MYKOLAS ROMERIS UNIVERSITY

LAW FACULTY

DEPARTMENT OF INTERNATIONAL AND EUROPEAN UNION LAW

AISTĖ AUGUSTAUSKAITĖ

(INTERNATIONAL LAW PROGRAMME)

# RESERVATIONS TO HUMAN RIGHTS TREATIES THAT ARE RELATED TO GENDER ISSUES

MASTER THESIS

Supervisor:

Doc. dr. Regina Valutytė

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# IŠLYGOS ŽMOGAUS TEISIŲ APSAUGOS SUTARTIMS, KURIOS YRA SUSIJUSIOS SU LYČIŲ LYGYBĖS PROBLEMOMIS

MASTER THESIS

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**TABLE OF CONTENTS**

## INTRODUCTION

The attainment of equality between women and men and the elimination of all forms of discrimination against women are fundamental United Nations values. Article 2 of the Universal Declaration of Human Rights states that: "Everyone is entitled to all the rights and freedoms set forth in [this] Declaration, without distinction of any kind, such as race, colour, sex, language, religion…"[1] These commitments are reflected in international legal instruments that address gender-based discrimination, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Social and Economical Rights (ICSER), Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities and Convention against torture and other Cruel, Inhuman or Degrading Treatment. In this master thesis the author will analyze the practice under the CEDAW, ICCPR, ICSER and CRC. These treaties are chosen because they laid down the most significant principles in the protection of equality between women and men rights. Moreover, a number of reservations made to the fundamental provisions of these treaties that relate gender issues is very high and only a small number of states have withdrawn the invalid reservations.

Even though the principle of equality and non-discrimination on the grounds of sex is included in the principal United Nations human rights treaties, also in the regional human rights documents, various issues arise while the states have to implement these fundamental rights in their own legal system. One of the biggest problems is reservations. States that make reservations, justify themselves that the provisions are incompatible with national laws and traditions. This issue makes the implementation of the treaty much more difficult than it might be seen.

**The novelty of the thesis** is that the analysis is helpful in identifying the existing practice in the international community how do the reservations affect the implementation of human rights treaties, especially those that relate gender issues, inside the states and what consequences these reservations bring.

One of the biggest problems last decades in international community has been the harmful practices that effect women and are based on gender issues. In the countries where these practices are widespread, the reservations are made to the fundamental cores of the abovementioned treaties.

[1] Universal Declaration of Human Rights, adopted December 10, 1948 by the United Nations General Assembly http://www.un.org/Overview/rights.html, 2011-12-06

The research of the master thesis aims to find the link between these practices and made reservation by analyzing the international human rights treaty law, and the states practice of implementing human rights treaties. For this purpose, the author has chosen to examine the concept of reservations to human rights treaties, in particular the reservations made to the provision that relates gender issues.

**The importance of the thesis** is that in the human rights treaties the implementation of Vienna Convention on the Law of Treaties provisions on reservations brings several issues, even though in theoretical level the regulation of reservations seems unproblematic.

Firstly, there is a major group of states (especially Islamic countries that base their explanation on the incompatibility with Islamic law), which want to become parties to the treaties that protects human rights and make reservations to fundamental provisions of them at the same time as well. Secondly, the state parties that make objections to the reservations have to decide is the reservation compatible with the object and purpose of the treaty or not. The regulation that is laid down in Vienna Convention creates difficulties for the state parties and withdrawal of reservations seems to be more problematic in reality than it is in theory.

**The object of the thesis** is reservations made to human rights instruments that are related to gender issues and how these reservations affect states practice.

**The purpose of the thesis** is to analyze whether the Vienna Convention regime works properly in the human rights treaties, what reservations might be invalid under the human rights treaties that are related to gender issues, what is the practice of states according to the reservations and to protect the treaty regime from the invalid reservations that address gender equality as one of the fundamental right of human beings in the human rights law.

In order to reach this purpose, **the tasks** are:

To analyze the notion of reservations according to the Vienna Convention regime;

To analyze what specific reservations are done to international human rights instruments and are they compatible with the object and purpose of the treaty;

To analyze what was the reaction of the rest of the state parties to the reservations;

To analyze how these reservations affect the society of the state parties;

To find the solutions how the problem of the invalid reservations should be solved in international community.

**The structure of the thesis:** the thesis consists of two parts. First part analyses the international treaty law that relates reservations. It examines the theory, jurisprudence and law on reservations to treaties, in particular the provisions of the Vienna Convention. Second part is devoted to the specific reservations made to the abovementioned treaties and the states practice of raising objections to substantive reservations. The author will try to explore why objections to reservations have not, in any material sense, affected the treaty relations between reserving states and objecting states parties. Also it will be analyzed the effect of the reservations to the harmful traditional practices that has been happening in those countries that made reservations to the fundamental provisions of human rights treaties.

**The sources.** Detailed analyses of international documents, such as Vienna Convention on the Law of the Treaties, four above mentioned principal human rights treaties will be provided in this master thesis. Also it will be analyzed states practice: specific reservations made to the fundamental treaties of human rights, also the objections to them. It has to be mentioned case law as well. Such cases as Genocide Convention case, Belilos case formulated basic principles in concept of reservations, therefore the most important provisions of them will be also provided. United Nations bodies have released significant documents that help to interpret the treaty provisions that relate reservations. Therefore, detailed analysis of the most important reports, observations and announcements will be provided as well. Furthermore, the author will base the observations on the works of the most significant researches in international law such as A. Pellet, M. N. Shaw and others. The monographs and specific articles that help to reach the goal of this master thesis will be analyzed as well.

## 1. NOTION OF A RESERVATION

### 1.1 The concept of reservations under Genocide Convention Case

In general, and in particular to human rights treaties reservations are one of the very few aspects of the law of treaties that have sparked intense discussions, often reflecting very conflicting views, both in the doctrine and practice of international law. This part of the master thesis will analyze in depth the general concept of the institution of the reservations to treaties taking into account the relevant jurisprudence of International Court of Justice on the reservations to human rights treaties, in particular the 1951 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Reservations to the Genocide Convention Advisory Opinion).

To begin with, the power of making reservations to international treaties grows out of the principle of "sovereignty of states", so states can claim that, they will not be bound with some particular provisions of an international treaty which they do not give their consent.[2]

On the other hand, the international treaties, in particular the multilateral ones are the results of a crucial need to regulate the relations between states and to provide stability and a control on the relations. In this context it can be said that treaties may lose their effectiveness if states are unwilling to enforce them, in other words if they make reservations to exclude or to modify the legal effect of certain provisions of the treaty.[3] If the social, political and other differences between the states which bear different reservation subjects are taken into consideration, it will be understood easily. Attention has to be made to these aspects while talking about human rights treaties in particular.

Speaking more narrowly the International Court of Justice has formed practice and had the opportunity to explain its approach to the effects of reservations to a multilateral human rights treaty in its 1951 advisory opinion on Reservations to the Genocide Convention[4].

The Reservations to the Genocide Convention Advisory Opinion established new foundations in the practice of reservations to all multilateral treaties that protects human rights, as well. It may be said that until then the general practice of States concerning reservations was based on the so-called "unanimity rule" or the "League of Nations" rule. Under this principle, all parties to

[2] Nurullah Yamali. How adequate is the law governing reservations to human rights treaties?// Ankara: Ministry of Foreign Affairs, 2004, p. 4
[3] M.N. Shaw. International Law. 6th. ed., Cambridge University Press, Cambridge. 2008. p. 915
[4] Reservations to the Convention on Genocide Advisory Opinion : I.C. J . Reports 1951, p. 1.5

the treaty had to consent to all reservations. This was a very inflexible rule, which although securing the integrity of the treaty, did not attract wider participation.[5]

It also has to be noted that the Genocide Convention does not have a rule on reservations. States therefore started to append various reservations to this Convention and the Secretary General of the United Nations (a depositary of the Convention) was uncertain which States should count in the determination of the date of entry into force of the Convention. The Court also explained that the contractual rule of absolute integrity is not relevant in relation to the Genocide Convention, and that there is no absolute rule of international law which only permits a reservation upon the acceptance by all the parties, as evidenced by the practice of such organizations as the Organization of American States. However, "It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself be impaired both in its principle and in its application".[6]

As it was mentioned above, the power of making reservations to international treaties grows out of the principle of sovereignty of states. The concept of reservations and the general practice of States were completely transformed by the Reservations to the Genocide Convention Advisory Opinion. It established new foundations in the practice of reservations to all multilateral treaties that protects human rights. The Court stated that it must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself be impaired both in its principle and in its application.

### 1.2 Objection to the reservations and possible consequences under Genocide Convention case

As to the consequences of the objections to a reservation, the Court envisaged the following possibilities: “It may be that the divergence of views between the parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by

[5] M. Fitzmaurice, On the protection of human rights, the Rome statute and reservations to multilateral treaties// 10 Singapore Year Book of International Law and Contributors 133, 2006, p. 134
[6] Ibid. p. 137

special agreement or by procedure laid down in Article IX of the Convention. Finally, it may be that a State, whilst not claiming the reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that understanding between that 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".[7]

In this part the Court laid down most important 3 outcomes. Firstly, the other parties may not object to the reservation and it will not have any consequences. Secondly, objecting party will decide to settle the dispute which thus arises either by special agreement. Thirdly, other state parties will not claim that the reservation is incompatible with the object and purpose of the treaty, will nevertheless object to it, but the treaty will enter into force between them, except for the clauses affected by the reservation.

Even though the International Court of Justice formed practice case by case and highlighted the main features of the reservations, the questions of validity of reservations, and what are the legal consequences of invalid reservations especially to those made to the human right treaties are still unanswered. It also has to be mentioned that the bilateral treaties do not include the case of reservations since "an agreement between two parties cannot exist where one party refuses to accept some of the provisions of the treaty"[8] The problem is about the multilateral treaties and to solve this and the other problems concerning treaties and therefore the regime of the Vienna Convention on the Law of the Treaties should be analyzed further.

For the outcome of the reservations the Court in the Reservations to the Genocide Convention Advisory Opinion laid down most important outcomes. Firstly, the other parties may not object to the reservation and it will not have any consequences. Secondly, other state parties will not claim that the reservation is incompatible with the object and purpose of the treaty, will nevertheless object to it, but the treaty will enter into force between them, except for the clauses affected by the reservation. The importance of this case shows the fact that the provision on reservations in VCLT follows the main structure of the Reservations to the Genocide Convention Advisory Opinion. However, the questions of validity of reservations and the legal consequences of invalid reservations especially to those made to the human right treaties this case remained unanswered.

[7] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion [1951] I.C.J. Rep. 15

[8] M.N. Shaw. International Law (6th. ed.). Cambridge: Cambridge University Press, Cambridge, 2008, p. 915

### 1.3 The regime of reservations under the Vienna Convention on the Law of Treaties

In this part of the master thesis the author will analyze the definition of reservations and the practical problems the system of reservations cause to human right treaties in particular those relating gender issues. Important question at this point arises whether the human rights treaties are of different character in the sense of making reservations and if the Vienna Convention on the Law of Treaties (hereinafter referred to as VCLT) approach can be applied to them to whole extent. All these questions will be analyzed in this part as well.

To begin with the provisions on reservations in VCLT follow the main structure of the Reservations to the Genocide Convention Advisory Opinion. However, the system of reservations causes several problems both in the practice and theory of the law of treaties, as the VCLT has left gaps in the regulation of fundamental issues (such as the permissibility of reservations), and certain other provisions were ambiguous (such as the "object and purpose" of a treaty which, generally, is not well defined in the VCLT).[9]

These problems proved to be particularly difficult to be solved in human rights treaties and especially those relating gender issues where reservations raise many question concerning their permissibility and/or compatibility with the object and purpose of a treaty.

To analyze further, Article 2 of the VCLT defines a "reservation" as a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, 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 or to that organization."[10]

According to this definition, certain criteria have to be analyzed deeper. Firstly, the reservation has to be unilateral act. Secondly, the state can be made only when entering the treaty. It cannot be made sometime after the treaty is entered and valid for the parties. A reservation must be formally confirmed by the State at the time of expressing its consent to be bound by a given treaty (Article 23 (2)), when ratifying, accepting or approving it[11]. Thirdly, the purpose of the reservation is to modify or to exclude the legal effect of certain provisions. This last element of the definition is important when deciding if the unilateral act is an interpretative declaration or a reservation hidden under it.

[9] K. Korkelia. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights// European Journal of International Law Vol. 13, 2002, p. 440

[10] Nurullah Yamali. How adequate is the law governing reservations to human rights treaties?// Ankara: Ministry of Foreign Affairs, 2004 p. 3

[11] K. Korkelia. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights. European Journal of International Law, Vol. 13, 2000, p. 443

M. N. Shaw clarifies the notion of the reservation indicating that "where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement. By the device of excluding certain provisions, states may agree to be bound by a treaty which otherwise they might reject entirely."[12]

Under Article 19, a state has a liberty to make reservations to a multilateral treaty, unless: all reservations are prohibited, or the specific attempted reservation is prohibited, or the specific attempted reservation is incompatible with the object and purpose of the treaty. The effect of this is that a prohibited reservation is without legal effect and the term of the treaty to which the invalid reservation related applies in full between all the parties. E.g. in the Human Rights Committee's General Comment, the Committee identifies potential reservations to the International Covenant on Civil and Political rights which would be impermissible in this sense being reservations offending rules of jus cogens and reservations to specific protected human rights, the denial of which would be incompatible with the object and purpose of the Covenant. In fact, the list is quite extensive, demonstrating how these procedural rules about reservations may be crucial in ensuring the efficacy or otherwise of a multilateral treaty.[13]

Under article 20 (2), if it appears from the limited number of negotiating states and the object and purpose of the treaty that the treaty obligations might be accepted in their entirely by all prospective parties, then a reservation requires acceptance by all those parties. M. Dixon explains it in other words: for those classes of treaty which are intended to create a completely uniform set of obligations, the unanimity rule still prevails. A state whose reservation is accepted by all states is a party to the treaty on the terms of its reservation, whilst a state whose reservation is objected to be any one of the prospective parties cannot be a party to the treaty at all.[14]

Acceptance of one state's reservation by another state means that the multilateral treaty comes into force between the members of the treaty those accept the reservation and the reserving state. However, the objection to a state's reservation by another state party does not prevent the entry into force of the treaty between the reserving state and the objecting state unless a contrary intention is definitely expressed by the objecting state.[15] As M. Dixon explains, it goes further than Genocide Convention case. The 'object and purpose' test of the VCLT differs in an important way from the similar test laid down by the International Court of Justice in the Genocide Convention case. As it was mentioned the International Court of Justice applied the test to assess the validity of

[12] M.N. Shaw. International Law (6th. ed.). Cambridge: Cambridge University Press, p. 914
[13] Martin Dixon. Textbook on international law, Fourth edition. Oxford: Oxford university, 2000, p. 64
[14] Ibid. p. 65
[15] Bowett, D.W. Reservations to Non-Restricted Multilateral Treaties// XLVIII British Yearbook of International Law, 1977, p. 71

reservations as well as objections to reservations. In comparison, the VCLT rule states that a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

VCLT clearly provides that even if the state does not object to a reservation, the multilateral treaty may still be in force between objecting state and the reserving state. However, it has to be mentioned that if the objecting state has declared that it does not regard the reserving state as a party to the treaty, then the treaty does not govern only their relations. The treaty is not in force between them, although it may remain in force in their relations with the other state parties. Article 21 also provides that if the entry into force of the treaty between the two states is not opposed by the objecting state, then the treaty will govern their relations saving only that the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation.[16]

VCLT has raised several questions. Firstly, the question arises whether the reservations' regime, as codified in the VCLT, can adequately be addressed to human rights relationships. The question is whether the consequences are different of reservations made to human right treaties and objections to them.

