.\textsuperscript{71}

Article 1 ICCPR, together with art.2 to art.5 ICCPR are seen as overarching or structural provisions, in light of which individual human rights established in part III of the Covenant should be applied. \textsuperscript{72}

The Covenant envisages further that for the better attainment of its States objectives, a monitoring role for the Committee, so reservations which purport to evade that essential element in the design of the Covenant are incompatible with the object and purpose. Furthermore the State may not reserve the right to present a report and have it considered by the Committee. A reservation that rejects the Committee’s competence to interpret the requirements of any provision of the Covenant would also be contrary to the object and purpose of the Treaty. \textsuperscript{73}

The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party’s jurisdiction. Domestic laws may need to be altered properly to reflect the requirements of the Covenant and mechanisms at the domestic level will be needed to allow the Covenant right to be enforceable at the local level. Reservation can reveal a tendency of a State not wanting to change a particular law. According the \textit{General Comment

\textsuperscript{70} S. Joseph e.a., ‘A handbook on the individual complaints procedures of the UN Treaty bodies’ Geneva: OMCT 2006, p. 36
\textsuperscript{71} UNHCHR,’ General Comment No.28’, United Nations 1996-2001, par. 3.
\textsuperscript{73} UNHCHR,’ General Comment No.24’, United Nations 1996-2001, par. 11.
of particular concern are reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenants rights may be sued in domestic Courts and that individual complaint may be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.\textsuperscript{74}

The issue arises as to whether reservations are permissible under the first Optional Protocol and if so whether such a reservation might be contrary to the object and purpose of the Covenant or the first Optional Protocol itself. The optional protocol has as the object and purpose to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victim of violations by a State party of any of the rights in the Covenant. The optional protocol establishes that these individual claims on the rights obligatory for a State under the Covenant are allowed to be tested before the Committee and a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant.\textsuperscript{75}

The second optional protocol extends to the substantive obligations undertaken under the Covenant which relate to the right of life, by prohibiting execution and abolishment of the death penalty. Only one category of reservations is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of military nature committed during wartime.\textsuperscript{76}

Legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the ICCPR

The Vienna Convention on the Law of Treaties provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions.\textsuperscript{77}

General Comment 24 addressed the role of the Human Rights Committee in the context of reservations. The comment suggests that the classic rules on reservations contained in the Vienna Convention are inadequate for the Covenant and other Human Rights Treaties. These Treaties concern the rights of individuals and not mutual obligation between States and

\textsuperscript{74} Idem, par. 12.
\textsuperscript{75} Idem, par. 13.
\textsuperscript{76} Idem, par. 15.
\textsuperscript{77} Idem, par. 17.
therefore there is no legal interest of State to lodge objections. Therefore according to the Committee only a few States lodged objections to incompatible reservations and they are entitled to do under the *Vienna Convention*. \(^{78}\)

However the absence of protest by a State cannot imply that reservations are either compatible or incompatible with the *object and purpose* of a Convention. Objections are made occasionally, are made by certain States and on grounds not always specified. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. An objection to a reservation may provide some guidance to the Committee in its interpretations as to its compatibility with the *object and purpose* of the Convention. \(^{79}\)

Then the Committee takes another view than the *Vienna Convention* and the ICJ in the *Genocide Convention* case stating that is up to the Committee to determine whether a specific reservation is compatible with the *object and purpose* of the Covenant and not the State. This is in part because it is an inappropriate task for States parties in relation to Human Rights Treaties and in part because it is the task that the Committee cannot avoid in the performance of its functions.

If a reservation is compatible with the *object and purpose* of the Convention must be established objectively, by reference to legal principles and the Committee is particularly well placed to perform this task. \(^{80}\)

*Reviewing reservations under ICCPR*

Recommendations were also made how to review the reservation by the Committee. Although these recommendations are made to the ICCPR and the Human Right Committee they can be also useful under other Treaties, because the *General Comment 24* suggested that the classic rules on reservations contained in the *Vienna Convention* are inadequate for the ICCPR and other Human Rights Treaties. So also the CEDAW Committee could use these recommendations in reviewing reservations made under CEDAW. \(^{81}\)

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\(^{80}\) Idem, par. 18.

Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human right compliance have or have not been undertaken. Reservations must therefore refer to a particular provision of the Convention and indicate the precise terms its scope in relation thereto.

When States consider the compatibility of possible reservations with the _object and purpose_ of the Convention, they should also take into account the overall effect of a group reservation, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligation and not the Covenant as such.

The interpretative declarations or reservations should not seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.

States should not seek through reservations or interpretative declarations to determine that the meaning of the provisions of the Covenant is the same as given by an organ of any other international Treaty body.  

States should institute procedures to ensure that each and every proposed reservation is compatible with the _object and purpose_ of the Covenant.

Furthermore it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for recommendations made by the Committee during the examinations of their reports.

Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

§10. _Influence of art.27 Vienna Convention_

Under art.27 Vienna Convention a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

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82 Idem, par. 19.
83 Idem, par. 20.
Art. 27 of the Vienna Convention deals with internal law and the observance of Treaties. 84 This article was proposed by Pakistan and supported by a substantial group of States and is a restatement of a long-standing principle of customary international law.

The Commission had not included the principle in its draft articles because it considered the point to fall within the law of State responsibility rather than the Law of Treaties. 85

The Pakistan amendment was nonetheless approved in principle and referred to the Drafting Committee. It was reported out with the addition of a qualification to the effect that the rule is without prejudice to art.46 Vienna Convention.

Art. 46 of the Vienna Convention gives exception to art.27 of the Vienna Convention by including that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance (art. 46 (1) Vienna Convention). A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith (art. 46 (2) Vienna Convention). 86

Chapter 3: International Legal Framework under the CEDAW.

In the previous chapter we discussed the International Legal Framework on Reservations to Treaties and now we will see how this framework works under the CEDAW.

CEDAW has helped advance women’s rights worldwide; however there remain difficulties with this Convention. Some countries ratified this Convention with conditions that effectively gut the provisions of the Treaty, often on the basis of religious or cultural norms. Although this Convention can be a powerful tool to promote gender equality, true acceptance and actual implementation of the rights and protections contained therein have yet to be achieved by many states parties. 87

§1. Objections made by other countries to the reservations made by Saudi- Arabia

As stated above reservations can be influenced in two situations first of all by objections which are formal disapprovals of reservations and knowledge of them is essential for acquiring a correct picture of the legal relations between parties to a Treaty. 88 The Maldives for example eventually dropped its offending reservation and replaces it with a more acceptable one, because of ongoing criticism of the objecting States. 89

The reservation can also be effected by the object and purpose of the Convention. Art. 28 (1) CEDAW states that it shall not be permitted when a reservation is incompatible with the object and purpose of the Convention.

We will start by the objections made by other countries to the reservation made by Saudi- Arabia. A number of objections were made to the reservations made by Saudi- Arabia. Austria, Denmark, Finland, France, Germany, Ireland, Netherlands, Norway, Portugal, Spain objected to the reservation of Saudi- Arabia to art. 9 (2) CEDAW stating such an important provision of non-discrimination is not compatible with object and purpose of the Convention.

All of these countries also made reservation to the general reservation made by Saudi- Arabia, one more country objected to this and that was United Kingdom of Great Britain and Northern Ireland.

Austria stated in 2001 that the fact that the reservation concerning of Saudi-Arabia concerns any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom raises doubts as to the commitment of the Kingdom of Saudi Arabia to the Convention.

Given the general character of this reservation a final assessment as to its admissibility under international law cannot be made without further clarification.

The Government of Denmark followed this idea stating that this general reservation is incompatible with the *object and purpose* of the Convention and accordingly inadmissible and without effect under international law.

Finland objected also to this general reservation as this reservation does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts as to the commitment of the reserving State to fulfill its obligations under the Convention.

Also France states that this general reservation of the Kingdom of Saudi-Arabia gives the other States parties absolutely no idea which provisions of the Convention are affected or might be affected in future. The Government of the French Republic believes that the reservation could make the provisions of the Convention completely ineffective and therefore objects to it.

Germany is also of the view that this general reservation made by Saudi-Arabia raises doubts as to the commitment of the Kingdom of Saudi Arabia to CEDAW. Germany also considers this reservation to be incompatible with the *object and purpose* of the Convention.

In the view of Ireland, Portugal, Spain, United Kingdom of Great Britain and Northern Ireland and the Netherlands this general reservation may cast doubts on the commitment of the reserving State to fulfill its obligations under the Convention. Norway then again states that, due to its unlimited scope and undefined character, this part of the reservation is contrary to *object and purpose* of the Convention. Sweden states that this general reservation raises doubts as to the *object and purpose* of the Convention.90

Now that we know which objections there have been to the reservations of Saudi-Arabia, it is time to see which influence these objections have on the reservation of Saudi-Arabia.

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First of all objections made by other countries did not make Saudi- Arabia withdraw any of their reservations. Till now Saudi- Arabia has the reservations;

1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.
2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention. “\(^91\)

Furthermore all the objecting States indicated that although reservations have been made they do not preclude the entry into force of the Convention between them and Saudi- Arabia. \(^92\)

Article 20 (4) (b) of the *Vienna Convention* gives State parties the option of precluding entry of the Convention between a reserving and objecting State, however, an objecting State under CEDAW has yet to utilize this option.

