NOTE:MAKING CEDAW UNIVERSAL: A CRITIQUE OF CEDAW'S RESERVATION REGIME UNDER ARTICLE 28 AND THE EFFECTIVENESS OF THE REPORTING PROCESS

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I. Introduction

In international law, a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in application to that State." [1] Reservations allow a state to ratify an international treaty without obligating itself to provisions it does not wish to undertake. [2]

Reservations have played an important role in the formulation of a substantive legal regime for women's rights. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been ratified with reservations by more states than almost any other human rights treaty to date. [3] The Commission on the Status of Women, a body under the United Nations Economic and Social Council, started working on CEDAW in the early 1970s, and the United Nations General Assembly finally adopted it in 1979. [4] CEDAW uniquely focuses on discrimination against women and condemning such discrimination in both the public and private spheres. [5] To date CEDAW has 168 party states; Mauritania most recently ratified the treaty in May 2001. [6]

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[1] Daniel N. Hylton, Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations, 27 Vand. J. Transnat'l L. 419, 422 (1994).

[2] Rebecca J. Cook, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 30 Va. J. Int'l L. 643, 650 (1990).

[3] Julie A. Minor, An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women, 24 Ga. J. Int'l & Comp. L. 137, 144 (1994).

[4] Id. at 138.

[5] Id. at 152-53.

[6] United Nations, Division for the Advancement of Women, State Parties to CEDAW, at http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Mar. 31, 2002).

[*606] Many scholars of human rights law argue that reservations undermine the effectiveness of treaties. [7] This particularly applies to CEDAW; [8] fifty-five states filed reservations, and another fourteen states initially entered reservations but subsequently withdrew them. [9] "Of the United Nations' human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty." [10] CEDAW deals with reservations through the reporting process, which encourages the removal of reservations. [11] The reporting system, however, has not effectively dealt with the high number of reservations; other methods could preserve the integrity of CEDAW even though this may hinder CEDAW from becoming universal.

Part II of this Note explores the development of treaty law, including the various approaches taken with respect to treaty reservations, and explains how such approaches have been used in contemporary multilateral treaties, such as CEDAW. Part II also discusses recent actions by the Human Rights Committee under the International Covenant on Civil and Political Rights and the European Court of Human Rights (ICCPR), which question the effectiveness of the traditional reservation regimes. Part III reviews the reservations states have made to CEDAW and, in light of these reservations, identifies the failure of CEDAW's reservation system to protect its integrity. Finally, this Note explores the possibility that newer developments in treaty law may provide effective alternatives to CEDAW's current system of dealing with debilitating reservations.

II. Discussion

A. The Traditional Approach to Reservation Treatment

The traditional treatment of reservations, otherwise known as the unanimity rule, required unanimous consent by each of the **[*607]** convention's member states before ratification approval. [12] The basis of this rule was the contractual model of multilateral treaties, whereby treaty provisions were assumed to be offers and reservations were counteroffers, which could be accepted or rejected by the contracting parties. [13]

Under the unanimity rule, if one party objected to a state's reservation, the reserving state could only either ratify the treaty without the reservation or not become a party to the treaty. [14] The purpose of requiring unanimous consent was to protect the integrity of the treaty. [15] As the international arena changed and became more diversified as a result of decolonization by the Western powers, [16] however, greater emphasis was placed on states consenting to the terms by which they would be bound. [17]

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[7] Katarina Tomasevski, Women and Human Rights 119 (1996). Katarina Tomasevski is a graduate of Harvard Law School and a Senior Research Fellow at the Danish Center for Human Rights.

[8] Belinda Clark, The Vienna Convention Reservations Regime and The Convention on Discrimination Against Women, *85 Am. J. Int'l L. 281, 317 (1991).* Ms. Clark is a former New Zealand delegate to the Third Committee of the United Nations General Assembly.

[9] United Nations, Division for the Advancement of Women, State Parties to CEDAW, at *http://www.un.org/womenwatch/daw/cedaw/states.htm* (last visited Jan. 11, 2002).

[10] Id.

[11] Cook, supra note 2, at 708.

[12] Clark, supra note 8, at 289.

[13] Id.