Human rights treaties have some features that are different from the other multilateral treaties. First at all, human rights treaties do not create reciprocal relationships between states parties, but envisage some obligations upon the states in the interest of individuals, in order to create an objective regime of protection of human rights.[17] In other words "individuals are the recipients of duties imposed on states".[18] However, it has to be mentioned that first of all the states have certain obligations towards each other while entering the treaties. Therefore, reservations made by the state parties have certain influence not only of the individuals of those states but also to the rest of the treaty members. Moreover, the common interest in the human rights treaties is the accomplishment of providing a high standard protection of human rights.[19] Therefore, the VCLT regime is for all treaties except certain specific provisions.

To sum up VCLT regime clearly provides that even if the state does not object to a reservation, the multilateral treaty may still be in force between objecting state and the reserving state. However, it has to be mentioned that if the objecting state has declared that it does not regard the reserving state as a party to the treaty, then the treaty does not govern only their relations. The treaty is not in force between them, although it may remain in force in their relations with the other state parties. As to the human rights treaty, the question is always raised whether the regime of

[16] Martin Dixon. Textbook on international law, Fourth edition. Oxford: Oxford university, 2000, p. 66
[17] K. Korkelia. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights. European Journal of International Law, Vol. 13, 2002 p.3
[18] Nurullah Yamali. How adequate is the law governing reservations to human rights treaties?, Ankara: Ministry of Foreign Affairs, 2004 p. 7
[19] Ibid., p. 7

VCLT is applicable to the scope of the aforementioned documents. Even though the human rights treaties set the rules for the protection of individuals, first of all the states have certain obligations towards each other while entering the treaties. Reservations made by the state parties have certain influence not only for individuals of those states but also to the rest of the treaty members and for this reason VCLT regime is for all treaties except certain specific provisions of it.

### 1.4. Object and purpose test according to VCLT

The "object and purpose" of a treaty has been described as a "unique and versatile criterion" but one without a definition in law.[20] It has been variously referred to as the "raison d'être", "fundamental core" or "core obligations" of a treaty. However, these are merely vague descriptions that do little to explain or identify with any certitude what really constitutes the "object and purpose" of a treaty. Opinions differ among scholars and jurists when it comes to giving a concrete shape and context to the term. To some extent, this disagreement shows an intrinsic impossibility of defining with any certainty the "object and purpose" of a treaty.[21]

Article 19 (c) of VCLT gives a preeminent position to these "core obligations" that automatically become non-derogable, while permitting States to make qualifying reservations to all other provisions of the treaty. In other words, the "object and purpose" of a treaty contains the absolutely indispensable provisions of a treaty, as against ancillary provisions. This approach of dividing the treaty into the "irreducible minimum" and ancillary provisions is criticized by some scholars who argue that in the case of human rights treaties such bifurcation is simply not possible because all the "substantive provisions" of the treaty must be considered as forming part of the normative content of the "object and purpose".[22]

This feature of Article 19 (c) becomes especially important when considering reservations to human rights treaties. It has been argued that the determination of the "object and purpose" is, as it stands, a difficult process and the thought that parts of the treaties that do not constitute the "object and purpose" can be dispensed with through valid reservations, places human rights regimes in a precarious position.[23] William Schabas points out that "all of the substantive provisions of a

[20] "Tenth Report on Reservations to Treaties By Mr. Alain Pellet, Special Rapporteur, A/CN.4/558/Add.1, 14 June 2005, para.78, United Nations General Assembly Official Records: Sixtieth Session, Supplement No.10 (A/60/10), (2 May - 3 June and 11 July - 5 August 2005) para. 376.
[21] Liesbeth Lijnzaad. Reservations to UN-Human Rights Treaties. Dordrecht: Martinus Nijhoff Publishers, 1995, p. 83
[22] Ulf Lindefalk. On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19// 50 Nordic Journal of International Law, 2003, p. 434.
[23] Belinda Clark. The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women// American Journal of International Law Vol. 85, No 2, 1991, p. 281

human rights treaty are essential to its 'object and purpose' and that, as a consequence, reservation any substantive provision is illegal."[24]

Lack of clarity on what constitutes the "core" or the "object and purpose" of a treaty weakens the claim for maintaining the absolute integrity of the treaty. The argument that no reservation can be allowed to any of the "core" provisions of a treaty becomes problematic when there is confusion regarding what may be specifically identified as the "core" provisions.[25]

The idea that every treaty has a clear and distinct "object and purpose" involves for the most part an open-ended concept because it is left to be determined by individual States parties. There is no unanimity or consensus of opinion as to the exact contents of the object and purpose of every human rights treaty. For example, in the case of the ICCPR, Article 4 (2) may be taken as the only provision in the Covenant that restricts the making of a reservation. It may also be considered as listing the "essential provisions" of the treaty by virtue of the non-derogable rights to which it refers.[26] What are the core provisions of specific treaty is the question for the state parties who determine the object and purpose of the treaty in their objections to the reservations if the treaty does not provide the essential provisions by itself.

The absence of certainty in the determination of what constitutes the "object and purpose" of a treaty is an obvious and intrinsic feature of the compatibility test under Article 19 (c) of the VCLT. The only exception to this would be the case of treaties that clearly specify the provisions containing the 'object and purpose' and the various circumstances that may be included within the scope of these provisions. In the case of international human rights treaty law, it is also undesirable because of the impossibility of foreseeing all situations that may be included in the object and purpose of a treaty. [27]

The compatibility test arguably sits well with the flexible policy directive of the VCLT that is also seen in the rest of the reservations regime under Articles 20 and 21. For instance, Article 20 (4) (c) of the VCLT allows a reserving State to become a party to a treaty on the strength of a single contracting State party accepting the reservation, notwithstanding any objection that might be raised on whatever grounds by any other State party. Similarly, Article 21 creates reciprocal treaty relations limited only by the "extent of the reservation" in question. These two provisions indicate that the VCLT approach to the process of determining the validity of reservations is flexible because this determination is ultimately left to the discretion of the various States parties.

[24] William A. Schabas. Reservations to the Convention on the Rights of the Child// Human Rights Quarterly Vol. 18, 1996, p. 476
[25] Oona A. Hathaway. Do Human Rights Treaties Make a Difference?// 111 The Yale Law Journal, 2002, p. 111
[26] Mashood A. Baderin. International Human Rights and Islamic Law, Oxford: Oxford University Press, 2003, p. 60
[27] Ahmed Ali Sawad. Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations, A thesis submitted for the degree of Doctor of Philosophy at the University of Otago. Dunedin New Zealand, 2008, p. 40

Even though the doctrine of international law lacks the clarity what is object and purpose of the treaty, state parties while making their objections have certain directions that are laid down in Vienna Convention what might be considered as the main provisions of the treaty.

To summarize the most problematic part of the reservations is how do distinguish what is the object and purpose of the treaty. As there is one unanimous definition of the object and purpose of the treaty, Article 19 (c) of VCLT gives a preeminent position to these "core obligations" that automatically become non-derogable, while permitting States to make qualifying reservations to all other provisions of the treaty. As to the human rights treaties, all of the substantive provisions of a treaty are essential to its 'object and purpose' and that, as a consequence, reservation any substantive provision is illegal. Therefore, lack of clarity on what constitutes the "core" or the "object and purpose" of a treaty weakens the claim for maintaining the absolute integrity of the treaty. As to the extent the reserving state is bound by the treaty by making reservations that are violates object and purpose of the treaty, the reserving state is not obliged to protect human rights and especially those related to gender equality by making such reservations. The solution might be that every treaty has a clear and distinct "object and purpose" in order to distinguish what reservation is permissible and which is not.

### 1.5. Consequences of the reservations incompatible with object and purpose

As it was mentioned above, the reservation to the treaty is legal only when it is in conformity with the object and purpose of the treaty. In this part of the master thesis the author will analyze the problems how to identify the illegal reservation, what doctrines authors suggest in order to find a distinction between legal and illegal reservation and what are the consequences of illegal reservations. These mentioned aspects have a vital importance for human rights treaties especially those concerning gender issues and women rights. Some state parties try to obey their responsibilities by making reservations to the main provisions of the treaties and defend themselves that e.g. Shariah law does not see women in an equal position as men. Therefore the mentioned analysis is important at this point, too.

As it was discussed above, Article 19(c) of the VCLT prevents a state to formulate a reservation, which is incompatible with the object and purpose of the treaty. This provision reflects the view taken by the International Court of Justice in the Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[28] The major issue is how to determinate whether the reservations are legal that means are they in conformity with the object

[28] Moloney, Roslyn. Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent// 35 Melbourne: Melbourne Journal of International Law, 2004, p. 155

and purpose of the treaty. Several authors suggest different theories and doctrines that will be discussed hereinafter.

There are certain different approaches while deciding about the validity of the reservation, such as the 'admissibility', 'opposability', and 'severability' doctrines[29] that will be discussed hereinafter.

### 1.5.1. Admissibility and opposability approach

According to the 'opposability' doctrine, a reservation cannot be invalidated for being incompatible with the object and purpose of the treaty unless a contracting state objects to a reservation on grounds of incompatibility within 12 months.[30] Contrarily to 'opposability' doctrine, the 'admissibility' approach states that the Vienna Convention rules on acceptance of, and objection to, reservations are only applicable if they are compatible with the object and purpose test.[31] According to this view, "if a reservation is challenged before a competent international court or tribunal, even many years after the reservation was initially drafted, it can still be declared invalid on the grounds of incompatibility"[32].

The authors who suggest that the 'admissibility' doctrine is more favourable provide the following arguments. Roslyn Moloney prefers the 'admissibility' doctrine, particularly in the case of human rights treaties. To follow this approach, she also provides an example: "in the case of the Convention on the Elimination of All Forms of Discrimination against Women, only four objections were lodged against the far-reaching reservation made by Libya that the Convention would not apply where its provisions conflicted with Shariah law"[33]. R. Higgins suggests that 'one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged'.[34]

According to these approaches, opposability doctrine let the state parties to decide is the reservation compatible with the object and purpose or not at the moment while the reserving tries to enter the treaty. As the VCLT provides that state parties have to decide the validity of the reservation, this approach would be the most relevant to the VCLT regime. The admissibility doctrine let to invoke the validity of reservations years later. This would seem fair in human rights

[29] Curtis Bradley and Jack Goldsmith. Treaties, Human Rights and Conditional Consent. University of Pennsylvania Law Review, 2000, p. 435
[30] Ibid., p. 399
[31] Roberto Baratta. Should Invalid Reservations to Human Rights Treaties be Disregarded?// European Journal of International Law, EJIL Vol. 11, No 2, 2000, p. 413
[32] Hylton, Daniel N. Default Breakdown: The Vienna Convention on the Law of Treaties, Inadequate Framework on Reservations// 27 Vanderbilt Journal of Transnational Law, 1994, p.45
[33] Moloney, Roslyn. Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent// 35 Melbourne: Melbourne Journal of International Law, 2004, p. 157
[34] Rosalyn Higgins. Human Rights: Some Questions of Integrity., Modern Law Reviev, 1989, p. 52

field, however, this regime might infringe the rights of the reserving state and the expectations of it by stating that VCLT allows for objecting states to decide on the validity of reservation before the entering the treaty.

### 1.5.2. Severability doctrine

Under the severability doctrine an incompatible reservation may be 'severed' from the state's instrument of ratification, leaving it as a party to the treaty without the benefit of its reservation.[35] According to R. Goodman, "a severability regime would also have a number of clear benefits for both the states concerned and the international human rights regime. Many non-democratic states ratify human rights treaties as tactical concessions to placate international and domestic pressure groups, without any intention of honouring their obligations under the treaty".[36]

The severability of invalid reservations has been considered twice by the International Court of Justice, in the Case of Certain Norwegian Loans (France v Norway) (Preliminary Objections) and Interhandel (Switzerland v United States of America) (Preliminary Objections). Even though these cases were not dealing with the human rights treaties they formulated basic principles that are important in international law in general and to specific treaty regimes as well. On both occasions, Judge Hersch Lauterpacht, in his separate opinions, suggested that inessential and invalid reservations were severable from a state's instrument of ratification. In neither case, however, did the rest of the Court consider the issue directly.[37]

In his separate opinion in the Norwegian Loans Case[38], having held France's reservation to its acceptance of the jurisdiction of the Court to be invalid, Judge H. Lauterpacht refused to sever the reservation on the grounds that it was 'essential' to France's consent. However, in coming to this conclusion, he had regard to the general principle of contract law that it is legitimate — and perhaps obligatory — to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument.[39]

Judge H. Lauterpacht considered that this principle was applicable to the present case such that the Court 'should not allow its jurisdiction to be defeated as the result of remediable defects of

[35] Moloney, Roslyn. Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent// 35 Melbourne: Melbourne Journal of International Law, 2004 p. 160
[36] Ryan Goodman. Human Rights Treaties, Invalid Reservations, and State Consent// 96 American Journal of International Law, 2000, p. 439.
[37] Moloney, Roslyn. Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent// 35 Melbourne: Melbourne Journal of International Law, 2004 p. 175
[38] [1957] ICJ Rep 7 ('Norwegian Loans Case')
[39] Ryan Goodman. Human Rights Treaties, Invalid Reservations, and State Consent// 96 American Journal of International Law, 2002, p 441.

expression which are not of an essential character'.[40] The view that inessential and invalid elements of a state's ratification could be severed from the whole was, by Judge Lauterpacht's own admission, a departure from the earlier view that every single provision of a treaty is indissolubly linked with the fate of the entire instrument which, in their view, lapses as the result of the frustration or non-fulfilment of any particular provision, however unimportant and non-essential.[41]

Despite strong arguments in favour of severability, the author Elena Baylis argues that state consent takes on a different form in the case of human rights treaties, because the intention behind such treaties is to create norms of customary international law which bind all states, not simply States Parties to the treaty. The imposition of a human rights standard on a state does not ultimately depend upon that state's consent, but upon the acceptance of that standard in the international community. In this context, binding a state to a reserved human rights norm does not pose the same affront to national sovereignty as would be presented by binding the state to an economic or political provision.[42] This argument definitely makes sense to those treaties that protects women rights and regulates gender issues in general. If a treaty is signed and then ratified for the purpose to reduce the number of violence against women, to formulate certain standard how women should be treated, the purpose is not the same as to formulate certain political provisions. The first issues are more sensitive and to reach the goals of the treaties requires much more efforts.