Under the *Vienna Convention*, a reserving State can still become a party to the Treaty but this is limited to the extent where an objecting State rejects the entry of the Convention between itself and the reserving State. It is questionable whether States have an incentive to object to the entry of the Convention or what purpose such an objection might serve, given the normative nature of Human Rights Treaties. By preventing the enforcement of the Treaty, the objecting State is in a way giving the reserving State the benefit of their reservation. On the other hand, by “keeping the Convention in force between themselves and the reserving States, the objecting States are in effect allowing a reserving State to be Party without having to adhere to central tenants of the Treaty, that is permitting a standard of adherence below what they consider acceptable”. \(^93\)

It can be said that by keeping the entry between the objecting States and Saudi- Arabia the objection and acceptance are identical. \(^94\) Also in the case of Saudi- Arabia and objecting countries, these countries did nothing else than object and this did not have any influence on the reservations made by Saudi- Arabia.

§2. How the object and purpose of a Convention is established

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Now that we saw how the reservation were affected by the objections of other States, it is now time to look on the reservations of Saudi Arabia and see if they are in compliance with the object and purpose of CEDAW. Before we start it is important to know how the object and purpose of the Convention is established in general.

As with all things if we say that something has a certain object and purpose it is all because someone, according to what we assume, confers on the thing this object and purpose. Of course, different people may confer different objects and purposes on a thing.

Sometimes, the interpretation of a Treaty using its object and purpose is referred to by the term teleological interpretation. In certain national legal systems, jurisprudence distinguished between two types of teleological interpretation, termed as subjective and objective.\textsuperscript{95}

According to this terminology, interpretation is subjective teleological when a law is interpreted based on the object and purposes conferred on the law by the original lawmaker. On the other hand, the law is dissociated from its authors and instead the applier interprets the object and purpose of law. Appliers do this based on the objects and purpose assigned to the law by the legal community or by people in general. We then speak about the objective teleological interpretation.

This division into subjective and objective teleological interpretation has no counterpart in international law. It is a view generally held in the literature that when appliers interpret a Treaty using its object and purpose it is always based on those objects and purposes assumedly conferred on the Treaty by the Treaty parties.

The ultimate determining factor for what shall be considered the content of the object and purpose of a Treaty are the intentions of the Treaty Parties. To determine the object and purpose of a Treaty it sometimes needed that a separate process of interpretations might be needed because in some cases, the intentions of the parties to a Treaty are considered unclear.

Because the legal correct meaning of a Treaty is those pieces of information conveyed by the Treaty with regard to its norm those pieces of information conveyed by the Treaty with regard to its norm content, according to the intention of the Treaty Parties insofar these intensions can be considered mutually held, the object and purpose of a Treaty can hardly be anything other than the object and purpose which the parties to the Treaty intended to or more specifically mutually intended to.\textsuperscript{96}

\textsuperscript{96} Idem, p. 205.
So where the *General Comment 24* gives the Human Rights Committee the right to determine the *object and purpose* of the Convention it is under CEDAW established by the Treaty parties. 97

The CEDAW Committee does not have the power to determine that a reservation is incompatible and thus null and void. But the reporting system is a way of scrutiny and public censure and States making reservations are under constant pressure to withdraw or amend the incompatible laws and practices. 98

Even though the recommendations of the CEDAW Committee are not legally binding the pressure can be felt, so in a way CEDAW Committee’s reporting technique can push a State Party to withdraw the reservations or to make national laws to be in line with CEDAW. 99

So the Committee has certain responsibilities as the body of experts charged with the consideration of periodic reports submitted to it. The Committee, in its examination of States' reports, enters into constructive dialogue with the State party and makes concluding comments routinely expressing concern at the entry of reservations, in particular to art. 2 jo art.16 CEDAW, or the failure of States parties to withdraw or modify them. 100

§3. **CEDAW provisions**

CEDAW was adopted by the United Nations in 1979. This Convention provides a broad definition of discrimination against women. Art.1 CEDAW states that for the purpose of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, in a basis of equality of men and women, of Human Rights and fundamental freedoms in their political, economic, social, cultural, civil or any other field.

CEDAW provides for women’s rights in various arenas such as government and political life, education, employment, health care, and other areas of social and economic life.

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99 Idem, p. 20.
It also provides for special protections for women such as “temporary special measures” and protection of maternity (art. 4 CEDAW). \(^{101}\)

International norms often expand the role and responsibility of the State with regard to equality of citizens, CEDAW illustrates this point. Art. 2 CEDAW requires States to eliminate not only governmental discrimination, but also by “any person, organization or enterprise”. As a result, the Convention seems to provide broad protection for women. Yet other provisions indicate a reluctance to demand full implementation of these rights and protections.

For example art. 18 CEDAW provides for a Committee to review compliance by State parties. However art. 18 CEDAW notes that States can indicate “factors and difficulties affecting the degree of fulfilment of obligations”, which implies that compliance is not really expected. When States’ reports are considered, the Committee can merely offer suggestions and general recommendations (art. 21 (1) CEDAW). \(^{102}\)

An Optional Protocol was drafted in 1999 to provide a complaint process for individuals to petition the Committee regarding violations by State parties. This Protocol has entered into force in December 2000. The Committee also has the power to examine grave or systematic violations by a State party, including a visit to the State. The inquiry must also be conducted confidentially. Although no reservations are allowed to the Optional Protocol, States can opt out of this procedure. \(^{103}\)

§4. The object and purpose of CEDAW

The object and purpose of the CEDAW Convention is to create legally binding standards for women’s human rights by highlighting civil and political as well as economic, social and cultural rights, and placing them in a framework of the right to equality and non-discrimination based on sex. It also provides efficacious supervisory machinery for the obligations undertaken. The object and purpose of this Convention encompasses the elimination of all forms of discrimination against women. The object of attaining equality for women is specifically realised in the elimination and modification of cultural practices and customs that discriminate against women, as reflected under art. 2 (f) jo art. 5 CEDAW.

While the CEDAW Convention is an International Treaty wholly devoted to the human rights of women in every sphere, its essence lies in art. 2 (f) jo art. 5 CEDAW because


\(^{102}\) Idem, p. 37.

\(^{103}\) Idem, p. 38.
they capture the concern expressed in the Preamble that only in traditional roles of men and women can bring about genuine equality between the sexes.

Art. 2(f) CEDAW states that State parties shall take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Art. 5(a) CEDAW states that State parties shall take appropriate measures to modify the social and cultural patterns of conduct of women and men, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Furthermore States shall take all the appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of children, it being understood that the interest of children is the primordial consideration in all cases (art. 5 (b) CEDAW).104

§5. How the object and purpose of CEDAW is achieved

The object and purpose of the CEDAW Convention gain specific application in certain provisions of this Treaty such as those guaranteeing the rights to education, employment, health, political representation and many other such rights. Art. 16 CEDAW is one of the articles which is the application of art.2 jo art.5 CEDAW and stressed a women’s right to equality within marriage and the removal of discriminatory practices.

Art. 16(1) CEDAW states that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriage; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) the same rights and responsibilities during marriage and at its dissolution; (d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions

104 IWRAW,’ The validity of reservations and declarations to CEDAW: The Indian experience’, IWRAW Asia Pacific Occasional Papers Series 2005, p. 3.
where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Art. 16(2) states that betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. ¹⁰⁵

In the Report of the CEDAW Committee (eighteenth and the nineteenth) session the Committee stated that they consider art. 2 jo art. 16 CEDAW to be core provisions of the Convention. Although some States parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles. ¹⁰⁶ Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to art. 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn. ¹⁰⁷

However the CEDAW Committee expressed what in their view core provisions are, they can only review the national reports and make recommendations. There don’t establish the object and purpose of the CEDAW Convention. ¹⁰⁸

The Committee however made their view of reservations very clear by saying that removal or modification of reservations, particularly to art. 2 jo art. 16 CEDAW would indicate a State party’s determination to remove all barriers to women’s full equality and its commitment to ensuring that women are able to participate fully in all aspects of public and private life without fear of discrimination or recrimination. States which remove reservations would be making a major contribution to achieving the objectives of both formal and de facto or substantive compliance with the Convention – a laudable and appropriate contribution to the commemoration of 50 years of compliance with the Universal Declaration of Human Rights, as well as implementation of the 1993 Vienna Declaration and Programme of

¹⁰⁵ Idem, p. 4.
¹⁰⁷ Idem, p. 49, par. 17.
Action. Above all because art. 2 (f) jo art. 5 jo art. 16 CEDAW deal with the same subject matter and the essence of women’s human rights, a reservation or declaration made against any of those articles would have the effect of violating a State’s obligation under all three provisions.

§6. Reservations regime under CEDAW

Art. 19(c) of the Vienna Convention is used in CEDAW’s approach to reservations. A State may, when signing, ratifying, accepting, approving or acceding to a Treaty, formulate a reservation unless the reservation in incompatible with the object and purpose of the Treaty (art. 19 (c) Vienna Convention). Art. 28(1) CEDAW states that 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. When a reservation is incompatible with the object and purpose of the present Convention, it shall not be permitted (art. 28 (2) CEDAW). Reservations may be withdrawn at any time by notification to thus 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 (art. 28 (3) CEDAW).

Art. 28 CEDAW goes on to repeat the ICJ/ Vienna Convention test whereby reservations will be invalidated if they are against the object and purpose of the Convention.

Furthermore any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiations shall, at the request of them, be submitted to arbitration and if within six months from the date of the request for arbitration the parties are unable to agree on the organization of arbitration, any one of those parties may refer the dispute to the ICJ by request in conformity with the Statute of the Court (art. 29 (1) CEDAW). Each party however may at the time of signature or ratification of the present Convention or accession thereto declare that is does not consider itself bound by art.29 (1) CEDAW and the other State Parties shall not be bound by this paragraph with respect to any State party which has made such a reservation (art. 29 (2)

CEDAW). A reservation under art.29 (2) CEDAW may be withdrawn at any time by notifying the Secretary-General of the United Nations (art. 29 (3) CEDAW).

§7. Object and purpose test of CEDAW in practice

Reservations illustrate a broader concern in the human rights system: the tension between the push for universal ratification and the need for meaningful implementation of Treaties. The reservations also illustrate the tension between the principles of non-discrimination and freedom of belief.

Reservations that violate the object and purpose of the Treaty are not allowed, under art.28 CEDAW, however some countries have attached sweeping reservations, like Saudi-Arabia with its general reservation to the Treaty “in case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention”. 112 Other States parties have filed objections to Saudi-Arabia’s and other countries’ similar reservations. They note that this type of broad reservation casts doubt on the commitment of the State to fulfil its obligations; the indefinite scope of the reservation could make the Convention completely ineffective in Saudi-Arabia.113

The struggle between religious and culturally-based reservations and the principle of non-discrimination shows both the perils and promise of CEDAW.114 Some countries, such as Saudi-Arabia, seem to become parties to CEDAW in name only. In other countries, CEDAW changed the understanding of cultural and religious norms.115

CEDAW Committee on reservations to the Treaty and the ‘object and purpose test’

It is now time to look how the object and purpose test of the CEDAW Convention takes place in practice. In this way we will know which reservations are allowed under this test and which are not.116

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114 Idem, p. 39.
115 Idem, p. 40.
116 Idem, p. 41 jo p. 42.
To see how the object and purpose test is examined by the CEDAW Committee, we will look on one of the reports of the CEDAW Committee. 117

During this sixteenth session, the Committee considered the reports submitted by eight States under art.18 CEDAW. 118

a. Morocco

The Committee considered the initial report of Morocco on the 14th and 20th of January 1997. 119

Upon ratification Morocco has made reservations. The first reservation which was made was under art.2 CEDAW. This article states that Parties to the Convention condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. 120

A reservation was also made to art.9 (2) CEDAW which established equal rights to women and men with respect to the nationality of their children. Under the law of the Kingdom of Morocco a child can only bear the nationality of the mother where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality.

Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother by declaring, within two years of reaching the age of majority, its desire to acquire that nationality, provided that, on making such declaration, its customary and regular residence is in Morocco.

A reservation was also made to art.16 CEDAW in which States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relation and in particular shall ensure on a basis of equality of men and women.

The Government of the Kingdom of Morocco makes a reservation to the provisions of this article particularly in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic Sharia, which

118 Idem, par. 42.
119 Idem, par. 45.
guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementary in order to preserve the sacred bond of matrimony. The provisions of the Islamic Sharia oblige the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support the family.

Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over his wife's property. For these reasons, the Islamic Sharia confers the right of divorce on a woman only by decision of a Sharia judge.

The last reservation is made to art.29 CEDAW, the Government of the Kingdom of Morocco does not consider itself bound by the art.29 (1) CEDAW which states that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. Kingdom of Morocco is of the view that any dispute of this kind can only be referred to arbitration by agreement of all parties to the dispute.121

Also a reservation was made to art. 15 (4) CEDAW which states that States shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.122

Now that we stated these reservations we will look how the CEDAW Committee reviews them. The Committee is of the view that although the instrument of ratification of the Convention by the Kingdom of Morocco was in itself an important event, the fact that it had been accompanied by declarations and reservations concerning the substance of the Convention seriously hindered the latter’s implementation.123

The Committee noted that obvious contradictions can be found between the obligations deriving from the undertaking made by the State party at the time of signing and the persistence of considerable discriminations against women in Morocco, particularly in the field of family law.124

The Committee is therefore deeply concerned at the number and importance of the reservations made by Morocco, particularly the reservation to art.2 CEDAW which is one of

124 Idem, par. 53.
the Conventions central articles. The Committee considers any reservations to that article to be *contrary* to the *object and purpose* of the Convention and is incompatible with international law (art. 28 (2) CEDAW). The Committee is also concerned that the combination of art.2 CEDAW and art. 15 CEDAW leave no room for the evolving concepts of Islamic law.\(^{125}\)

According to the Committee cultural characteristics could not be allowed to undermine the principle of the universality of human right which remained inalienable and non-negotiable, nor to prevent the adoption of appropriate measures in favour of women. As a result, the Committee remained concerned at the profound inequalities affecting the status of women in Morocco. Considerable discrimination in the areas of marriage, conjugal relations, divorce and the custody of children still exists. Laws regarding the punishment of adultery and the ability to pass on nationality continue to benefit the husband to the detriment of the wife.\(^{126}\)

The Committee recommended that the State incorporate the principle of equality between men and women into all spheres of life and into the Constitution and that it bring the Constitution into line with the relevant international norms of the Convention.\(^{127}\)

b. *Turkey*

The Committee considered the periodic report of Turkey on the 17\(^{th}\) of January 1997.\(^{128}\) Although Turkey ratified the Convention it did so with reservations. Reservations of the Government of the Republic of Turkey regard articles of the Convention dealing with family relations which are not compatible with the provisions of the Turkish Civil Code, in particular art.15 (2) CEDAW which establishes that States Parties accord women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise the capacity. In particular, they shall give women equal right to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. Also reservations were made to art. 15(4) CEDAW, art.16 (1) (c) jo art.16 (1) (d) jo art.16 (1) (f) jo art.16 (1) (g) CEDAW and art.29 (1) CEDAW.\(^{129}\)

\(^{125}\) Idem, par. 59.

\(^{126}\) Idem, par. 64.

\(^{127}\) Idem, par. 69.

\(^{128}\) Idem, par. 151.

Now let look at the view of the Committee on theses reservations. The reservations to art.15 jo art.16 CEDAW are regarded by the experts as serious impediments to the full implementation of the Convention in the State Party. 130

The Committee was deeply concerned about the reservations of Turkey to article 15, paragraphs 2 and 4, and article 16, paragraphs 1 (c), (d), (f) and (g). It was also concerned with the prolonged discussions and the resistance to the reform of the Civil Code, although it appreciated that efforts had been made in that context by the General Directorate, women members of Parliament and the Ministry of Justice. The Committee urged the State party to facilitate and hasten that process so that the Law on Citizenship, the Civil Code and the Criminal Code could be brought into conformity with the articles of the Convention.131

However the Committee has expressed it concerns, it has said nothing about the inconsistency of these reservation to the object and purpose test under art.28 (2), so it can be concluded that they are consistent with the object and purpose of the Convention.132

c. Venezuela

The Committee considered the periodic report of Venezuela on the 22nd of January 1997. 133

The reservation made by Venezuela upon ratification confirming in substance the reservation made upon signature consisted of that the country makes a formal reservation with regard of art.29 (1) CEDAW, since it does not accept arbitration or the jurisdiction of the International Court of Justice for the settlement of disputed concerning the interpretation or application of this Convention.134

Although various recommendations and concerns were expressed by the CEDAW Committee nothing was said that this reservation would be inconsistent with the object and purpose of the CEDAW Convention.135

131 Idem, par. 174.
133 Idem, par. 207.
In its seventeenth session, the Committee considered the reports submitted by nine States parties under art.18 CEDAW. 136

d. Australia

The Committee considered the report of Australia on the 18th of July 1997. 137 Upon ratification Australia made a reservation to art.11 (2) CEDAW which consists the prevention of discrimination against women on the grounds of marriage or maternity and ensures their effective right to work.

The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents. 138

Again here the Committee did not consider this reservation inconsistent with the object and purpose of the Convention. 139

e. Bangladesh

The Committee considered the report of Bangladesh on the 23rd of July 1997. 140 Also Bangladesh is one of the countries which made reservations to CEDAW. The reservation consisted of the following; The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, 13 (a) and 16 (1) (c) and (f) as they conflict with Sharia law based on Holy Quran and Sunna”.

On the 23rd of July Bangladesh notified the Secretary- General that it had decided to withdraw the reservation relating to art. 13(a) jo art.16 (1) (c) and art.16 (1) (f) CEDAW.

137 Idem, par. 365.
140 Idem, par. 409.
So from this moment the reservation made by Bangladesh consists of the following: "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of article 2 as they conflict with Sharia law based on Holy Quran and Sunna".141

The Committee expressed its concerns over the Government’s remaining reservations to art.2 jo art.16 (1) (a) of the Convention. The Committee noted also here that this article is a fundamental and core provision of the Convention, while art.16 is critical to the full enjoyment by women of their rights. 142

As stated above the Committee holds the view that art.2 CEDAW is central to the objects and purpose of the Convention. States parties which ratify the Convention do so because they agree that discrimination against women in all its forms should be condemned and that the strategies set out in art. 2 CEDAW, subparagraphs (a) to (g), should be implemented by States parties to eliminate it.

Furthermore neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.

So both art.2 jo art. 16 CEDAW are the core articles of the Convention, therefore the Committee is particularly concerned at the number and extent of reservations entered to those articles.