Even though the above mentioned arguments in favour of severability regime are persuasive, in the real situation they are not sufficiently strong to rationalize binding a state to a provision, the reservation of which may have been an essential condition of its consent to be bound. Moreover, the likelihood that a reserving state will continue to ignore that provision undermines the authority and respects those human rights instruments should command.

It is submitted, therefore, that any regime of severability should apply only to reservations that are inessential to a state's consent. Author C. Redgwell points out her doubts about drawing an artificial distinction between 'an intention to be bound and an intention to modify certain provisions of the convention in their relation to the reserving state'.[43] However, it is still true that reservations are often an inessential component of ratification, and that when challenged, the desirability of remaining in the treaty regime will often outweigh the importance of the reservations.

Determining the essentiality of a reservation to a state's consent to be bound by a treaty regime may be problematic. The International Law Commission has focused upon this problem as

[40] [1957] ICJ Rep 7 ('Norwegian Loans Case')
[41] Ibid 56 (Separate Opinion of Judge Lauterpacht)
[42] Elena Baylis. General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties// 277 Berkeley Journal of International Law, 1999, p. 277
[43]Catherine Redgwell. Reservations to Treaties and Human Rights Committee General Comment No 24//52 International and Comparative Law Quarterly,1997, p.267.

justification for its rejection of the severability option, stating "[i]n international society at the present stage, the state alone could know the exact role of its reservation to its consent".[44]

The first is an evidentiary problem: what is the best and most objective manner of determining whether a provision is 'essential' to consent? Some writers have suggested that deciding severability 'is essentially a matter of construction of the state's ratification instrument'.[45]

The second problem arises when the validity of a reservation is challenged before an international tribunal. A reserving state concerned to prove the essentiality of its reservation has the best access to evidence of its 'intention' at the time of formulating the reservation. Moreover, at the time of formulating the reservation it is relatively simple for the state to make a statement saying that it is 'essential'. Determining essentiality on the basis of unilateral statements made by a state and subjectively selected evidence is unreliable and would make a system of severability and the reservations regime largely meaningless.

Even though the European court of human rights is a regional court, it outlined an alternative approach to determining essentiality in Loizidou v Turkey case[46], the facts of which are discussed below. In Loizidou v Turkey case, Turkey pointed to statements it made at the time of making its reservation as evidence that the reservations were an essential element of Turkey's consent to be bound by the European Convention and thus could not be severed from its instrument of ratification. Thus, disregarding the reservations would have the consequence that Turkey's acceptance of the right of individual petition under the European Convention would lapse. However, the Court refused to determine the essentiality of the reservations by reference to Turkey's statements. Instead, it observed that Turkey must have been aware of the impermissibility of its reservation in view of the consistent practice of other contracting states. Objections by other contracting states at the time of making the reservation lent 'convincing support' to arguments that the reserving state should have been aware of the invalidity of its reservation. Turkey's awareness of the legal position 'indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves'. In other words, where a state should have known that its reservation was invalid, it will be deemed inessential to the state's consent and subject to severance. This sets a high standard for essentiality. However, it is submitted that this would have the effect of forcing states to take greater responsibility in the negotiation of human rights treaties and the formulation of reservations. It is important to note that a state in this position would always have the option of withdrawing from a treaty, and then redrafting an instrument of ratification by either amending or

[44] Report of the International Law Commission, 106 (emphasis in original)
[45] Richard Edwards Jr. Reservations to Treaties// 10 Michigan Journal of International Law 362, 1989, p. 378.
[46] Loizidou v Turkey case (1995) 310 Eur. Court HR (ser A) 7, 30; [1995] ECHR 10; 20 EHRR 99, 137

redrafting the impugned reservation. In short, although severability creates the useful presumption that states wish to remain within the treaty regime, this may be rebutted by the states themselves[47].

It is submitted that severing an inessential and incompatible reservation from a state's instrument of ratification, using the criteria for essentiality adopted by the European Court of human rights in Loizidou v Turkey case, would strengthen the integrity and universality of multilateral human rights treaties, without undermining state sovereignty.[48]

Under the severability doctrine an incompatible reservation may be 'severed' from the state's instrument of ratification, leaving it as a party to the treaty without the benefit of its reservation. A severability regime has a number of clear benefits for both the states concerned and the international human rights regime. Even though the arguments in favour of severability regime are persuasive, in the real situation they are not sufficiently strong to rationalize binding a state to a provision, the reservation of which may have been an essential condition of its consent to be bound. Moreover, the likelihood that a reserving state will continue to ignore that provision undermines the authority and respects those human rights instruments should command.

### 1.5.3. Legal remedy of the determination of the invalidity of a reservation

After this analysis the leading question remains: what legal remedy should follow the determination of the invalidity of a reservation? While answering this question R. Goodman suggests that leading commentators have discussed a limited set of options. Three choices can be identified:

Option 1: The state remains bound to the treaty except for the provision(s) to which the reservation related.

Option 2: The invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the agreement.[49]

The first remedial option—i.e., that the state remains bound to the treaty except for the obligations to which the incompatible reservation related could be defined as the most suitable for the reserving state. However, it has been argued that "this option would infringe the interest of other state parties. Their interest consists in preserving the bargained-for elements of a multilateral agreement, which incompatible reservations or similar arrangements would defeat. No scholar has

[47] Richard Edwards Jr. Reservations to Treaties// 10 Michigan Journal of International Law 362, p. 362
[48] Moloney, Roslyn. Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent// 35 Melbourne: Melbourne Journal of International Law, 2004, p. 155
[49] Ryan Goodman. Human Rights Treaties, Invalid Reservations, and State Consent// 96 American Journal of International Law, 2002, p. 531

offered a sustained defence of the first remedy, and various commentators have referred to it as implausible"[50].

The structure of modern reservations law, as set forth in the ICJ's opinion in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and in the Vienna Convention on the Law of Treaties, is committed to safeguarding these interests of state parties. Prior to the Reservations opinion, international practice generally applied a unanimity rule: a state could enter a reservation to a multilateral treaty only if it was accepted by all the other parties.[51]

The option that was mentioned as the second one raises the question. Primarily owing to diplomatic sensitivities, states avoid choosing the second option, if they are politically willing to enter an objection at all. As for the first option, because the rule of reciprocity produces the exact same result as the reservation, state A loses nothing if state B selects this alternative. States consequently have little incentive to avoid submitting accessory reservations.[52]

After the analysis both arguments for and against these possible options are reasonable, however, the arguments for the first option seems to be the most persuasive ones and therefore the author would uphold this one for this following reason. Human rights treaties are important instruments that protect the most important values. Those treaties that protect women rights have specific "mission". Gender issues are closely related to tradition and religion aspect. The state parties that make reservations usually try to avoid responsibility to protect these rights. However, the first option would lead the reserving state to fall out of the regime of the treaty. But the first option leaves the opportunity for the reserving state to follow at least general principles of the treaty and a possibility that the state would be bound by other provisions of the treaty that still promotes equality of gender. Therefore this solution seems to be more optimistic and beneficial to the whole international community.

### 1.6. A distinction between reservation and interpretative declaration

The problems with reservations have been on the agenda of the International Law Commission (hereinafter referred to as ILC) since 1993 when the ILC began work (which is still on-going) on this subject[53]. Some of the topics, which have been discussed by the ILC**,** relate directly to the subject matter of the master thesis, i.e., the differences between interpretative

[50] William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?// 21 Brooklyn International Law Journal, 1995; p. 118–19

[51] Jean Kyongun Koh. Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision// Harvard International Law Journal Vol. 23, 1982, p. 55

[52] Coccia, Massimo. Reservations to Multilateral Treaties on Human Rights// California Western International Law Journal Vol. 15, No 1, 1985, p. 11

[53] This Commission began work on the Convention in 1949 and finished in 1969 with a diplomatic conference held by the United Nations in Vienna, Austria.

declarations and reservations submitted by States to human rights treaties. These two concepts are closely linked and a distinction between them is often problematic.

This part of the master thesis will be devoted to the analysis of the notion of interpretative declarations and distinction between interpretative declaration and reservation. Usually multilateral treaties allow both of these acts but the main issue is the consequences that are completely different.

To compare the differences between the reservations and interpretative declarations, it is worth to mention that different authors are not in the same opinion how to distinguish them in reality. The line is very thin though and the states can manipulate while stating it is not a reservation. In the 63rd General Assembly director, Department of Legal Affairs of the Ministry of Foreign Affairs addressed Chapters VI, VII and VIII of the Report of the International Law Commission dealing with the topics Reservations to Treaties, Responsibility of International Organizations and Expulsion of Aliens, stating that "Reservations and interpretive declarations are two different legal concepts. If a "reservation" is intended to modify or exclude the legal effects of certain provisions of a treaty, an "interpretative declaration" has the purpose to specify or clarify the meaning or the scope attributed by the declaring to a treaty or to certain of its provisions. Therefore, if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having legal consequences associated. Since they are two different legal concepts, they should be treated separately unless where they interrelate with each other. "[54]

By an interpretative declaration, a State aims at clarifying the meaning or extent it attributes to a given treaty or to some of its provisions. The qualification of a unilateral declaration as reservation or interpretative declaration depends on the content of this act and also on a legal effect it intends to produce, a matter, which is far from being always clear. However, the line between such statements and reservations proper may be a thin one and it will be a matter for construction in each case.

In the words of UN Human rights Committee in its 1994 General Comment on the effect of the reservations made to the International Covenant on Civil and Political Rights, the distinction between reservations and interpretative declarations should be made according to the intention of the State rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify that provision in its application to that State, it is, in reality, a reservation.[55] The problem of a clarification is that a state might have different intentions while

[54]The 63rd General Assembly, Report of the International Law Commission, Chapter VI, Chapter VII and Chapter VIII - Statement by Mr. Luís Serradas Tavares – Director, Department of Legal Affairs of the Ministry of Foreign Affairs - New York, 30 October 2008

[55] Martin Dixon. Textbook on international law (fourth edition). Oxford: Oxford university, 2000, p. 64

making an interpretative declaration. It is always a question of the Islamic countries that make interpretative declaration to the human rights treaties. These countries state that the provision of the treaty in incompatible with the national legal system and customs and call this unilateral act not a reservation that brings different consequences for the state towards the provision of the treaty. In this way, if the other state parties do not raise the question is it interpretative declaration or maybe a covered reservation may open the gates for that state not to follow its legal obligations.

In the case of a state not qualifying its declaration as reservation or interpretative declaration, it is sometimes the depositary who chooses one of the two designations when communicating the declaration to the other States Parties in accordance with Article 77 (1)(e) of VCLT or with any other provision of a particular treaty relevant in the given circumstances. The favor contractus principle[56] has a double impact on the legal regime of reservations: in order to facilitate both the entry into force of a convention and a wide participation to it, the Vienna Convention establishes practically no obstacles to the declaration of reservations, although this is done at the price of the integrity of the treaties.[57]

Furthermore, silence amounts to agreement (Article 20 (5) of VCLT) so that in the reality of treaty relations, in particular with regard to universal treaties, the entry into force of a reservation can be almost automatically assumed as long as it is in conformity with the object and purpose. However, a return to treaty integrity is made even easier, since a reservation can be withdrawn at any time even without the consent of those States which had previously accepted (Article 22 (2)). In that case, the favor contractus principle supersedes the free consent rule.[58]

The Temeltasch v. Switzerland case was the first one in which the European Commission on Human Rights dealt with the validity of a reservation.[59] The issue was "whether Switzerland could apply to its interpretive declaration to Article 6(3)(e) of the Convention to remove the obligation to provide a free assistance of an interpreter if a person charged with a criminal offence cannot understand or speak the language used in court."[60] After the determining whether the Swiss interpretative declaration was a reservation, the Court went on deciding whether this reservation was valid. After the examination of the case in the context of the conditions of the Convention for reservations, based on Article 63 of the Convention, the Commission held that the reservation was valid.

[56] This principle expresses the preference of international treaty law for the maintenance and the conclusion of treaties over expiry for reasons of form. The favor contractus principle can be found in Article 74, too. This provision clarifies that the severance or absence of diplomatic or consular relations does not prevent concerned States to conclude treaties between themselves.
[57] Frank Horn. Reservations and Interpretative Declarations to Multilateral Treaties, Elsevier Science Publishers B.V, 1988, p. 33
[58] Anthony Aust. Modern Treaty Law and Practice. Cambridge: Cambridge University Press, 2007, p. 126
[59] K. Korkelia. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights// European Journal of International Law Vol. 13, 2002, p.5
[60] Belilos v. Switzerland, (App.10328/83), ECtHR, 29 April 1988

The second and the leading authority especially for the human rights treaties (also those relating gender issues) is the Belilos case. The Lausanne Police Board imposed on Mrs. Marlène Belilos a fine of 200 Swiss francs for having taken part in a demonstration in the streets of the city on 4 April for which permission had not been sought in advance[61]. After the exhaustion of domestic remedies, she raised a complaint under Article 6 of the Convention. In its final submissions the Government declared that "Switzerland's interpretative declaration concerning Article 6 § 1 of the Convention produces the legal effects of a validly adopted reservation and that accordingly there has been no infringement of that provision as it is applicable to Switzerland."[62] The Court stated that "...it will examine the validity of the interpretative declaration in question, as in the case of a reservation in the context of Article 64 (now 57)..." The court also stated that it has jurisdiction, to determine the validity under Article 64 of the Convention of a reservation, is apparent from Articles 45 and 49 of the Convention and from Article 19.

For the method of distinguishing between reservations and interpretative declarations Alain Pellet suggests: „To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.[63] Article 31 of VCLT states that it shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, the context of the interpretative declarations should be taken into consideration as well.

The main questions after this analysis arises what are the legal consequences of interpretive declarations made to human rights treaties. It has to be noted that if the objecting state party concludes that the declaration is a reservation and/or incompatible with the object and purpose of the treaty, the objecting state may prevent the treaty from entering into force between itself and the reserving state. However, if the objecting state intends this result, it should specify it in the objection. Moreover, an objecting state sometimes requests that the reserving state should clarify its intention. In such a situation, if the reserving state agrees that it has formulated a reservation, it may either withdraw its reservation or confirm that its statement is only a declaration. But if the state had an intention to hide the reservations under the interpretative declaration especially to the obligations to human rights it is doubtful that it would agree with those arguments of the objecting states.

[61] Belilos v. Switzerland, (App.10328/83), ECtHR, 29 April 1988
[62] Belilos v. Switzerland, (App.10328/83), ECtHR, 29 April 1988
[63] Mr. Alain Pellet, Special Rapporteur, Third report on reservations to treaties A/CN.4/491/Add.6, 1998, p. 4

Therefore, the regulation for interpretative declarations should be clearer and explained in legal documents that would bind all the international community.[64]

As it was analyzed reservations and interpretive declarations are two different legal concepts. If a "reservation" is intended to modify or exclude the legal effects of certain provisions of a treaty, an "interpretative declaration" has the purpose to specify or clarify the meaning or the scope attributed by the declaring to a treaty or to certain of its provisions. Therefore, if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having legal consequences associated. For the method of distinguishing between reservations and interpretative declarations it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties. Article 31 of VCLT states that it shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. As to the legal consequences of interpretive declarations made to human rights treaties, the biggest problem is the intentions of the state that made it. If the state had an intention to hide the reservations under the interpretative declaration especially to the obligations to human rights it is doubtful that it would agree with those arguments of the objecting states. For this reason the regulation for interpretative declarations should be clearer and objecting states have always pay attention to the context of these interpretative declarations.