The conclusion which can be reached from these reports is that the object and purpose test in not very strong. The Committee can only make recommendations and reservations. However these can influence withdraw of reservations. This was also the case with Bangladesh which withdrew the reservation relating to art. 13(a) jo art.16 (1) (c) and art.16 (1) (f) CEDAW. 143

The Committee considers any reservations to that art. 2 jo art. 16 CEDAW to be contrary to the object and purpose of the Convention and is incompatible with international law (art. 28 (2) CEDAW), however it does not really mean anything in practice as the

reserving State can still keep the reservation made to these articles and it are the States which establish the object and purpose of the Convention. 144

§8. Criticism on CEDAW’s Reservations regime

No independent Adjudicative Body under CEDAW

The Convention allows reservations that are not contrary to the ‘object and purpose’ of the Treaty, but it contains no objective criteria to determine if this requirement has been met, nor does the Conventions establish an independent Committee to deal specifically with reservations. Because no independent body evaluates reservations, objections tend to be subjective. 145 Either the States disagree as to which reservations were incompatible with the Treaty, or they have other intervening concerns about foreign relations which prevented them from objecting to reservations from other States.

Some CEDAW members see Treaties as necessitating a change in domestic policy in order to ensure adherence to the Treaty. On the other hand there are countries that argue that because there is no authoritative criterion for judging a reservation’s validity, the Convention is able to promote universality and open the door to more widespread country participation. 146

Reservations promote universality because many States could participate.

The conclusion of these statements is that there is a two-tier system in which States can find a reservation incompatible with the Convention but still accept the State’s ratification. 147

The reporting system under CEDAW

Reservations are largely dealt with through the reporting system under art.18 CEDAW, where the CEDAW Committee considers the progress and measures taken by State parties to implement the Treaty provisions. The CEDAW Committee has twenty-three

147 Idem, p. 616.
members from different member States and it analyses the Convention’s progress, make
recommendations to States, and review State reports.

Art. 18 CEDAW requires States to submit to the Secretary-General of the United-
Nations, for the consideration by the Committee, a report on the legislative, judicial,
administrative or other measures which they have adopted to give effect to the provisions of
the present Convention in this respect, within one year after the entry into force for the State
concerned (art.18 (1) (a) CEDAW) and thereafter at least every four years and further
whenever the Committee request so (art. 18 (1) (b) CEDAW).

States should not regress further from implementing the Convention’s standards, even
with reservations, or they may find themselves in breach of the Treaty. The country report
should summarize all measures taken by the government of that country to implement
CEDAW’s provisions. Reports may also indicate factors and difficulties affecting the degree
of fulfilment of obligations under the present Convention (art. 18 (2) CEDAW).

Specifically in regard to reservations, the State must explain why the reservation is
necessary, show that the reservation is consistent with reservations it has made to other
Treaties, and state the effect it intends with the reservations. The State should also address
how it will limit the reservation, in other words, whether and when it might withdraw the
reservation. The Committee had also requested that the Secretary-General send letters to
States with substantial reservations as a way of expressing the Committee’s interest in having
the reservation limited or withdrawn.

The CEDAW Committee, in its meetings, has commented specifically on country
reports and on its dismay at the large number of reservations that are incompatible with the
-object and purpose- of the Convention. Members of CEDAW has asked penetrating questions
of State parties presenting their national reports about their reservations, in order to determine
the extent to which the goals of the Convention are impeded due to their reservations.
CEDAW also encourages State parties to review and amend their laws and policies in
compliance with the Convention in order to facilitate withdrawal of reservations. This process
of reviewing State reports has commonly been called “constructive dialogue”. Instead of the
Committee focusing its discussion on specific instances of Human Rights violations, it
engages in a joint enterprise with the States to advance the provisions of the Treaty.

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148 Idem, p. 616.
Many observers have acceded to the Committee’s approach to reservations through the reporting process. The Vienna Declaration and Program of Action stated that CEDAW should continue its review of reservations to the Convention. 149

Furthermore during the General Assembly’s 47th seventh session each chairperson presented the situation of reservations with regard to the respective Treaty. The situation was felt to be very alarming concerning CEDAW since a number of reservations were thought by the CEDAW Committee to be incompatible with the object and purpose of the Convention and should not have been permitted.

It was agreed that the States parties concerned should be urged to withdraw the reservations and that other States parties should not hesitate to object to such reservations as appropriate. The Treaty 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. 150

This resulted in the further amendment of the guidelines by the Committee for country reports, requiring that States with substantive reservations provide information about the status of those reservations as discussed above.

Conversely, other experts state that active review taken by the Committee may actually encourage reservation making because the accountability of State parties to CEDAW may encourage State parties to make reservations to forestall criticism from the CEDAW Committee on the reports submitted by countries.

So in order to adhering to provisions it does not intend to implement, the State will try to define its obligation as narrowly as possible. 151

Because the CEDAW Committee has limited authority to force governments to implement or provide timely reports, we see that maximum countries have either not submitted any report or submitted less than expected. Furthermore the recommendations of the Committee have no binding force to State parties for incorporating them in their domestic laws. 152

149 Idem, p. 617.
152 A. Ajaib, ‘Effectiveness of CEDAW in addressing domestic violence against women and women’s employment in Pakistan, India and Bangladesh’, Metropolitan University 2010, p.9.
The CEDAW Committee lacks any mandate or authority to independently determine whether a reservation goes against the *object and purpose* of the Treaty. Some States argue that CEDAW should be under an even lesser standard than the *Vienna Convention* because CEDAW contains culturally sensitive provisions. Furthermore neither the Secretary-General as depository, nor CEDAW has the power to determine the compatibility of reservations.\(^{153}\)

§9. **Analysis**

The ICJ/ *Vienna Convention* approach to reservations encourages States to adopt Treaties because it allows State to both ratify the Treaty and at the same time to limit its obligation to the Treaty and the effect it may have on the State’s domestic policy. CEDAW had undoubtedly benefited from allowing signatory States to make broad reservations in that it has maximized the number of ratifications. These broad reservations, however, undermine CEDAW’s effectiveness and compromise the integrity of the document.\(^ {154}\)

Even if the reservation regime of CEDAW were improved as suggested above, the problem cannot be solved due to unique character of CEDAW, which, unlike other Human Rights Treaties, attracts issues that are not only culturally but also religiously sensitive. The most sensitive of them is the conflict of certain provisions of CEDAW with the Islamic law in general and the Islamic family law in particular.\(^ {155}\)


Chapter 4: Reservations made by Saudi Arabia to CEDAW

CEDAW has been subjected to a number of reservations, especially to art.2, 5, 7 and 16 of CEDAW, but also art.9 CEDAW is subjected to reservations. These articles tend to address sensitive issues with regard to state sovereignty or cultural and religious practices. Many States have relied regarding to this on art.29 (2) CEDAW.

Art. 2 (1) (d) of the Vienna Convention a “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Out of the 185 States parties to CEDAW, 57 States have currently reservations to CEDAW and interestingly enough and contrary to the popular understanding, the majority of them are non-Muslim countries. There are however 24 Muslim counties which did make reservations to CEDAW. 156

§1. Reservations made by Saudi Arabia to CEDAW

After this brief explanation of reservations to CEDAW, we will look at a specific country, namely Saudi Arabia. This country has ratified CEDAW on the 7th of September 2000 and made reservations. The reservations consist of the following:

1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.
2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention. 157

Important is to know what these articles of CEDAW to which reservations are made by Saudi Arabia entail. Art.9 (2) CEDAW states that States parties shall grant women equal rights with men with respect to the nationality of their children. Art. 29 (1) CEDAW entails that if there may appear any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from date of the request for arbitration the parties are unable to agree on the organization of the

arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

§2. Situation after the ratification of CEDAW in Saudi-Arabia

Saudi-Arabia’s General Reservation to CEDAW

In the 40th Session of the CEDAW Committee, the Committee questioned the necessity of the so-called general measure taken by Saudi-Arabia to CEDAW.158 In my view it creates in practice that Saudi-Arabia is making a reservation whereby the State purports to exclude or modify the legal effect of the Treaty (art.2 (1) (d) Vienna Convention).

However according to Saudi-Arabia this general reservation does not affect Saudi-Arabia’s core obligations to the Convention and that Islamic sharia is compatible with the general principles of CEDAW. Saudi-Arabia stated also that they remain cautious of future interpretations of human rights statements developing within the international arena and the State believes that the reservation is a legitimate safeguard against possible interpretations of the Convention that might contradict the sharia. The Committee however remains concerned and urges the State once more, to reconsider withdrawal of the general reservation. 159

The Human Rights Commission of Saudi-Arabia

In the same session the Committee requested information regarding the independence of the Human Rights Commission of Saudi-Arabia. According to the Vice President Zeid Al Hussein of this Commission, it works in an “independent manner” but is directly accountable to the King and State. The Vice President also stated that this Commission was established to promote the identification and cessation of human rights violations and it is also responsible for raising awareness of human rights and implementing the international Treaties to which Saudi-Arabia is a party. Moreover the Commission is now elaborating on a programme of work to implement women’s rights.

Furthermore there are some non-governmental national human rights associations including the National Human Rights Society which is an independent body and operates with

159 Idem, p. 4.
UN Paris Principles. One quarter of the complaints received by this Society has been from women. Also ten of the 40 members of this Society are women; three are even elected to the Executive Council of the Society.\textsuperscript{160}

\textit{Status of the Convention in domestic law}

The Committee wanted to know how Saudi- Arabia’s State laws incorporate the provisions of the Convention. The Committee was interested how the Convention is invoked in legal proceedings and how international Treaties would be represented in the State’s pending judicial reform. They also wanted to know the State’s intention to train the judiciary and law enforcement on the scope and substantive provisions of the Convention.

A professor of law responded to this question by saying that basic law should be implemented taking into account international Conventions and that the Royal decree demands that all amendments must consider international Treaties.\textsuperscript{161} He states also that there would be special training sessions to train judiciary officials with respect to the commitment of Saudi- Arabia to international Treaties.

The Committee was not satisfied and asked the State party to amend legislation in this way that international Treaties have precedence over domestic laws and they asked to ensure that the Convention becomes an integral part of legal education in Saudi- Arabia. Saudi- Arabia also didn’t provide any information on cases where the Convention had been invoked in the Court. Committee noted with concern that the principle of equality is not evident in the Constitution or other legislation, so therefore the State is requested to enact gender equality law and to take steps to implement formal and substantive equality.

There is a lack of plan or promoting of gender equality and encourage the State to seek the technical support of the UN in developing, elaborating and implementing such a plan. The “national machinery” should be advanced for the women in Saudi- Arabia, in the areas of decision making and enforcement. The State needs to therefore provide the necessary power and co-ordination to effectively fulfil its mandate in promoting gender equality.\textsuperscript{162}

\textit{Gender Equality & Male Guardianship}

\textsuperscript{160} Idem, p. 4.
\textsuperscript{161} Idem, p. 4.
\textsuperscript{162} Idem, p. 5.
One of the fundamental concerns of the Committee is that women in Saudi Arabia are not free to enjoy all of their rights under the Convention. Saudi Arabia uses throughout the whole State report that women’s rights are ‘similar’ to those of men. According to the Committee CEDAW is about equality not similarity, so an explanation was asked for this.

Especially the topic of male-guardianship was discussed during this session. The State however avoided this topic in their report. Despite this, the Committee expressed their grave concerns that women of all ages are required to have permission of a male guardian to access all basic human rights of education, employment, freedom of movement, entrepreneurship and marriage.

The practice of a male guardianship creates an impediment to the development of women under art.3 CEDAW, which states that State parties shall take in all fields, in particular in the political, social, economic and cultural fields, all the appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. This was not the only concern that the Committee had; they stated that permission of a male guardian would prevent women from reporting instances of abuse perpetrated by their male guardians. Some members of the Committee contended that women are only able to enjoy all of their human rights when they are free to make essential decisions in all aspects of their lives. And some members even asked Saudi Arabia if they don’t see the obvious conflict between this practice of male guardianship and the Convention.

Saudi Arabia stated there is indeed a problem with implementing women’s rights on that ground and in the community, the moral obligation to protect family is contradicting the legal obligations of equality. Furthermore there are no provisions in Islamic law that allow for discrimination against women and there is no legal basis for the requirement of permission from a male guardian. However customs and traditions could impose some restrictions even on the Government. It is also hard to change such attitudes and beliefs. Furthermore education is the key for changing discriminatory customs and traditions and would provide women with a guarantee for access to human rights. According to the vice president of the Human Rights Commission the change in Saudi Arabia is occurring gradually.

163 Idem, p. 5.
The Committee however reiterated its concerns about these ‘discriminatory cultural practices and stereotypes’ and the limited efforts of the State to address them. The State must therefore define a clear strategy to remedy this. 164

Freedom of movement

According to the Committee it is concerning that women in Saudi Arabia do not enjoy the freedom of movement. The Committee is especially concerned about art.1, 2, 6, 15 and 16 of CEDAW. Women require the permission of a male guardian to travel to and from a place of employment, educational institutions or public facility such as a police station or health centre. Women also require the same permission to travel abroad, Saudi Arabian Ministry of the Interior who state on their website that travel visas for women require the approval of a family guardian.

Women in Saudi Arabia are also not allowed to drive. According to the State the Islamic law does not refer to cars or vehicles, so there is no legal precedent forbidding it. Given the dangers of the roads, women are forbidden to drive in Saudi Arabia for their own safety and protection. The society is reluctant to change this practice. However according to the State, attitudes are becoming more permissive and the rights of women to drive cars would evolve to be acceptable in Saudi Arabian culture in the future. 165

This is the statement by Saudi Arabia however can be doubt as in May this year a women was arrested because she was driving a car. Manal Al Sharif was one of the individuals who started an event page on Facebook calling on women to drive their cars on the 17th of June 2011. This cause a lot of controversy around the country, there came more Facebook pages which consisted on the one hand from campaigns to whip women who drive on the 17th of June and also anti women driving campaigns. One of the sheikhs Dr. Al Habdan made it clear that his personal mission was to make sure that no women drives in Saudi Arabia.

The opponents of driving of women stated that women’s driving is Zionist, western, Iranian conspiracy to disrupt Saudi society and corrupt the morals and honour of Saudi women. According to them any woman that speaks out for lifting the ban is not a pure Saudi but rather a woman who is nontribal or an immigrant, because no pure Saudi woman wants to drive.

164 Idem, p. 6.
165 Idem, p. 6.
Manal Al Sharif was against this and posted a video with an instruction on how to participate in the June 17th Movement; there will be no gathering or demonstrations. The instruction consisted that each woman that wants to participate should just get in her car and go about her daily business without the driver. Only women who have valid driving licenses from other countries are to drive. That there are volunteers who will teach other women to drive until the government sets up an official system for women to obtain local driving licenses. Everyone should drive with their safety belts on and drive carefully. Women who drive are encouraged to videotape it and upload it to YouTube.

Manal Al Sharif also addressed Saudi men who oppose women driving. She told them that there is no threat in a women driving. She asks them if they are happy about the current situation where women are forced to be at the mercy of unreliable drivers or stand on the pavement in the hot sun waiting for a taxi. Manal told them this is your opportunity to show the world how you are capable of respecting women and being civil. Furthermore traffic laws say nothing about the gender of the driver and that King Abdullah, Prince Naif and Prince Sultan all have issued statement where they said that a woman driving is not a governmental issue but rather a cultural and societal one.

Manal took it even further and actually went driving; she posted the video on the 19th of June. The next day she drove the car again along with her brother and his wife and children. That is when they were stopped by the traffic police. The traffic police (PVPV) asked her if she was a foreigner and when she said no, he asked for the car registration. So she gave her and her brother’s license with the car registration. The police asked her if she doesn’t know the country’s system. She replied that there is no law that prevents women from driving a car.

After an hour the wife of her brother and children were released but she and her brother were taken by the PVPV (Promotion of Virtue and Prevention of Vice), to the traffic police. Manal was later released that night. However the CNN reported that she needed sign a document in which she promised she will not drive any more. Furthermore Women2Drive’s twitter account reported that she has already been arrested again. On Twitter the Saudi- Arabian government is asked to release Manal.  

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167 NOS op 3, ‘Saudische vrouw gearresteerd voor autorijden’ NOS 2011 <www.nos.nl> (* Saudi Woman arrested for driving)
Political participation of women

In the 40th session the Committee referred to art.7 jo.art.8 CEDAW, with regard to the situation in Saudi- Arabia whereby women could not participate in the 2004 municipal elections. Furthermore other sources suggested that several potential women candidate were discouraged from running for office. 168 This creates a concern because women are not allowed to participate in decision- making process in Saudi- Arabia. Saudi- Arabia however stated that there are female members of the Shura Council and there is a growing tendency to appoint women to leading and senior posts, the post of the Minister has not yet been held by a woman.169

Nationality

The Committee is disappointed at the State’s insistence in maintaining a reservation on art.9 (2) CEDAW regarding the nationality of citizens. The Committee is against the policy to refuse dual nationality and to ask a child of a non- Saudi parent to choose one nationality at the age of 18. Furthermore it is discriminatory to women to allow a Saudi man married to a non- Saudi woman to pass his Saudi nationality to children of the marriage, but to prevent a Saudi woman from doing so if her husband is non- Saudi. Saudi- Arabia did not respond to this at all.170

Equality in Education

Saudi- Arabia was proud of the significant achievement it had made in increasing access to education for all women. Even non- Saudi children are entitled to full education and social services.

The education for girls was introduced in 1960 this is 30 years after boys’ school were established. Since then, the budget for female education has increased and in the past 3-4 years this has exceeded the budget for boys’ education. However the rates of illiteracy for women remain significantly larger than men because of this historical development.

169 Idem, p. 7.
170 Idem, p. 7.
With respect to gender equality, the State declared that the school curriculum for girls is being revised to be equivalent to boys. However some fields of study such as geology remain prohibited for women. NGO’s however say that State parties declaration that study such as engineering and law, which were first prohibited for women are now open.

The Committee therefore stated that the State should ensure equal access for women to all levels and fields of education. 171

Provisions of health services & family planning

According to Saudi- Arabia, 99% of the population have access to health services. There are equal proportions of male and female practitioners available for consultation: women who wish to be under the care of a female health care professional are able to request this. The country has also 99% coverage for childhood immunisation. A female doctor furthermore dismissed the claims that a woman is not able to provide consent for herself. Only in certain areas like issued of fertility and reproduction women cannot autonomously consent and they need the consent of their husband. Also for medical procedures consent is not always needed.

With regards on the availability of reproduction, family planning and sex education, the State clarified that contraception can be bought cheaply from health centres and family planning information is available. Saudi- Arabia stated that 80% of the population is aware of the different forms of contraception, and around 30% utilise a method of contraception.