## 2. RESERVATIONS TO INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

### 2.1. The problem of reservations under particular human rights instruments that relates gender equality

In this part of the master thesis the author will analyze the general human rights instruments to which reservations are done mostly, the main types of reservations done to them and the effect of these reservations on the rights of the protected group of persons and also the rest of the state parties of the treaties.

Reservations made by the state parties to different human rights instruments might be seen as a threat to the world wide excepted principle of the universality. Universality is inherent in human rights.[65] The Charter of the United Nations unambiguously expressed this in Article 55. The very title of the Universal—and not international—Declaration of Human Rights reinforced that

[64] Clark, Belinda. The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women, American Journal of International Law Vol. 85 No 2, 1991, p.7

[65] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993 (A/CONF.157/24 (Part I), chap. III, I, para. 1)

trend, the objective being to unite all individuals over and above their racial, ethnic, religious and gender differences and combine unity and diversity in the name of equal dignity in regard to differences of identity.[66]

As attested by many relevant international instruments, broadly representative State practice and virtually unanimous legal opinion, the universality of human rights is now a fully accepted principle and an established right that can no longer be called into question. That imperative derives from the concept of a human being and from the fact that women's rights, even when involving cultural and religious aspects, form part of the fundamental rights of an individual. Also, universality arises out of the concept which is at the very root of human rights: the substantial dignity of the person. It is the cardinal and indivisible notion of human dignity which is the common foundation of a universal conception of women's rights notwithstanding cultural or religious differences. When women' dignity is infringed, there is no place for sovereignty or for cultural or religious distinctions. This fundamental concept of dignity is the common denominator among all individuals, people, nations and States irrespective of their cultural or religious differences or stage of development.[67]

Therefore, the state parties, while making the objections, and the responsible UN bodies, while making their reports during the monitoring, have to be very cautious about the reservations and the real purposes of the states while making interpretative declarations.

As it is mentioned above, the common interest in the human rights treaties is the accomplishment of providing a high standard protection of human rights. The other feature of human rights treaties is to have a treaty supervisory body to monitor the enforcement of the treaty.[68] The monitoring bodies perform their duties by considering the reports submitted by states and also examining individual and inter-state complaints.

Certain authors make a statement that "in human right treaties the reservations do not affect the states directly, so the states do not have any interest in objecting other than in order to maintain the effectiveness of a human rights treaty."[69] Then, the main issue is who can decide about the validity of a reservation. This question wider will be analyzed hereinafter in the context of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) because

[66] Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2001/42, Study on freedom of religion or belief and the status of women in the light of religion and traditions E/CN.4/2002/73/Add.2 24 April 2009, p. 10, para. 27

[67] Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2001/42, Study on freedom of religion or belief and the status of women in the light of religion and traditions E/CN.4/2002/73/Add.2 24 April 2009, p. 10, para. 29

[68] . Korkelia, R. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights// European Journal of International Law Vol. 13, 2000, p.3

[69] Nurullah Yamali. How adequate is the law governing reservations to human rights treaties? Ankara: Ministry of Foreign Affairs, 2004, p. 8

the number of reservations is the highest of all human rights treaties (also to those that are incompatible with the object and purpose of this Convention). It is worth mention that Article 20 of CEDAW provides that a reservation is held to be incompatible with the object and purpose of this Convention if at least two thirds of the States parties object to it. CEDAW is one of the human rights treaties that have adopted a so-called "collegiate" system of reservations whereby a special mechanism is put in place to deal with the character of reservations.[70]

Furthermore, the Committee of this Convention has a cautious approach to the issues of reservations. In its 2003 preliminary report, the Committee was of the view that in principle the provisions of the VCLT on reservations should be followed, observing the requirement of compatibility with the object and purpose of the treaty. This Committee emphasized the fact that the issue of reservations is essential within the jurisdiction of States, notwithstanding the special character of the human rights treaties and that reservations form an integral part of the consent to be bound by a State.[71] The view on the suitability of the VCLT to the reservations under this Convention conforms also to the Professor Pellet view that the VCLT regime is adequate for human rights treaties and that one of its commendable features is that it leaves the parties to the treaty free to decide on reservations. [72] This is important in order to analyze specific human rights treaties and how the regime of VCLT should be applicable to them.

As to the researches of international law, author M. Fitzmaurice follows the opinion stating that the Committee on the Elimination of Discrimination against Woman has adopted a similarly cautious approach.[73] As observed by Schopp-Schilling, the Committee on the Elimination of Discrimination against Woman tried several approaches, such as requesting States to withdraw, reconsider or explain offending reservations and not to submit reservations against the object and purpose of the Convention. This request has "not [been] heeded" by the newly ratifying States. [74] However, the same author more positively states that some of the new Parties explain their reservations in a fairly precise manner. However, at the same time "these explanations may not be acceptable and do not solve the problem of the impermissibility of these reservations."[75]

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[70] M. Fitzmaurice. On the protection of human rights, the Rome Statute and reservations to multilateral treaties// 10 Singapore Year Book of International Law and Contributors 133, 2006, p. 154

[71] M. Kjerum. Approaches to Reservations by the Committee on the Elimination of Racial Discrimination" in Reservations to Human Rights Treaties// 10 Singapore Year Book of International Law and Contributors 133, 2006, supra note 2 at 67-77.

[72] A.Pellet, First Report on the Law and Practice Relating to Reservations to Treaties, 4 7th Sess., UN Doc. A/CN.4/470, in particular para. 69.

[73] M. Fitzmaurice. On the protection of human rights, the Rome Statute and reservations to multilateral treaties// 10 Singapore Year Book of International Law and Contributors 133, 2006, p. 156

[74] H.B. Schopp-Schilling. Reservations to the Convention on the Elimination of All Forms of Discrimination Against Woman: Unresolved Issue or (No) "New Developments?" in Reservations to Human Rights Treaties // The Journal of Legal Studies, 2000 supra note 2 at 3

[75] M. Fitzmaurice. On the protection of human rights, the Rome Statute and reservations to multilateral treaties// 10 Singapore Year Book of International Law and Contributors 133, 2006, p. 156

However, as it will be seen later, even though the human rights instruments permits reservations that do not go beyond purpose and object of the treaties, state parties not so rarely make reservations to the essence of the treaty. Another question is who can determine the validity of the reservations and decide what provisions of the treaty forms the essence of it. As it was stated above, even though monitoring bodies one of the functions is to decide whether the reservation is compatible within the core treaty provisions, state parties usually are the ones who raise the objects to the reservations and decide is the reservation is in conformity with the object and purpose of the treaty or not.

To sum up, the common interest in the human rights treaties is the accomplishment of providing a high standard protection of human rights. The concept of equality is also highly protected by various international documents. However, many reservations based on national law are made to those treaties. One of the examples is CEDAW. Even though CEDAW provides that a reservation is held to be incompatible with the object and purpose of this Convention if at least two thirds of the States parties object to it, the reservations are widely made to the provisions of it. For this reason, CEDAW Committee expressed the view that in principle the provisions of the VCLT on reservations should be followed, observing the requirement of compatibility with the object and purpose of the treaty while making reservations and providing objections to them. However, in practice the situations is much more difficult because the state parties do not follow the VCLT provisions and make reservations that are incompatible with the object and purpose of the treaty.

### 2.2. Reservations under the Convention on the Elimination of All Forms of Discrimination against Women

CEDAW) was adopted by the General Assembly in 1979 and has 187 states parties[76]. In various sources the CEDAW is often described as an international bill of rights for women. CEDAW seeks to address social, cultural and economic discrimination against women, declaring that states should endeavour to modify social and cultural patterns of conduct that stereotype either sex or put women in an inferior position. It also provides that states should ensure that women have equal rights in education and equal access to information. Furthermore, states should eliminate discrimination against women in access to health care and end discrimination against women in all matters related to marriage and family relations. The CEDAW is the key to consolidate that states

[76] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, 2011-11-06, 11:20

must act to eliminate violations of women's rights whether by private persons, groups or organizations.[77]

CEDAW plays an important role in the field of women rights protection because it sets specific principles and more explicit standards than the earlier covenants with respect to gender equality and expands the protection against discrimination. In particular, it recognizes that because of the differences existing between socially defined gender roles, provisions against discrimination and abuse cannot simply require equal treatment of men and women; there must be a more positive definition of responsibilities that applies appropriate rights standards to all. The CEDAW recognizes the need to examine rules and practices concerning gender in society, to make sure that they do not weaken rights of women and provide guarantees that ensure the equality of the two sexes in all aspects of their lives[78]. These provisions are laid down in the articles of the CEDAW and form the object of the Convention. However, the CEDAW is also the one with the highest number of reservations made to it.

It has to be mentioned that by accepting the CEDAW, States commit themselves to undertake a series of measures to end discrimination against women in all forms. The measures include incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women, establishing tribunals and other public institutions to ensure the effective protection of women against discrimination. However, many of the State parties have made reservation on the very important provisions of this Convention and they do not implement the provisions in their national legal system. Therefore, the implementation of the fundamental values provided in this Convention is not so easy in those countries (especially Islamic ones[79]). Therefore it is necessary to analyze deeper the consequences of the reservations to this Convention.

It has to be mentioned that in 1998 the Committee adopted a statement on reservations as its contribution to the commemoration of the fiftieth anniversary of the Universal Declaration on Human Rights. The Committee in its Statement stated that "reservations affect the efficacy of the Convention, whose objective is to end discrimination against women and to achieve de jure and de facto equality for them. The Committee explained that by entering a reservation, the state indicates its unwillingness to comply with an accepted human rights norm".[80]

[77] Ibid
[78] Ibid
[79] Islamic reservations have certain features: they are made by Muslim countries, based on Islamic law (Shariah or Quaran), they are ussualy made to human rights treaties,
[80] Mervat Rishmawi. The revised Arab Charter on Human Rights: A Step forward? //United Kingdom: Oxford University Press. 2005, P. 368

The CEDAW permits ratification subject to reservations, provided that the reservations are not incompatible with the object and purpose of the Convention. A number of States enter reservations to particular articles on the ground that national law, tradition, religion or culture are not congruent with CEDAW principles, and purport to justify the reservation on that basis.[81] The highest number of reservations was to articles 2 and 16, which the Committee considers as core articles of the Convention and which in its view is impermissible. Therefore in this part the author will analyze specific reservations to the provisions of these relevant articles, their legality (compatibility with object and purpose of the treaty) and consequences to it by analyzing specific practice of the parties.

### 2.2.1. Reservations to the principle of elimination of discrimination against women

Article 2 of the Convention is one of the main articles because it provides all the basic principles of the implementation of the convention's provisions. By this article the state parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and decide to take all the appropriate measures to adopt appropriate legislative and legal protections to the rights provided in the Convention. However some states enter a reservation to this article although their national constitutions or laws prohibit discrimination as such. Moreover, some reservations are drawn so widely that their effect cannot be limited to specific provisions in the Convention.[82]

The Committee holds the view that Article 2 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 Article 2, subparagraphs (a) to (g), should be implemented by States parties to eliminate it.[83]

The analysis of the reservations made by different member states of the Convention[84] shows that most of the state parties made reservations to this article for the following reasons. First of all, the reserving states claim that the relevant provisions of Article 2 conflicts with Shariah law[85], it conflicts with constitutional stipulations relative to succession to the throne and law relating to succession to chieftainship[86], it conflicts with the provisions of the Family Code. E.g. The Government of the People's Democratic Republic of Algeria declared that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the

[81] Ekaterina Yahyaoui Krivenko. Women, Islam and International law.Geneva. Graduate Institute of International and Development Studies, 2009, p. 111
[82] http://www.un.org/womenwatch/daw/cedaw/reservations.htm,2011-09-14, 13:14
[83] http://www.un.org/womenwatch/daw/cedaw/reservations.htm,2011-09-14, 13:14
[84] Bahrain, Bangladesh, Egypt, Iraq, Libya, Saudi Arabia
[85] Especially Islamic countries such as Bahrain, Bangladesh, Egypt, Iraq, Libya, and Saudi Arabia that made reservations based on Shariah law.
[86]The Kingdom of Lesotho

Algerian Family Code. The Kingdom of Morocco made Declaration with regard to Article 2, because certain of the provisions in the Moroccan Code of Personal Status contained different rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.

At this point it is necessary to mention that the concept of "equality" in Islamic law is comparatively different from the provisions of Article 2 of CEDAW and the reservations made thereto by Islamic States in many respects reflect this difference in perception. To begin with, Shariah recognizes the legal status of women and men as being equal before Allah and the *Ummah* (Islamic community). This "equality" is, however, not conceived in an absolute sense. All persons are considered equal before Allah, with no distinction as to gender, language, race or religion. "Equality" is also a key principle that is respected even in all dealings between people (*muʿāmalāt*). This view of equality of all human beings (*musāwāt*) is also an expression of the Shari`ah concept of dignity (*karâmah*). It accepts the unity of mankind and the dignity of all human beings.[87] It is very important that this equality is not the same as in society. According to Shariah women and men are not equal in their marital life, also in the context of family relations.

The second question that has to be answered is whether reservations under this article do not violate object and purpose of the Convention. As it was analyzed in the first part, the rest of the state parties to the treaty can raise the objections to the reservation if it is incompatible with the object and purpose of the treaty. If the state parties decide that the reservation is incompatible with the object and purpose they can choose either to be bound by the treaty in relation with the reserving state or do no maintain the relationship if the reserving state would not withdraw the invalid reservation.

Under this Convention several states made objections regarding the reservations made to Article 2. E. g. with regard to reservations made by the Democratic Republic of Korea Austria objections to the reservations made in respect with Paragraph f of Article 2[88]. This part of the Article 2 referred to basic aspects of the Convention, to abolish existing discrimination against women and a specific form of discrimination, such as the nationality of children. The Government of Denmark found that the reservations made by the Government of Niger are not in conformity

[87] Ahmed Ali Sawad. Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations, A thesis submitted for the degree of Doctor of Philosophy at the University of Otago, Dunedin New Zealand, 2008, p. 85

[88] The Government of the Democratic People's Republic of Korea does not consider itself bound by the provisions of paragraph (f) of article 2, paragraph 2 of article 9 and paragraph 1 of article 29 of [the Convention].

with the object and purpose of the Convention[89]. The provisions in respect of which Niger made reservations cover fundamental rights of women and establish key elements for the elimination of discrimination against women. Therefore, the reservation is incompatible with the object and purpose of the Convection. However, the objecting states expressed their willingness for the reserving state only to reconsider its reservations to the Convention.[90]

Even though the state parties clearly expressed their objections that reservation to the Article 2 of the Convention is incompatible with the object and purpose of the treaty, the question remains, what steps should be done afterwards. Moreover, even though the states expressed their objections, those reserving states do not think themselves to be bound by those provisions especially Article 2 as far as it is contrary to the national laws and Shariah law.