However a female doctor from Saudi- Arabia stated that contraception is not offered routinely to women who had not given birth to a child, as the State feels it is desirable to increase the population and encourage procreation. Women can however seek family planning services and a routinely offered to a couple after the birth of their first child. The State stated also that sex- education is not a part of the school curriculum, although the structure of the human body is taught in biology classes.

Abortion is only legal in the country if there is a legitimate medical contradiction to the pregnancy. This reflects according to Saudi- Arabia the desire to protect the foetus, in the same way that other countries protect the right of the women. 172

Women in Rural Areas

171 Idem, p. 7.
172 Idem, p. 8.
The Committee also addressed the issue of accessibility of rural women to education, employment and health. In particular under the consideration of art.14 CEDAW, the Committee enquired about the right to land ownership of women. The answer of the State in this matter was that traditional attitudes have led to predominantly male ownership but these trends were gradually changing through Government initiatives to promote land- ownership by women. 173

Labour rights of women

Saudi- Arabia suggested that women are achieving greater representation in commerce because some of them have ascended to the Board of Directors in several companies. The contribution of women to the private sector comes from the basic Islamic principle whereby women have an independent financial status and men cannot interfere with her wealth. The Committee however pointed out that the favour equal participation of women in all sectors and not just the traditional ones.

Furthermore according to the State women are free to set up commercial enterprises and a number of female entrepreneurs were supported. Furthermore according to Saudi- Arabia that women are even free to set- up charitable organisations, although they clarifies that these organisations must be registered with the Ministry of Social Affairs and are not entitled to work outside the country.

According to the Committee however it appears that women and men remain segregated in working environment, this fallow even from the statement made by the State that separate working areas are created to accommodate women in Government institutions. Furthermore the point made by Saudi- Arabia that only an organisation which employs more than 50 women needs to have nursery creates again discrimination.

For this reason the Committee stays concerned about the level of discrimination in the labour force. The State should therefore take immediate steps to increase women’s participation in the workforce and it urges the State to reform its maternity leave policy, to adequate childcare facilities and to abolish segregation of women and men in the workplace.174

173 Idem, p. 9.
174 Idem, p. 9.
**Migrant workers**

The Labour Code of Saudi Arabia does not cover domestic workers. The Committee also asked the State to gather information and statistics to identify the extent of human rights violations against migrant workers and provide essential services to afford such persons the dignity and protection to which they are entitled.

Saudi Arabia said in this matter that the Labour Code should be in effect shortly and that there have never been major problems in this regard. There are also executive regulations which address any potential problems, which states that those who violate their legal obligations or who treat people in an inhuman matter will be punished severely. Furthermore both women and men are entitled to submit complaints and obtain the service of a lawyer. Ministry of Labour also issued brochures to migrant workers explaining their rights and the legal proceedings required if they wished to return to their countries of origin. Saudi-Arabia stated that they became a member to the Protocol to Prevent, Suppress and Punish Trafficking and enquired about the State’s National Plan against Trafficking. They stated also that both men and women prevention of trafficking is taken very seriously.

The Committee recognises the State’s commitment to combat trafficking but it remains concerned about the exploitation and mistreatment of young girls employed as domestic servants. The Committee returns to the issue of awareness amongst the general public regarding the rights of female domestic workers to legal protection, their omission from the labour code and expresses concern over the rights of their children in relation to residency and access to health care and education. They ask for the State to grant the rights in the Convention to female domestic migrant workers and to ‘speedily enact specific and comprehensive national legislation on trafficking’.

**Marriage and family relations**

The Committee is concerned about the equal rights for women relevant to marriage and the family. The State stated that women have the right to choose their own husband and can initiate divorce. In the case of divorce or becoming a widow, a woman is only able to retain legal custody of her children until the ages of 9 for boys and 7 for girls and thereafter custody return to their father or nearest male guardian. No comments were made regarding

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175 Idem, p. 9.
176 Idem, p. 9.
changing this discriminatory law. Also the Committee asked Saudi- Arabia about the discriminatory inheritance laws that allow men to receive twice the amount received by women. According to Saudi- Arabia men are required to support a wife and family, this is reflected in the distribution of assets. Saudi- Arabia also made clear that there is no legal minimum age of marriage in Saudi- Arabia. The Committee therefore asked to prescribe and enforce the minimum age of marriage of 18 years for both women and men, in accordance with art.16 (2) of the Convention on the Rights of the Child and to introduce ‘legislative reform to provide women with equal rights in marriage, divorce, the custody of children and inheritance.

In Saudi- Arabia the Islamic law allows a husband to take more than one wife he treat each wife fairly and financially support both wives and their children (two prerequisites). According to the State polygamy helped to reduce the incidence of extra-marital sexual relations. 177 This is the practice dating for many years, arising from a historical era. In reality, men are rarely able to fulfil these prerequisites and so this practice is uncommon in Saudi society. Furthermore the State is not intending to ban the practice of polygamous marriage in the near future. The Committee requested the State to do so. 178

Domestic violence

Until 2000 the State did not recognise domestic violence as a problem. In 2004 however the Ministry of Social Affairs established a Social Protection Committee to examine the causes of the problem and implement appropriate intervention methods in each of the 13 provinces of Saudi- Arabia. Each province also established family protection centres linked to health centres. In 2005 the State established a programme to increase awareness and train professionals including prosecutors, lawyers, police, doctors and social workers to deal with violence against women. Finally in 2007, a Family Court was created and it became mandatory to report all the cases of domestic violence by all health care professionals in Saudi- Arabia.

The Committee expressed their concern about the problem of women being denied permission by a male guardian to make a legal complaint or visit a police station, when the guardian could also be the one who is perpetrating domestic violence. According to the State

177 Idem, p. 10.
178 Idem, p. 11.
however women had the complete freedom to make a full complaint against her guardian and the right to litigation for men and women is enshrined in the Basic Law.

The Committee also expressed concerns about the absence of specific laws governing violence against women and the lack of prosecution and punishment of its perpetrators. The Committee therefore asked the State to take measures such as implementing educational and awareness-rising campaign for all the multidisciplinary personnel and the general public. 179

Dissemination of Information in the Convention

With respect to art.3 and art.4 of the CEDAW, the Human Rights Commission in Saudi Arabia acknowledged that women were not currently fully aware of their rights and how to access them, but measures were being taken to improve this. The Ministry of Social Affairs of Saudi Arabia stated that programmes and schools curricula teach women of their rights, role in the Islamic culture and about international organisations and Treaties. Saudi Arabia has enjoyed free discussion of issues in the press for the past seven years, which represented a radical change in debate and dialogue within the country.

The Committee also heard that the State report in its present form was not submitted to the Advisory Council or Shura Council, but that institutions participated in preparing the report and were represented in the delegation. The Vice-president of the Human Rights Commission of Saudi Arabia assured the Committee that the results of the session and concluding observations would be circulated amongst the Sharia Council and other departments concerned with women affairs. 180

Despite this the Committee required the State to include information pertaining to dissemination of the report and detail cases in which CEDAW has been implemented such as legal cases and complaints filed by women to access their rights under the Convention. The Human Rights Commission reacted positively to this and stated that they will pay more attention to collation of statistics and reports and draw this issue to the attention of the appropriate State bodies. 181

Conclusion

179 Idem, p. 11.
180 Idem, p. 11.
181 Idem, p. 12.
Despite all the efforts of the Saudi-Arabian country there are still tremendous challenges evident in fulfilling the State’s commitment to equal rights for women. There is not only the problem of male guardianship and discriminatory customs and practices, but also the Committee commended Saudi Arabia for its ‘high standard of social services’, especially health care and education services and also for the new institutional mechanisms to address violence against women, such as the higher national Committee specialising in women’s affairs and the 13 social protection Committees. Although the Committee also recognised that the State demonstrated progress in emancipating women in Saudi Arabia, particularly in terms of increasing education for women, reducing illiteracy and implementing policies to integrate women into decision-making or influential role, a need for a gender perspective and reflection upon the provisions of the Convention remain. The Committee therefore encourages collaboration and coordination between the State and civil society organisations to strengthen the implementation of the Convention and the realisation of equality for women in Saudi Arabia.

The Committee also wants the State to utilise the Beijing Declaration of Action and Platform for Action, which reinforces the provisions of the Convention. To ensure the fundamental freedoms and enjoyment of human rights of women, the Committee urges the State to consider ratifying the ICCPR, ICESCR, the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities.\(^\text{182}\)

\(^{182}\) Idem, p. 12.
Chapter 5 To what extend do the reservations made by Saudi- Arabia to CEDAW comply with the requirements of the International Legal Framework to Treaties?

Now that the three sub questions regarding the International Legal Framework are answered it is possible to answer the central research question.

Saudi- Arabia is one of the countries which made a general reservation to CEDAW. 183 The reservations consist of the following:

"1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.
2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention." 184

§1. Object and purpose test

Under art.28 of the CEDAW reservations can be made to the Convention. Although art. 28 (2) CEDAW does not allow reservations which violate the object and purpose of the Treaty; some countries have attached sweeping reservations. Saudi- Arabia is one of those countries which made a general reservation to CEDAW. 185

In the ICJ Genocide Convention case the ICJ established that a State which has maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.

Furthermore this case stated that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, the objecting States can in fact consider that there is no Convention between the reserving State and them. If a party accepts the reservation as being compatible with the object and purpose of the Convention, the reserving State can in fact be considered as a party to the Convention between them.186

Although the ICJ established the *object and purpose test*, it has not specify what criteria to consider in determining whether a reservation goes against the *object and purpose* of the Treaty, the basis for this decision was left to each state’s own perception of the Treaty. The ICJ remains the forum where disputes over a reservation’s compatibility must be brought.

The ICJ’s decision was codified under the *Vienna Convention on the law of Treaties*. The regime of this Convention on reservations is incorporated in articles 19-23 of this specific Convention. Art. 19(a) jo art.19 (b) of the *Vienna Convention* establishes that States are entitled to formulate a reservation on signature or ratification of a Treaty or accession thereto unless the Treaty prohibits the reservation or provides that only specified reservations, which do not include the reservation in question, may be made.

In other cases, States are entitled to formulate a reservation unless the reservation is incompatible with the *object and purpose* of the Treaty (art. 19 (c) *Vienna Convention*). This is of course the test laid down in the *Genocide Convention* case.

If the Treaty contains specific criteria by which to judge the reservation’s compatibility, the combination of the *Vienna Convention* and the Treaty could yield an objective approach to evaluate reservations. However when the Treaty is silent, like CEDAW, each State party, determines the *object and purpose* of the Treaty on its own, allowing for much more subjectivity and vulnerability to outside influences and considerations.

In a number of Human Rights Treaties there is an absence of specific provisions for dealing with reservations and we can say that the *Vienna Convention* failed to specify the legal consequences of an impermissible reservation. That is why *General Comment 24* was established by the Human Rights Committee.

However this *General Comment 24* is made to the ICCPR and thus addresses the Human Right Committee in my opinion this comment can be useful under other Treaties because as this *General Comment* suggested the classic rules on reservations contained in the *Vienna Convention* are inadequate for the ICCPR and other Human Rights Treaties. So also

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the CEDAW Committee could use these recommendations in reviewing reservations made under CEDAW.\textsuperscript{191}

\section*{\textsuperscript{191}CEDAW Committee,’ Reservations to the Convention on the Elimination of all forms of discrimination against women’, United Nations 1997, par. 24.}

\section*{\textsuperscript{192}UNHCHR,’ General Comment No.24’, United Nations 1996-2001, par. 8.}

\section*{\textsuperscript{193}Coalition equality without reservation, ’Saudi- Arabia’,wordpress 2007 <www.cedaw.wordpress.com>.}

\section*{\textsuperscript{194}UNHCHR,’ General Comment No.24’, United Nations 1996-2001, par. 10.}

\section*{\textsuperscript{195}Idem, par. 9.}

\section*{\textsuperscript{196}Idem, par. 11.}

\section*{§2. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.}

\textit{General Comment 24}

Under the \textit{General Comment 24} reservations which are regarded incompatible with the ‘\textit{object and purpose}’ test are peremptory norms.\textsuperscript{192} The first reservation made by Saudi- Arabia, \textit{in case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention}, is not made to a fundamental principle of international law.\textsuperscript{193}

This is also not a reservation to a non-derogable right.\textsuperscript{194} Certain rights have been considered so important that they are non-derogable. Art. 15 (2) ECHR states that there will be no derogation from Art. 2 ECHR (right to life), except in respect of deaths resulting from lawful acts of war, or from Art. 3 (1) ECHR (right to be free from torture and other inhumane or degrading treatment or punishment, art. 4 (1) ECHR (right to be free from slavery) or art. 7 ECHR (the right to be free from retroactive application of penal laws) shall be made.

This reservation also does not deny people the right to determine their own political status and to pursue the economic, social and cultural development.\textsuperscript{195} Also the reservation does not go against the supportive guarantees.\textsuperscript{196}

These incompatible reservations stated under \textit{General Comment 24} do not help us further and to this point the first reservation made by Saudi- Arabia is compatible with \textit{object and purpose}. However \textit{General Comment 24} does help us to review this reservation. Reservations must be specific and transparent and must therefore refer to a particular provision of the Convention and indicate the precise terms its scope in relation thereto. As we can see the first reservation made to CEDAW is a general one en therefore not transparent.
When States consider the compatibility of possible reservations with the *object and purpose* of the Convention and States should not enter so many reservations that they are in effect accepting a limited number of human rights obligation and not the Covenant as such.

Again here it can be said that this reservation is so broad that it limits the CEDAW Convention as such.

The reservations should not seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.\textsuperscript{197} Saudi- Arabia with this first reservation stated exactly what it not should the Kingdom is not under the obligation to observe the contrary terms of the Convention.\textsuperscript{198}

States should not seek through reservations or interpretative declarations to determine that the meaning of the provisions of the Covenant is the same as given by and organ of any other international Treaty body.\textsuperscript{199}

States should institute procedures to ensure that each and every proposed reservation is compatible with the *object and purpose* of the Covenant. This is also not done by Saudi- Arabia.

Furthermore it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Convention obligation reserved; and to explain the time period it requires to render its laws and practices compatible with the Convention, or why it is unable to render its own laws and practices compatible with the Convention. States should also ensure that the necessity for recommendations made by the Committee during the examinations of their reports.\textsuperscript{200}

In the report submitted by Saudi- Arabia they remained cautious of future interpretations of human rights statements developing within the international arena and the State beliefs that the reservation is a legitimate safeguard against possible interpretations of the Convention that might contradict the *sharia*. The Committee however remains concerned and urges the State once more, to reconsider withdrawal of the general reservation.\textsuperscript{201}

So the reservation is not precise about the domestic legislation and practices which it believes to be incompatible with the CEDAW and neither the State explain the time period it

\textsuperscript{197} Idem, par. 19.
\textsuperscript{200} Idem, par. 20.
\textsuperscript{201} CEDAW Committee, ‘40\textsuperscript{th} Session Saudi- Arabia, combined initial& 2\textsuperscript{nd} report’, *International Service for Human Rights* 2008, p.4.
requires to render its laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant.

Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations. And again here it can be said that Saudi- Arabia is not planning to withdraw this reservation.

After reviewing the reservation under the General Comment 24 we can establish that this first reservation is indeed contrary to the object and purpose of the CEDAW convention.

**International Legal Framework under CEDAW**

To go on further we will look at the International Legal Framework on Reservations to Treaties established under the CEDAW.

Art. 2 jo art. 16 CEDAW are considered by the Committee to be core provisions of the Convention. However the Committee only makes reservations and recommendations and the object and purpose is determined by the States.

Although some States parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles. Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to art. 16 CEDAW, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.

Furthermore the Committee expressed their view of reservations very strongly by saying that removal or modification of reservations, particularly to art. 2 jo art.16 CEDAW would indicate a State party’s determination to remove all barriers to women’s full equality

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207 Idem, p. 49, par. 17.
and its commitment to ensuring that women are able to participate fully in all aspects of public and private life without fear of discrimination or recrimination.\textsuperscript{208}

However the Convention is clear about the \textit{object and purpose} of the Convention it is not clear what can be stated as being incompatible with it under art.28 (2) CEDAW.

So from the Convention you cannot judge if the reservation is contrary or not to the \textit{object and purpose} of the Convention.

\textit{Object and purpose test in practice}

According to the Committee the \textit{object and purpose} of the CEDAW Convention is to create legally binding standards for women’s human rights by highlighting civil and political as well as economic, social and cultural rights, and placing them in a framework of the right to equality and non-discrimination based on sex. It also provides efficacious supervisory machinery for the obligations undertaken. The \textit{object and purpose} of this Convention encompasses the elimination of all forms of discrimination against women.\textsuperscript{209}

Also reports were examined to establish if this first reservation is incompatible with the \textit{object and purpose} of the Convention. However these reports did not make a very clear statement but it can however been seen that the Committee considers any reservations to art. 2 jo art. 16 CEDAW to be \textit{contrary} to the \textit{object and purpose} of the Convention and is incompatible with international law (art. 28 (2) CEDAW).\textsuperscript{210}

When we look on the first reservations made by Saudi- Arabia it is now clear that this general reservation also includes art.2 CEDAW which will make it contrary to the \textit{object and purpose} of the Convention according to the Committee.

So both the \textit{General Comment 24} as well as the practice of the CEDAW Committee indicates that this first general reservation can be seen as incompatible with the \textit{object and purpose}.

However after researching some reports, it is clear that inconsistency with the art.28 (2) CEDAW creates only strong recommendations and concerns of the Committee and not the obligation to withdraw this reservation.

\textsuperscript{208} Idem, p. 50, par. 25.
\textsuperscript{209} IWRAW, ‘The validity of reservations and declarations to CEDAW: The Indian experience’, \textit{IWRAW Asia Pacific Occasional Papers Series} 2005, p. 3.
Art.27 Vienna Convention

The accountability of States parties to CEDAW may encourage State parties to make reservations to forestall criticism from the CEDAW Committee on the reports submitted by countries. So in order to adhering to provisions it does not intend to implement, the State will try to define its obligation as narrowly as possible.\(^{211}\)

This is also clearly the case by Saudi- Arabia by making such a general reservation it wants to forestall criticism. However now again criticism is expressed by the Committee on this general reservation.\(^{212}\)

Under art.27 Vienna Convention a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to art. 46.

In my opinion from the report the CEDAW report in the 40\(^{th}\) Session to Saudi- Arabia there is a clear violation of art.27 CEDAW. The State didn’t prove to be very effective in complying with the CEDAW regulations. So in my opinion there is a clear violation of this article.