As it was stated in the first part of master thesis, the consequences of the incompatible reservations are important. The objecting states according to the Vienna Convention regime can choose to maintain relationship with the reserving state or reject to maintain the relations with the reserving state or to continue being into relation with the reserving state except the provisions to those reservations were made.

Taking into account the position of objecting states[91] it has to be noted that most of the governments of state parties recommend the reserving state to reconsider its reservations to the Convention. Moreover, states express their willingness not to preclude the entry into force in its entirety of the Convention between the objecting state and reserving state. Generally the objecting state adds that the Convention will thus become operative between the two States without reserving state benefiting from its reservations.

As the reservations under this convention are in general permissible as long as they are in conformity with the object and purpose, the states generally uphold the severability doctrine according to the practice. This position is understandable because keeping the state into the treaty regime even with the reservations can still be positive in the protection of human rights field than the reservations would be impermissible in the treaties at all and the states would not enter the treaties at all.

To sum up, the states making reservations to the Article 2 of the Conventions do not want to be bound by the Conventions as long as the provisions are contrary to their national legislation and Islamic law regulations. However, the objecting states made it clear that reservations made to Article 2 are incompatible with the object and purpose of the Convection because this article covers

[89] The Government of the Republic of the Niger expresses reservations with regard to article 2, paragraphs (d) and (f), concerning the taking of all appropriate measures to abolish all customs and practices which constitute discrimination against women, particularly in respect of succession.
[90] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, 2011-11-10, 20:27
[91] Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany

fundamental rights of women and establish key elements for the elimination of discrimination against women. According to the analysis of the objecting states practice, they usually only suggest but not demand to withdraw the reservation but want to maintain the relations. For this reason according to the mentioned practice the author considers that the reservations for CEDAW convention should be void at all or maybe the Convention should be modified to prohibit reservations for the whole Convention.

### 2.2.2. Reservations to the provision that protects gender equality

Other important provisions are stated in Article 16. It provides that all the parties to the present Convention shall take all appropriate measures to eliminate discrimination against women. It also specifies the main rights that are the key to the gender equality, relating to marriage and family relations. These rights are: the same right to enter into marriage, the same right freely to choose a spouse and to enter into marriage only with their free and full consent, the same rights and responsibilities during marriage and at its dissolution, 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 and more.

Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also stated that it remained 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.[92] However, a large number of the state parties made reservations also to Article 16.[93] E.g. The Arab Republic of Egypt made certain reservations, one of them in respect of Article 16 states that „reservation is made to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Shariah's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. The Shariah restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."[94]

The Republic of India made declarations and reservations declaring that it would abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent with regard to Article 16 (2) it declares that

[92] http://www.un.org/womenwatch/daw/cedaw/reservations.htm,2011-09-14, 13:14
[93] Such countries as Algeria, Bahrain, Egypt, France, India, Iraq, Israel, Jordan, Kuwait, Lebanon, Malaysia, Maldives, Malta, Federated States of Micronesia, Niger, Oman, Qatar, Republic of Korea, Singapore, Syrian Arab Republic, Tunisia and others
[94] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, 2011-11-10, 20:27

though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.[95]

To analyze further the Government of the Republic of Maldives reserves its right to apply Article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations without prejudice to the provisions of the Islamic Shariah, which govern all marital and family relations of the 100 percent Muslim population of the Maldives.[96]

As to the consequences of the reservations made to the Article 16, the rest of the state parties expressed their objections by stating that the Article 16 contains of the main provisions of the treaty and therefore the reserving states violate object and purpose of the treaty. However, the objecting states declared they want to be bound by the Convention's provisions and maintain relations with the objecting state except the reservations.[97]

As to the Article 16 and reservations made to it by stating that it is inconsistent with the Shariah law brings consequences as follows. In Islamic countries female infanticide and prenatal sex selection, early marriage, dowry-related violence, female genital mutilation/cutting, crimes against women committed in the name of "honour", and maltreatment of widows, including inciting widows to commit suicide, are forms of violence against women that are considered harmful traditional practices, and may involve both family and community. While data has been gathered on some of these forms, this is not a comprehensive list of such practices. Others have been highlighted by States (for example in their reports to human rights treaty bodies and in follow-up reports on implementation of the Beijing Platform for Action[98]), by the Special Rapporteur on violence against women, its causes and consequences and by the Special Rapporteur on harmful traditional practices. They include the dedication of young girls to temples, restrictions on a second daughter's right to marry, dietary restrictions for pregnant women, forced feeding and nutritional taboos, marriage to a deceased husband's brother and witch hunts.[99]

Therefore when the state parties of this Convention make reservations while stating that some of the provisions are incompatible with their own culture and laws creates a possibility for the communities to obey fundamental principles of the Convention and also violate women rights as such.

The entire issue is whether such reservations and declarations, especially general ones or ones which limit obligations under the Convention to the least exacting standards of domestic law,

[95] http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm, 2011-09-20, 13:45
[96] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, 2011-11-10, 20:27
[97] Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany
[98] Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 15 September 1995
[99] In-depth study on all forms of violence against women. Report of the Secretary-General, 2006, p. 39

are contrary to the object and purpose of the Convention as the most of the states think is Article 2 and 16. It seems certain that reservations conflict with a treaty's object and purpose if they are general in nature i.e. if they do not refer to a specific provision. Also, reservations should not systematically reduce treaty obligations only to the least demanding standards in the reserving State's domestic law.[100]

As it was seen from the examples, the objecting state parties choose to maintain relations with the reserving state even though the relevant reservation is incompatible with the object and purpose of CEDAW. This choice causes bad practices against women, especially in Islamic countries. The main problem arises at this point that the monitoring bodies can only provide recommendations without any legal power to stop violations of the rights provided in the Convention where the reservations are made. For this reason the author suggests the states that are not ready to commit themselves to be bound by the provisions of the fundamental human rights instruments in full extent should not enter them at all. As a solution for those countries might be special documents (that might be called as secondary ones) with the minimal level of the obligations that would be in conformity with their traditions and religion norms as well under the United Nations system. The state members would be bound by these documents with the certain level of obligation and implement the norms of these documents in their national legal system in reality. Only when these states would really show the efforts to be bound by the international standards of the protection of human rights, they could try to reach the level of the commitments that would let them to join the international instruments such as CEDAW or ICCPR with the same standard of obligations as the state parties without reservations to the fundamental provisions. According to the above mentioned mechanism the individuals in the reserving states might feel the real benefit and protection according the aforementioned secondary documents that would be entered without any reservations.

### 2.3. Reservations under the International Covenant on Civil and Political Rights

After adopting the Universal Declaration, the international community agreed on two covenants spelling out in more detail the rights embodied in the declaration. These were the International Covenant on Civil and Political Rights (often referred to as the political covenant) which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976, and the

[100] Human Rights Committee, general comment 24, para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 1994

International Covenant on Economic, Social and Cultural Rights (often referred to as the economic rights covenant) which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976. These are legally binding documents on member states that ratified them.[101] As it was mentioned already the States that are parties to the relevant international treaties can make reservations to treaty articles that they do not wish to be bound by, as long as these are not contrary to the meaning of the treaty and its object and purpose.

Both covenants incorporated understandings based on the declaration, many of which have important implications with regard to gender and reproductive rights; these include the right of women to be free of all forms of discrimination, the right of freedom of assembly and association, and family rights. The political covenant, among other things, recognizes the rights to "liberty and security of the person" (Article 9) and "freedom of expression", including "freedom to seek, receive and impart information and ideas of all kinds" (Article 19); and affirms that "no marriage shall be entered into without the free and full consent of the intending spouses" (Article 23).[102]

### 2.3.1. Observations of the Human Rights Committee and consequences of the reservations

In this part the author will focus on the political covenant.

The rights protected in the ICCPR are rights "rooted in basic democratic values and freedoms". The Covenant seeks to promote "the inherent dignity and.., equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world". To further this goal, the Covenant proffers twenty seven articles which give individuals around the world various civil and political rights "without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." [103]

In addition, the Covenant establishes Human Rights Committee to oversee compliance of the various articles by the Parties to the covenant. Countries may recognize the Committee's competence to consider complaints made by other parties to the treaty.[104]

As of 15 October 2011, signatories are 74 and 167 State parties to the International Covenant on Civil and Political Rights[105] had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations

[101] However, many member states of international community have not done so, and many others have done so only with substantial reservations.
[102] Women rights are human rights, p. 48, http://www.unfpa.org/swp/2000/pdf/english/chapter6.pdf, 2011-09-23, 19:53
[103] http://www2.ohchr.org/english/law/ccpr.htm, 2011-10-15, 14:15
[104] Ibid.
[105] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 2011-10-16, 12:19

exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramount of certain domestic legal provisions. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. It is important for States parties to know exactly what obligations they, and other States parties, have in fact undertaken. And the Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a state is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.[106]

The Committee also analyzed the „purpose and object test". It added that the absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.[107]

The very important note has to be made for the comment that the Committee made hereinafter. It stated that the reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations.[108] This comment has a very significant meaning because the Committee provided that

[106] General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994.11.04. ICCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments)

[107] General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994.11.04. ICCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), para 7

[108] Under Article 53 of the Vienna Convention on the Law of Treaties, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (jus cogens).

such fundamental values cannot be reserved and even though it is not expressly stated, these values are essential ones under customary law and has a meaning of *jus cogens*. That means even though the state party would not be a party to the treaty, if international community excepts these fundamental principles as a customary law the whole international community has to except it and do not violate it. Therefore it is much easier to describe what can be the object of a treaty that protects human rights.

The Committee has further examined whether certain specific of reservations may be incompatible with the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the 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. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples. While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.[109]

The Committee stated that: "a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty."[110] It is very important to note here that by this particular comment the Committee introduced itself a as body that can interpret the reservations and decide whether they are compatible with the object and purpose of the Covenant or not.

In practice it is clear that the permissibility of these certain reservations that made to the equality between women and men, prohibition of torture and are incompatible with the object and

[109] General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994.11.04. ICCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), para 10

[110] General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994.11.04. ICCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), para 12

purpose directly relates to the violations of human rights and especially those of women rights. It is very much related to the honour killings.

Hundreds, if not thousands, of women are murdered by their families each year in the name of family "honour."[111] The exact statistics of women who suffer this extreme violation in the name of tradition is not established as the murders are not reported; nor are the perpetrators brought to book as the killings are considered to be heroic acts and justified by the society, in some instances with rewards to the perpetrators. In these instances, women are seen as a vessel of the family reputation.[112]

Crimes against women committed in the name of "honour" may occur within the family or within the community. These crimes are receiving increased attention, but remain underreported and under-documented. The most severe manifestation is murder — so-called "honour killings". UNFPA estimated that 5,000 women are murdered by family members each year in "honour killings" around the world. A government report noted that "karo-kari" ("honour killings") claimed the lives of 4,000 men and women between 1998 and 2003 in Pakistan, and that the number of women killed was more than double the number of men.[113]

Therefore specific reservations should be analyzed very careful in order to decide whether they are valid or not. Moreover, as a Committee stated if a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty. In order the number of traditional harmful practices around the world would be reduced, state parties should follow the directions as the Committee stated in its Comment.

### 2.3.2. Specific Reservations to the ICCPR

Further it will be summarized what substantive provisions of the ICCPR have been subject to reservations by states and to what extent other states have reacted to those reservations by objecting to them. Only 37 states had made one or more reservations that amount to 22 % of the 167 States Parties to the ICCPR in 2011[114]. A clear majority of the reserving states (21 states) belong to the group of Western European and other states, 7 were Latin American or Caribbean states, 4

[111] Carole Ageng'o. Harmful traditional practises in Europe, Judicial interventions// New Haven: Yale University Press 2009, p. 11
[112] Honor killings have been reported in Bangladesh, Great Britain, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Morocco, Sweden, Turkey, and Uganda according to reports submitted to the United Nations Commission on Human Rights.
[113] Kogacioglu, D., 2004. The tradition effect: Framing honour crimes in Turkey, Differences: A Journal of Feminist Cultural Studies, vol. 15, No. 2, 2004, pp. 119
[114] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 2011-11-28

Asian[115] and 3 African countries. One Eastern European country (Romania) and also Israel had reservations.

Article 26 on equality and non-discrimination is subject to 6 reservations, two of which have been objected to by other states. There is only one reservation (by France) to the minority rights provision in article 27, and even that reservation has been contested by way of an objection. Three hereditary monarchies have entered a reservation in respect of article 3 (equal rights of men and women) in the issue of succession to the throne. Kuwait's much more general reservation to article 3 has been subject to objections by other states.

Objections by states to reservations by other states under the ICCPR have been classified here to represent the severability approach in two situations. Firstly, an objection is classified as representing the severability approach if the objection includes a clear pronouncement that a reservation is impermissible under international law[116] and an equally unambiguous statement that the ICCPR will in spite of the objection enter into force between the reserving state and the objecting state. A second application of the severability approach is represented by objections that clearly state the actual conclusion, namely that the ICCPR will enter into force between the objecting and the reserving state, the latter not benefitting from the reservation. While the first-mentioned form of the severability approach was applied by states also prior to 1994, the latter one appears only in state practice subsequent to the adoption of General Comment No. 24.

In order to be more specific, certain examples of the reservations made by state parties, those that are very close to the topic of this master thesis have to be mentioned. Islamic countries usually make reservations that directly relates to the cultural and religion aspects.

The attention has to be made to the 46 Islamic States which have ratified the ICCPR, 14 of them have formulated reservations.[117] Reservations based on the equality are as follows:

(a) Algeria: a reservation to Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses);

(b) Bahrain: a reservation to Article 3 (equality of men and women in civil and political rights), Article 18 (freedom of religion) and Article 23 (family and marital rights);

(d) Kuwait: a reservation to Article 2 paragraph (1) (guarantee of all rights in the Covenant without discrimination of any kind), Article 3 (equality of men and women in civil and political rights), Article 23 (equal rights and responsibilities of marital spouses),

[115] India, Republic of Korea, Thailand and in the Middle East also Kuwait.
[116] Martin Scheinin. Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols – Reflections on State Practice. Åbo Akademi University, 2001, p. 2
[117] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 2011-11-30

(f) Mauritania: a reservation to Article 23 paragraph (4) (equal rights and responsibilities of marital spouses).[118]

To analyze further the Government of Pakistan should be mentioned. It acceded to the UN's International Covenant on Civil and Political Rights (ICCPR) on 23 June 2010. Upon ratification, Pakistan entered numerous reservations, which relate to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the Covenant. As to the reservations that were entered in relation to Articles 3 (equal right of men and women), 6 (right to life), 7 (torture, cruel punishment), 18 (freedom of thought, conscience and religion) and 19 (freedom of opinion):

"The Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Shariah laws."[119]

The question arises here whether the reservations are compatible with the international law and object and purpose of the treaty. As it was mentioned above, in General Comment 24, the UN's Human Rights Committee has laid down general rules on incompatibility of reservations with the ICCPR. Therefore, in order to determine the compatibility one has to follow the provisions of Committee mentioned above.

As an example, the reservation under Article 3 made by Islamic Republic of Pakistan is unspecific. General Comment 24 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." [120]

Moreover, the reservation is not transparent. The reservation refers to a domestic legal document which is not easily understood by other State parties (states which have exceed to the Covenant) and which is subject to changes and interpretation.

It has been doubtful whether the hierarchy of norms is lawful at all. By indicating that the mentioned ICCPR articles only apply as far as they are in line with Pakistan's Constitution, the reservation introduces a *de facto* hierarchy of norms by which national law supersedes international obligations.

No real international rights or obligations have thus been accepted. This is contrary to what General Comment 24 requires. A leading commentary on the Vienna Convention notes that

[118] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 2011-11-30
[119] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 2011-11-30
[120] Pakistan's reservations to the International Covenant On Civil And Political Rights, Briefing paper 04, 2004, p. 3

"reservations aimed at preserving the integrity of internal law may go against a treaty's object and purpose in view of their often undetermined and sweeping nature."[121]

Pakistan's far-reaching reservations do not pass these tests, and therefore may be regarded as unlawful and inapplicable. Such reservations are damaging in undermining the application of the ICCPR in Pakistan's legal and political practice, and may also expose Pakistan to objections from other States that are party to the treaty. Therefore, Pakistan's reservations to the ICCPR are incompatible with international law.

Given the consequences of impermissible reservations, it would be useful for the Government of Pakistan to consider withdrawing its reservations. If the Government decides not to withdraw all reservations, those remaining could be made specific and not subject to domestic legislation. The Government should report to the UN Human Rights Committee and benefit from the Committee's expertise in identifying which areas of Pakistani legislation may need amendments in light of ICCPR obligations.[122]

In the light of the obligations under the treaty, it is worth to mention the objections made by the other state parties. They considered that the reservations by the Islamic Republic of Pakistan are incompatible with the object and purpose of the International Covenant on Civil and Political Rights. The governments of the state parties recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted.[123] It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. Furthermore, the other states consider that The Islamic Republic of Pakistan, through its reservations, is purporting to make the application of the Covenant subject to the provisions of general domestic law in force in The Islamic Republic of Pakistan. As a result, it is unclear to what extent The Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of The Islamic Republic of Pakistan to the object and purpose of the Covenant. Moreover, the parties consider that the reservations to the Covenant are subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention of the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. It is worth to mention that over all the other state parties expressed the hope that the Islamic Republic of

[121] M. Villiger. Commentary on Vienna Convention on the Law of Treaties// International Journal of Law AJIL 65 2009, p 272, para 13

[122] Pakistan's reservations to the International Covenant On Civil And Political Rights, Briefing paper 04, 2004, p. 4

[123] Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Denmark, Ireland, Italy, Latvia, Norway, Poland, Portugal, Slovakia, Spain, Swede, Switzerland, Urugway made objections to the reservations of Pakistan

Pakistan will withdraw its reservations. However, the objection shall not preclude the entry into force of the Covenant between them and The Islamic Republic of Pakistan."[124]

Objections by states to reservations by other states under the ICCPR have been classified here to represent the severability approach in two situations. Firstly, an objection is classified as representing the severability approach if the objection includes a clear pronouncement that a reservation is impermissible under international law[125] and an equally unambiguous statement that the ICCPR will in spite of the objection enter into force between the reserving state and the objecting state. A second application of the severability approach is represented by objections that clearly state the actual conclusion, namely that the ICCPR will enter into force between the objecting and the reserving state, the latter not benefitting from the reservation.

To sum up, at least two different forms of state practice emerge under the ICCPR: the practice of reserving states in entering, modifying and withdrawing their reservations; and the practice the Human Rights Committee in relation to reservations by states. As it was mentioned in the first part the doctrine of the potential severability of impermissible reservations, i.e., the possibility to consider a state as a party to the ICCPR without the benefit of its impermissible reservation, is absent from the text of the Vienna Convention on the Law of Treaties. However this silence can be attributed to of other states in objecting to the reservations by reserving states. A third form of state practice could be said to emerge through states' action or inaction in respect of the pronouncements made by the fact that the Vienna Convention only regulates the consequences of permissible reservations and objections to them. As it was analyzed in the first part, the Vienna Convention is silent in the issue of the consequences of impermissible reservations – it neither denies nor supports the severability doctrine. The severability approach taken in 1994 by the Human Rights Committee in its General Comment No. 24 on reservations had prior to that point been expressed in certain objections by States Parties to reservations made i. e. by the Pakistan. Subsequent to the adoption of the General Comment, objections by states have become even more explicit in treating a state that enters a reservation that is incompatible with the object and purpose of the ICCPR as a State Party but without the benefit of its impermissible reservation.

### 2.4. Reservation under the International Covenant on Economic, Social and Cultural Rights

[124] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 2011-11-26
[125] Martin Scheinin. Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols – Reflections on State Practice. Åbo Akademi University, 2001, p. 2

The International Covenant on Economic, Social and Cultural Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, following almost 20 years of drafting debates. It finally gained the force of law a decade later, entering into force on 3 January 1976.[126]

The Covenant (also referred to as ICESCR) contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights related to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress.

The Preamble of the Covenant recognizes, *inter alia*, that economic, social and cultural rights derive from the "inherent dignity of the human person" and that "the ideal of free human beings enjoying freedom of fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights." [127]: Furthermore, the overarching principles of the Covenant are: (1) equality and non-discrimination in regard to the enjoyment of all the rights set forth in the treaty; and (2) States parties have an obligation to respect, protect and fulfil economic, social and cultural rights.

As of 25 September 2011, the Covenant has 70 signatories and 160 States are parties to this Covenant thereby voluntarily undertaking to implement its norms and provisions. Compliance by States parties with their obligations under the Covenant and the level of implementation of the rights and duties in question is monitored by the Committee on Economic, Social and Cultural Rights.[128]

The Committee works on the basis of many sources of information, including reports submitted by States parties and information from such United Nations specialized agencies[129]. It is also important in the scope of reservations. Even though the state parties that made objections to the reservations did not preclude enter into force the treaty between them and the reserving states, these above mentioned institutions monitor how the state parties implement the norms of the ICESCR

[126] Anthony Aust. Modern Treaty Law and Practice. Cambridge: Cambridge University Press, 2007, p. 33
[127] International Covenant of Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407
[128] The Committee on Economic, Social and Cultural Rights is the supervisory body of the International Covenant on Economic, Social and Cultural Rights. It was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR.
The ECOSOC is the primary body dealing with the economic, social, humanitarian and cultural work of the United Nations system. ECOSOC oversees five regional economic commissions and six "subject-matter" commissions, along with a sizeable system of committees and expert bodies. ECOSOC is composed of 54 member States, elected by the United Nations General Assembly for three-year terms. The Committee on Economic, Social and Cultural Rights is composed of eighteen independent experts. Members of the Committee are elected by ECOSOC by secret ballot from a list of persons who qualify as "experts in the field of human rights" and who have been nominated for that purpose by the States parties. Members are elected for four years and are eligible for re-election.
[129] as International Labor Organization, United Nations Educational, Scientific and Cultural Organization, World Health Organization, Food and Agriculture Organization of the United Nations (from the Office of the United Nations High Commissioner for Refugees, and from the United Nations Centre for Human Settlements (Habitat) and others)

and informs rest of the parties how they keep their obligations (with the reservations made to the ICESCR also) under the treaty.

It has to be mentioned that about 27 percent of the States parties to the Covenant had entered several declarations and reservations of varying significance to their acceptance of the obligations under the Covenant. Yet, unlike most other human rights treaties the Covenant lacks a specific clause on declarations and reservations.[130]

This has given rise to several questions examined in this part of master thesis. Firstly, what reservations to the ICESCR are permissible or impermissible. Secondly, who should decide whether a reservation under the ICESCR is permissible or impermissible. Thirdly, if a reservation under the Covenant is impermissible, what is the legal effect of such an impermissible reservation. And finally, whether the particular existing State reservations to the Covenant are compatible with the object and purpose of the Covenant (i.e. The Covenant's essential rules, rights and obligations) and thus permissible. In case of negative answer, how should reservations incompatible with the object and purpose of the Covenant be treated by the Committee on Economic, Social and Cultural Rights (CESCR or the Committee).

### 4.4.1. Observations of the Committee on Economic, Social and Cultural Rights

To begin with it has to be mentioned that the Committee made certain comments on the ICESCR. As to the extent of the master thesis it is important to mention that the Committee in its Comment No. 16, stated that "the equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties". The equal right of men and women to the enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties - the obligation to respect, to protect and to fulfil. The obligation to fulfil further contains duties to provide, promote and facilitate. Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR.[131] Therefore these articles formulate object and purpose of the ICESCR.

Moreover, the Committee added that in order to eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full

[130] Ssenyonjo, Manisuli, State reservations to the ICESCR: a critique of selected reservations// Netherlands quarterly of human rights; vol. 26, no. 3, 2008, p. 315

[131] The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), General Comment No 16, Thirty-fourth session Geneva, 25 April-13 May 2005, para 16-17

range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.[132]

Upon ratification of the ICESCR, some states have limited their legal obligations under the Covenant by formulating reservations, at times disguised as 'declarations', 'understandings', 'explanations', or 'observations', to some of the Covenant provisions.[133]

As it was stated in the beginning of this part, it should be analyzed whether the reservations made to the ICESRC are permissible. In accordance with the rules of customary international law that are reflected in Article 19(c) of the Vienna Convention, reservations can therefore be made, provided they are not 'incompatible with the object and purpose of the treaty.[134]

The Committee of ICESRC confirmed that a State party cannot, under any circumstances whatsoever, justify its non-compliance with these core obligations, which are 'non-derogable'. One reason for core obligations of ICESRC rights being considered non-derogable is because their suspension is irrelevant and unnecessary to the legitimate control of the state of national emergency (for example, the undertaking to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind and to ensure the equal right of men and women to the enjoyment of all ESC rights in Articles 2 and 3 would deserve greater rather than less importance in times of national emergency so as to protect vulnerable groups against discrimination).[135]

Another question is who should determine the validity of the reservation to ICERC. According to Ssenyonjo Manisuli, the compatibility of the reservation with the object and purpose of the treaty is subject to assessment by the competent (judicial and quasi-judicial) bodies. The compliance of States with their obligations under the Covenant is monitored by the CESCR. It can effectively monitor the measures adopted and the progress made if it can determine the extent of each State party's obligations under the Covenant, and this necessarily involves addressing the issue

[132] The right to the highest attainable standard of health : 2000.08.11. ,E/C.12/2000/4. (General Comments), para. 21

[133] Ssenyonjo, Manisuli, State reservations to the ICESCR: a critique of selected reservations// Netherlands quarterly of human rights; vol. 26, no. 3, 2008, p. 15

[134] Neumayer, E., Qualified Ratification: Explaining Reservations to International Human Rights Treaties// The Journal of Legal Studies, Vol. 32, No. 6, 2007, p. 397

[135] Klaus Hüfner How to File Complaints on Human Rights Violations, 2010 United Nations Association of Germany, Berlin Deutsche Gesellschaft für die Vereinten Nationen e. V. (DGVN), Berlin ISBN 978-3-923904-66-2

of the legality of reservations. In particular, whether a reservation is permissible, and whether it is compatible with the object and purpose of the Covenant.[136]

As the Committee has stated, "when a State has ratified the Covenant without making any reservations, it is obliged to comply with all of the provisions of the Covenant. It may therefore not invoke any reasons or circumstances to justify the non-application of one or more Articles of the Covenant, except in accordance with the provisions of the Covenant and the principles of general international law".[137]

It may be questioned whether the ICESCR is under an obligation or simply has the option of entering into a 'reservations dialogue' with States. Given the mandate of the Committee, as a body monitoring State obligations under the Covenant, and the fact that a reservation becomes an integral part of the treaty, it is arguable that a 'reservations dialogue' with relevant States is more of an obligation than an option. Therefore, as a body monitoring the Covenant, the ICESCR should consistently determine (a) whether a statement is a reservation or not; and (b) if so, whether it is a valid reservation; and (c) to give effect to a conclusion with regard to validity.[138] Reservations to the ICESCR must be interpreted by according to the relevant principles of general international law within the general context of the Covenant and taking into account its object and purpose as well.

The next question that should be answered what are the effects of an invalid reservation. As to the scope of ICESCR, if an essential reservation is found to be incompatible with the object and purpose of the Covenant, it is invalid. It follows that such an invalid reservation is to be considered null and void meaning that a state party will not be able to rely on such a reservation and, unless a State's contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.[139] In such a case, a State should be invited to make a careful review of an incompatible reservation with a view to withdrawing it with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded. As yet there have not been any major difficulties with States parties to the ICESCR on the subject of reservations, even where the Committee examined the Articles to which reservations were made.[140]

[136] Ssenyonjo, Manisuli, State reservations to the ICESCR: a critique of selected reservations// Netherlands quarterly of human rights ; vol. 26, no. 3, 2008, p. 15
[137] CESCR, Concluding Observations: Morocco, UN Doc. E/C.12/1994/5, 30 May 1994, para. 9.
[138] Franēoise Hampson, Reservations to Human Rights Treaties, UN Doc. E/CN.4/Sub.2/2004/42, 19 July 2004, para. 37
[139] Goodman, R. Human Rights Treaties, Invalid Reservations, and State Consent// The American Journal of International Law, Vol. 96, No. 3, 2002, p. 531
[140] Ssenyonjo, Manisuli. State reservations to the ICESCR: a critique of selected reservations// Netherlands quarterly of human rights; vol. 26, no. 3, 2008, p. 20

### 2.4.2. Problematic reservations made to ICESCR

The most problematic reservations to human rights treaties including the ICESCR are those which subject to a treaty, or some of the core provisions in a treaty, to national constitution or to the domestic law generally of a reserving state. Such countries as Egypt, Kuwait formulated specific Islamic reservations. Both labelled them as interpretative declarations. Yet this is contradicted by other states that made objections to those declarations[141]

The declaration by Egypt states that "taking into consideration the provisions of Islamic *Shariah* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it." It must be noted that although *Shariah* makes extensive provisions for economic social and cultural rights, it is far from complying with international human rights standards regarding equality between men and women, which is one of the key obligations States have to fulfil under the ICESCR.[142] Kuwait made interpretative declaration regarding Article 2, paragraph 2, and Article 3, stating that although the Government of Kuwait endorses the worthy principles embodied in Article 2, paragraph 2, and Article 3 as consistent with the provisions of the Kuwait Constitution in general and of its Article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwait law.[143]

As it was mentioned in the first part, first of all it has to be decided whether such interpretative declarations are not reservations by their nature and do they not violate object and purpose of the treaty.