**Conclusion**

The first reservation is contrary to the object and purpose of the CEDAW Convention, so actually it should not be permitted under art.28 (2) CEDAW, but Saudi- Arabia is still a member and the other countries which made objections do not preclude the entry into force in its entirety of the Convention between Saudi Arabia and them.\(^{213}\)

So that these reservation don’t comply with the object and purpose stated by the CEDAW Committee but also can be seen in practice, does only have the effect in putting pressure of the Committee on the country to withdraw certain reservation.

In my opinion this is not enough. According to me the next step which should be taken under the International Legal Framework to Treaties is to create a system whereby the Committee can do more than state recommendations and concerns, maybe for example really punish States for making general reservations like the one of Saudi- Arabia.

\(^{212}\) CEDAW Committee,’ 40\(^{th}\) Session Saudi- Arabia, combined initial& 2\(^{nd}\) report’, *International Service for Human Rights* 2008, p. 3.
§3. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.”  

Art. 9 (2) CEDAW

Also under this article we should look at the ‘object and purpose’ test of art.28 (2) CEDAW. Morocco is one of the countries which also made a reservation to art.9 (2) CEDAW. Art.9 (2) CEDAW establishes equal rights to women and men with respect to the nationality of their children.  

With respect to the reservation of this right by Morocco the Committee did not state that this article would be inconsistent with the object and purpose of the Convention. Recommendations and concerns were only stated with regards to other reservations which were made to other articles. So under the practice of the CEDAW Committee this article is not contrary to the object and purpose. This probably also be the case with Saudi- Arabia.

Furthermore General Comment 24 helps us to review this reservation. Under this Comment reservations must be specific and transparent and must therefore refer to a particular provision of the Convention and indicate the precise terms its scope in relation thereto. As we can see the second reservation is made to a specific article and is therefore transparent.

The Comment also indicates that when States consider the compatibility of possible reservations with the object and purpose of the Convention the States should not enter so many reservations that they are in effect accepting a limited number of human rights obligation and not the Covenant as such. Again here it can be said that this reservation is not too broad that it limits the CEDAW Convention as such.

Furthermore under this Comment reservations should not seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law. This reservation will not remove an autonomous meaning to the Covenant.

Furthermore the Comment states that it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires.

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217 Idem, par. 19.
to render its laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for recommendations made by the Committee during the examinations of their reports.218

Saudi- Arabia remains cautious of future interpretations of human rights statements developing within the international arena and the State believes that the reservation is a legitimate safeguard against possible interpretations of the Convention that might contradict the sharia.219

Reservations should be withdrawn at the earliest possible moment under the General Comment 24 and reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.220 And again here it can be said that Saudi- Arabia is not planning to withdraw this reservation.221

Also in this case there is a violation of art.27 CEDAW. The State didn’t prove to be very effective in complying with the CEDAW regulations. So in my opinion there is a clear violation of this article.222

Art.29 (1) CEDAW

The reservation to this article can be made as it is not contrary to the object and purpose of the Convention under art.28 (2) CEDAW.

This can also be seen in the reaction of the Committee to Venezuela’s ratification with regard of art.29 (1) CEDAW.223

Although various recommendations and concerns were expressed by the CEDAW Committee nothing was said that this reservation would be inconsistent with the object and purpose of the CEDAW Convention.224 So also here Committee’s practice of review indicates no contrary to the object and purpose of the Convention.

218 Idem, par. 20.
222 Idem, p. 3.
Again here the General Comment 24 helps us to review this reservation. Reservations must be specific and transparent as we can see this third reservation is made to a specific article and is therefore transparent. The reservation is also not too broad that it limits the CEDAW Convention as such. 225 This reservation will not remove an autonomous meaning to the Covenant. 226

Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations. 227 And again here it can be said that Saudi- Arabia is not planning to withdraw this reservation. 228

These two reservations are not contrary to the object and purpose test and comply with the International Legal Framework on Reservations to Treaties.

According to me the reservation under art.29 (1) CEDAW cannot be seen as a violation of art.27 CEDAW, because the arbitration doesn’t influence if the rights of the Convention are well applied by Saudi- Arabia but just indicate a certain procedure.

226 Idem, par. 19.
227 Idem, par. 20.
Chapter 6 Conclusion

The traditional treatment, otherwise known as the unanimity rule stated that any reservations, in order to be admitted must be accepted by all the contracting parties to the Treaty in question. 229

This was the practice a very long time; however when the international arena changed and became more diversified as a result of decolonization of Western powers, greater emphasis was placed on States consenting to the terms by which they would be bound.

The current approach to reservations is currently comprised in the advisory opinion of the International Court of Justice decision Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention Case) and the Vienna Convention on the Law of Treaties. 230

In the ICJ Genocide Convention case the ICJ established that a State which has maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise; that State cannot be regarded as being a party to the Convention.

Furthermore this case stated that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, the objecting State can in fact consider the reserving State not to be a party to the Convention between them. If a party accepts the reservation as being compatible with the object and purpose of the Convention, the reserving State can in fact be considered as a party to the Convention. 231

The ICJ’s decision has been codified under the Vienna Convention on the Law of Treaties. 232 The regime of this Convention on reservations is incorporated in articles 19-23 of this specific Convention. Art. 19(a) jo art.19 (b) of the Vienna Convention establishes that States are entitled to formulate a reservation on signature or ratification of a Treaty or accession thereto unless the Treaty prohibits the reservation or provides that only specified reservations, which do not include the reservation in question, may be made.

In other cases, States are entitled to formulate a reservation unless the reservation is incompatible with the object and purpose of the Treaty (art. 19 (c) Vienna Convention). This is of course the test laid down in the Genocide Convention case.\(^\text{233}\)

If the Treaty contains specific criteria by which to judge the reservation’s compatibility, the combination of the Vienna Convention and the Treaty could yield an objective approach to evaluate reservations. However when the Treaty is silent, like CEDAW, each State party, determines the object and purpose of the Treaty on its own, allowing for much more subjectivity and vulnerability to outside influences and considerations.\(^\text{234}\)

Art. 28 CEDAW goes on to repeat the ICJ/ Vienna Convention test whereby reservations will be invalidated if they are against the object and purpose of the Convention.\(^\text{235}\) Art.28 (2) CEDAW states that reservations should not be permitted when it is incompatible with the object and purpose test.

In a number of Human Rights Treaties there is an absence of specific provisions for dealing with reservations and we can say that the Vienna Convention failed to specify the legal consequences of an impermissible reservation. That is why General Comment 24 was established by the Human Rights Committee.\(^\text{236}\)

This comment however doesn’t help us to understand the object and purpose test, to do that we examined various reports. The conclusion which can be reached from these reports is that the object and purpose test in not very strong.\(^\text{237}\)

The Committee considers any reservations to art.2 or art. 16 CEDAW to be contrary to the object and purpose of the Convention and is incompatible with international law (art. 28 (2) CEDAW), however it does not really mean anything in practice as the reserving State can still keep the reservation made to this article or art. 16 CEDAW, however the Committee will recommend not to do so.\(^\text{238}\)

After the establishment of the test we will look at the reservations made by Saudi-Arabia which state that;

\(^\text{235}\) Idem, p. 15.
\(^\text{236}\) CEDAW Committee,’ Reservations to the Convention on the Elimination of all forms of discrimination against women’, United Nations 1997, par. 23.
"1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.

From the General Comment 24 and the practice of the CEDAW Committee it can be said that there is no compliance with the object and purpose of the CEDAW Convention, so actually it should not be permitted under art.28 (2) CEDAW.\textsuperscript{239}

Despite this Saudi- Arabia is still a member and other countries which made objections not preclude the entry into force in its entirety of the Convention between Saudi Arabia and them.\textsuperscript{240}

Furthermore a violation of art.27 Vienna Convention can be found by this reservation. So it can be concluded that Saudi- Arabia’s reservation is contrary to the International Legal Framework to Treaties.

2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention." \textsuperscript{241}

Also under this art.9 (2) we should look at the ‘object and purpose’ test of art.28 (2) CEDAW. Morocco is one of the countries which also made a reservation to art.9 (2) CEDAW. With respect to this right it was not stated that this article would be inconsistent with the object and purpose of the Convention. Recommendations and concerns were only stated with regards to other reservations which were made to other articles.

The reservation to art.29 (1) CEDAW is not contrary to the object and purpose of the Convention under art.28 (2) CEDAW. This can also be seen in the reaction of the Committee to Venezuela’s ratification with regard of art.29 (1) CEDAW.\textsuperscript{242}

Although various recommendations and concerns were expressed by the CEDAW Committee nothing was said that this reservation would be inconsistent with the object and purpose of the CEDAW Convention.\textsuperscript{243}

Also the review of General Comment 24 indicates that this reservation is not contrary to the object and purpose of the Convention.

Under art.9 (2) CEDAW a violation of art.27 of the Vienna Convention can be found, but under art.29 (1) CEDAW not.


According to me the Committee did not make a clear *object and purpose test* because it is up to the States to decide this. However I think like the *General Comment 24* that it should be up to a Committee to determine whether a specific reservation is compatible with the *object and purpose* of the Covenant and not the State.

This is in part because it is an inappropriate task for States parties in relation to Human Rights Treaties and in part because it is the task that the Committee cannot avoid in the performance of its functions.

If a reservation is compatible with the *object and purpose* of the Convention must be established objectively, by reference to legal principles and the Committee is particularly well placed to perform this task. 244

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Books


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