With regard to the declarations and the reservation made by Kuwait upon accession, the governments of other state parties in their objections noted that according to the interpretative declaration regarding Article 2, paragraph 2, and Article 3 the application of these articles of the Covenant is in a general way subjected to national law. Other state parties consider this interpretative declaration as a reservation of a general kind. The Governments are of the view that such a general reservation raises doubts as to the commitment of Kuwait to the object and purpose of the Covenant and would recall that a reservation incompatible with the object and purpose of the Covenant shall not be permitted. They also noted that it is in the common interests of States that all parties respect treaties to which they have chosen to become parties, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. However, the other states do not preclude the entry into force of the

[141] Eva Brems. Human rights-universality and diversity. Kluwer Law International, 2001, p. 274
[142] Danwood Mzikenge Chirwa, An overviev of the impact of the International Covenant on economic, social and cultural rights in Africa,
[143] http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3&src=TREATY, 2011-11-26

Covenant between Kuwait and them."[144] As it was mentioned above, if the state party makes interpretative declarations, the other state parties can object to it and express their opinion if they think it is a reservation and furthermore, is this reservation covered under interpretative declaration is compatible with the object and purpose of treaty.

Although there is no legal obligation under the ICESCR, and no express provision for the withdrawal of reservations, it would be in accordance with the Covenant's object and purpose, and the spirit of the VCLT to envisage that laws and practices which necessitated existing reservations in some states would be examined carefully, progressively amended or repealed to ensure that the states parties complied, without reservation, with all the Covenant's provisions. This has certainly happened on some occasions[145], and some of the reservations withdrawn appear clearly to have been incompatible with the object and purpose of the Covenant.[146] Indeed, it is pointless to maintain reservations, which are incompatible with the object and purpose of the Covenant since these reservations are invalid in law. However, the formal removal of such reservations is still useful as an indicator of a State's commitment to its human rights obligations.

To conclude, the above mentioned examples indicate main features of the interpretative declarations: the state parties can declare that the interpretative declaration has features of a reservation. If the state party does so, the consequences are different as from the declarations. Furthermore, if the other state parties find declaration as a reservation, they have to analyze whether it is incompatible with the object and purpose of the Covenant. While making arguments for and against and why the objecting states believe it is compatible with the object and purpose or not, later they should decide do they want to continue the relations with the reserving state. However, according to the majority of the state parties, even though they find the reservation incompatible, they still want to maintain their relations with the reserving state. For this reason the reserving state has a choice of withdrawing the reservation (that is incompatible with the object and purpose) or of following its arguments and keeping it later on. In this situation the author would suggest that other state parties should make an ultimatum: if a reserving state does not withdraw the reservation, the other state parties will not maintain relations with it in the scope of the treaty. Even though this position is strict, the argument would be that according to the reserving states practice, they base their reservation on the inconformity with national regulation, Shariah law. These reservations are

[144] http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3&src=TREATY, 2011-10-16, 13:37

[145] The States which have withdrawn some reservations to the ICESCR (on the dates shown in the brackets) include: Belarus (30 September 1992); Denmark (14 January 1976); Democratic Republic of Congo (21 March 2001); Malta (upon ratification 13 September 1990); New Zealand (5 September 2003)

[146] For example on 21 March 2001, the Government of the (Democratic Republic of the) Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows: 'Reservation: The Government of the People's Republic of the Congo declares that it does not consider itself bound by the provisions of Article 13, paragraphs 3 and 4 (...) In our country, such provisions are inconsistent with the principle of nationalisation of education and with the monopoly granted to the State in that area'.

not transparent; other state parties are not familiar with the religion norms or national legislation of the reserving states. For this reason by maintaining relations with the reserving state made reservations as it was mentioned also might create violations of the obligations of the treaty. After the analysis of the reservations and objections to it seems that the objections have the role only as an expression of opinion.

### 2.5. Reservations under the Convention on the Rights of the Child

The possibility of a convention on the Rights of the Child (CRC)[147] was first raised by the government of Poland in 1978 as United Nations (hereinafter referred to as U.N.) member states planned activities and programs that would take place during the International Year of the Child in 1979. For the next decade, U.N. member states participated in a U.N. Commission on Human Rights (now the Human Rights Council) working group to draft the CRC text. The Convention was adopted by the U.N. General Assembly after a decade of negotiations in 1989, and entered into force on in 1990. [148]

Nearly all states of international community have ratified the Convention on the Rights of the Child, making it a strong tool for holding governments accountable on human rights issues. In addition to upholding specific rights of children, this Convention deals more broadly with gender relations. It reaffirms, for example, the right to family planning services, recognized by prior conventions and conferences. Article 24 obligates states "to ensure appropriate prenatal and post-natal health care for mothers". It also calls on them to take "all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children"; this is an explicit recognition of the deleterious effects of such practices as female genital mutilation. Article 34 says that states must "undertake to protect the child from all forms of sexual exploitation and sexual abuse". Article 17 states that the child should have access to information "aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health"[149].

[147] The Convention has two optional protocols that provide specific protections for children: (1) the Optional Protocol on the Involvement of Children in Armed Conflict; and (2) the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Though both Optional Protocols operate under CRC, they are independent multilateral agreements under international law. The Optional Protocol on Children in Armed Conflict limits the recruitment of children under the age of 18 for armed conflict and requires parties to provide children who have participated in armed conflict with appropriate physical and psychological rehabilitation. It entered into force in 2002, and has been ratified by 142 countries. The Optional Protocol on the Sale of Children requires parties to criminalize child pornography and prostitution, close establishments that practice such activities, and seize any proceeds entered into force in 2002 as well, and has been ratified by 145 countries, see Luisa Blanchfield The United Nations Convention on the Rights of the Child: Background and Policy Issues, Congressional Research Service 7-5700, 2011, p. 4

[148] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

[149] Article 17 of the Convention on the Rights of the Child

A significant area of debate among the CRC supporters and opponents is the effectiveness of the Convention, particularly in countries that have already ratified it. Some critics agree with the CRC's overall goal of protecting children's rights internationally, but they do not believe that the treaty is an effective mechanism for achieving this goal. As evidence of this, they emphasize those countries that many regard as abusers of children's rights—including Sudan, Democratic Republic of the Congo, and China—are parties to the Convention.[150]

Some argue that instead of helping children, ratification of the CRC may serve as a facade for governments those abuse children's rights. Critics have also asserted that reservations and declarations that some countries attached to the Convention are at odds with the purpose of the treaty, possibly undermining its intent and effectiveness.[151]

Applying the Convention, the Committee on the Rights of the Child, which is established for monitoring how the state parties implement the CRC in their own countries, has for example recommended that specific laws be enacted and enforced to prohibit Female gender mutilation (1997), called on Kuwait to take action to prevent and combat early marriage (1998), and called on Mexico to raise and equalize the minimum legal ages for marriage of boys and girls (1999).[152] These harmful practices will be analyzed later in this part in the context of reservations made to CRC.

Even though everyone accepts that the CRC is the most universally accepted human rights treaty, notably, this convention is the only international treaty that includes an explicit reference to "Islamic law."[153] Moreover, Article 51 of CRC allows making reservations to the CRC, however noticing that the reservation incompatible with the object and purpose of treaty shall not be permitted.

### 2.5.1. Specific reservations to CRC incompatible with gender equality principle

In this part analysis will be made on reservations that are based on Shariah or Islamic law that some Muslim states have entered to. These reservations are either to the whole Convention (General Shariah Based Reservation) or to its specific articles (Specific Shariah Based Reservation). All fifty-seven Muslim states are signatories to the Convention, including the twenty-two states that entered reservations or declarations. Algeria, Djibouti, and Kuwait have declarations on the CRC.

[150] William A. Schabas. Reservations to the Convention on the Rights of the Child// Human Rights Quarterly, Vol. 18.2, May 1996, p. 472-491.
[151] Luisa Blanchfield. The United Nations Convention on the Rights of the Child: Background and Policy Issues// Congressional Research Service 7-5700, 2011, p. 4
[152] Women rights are human rights, p. 48, http://www.unfpa.org/swp/2000/pdf/english/chapter6.pdf, 2011-09-23, 19:53
[153] Kamran Hashemi. Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation// Human Rights Quarterly 29, The Johns Hopkins University Press, 2007 p. 197

Bangladesh, Bosnia and Herzegovina, Brunei Darussalam, Egypt, Indonesia, Iran, Iraq, Jordan, Maldives, Mali, Morocco, Oman, Qatar, Saudi Arabia, Syria, Turkey, and the United Arab Emirates entered reservations to the convention. Finally, Malaysia and Tunisia have entered both declarations and reservations. Yet, as will be discussed further, not all of these reservations or declarations are necessarily ones based on Shariah.[154] Qatar, Iran, Saudi Arabia, Brunei Darussalam, Syria, and Oman are states with General Shariah reservations, among which Brunei Darussalam, Syria, and Oman have also specified in their General Shariah reservation some articles of the Convention, including Articles 14 and 21, as the focus of their general reservations. As an example the reservation of Qatar states that it "enter(s) a general reservation by the state of Qatar concerning provisions incompatible with Islamic Law."[155]

In these Islamic countries where the culture and religion has a great influence, reservations to the core provisions of CRC might open the gates to the harmful practice towards women such as early marriage, female genital mutilation and others.[156] A number of articles within the CRC hold relevance to child marriage. It is Article 3: In all actions concerning children … the best interests of the child shall be a primary consideration. Article 19 provides the right to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of parents, guardian, or any other person. Article 24 states that the right to health; and to access to health services; and to be protected from harmful traditional practices. Articles 28 and 29 ensure the right to education on the basis of equal opportunity. Article 34 guarantees the right to protection from all forms of sexual exploitation and sexual abuse. Article 36 ensures the right to protection from all forms of exploitation prejudicial to any aspect of the child's welfare.[157] The harmful practices that will be analyzed further are still the biggest issue for the whole international community and consequence of the reservations made by states based on the cultural aspects.

As to the reservations made to the whole CRC certain issues have to be noted. Firstly, such countries as the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect. [158] The other state parties made objections stating that this reservation poses difficulties for the states parties to the Convention in identifying the provisions of the Convention which the Islamic Government of Iran does not intend to apply and consequently makes it difficult for States Parties to

[154] Ibid., p. 198
[155] Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, Committee on the Rights of the Child, U.N. Doc. CRC/C/2/Rev.5 (1996).
[156] Krivenko, Ekaterina Yahyaoui. Women, Islam and International law. Geneva: Graduate Institute of International and Development Studies, 2009, p. 45
[157] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en, 2011-11-26
[158] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en, 2011-11-26

the Convention to determine the extent of their treaty relations with the reserving State. Moreover, other state parties consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the common interest of states that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties.[159]

Moreover, a states practice of objecting varies from one instrument to the other, as if a general reservation to the Women's Convention is more serious than one to the Children's Convention. This practice gives the impression that most objecting states are making perfunctory objections with no discernable policy. The aforementioned perception confirms the observations of the Human Rights Committee, set forth in its General Comment Number 24, of an "unclear" pattern of objections that have only been "occasional[ly], made by some states but not others, and on grounds not always specified."[160]

### 2.5.2. Harmful practices as a consequence of reservations

The reservations that made to the essence of the CRC bring consequences that the reserving state can justify itself while violating the norm of CRC in the sense of conflicting with Islamic law. This causes harmful practice in the aforementioned countries that will be analyzed further.

Early marriages involve the marriage of a child, i.e. a person below the age of 18. Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted.[161] Such marriages take place all over the world, but are most common in sub-Saharan Africa and South Asia, where more than 30 per cent of girls aged 15 to 19 are married. In Ethiopia, it was found that 19 per cent of girls were married by the age of 15 and in some regions such as Amhara, the proportion was as high as 50 per cent. In Nepal, 7 per cent of girls were married before the age of 10 and 40 per cent by the age of 15. A UNICEF global

[159] Several of the general reservations to the CRC have provoked objections, but a limited number of states are responsible for the objections. One or more of the following countries - Austria, Belgium, Finland, Germany, Ireland, Norway, Portugal, Slovakia and Sweden - have challenged reservations made by Indonesia, Qatar, Syria, Iran, Bangladesh, Djibouti, Jordan, Kuwait, Tunisia, Pakistan, Malaysia and Myanmar.

[160] William A. Schabas. Reservations to the Convention on the Rights of the Child// Human Rights Quarterly, Vol. 18.2, May 1996, p. 473

[161] Committee on the Elimination of Discrimination against Women general recommendation No. 21

assessment found that in Latin America and the Caribbean, 29 per cent of women aged 15 to 24 were married before the age of 18.[162]

A forced marriage is one lacking the free and valid consent of at least one of the parties.[163] In its most extreme form, forced marriage can involve threatening behaviour, abduction, imprisonment, physical violence, rape and, in some cases, murder. There has been little research on this form of violence. A recent European study confirmed the lack of quantitative surveys in Council of Europe countries. One study of 1,322 marriages across six villages in Kyrgyzstan found that one half of ethnic Kyrgyz marriages were the result of kidnappings, and that as many as two thirds of these marriages were non-consensual.[164] In the United Kingdom of Great Britain and Northern Ireland, a Forced Marriage Unit established by the Government intervenes in 300 cases of forced marriage a year.[165]

The right to marry only with one's free and full consent is reflected in the Universal Declaration of Human Rights and in a number of subsequent international human rights treaties.[166]

Forced and early marriages are recognized as human rights violations. Numerous international and regional legal instruments condemn the practices of forced and early marriage. Many of these documents mandate consent of both parties, recommend a minimum marriage age, and require that the marriage be registered to better review the occurrences of forced and early marriages and to ensure that both partners receive equal rights and protection. Although most countries have signed onto these documents, many countries lack adequate implementation of the treaties.[167] According to Cheryl Thomas, despite the recommendations to set the minimum age to marry to 18, many countries lack domestic laws specifying 18 as the minimum age to marry as a means of preventing early marriages.[168]

It also should be noted that such conventions as the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (The Convention on Consent to Marriage), as well as The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), contain all three principles articulated above. They require the consent of both

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[162] In-depth study on all forms of violence against women Report of the Secretary-General,2006, p 39

[163] Article 16 (1) (b) of the Convention on the Elimination of All Forms of Discrimination against Women requires that States parties ensure to women "the same right freely to choose a spouse and to enter into marriage only with their free and full consent".

[164] Kleinbach, R. Frequency of Non-Consensual Bride Kidnapping in the Kyrgyz Republic// International Journal of Central Asian Studies, vol. 8, No. 1 (2003).

[165] Home Office, Dealing with Cases of Forced Marriage: Guidance for Education Professionals (London, Foreign and Commonwealth Office, 2005).

[166] Status of Women Fifty-second session 25 February-7 March 2008 Forced marriage of the girl child Report of the Secretary-General

[167] Cheryl Thomas. Forced and early marriage: a focus on Central and Eastern Europe and former Soviet Union countries with selected laws from other countries, United Nations Division for the Advancement of Women United Nations Economic Commission for Africa Expert Group Meeting on good practices in legislation to address harmful practices against women, United Nations Conference Centre Addis Ababa, Ethiopia 2009, p. 2

[168] Ibid. P. 3

parties. In addition, both Conventions mandate that all State Parties take legislative action to set a minimum age to marry, and both Conventions direct that marriages be registered. Neither Convention, however, suggests what that minimum age should be.

While the CEDAW warns that the betrothal and marriage of a child will have no legal effect, The Convention on Consent to Marriage allows for exceptions to whatever minimum age is set. [169]

Although CRC does not contain the specific principles related to marital consent and registration, it does specifically define children as people under the age of 18.[170] Regional legal instruments such as the Council of Europe Parliamentary Assembly Resolution 1468 and the African Charter on the Rights and Welfare of the Child have taken a strong position on the age of consent to marry, and recommend that 18 be the minimum age of marriage. In 2005, the Council of Europe adopted Resolution 1468 on forced marriages and child marriages. The resolution defines forced marriage as "the union of two persons at least one of whom has not given their full consent to the marriage." It defines child marriage as "the union of two persons at least one of whom is under 18 years of age." Among other things, Resolution 1468 urges the national parliament of the Council of Europe member states to set the minimum age for marriage at 18 for women and men, to make it a requirement that every marriage be declared and officially registered, and to consider criminalizing acts of forced marriage.[171] However, it should be noted that not all the marriages below the age of 18 are forced and should be criminalized. The national laws provide that people who want to marry before 18 should be emancipated. The international documents deals with those situation where girls marry without their consent and before age of 18.

Where forced marriage involves the girl child who is 14 or even younger and especially in those countries where poverty is very significant, a range of her rights are affected, including the right to education, the right to life and physical integrity, and the right not to be held in servitude or perform forced or compulsory labour..[172]

In response to the practice of forced marriage of the girl child, human rights treaty bodies have requested States to rise the legal age for marriage. According to the Committee on the Elimination of Discrimination against Women, the minimum age for marriage should be 18 years for both men and women because the important responsibilities of marriage required maturity and

[169] Ibid. P.4
[170] The Convention on the Rights of the Child, G.A. res. 44/24, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, in accordance with article 49
[171] Cheryl Thomas. Forced and early marriage: a focus on Central and Eastern Europe and former Soviet Union countries with selected laws from other countries, United Nations Division for the Advancement of Women United Nations Economic Commission for Africa Expert Group Meeting on good practices in legislation to address harmful practices against women, United Nations Conference Centre Addis Ababa, Ethiopia 2009, p. 9
[172] United Nations Children's Fund, The State of the World's Children, 2006: Excluded and Invisible (New York, UNICEF, 2006), p. 45

capacity to act. The Human Rights Committee emphasized that age for marriage should be such as to enable reach of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law.[173] The Committee on Economic, Social and Cultural Rights has recommended that States parties raise and equalize the minimum age for marriage for boys and girls, as well as the age of sexual consent. These mentioned acts are important in the scope of the issues that CRC does not cover directly. Therefore the aforementioned acts are lex specialis with the CRC and help to reduce harmful practice that was mentioned before.

Regional bodies have also taken up the issue of forced marriage. The Parliamentary Assembly of the Council of Europe focused on forced marriage that arose chiefly in migrant communities and that primarily affected young women and girls.[174]

In most countries where there is no specific criminal offense for forced or early marriage, other crimes related to the act can be used to hold perpetrators accountable. While categorized differently in various counties, typical offenses include, among others, "rape, attempted rape, physical and psychological violence, sexual violence, bodily harm, threatening with a weapon or dangerous object, ill-treatment, trespass to the person, indecent assault, false imprisonment, infringement of freedom and integrity, psychological duress, sexual duress, kidnapping and abduction, offenses against the person, infringement of sexual integrity, and honour crimes."[175] The protection of these abuses is formulated in CRC as well. Therefore, states making reservations to the whole treaty, leaves the possibility to the aforementioned crimes.

Another harmful practice made to women and girls is female genital mutilation (hereinafter referred to as FGM), or female circumcision as it is sometimes erroneously referred to, involves surgical removal of parts or all of the most sensitive female genital organs. It is an age-old practice which is perpetuated in many communities around the world simply because it is customary. FGM forms an important part of the rites of passage ceremony for some communities, marking the coming of age of the female child. It is believed that, by mutilating the female's genital organs, her sexuality will be controlled; but above all it is to ensure a woman's virginity before marriage and chastity thereafter.[176] In fact, FGM imposes on women and the girl child a catalogue of health complications and untold psychological problems. The practice of FGM violates, among other international human rights laws, the right of the child to the "enjoyment of the highest attainable

[173] General comment No. 19 (1990) of the Human Rights Committee (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40 (vol. I)), annex VI, Sect. B), para. 4; see also general comment No. 28 (2000), para. 23.
[174] Resolution 1468 of 5 October 2005
[175] Rude-Antoine, Edwige, ed. Forced Marriages in Council of Europe Member States. Council of Europe, 2005, p. 42
[176] Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children, p. 3

standard of health", as laid down in article 24 (paras. 1 and 3) of the Convention on the Rights of the Child.[177]

One of the principal forms of discrimination and one which has far-reaching implications for women is the preference accorded to the boy child over the girl child. This practice denies the girl child good health, education, recreation, economic opportunity and the right to choose her partner, violating her rights under articles 2, 6, 12, 19, 24, 27 and 28 of the Convention on the Rights of the Child[178]. It may mean that a female child is disadvantaged from birth; it may determine the quality and quantity of parental care and the extent of investment in her development; and it may lead to acute discrimination, particularly in settings where resources are scarce. Although neglect is the rule, in extreme cases son preference may lead to selective abortion or female infanticide. As to the reservations made to the aforementioned articles, the reserving states formulate their reservations as follows: "provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia."[179] As to the objections, the states refer that these reservations remain unclear and unspecific. However, objecting states expresses their opinion that they want to maintain relations with the reserving state and indirectly let the reserving state not to keep the obligations under CRC.

It also should be mentioned that some states such as Qatar, People's Republic of China, Egypt, Dijibouti have withdrawal certain reservation. This fact shows that some states reacts to the objections of other state parties and want to be bound by the provisions of CRC.

An examination of the long list of reservations submitted to the CRC reveals that these reservations and declarations represent strongly entrenched positions of States parties. This is evident from the fact that, so far, only a handful of States parties have completely withdrawn their reservations to the CRC. These strong positions, often led by religion justification raised certain issues and violations of human rights in general and women rights specifically such as early marriages, female genital mutilation, and others. The harmful practices against women that were analyzed are still the biggest issue for the whole international community and consequence of the reservations made by states based on the cultural and religion aspects. For this reason, other state parties that give objections to the reservations should formulate them in a stricter manner and express their strong position about the reservations that violate object and purpose of the treaty that the reserving states would withdraw them as a consequence to the objections.

[177] Javaid Rehman. The Shariah, Islamic family laws and international human rights law: examining the theory and practice of polygamy and talaq.// International Journal of Law, Policy and the Family 21, (2007), doi:10.1093/lawfam/ebl023 Advance Access Publication 2007. P. 3
[178] The Convention on the Rights of the Child
[179] http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

## CONCLUSIONS

The most problematic issue related to reservations is the determination/establishment of the object and purpose of the treaty. As there is no any uniform definition of the object and purpose of the treaty, Article 19 (c) of VCLT explains it as "core obligations" of the treaty. Although VCLT does not give a direct answer on who and how has to decide if the particular provision of the treaty contains core obligations, the analysis of CEDAW, ICCPR, ICESCR, CRC, allows to make the suggestions as follows. Firstly, every treaty should have a clear and distinct "object and purpose" in order to distinguish what reservation is permissible and reserving state would not deny the obligations to the fundamental provisions of the treaty. Furthermore, as there are state parties who can object to the reservations and decide the validity of the reservation (its conformity with object and purpose), the monitoring bodies have to state clearly what provisions are considered to be essence of the treaty in their comments.

The issue of the distinction between interpretative declarations and reservations is also problematic. Reservations and interpretive declarations are two different legal concepts. If a "reservation" is intended to modify or exclude the legal effects of certain provisions of a treaty, an "interpretative declaration" has the purpose to specify or clarify the meaning or the scope attributed by the declaring to a treaty or to certain of its provisions. After the analysis of these legal concepts, it is obvious that if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having legal consequences associated. To distinguish between reservations and interpretative declarations it should be applied general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties which provides that it shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, it is recommended that the context of the interpretative declarations must be analysed as well.

Taken into consideration CEDAW and practice of the state parties, the most reservations were made to Article 2 (relating to equality in general) and Article 16 (specifies the main rights that are the key to the gender equality, relating to marriage and family relations) based on Islamic law. Therefore, strong positions of reserving states often led by religion justification (inconformity with Shariah law) raised certain issues and violations of human rights in general and women rights specifically such as early marriages, female genital mutilation, and others. The analysis of these

harmful practices against women revealed that there is a close link between the reservations made by states based on the cultural and religion aspects and these harmful traditional practices. For this reason, other state parties that give objections to the reservations formulated them in a stricter manner and express their strong position about the reservations that violate object and purpose of the treaty that the reserving states would withdraw them as a consequence to the objections.

As to ICCPR, majority of the states made reservations that relate gender issues to the Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses), Article 3 (equality of men and women in civil and political rights), Article 23 (family and marital rights). The attention has to be made to the 46 Islamic States which have ratified the ICCPR, where 14 of them have formulated reservations to these Articles by justifying the incompatibility of the above mentioned provisions with the Islamic regulation. Even though all the other state parties object to these specific reservations and expressed the hope that those reservations should be withdrawn there were only several states that withdraw those reservations based on Islamic law. The provisions to which reservations were made clearly established gender equality. By making reservations to them, states parties denied the essence of the equality between man and women established in ICCPR and expressed their strong position that they are not ready to accept and implement these guarantees in their national system.

The analysis of practice of ICESCR and Convention on the Rights of the Child with the reservations that relates gender equality revealed similar issues as in ICCPR. The analysis showed that the reserving states base their reservations on the inconformity of treaty provisions with national regulation which is often based on Shariah law. These reservations are not clear; other state parties are not familiar with the religion norms or national legislation of the reserving states. For this reason the reserving state has a choice of withdrawing the reservation (that is incompatible with the object and purpose) or of following its arguments and keeping it later on. In order to solve the problem of continuing invalid reservations, the other state parties should insist on reserving state to withdraw the reservation. Otherwise the rest of the state parties will not maintain relations with the reserving state in the scope of the treaty. This outcome of invalid reservation is clearly stated in VCLT. Analysis of the reservations and objections to the above mentioned treaties revealed that if the state parties do not follow the rules of the VCLT, the objections to the reservations have the role only as an expression of opinion.

The author suggests that the states, which are not ready to commit themselves to be bound by the provisions of the fundamental human rights instruments in full extent, should not enter them at all. As a solution for those countries might be special documents (that might be called as secondary ones) with the minimal level of the obligations that would be in conformity with their

traditions and religion norms as well under the United Nations system. The state parties would be bound by these documents with the certain level of obligation and implement the norms of these documents in their national legal system in reality. Only when these states would really show the efforts to be bound by the international standards of the protection of human rights, they could try to reach the level of the commitments that would let them to join the international instruments such as CEDAW or ICCPR with the same standard of obligations as the state parties without reservations to the fundamental provisions. According to the above mentioned mechanism the individuals in the reserving states might feel the real benefit and protection according the aforementioned secondary documents that would be entered without any reservations.

However, the biggest issue is with those states that are already parties to the human rights treaties and have made reservations to the fundamental provisions of them. In this case the role of the monitoring bodies can be very useful as well. By making their reports on how the state parties implement treaty norms and how the mechanism of protection works in their national legal system, these UN bodies inform other treaty members about the relevant situation. According to these reports, if the state party which entered invalid reservation does not comply national legal system with treaty norms, other state parties should demand to withdraw invalid reservation that were entered because the reserving state clearly avoids to take responsibility and implement the treaty in its national law system. The problem is that those reports of UN bodies do not have a binding effect. Therefore, the suggestion would be to stronger the position of these documents from the recommendations to the decisions that would be binding to the state parties.

**Summary**

The goal of this master thesis is to find the link between the harmful traditional practices against women that have been one of the biggest problems last decades in international community and reservations made to human rights treaties that relate gender issues. For this reason the author analyzes the practice under the Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Civil and Political Rights, International Covenant on Social and Economical Rights and Convention on the Rights of the Child. These treaties were chosen because they laid down the most significant principles in the protection of equality between women and men rights. Moreover, a number of reservations made to the fundamental provisions of these treaties relating gender issues is very high. It has to be noted that states making reservations, justify themselves that the provisions are incompatible with national laws and traditions. This issue makes the implementation of the treaties much more difficult than it might be seen. In order to find the solutions for the above mentioned issues, author analyzes whether the Vienna Convention on the Law of the Treaties regime works properly in the human rights treaties, what reservations might be invalid under the human rights treaties that are related to gender issues, what is the states practice according to the reservations and what could be the solution for the best protection from the invalid reservations that address gender equality as one of the fundamental right of human beings in the human rights law.

**Santrauka**

Šio darbo tikslas – atrasti ryšį tarp valstybių daromų išlygų žmogaus teisių sutartims, kurios yra susijusios su lyčių lygybės problemomis, ir vykdomos žalingos praktikos prieš moteris, kuri yra paremta tradicijomis ir religiniais papročiais. Minėta praktika daroma žala moterims yra viena opiausių problemų tarptautinėje erdvėje pastaruoju laikotarpiu. Dėl šios priežasties autorius šiame magistro baigiamajame darbe nagrinėja Konvencijos dėl visų formų diskriminacijos panaikinimo moterims, Vaikų teisių apsaugos konvencijos, Tarptautinio pilietinių ir politinių teisių pakto, Tarptautinio socialinių ir ekonominių teisių pakto atžvilgiu valstybių vykdomą praktiką. Pažymėtina, kad šios sutartys buvo pasirinktos nagrinėti būtent todėl, kad jos nustato svarbiausius lyčių lygybės apsaugos reguliavimo principus, taip pat dėl to, kad valstybių padarytos išlygos šioms sutartims sudaro itin didelį skaičių. Pažymėtina, kad valstybės, darydamos minėtąsias išlygas, bando pateisinti šiuos savo veiksmus tuo, kad sutarčių, kurių narėmis jos nori tapti, nuostatos yra nesuderinamos su šių valstybių nacionaline teise, tradicijomis bei papročiais. Pastebėtina, kad ši problema itin apsunkina minėtųjų žmogaus teisių sutarčių įgyvendinimo procesą valstybių nacionalinės teisės viduje. Dėl šios priežasties ieškant sprendimo būdų, kaip pakeisti ydingą valstybių išlygų sutartims darymo praktiką, autorius taip pat nagrinėja ir Vienos konvencijos dėl tarptautinės sutarčių teisės režimą, ar jis gali būti įgyvendinamas žmogaus teisių sutarčių kontekste. Taip pat autorius šiame darbe analizuoja, kokios išlygos yra negaliojančios (prieštaraujančios sutarties objektui ir tikslui), kokia yra valstybių praktika darant išlygas ir kokios galėtų būti išeitys, siekiant apsaugoti žmogaus teisių sutartis nuo šių išlygų, kurios pažeidžia sutarčių tikslą ir objektą. Pažymėtina, kad visi nurodyta problematika, susijusi su lyčių lygybės klausimais, yra itin svarbi ir išlieka viena aktualiausių tarptautinėje žmogaus teisių apsaugos srityje.

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