[14] Catherine Logan Piper, Note, Reservations to Multilateral Treaties: The Goal of Universality, *71 Iowa L. Rev. 295, 306 (1985).*

[15] Id.

[16] The unanimous rule dominated reservation law until the 1950s, as until that point international law was dominated largely by Western Europe. *Id. at 307.*

The Pan-American approach shifted away from the unanimity rule by allowing a state to become a party to a treaty notwithstanding objections to its ratification. [18] Under this scenario a reserving state had to circulate its proposed reservation to other member states. [19] The states would comment on the proposed reservation and the reserving state could then take these comments into consideration. [20] Objections to the reservation, however, did not prevent the state from becoming a member; rather, the treaty would be enforced with the benefit of the reservation between the reserving state and the signatories that accepted the reservation, but no treaty existed between the reserving state and those that objected to the reservation. [21] Though theoretically a multilateral treaty, the meaning of the treaty, therefore, was different between the various parties, breaking it up into bilateral or sub-treaties. [22] The Pan-American system sought to reestablish a state's inherent right to make reservations to treaties. [23]

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B. The Current Approach to Reservations

The decision of the International Court of Justice (ICJ) in the advisory opinion Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide [24] (Genocide Convention Case) and the Vienna Convention on the Law of Treaties [25] comprise the current international approach to reservations. [26] While the ICJ deliberated in the Genocide Convention Case, however, the United Nations General Assembly requested that the International Law Commission also investigate the proper treatment of reservations. [27] In the Commission's initial report, it recommended the unanimity rule approach to reservations; [28] however, fifteen years later, when actually publishing the report, the Commission changed its view and supported a combination of the Pan-American system and the ICJ decision. [29]

1. The Genocide Convention Case

The ICJ's advisory decision in the Genocide Convention Case differed in two major ways from the unanimity rule. First, the ICJ no longer required that all state parties assent to each state's reservation, allowing a state to ratify the treaty even though some states objected to the reservation. [30] Second, the ICJ established the object and purpose

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17 *Id. at 307-08.*

18 *Id. at 308.*

19 Hylton, supra note 1, at 425.

20 Id.

21 Id. at 425-26.

22 Piper, supra note 14, at 308.

23 Hylton, supra note 1, at 425.

24 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (May 28) [hereinafter Genocide Convention Case].

25 Vienna Convention on the Laws of Treaties, May 23, 1980, 1155 U.N.T.S. 331.

26 Elena A. Baylis, General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties, *17 Berkeley J. Int'l L. 277, 287 (1999).*

27 Hylton, supra note 1, at 424.

28 Id.

29 Id. at 425.

30 Genocide Convention Case, 1951 I.C.J. 15, 21 (May 28); see Baylis, supra note 26, at 287.

test as a standard for evaluating reservations in order to prevent states from using their own criteria for compatibility. [31]

The ICJ effectively established a two-tier test: first, the state party could object to a reservation but not necessarily find it incompatible with the treaty, allowing enforcement of the treaty between the two states, albeit as modified by the reservation. Alternatively, the state could go beyond simply objecting and hold that the reservation goes against the object and purpose of the treaty, precluding enforcement of the treaty between those two states. [32] Ideally if a **[*609]** state made a reservation that was against the object and purpose of the treaty, the objecting state could also object to the reserving state's entry to the treaty. [33]

A reservation in a one-tier regime can only be invalid if it is incompatible with the treaty. [34] Under the two-tier test, states can object to a reservation if it is incompatible or if it is impermissible. [35] A reservation can be compatible and still be impermissible and vice versa. [36] As a result, states in a two-tier system have four different ways they can approach reservations: 1) they can expressly accept the reservation; 2) they can impliedly accept the reservation; 3) they can object to the reservation; or 4) they can object to the reservation and preclude the treaty from coming into force between them and the reserving state. [37]

The other important portion of the ICJ's holding constitutes the object and purpose test. In analyzing the validity of reservations to the Genocide Convention, the ICJ concluded that the Genocide Convention meant to maximize state participation; therefore, minor reservations to the treaty should not prevent state ratification. [38] On the other hand, the ICJ did not want to promote universality to such an extreme level as to completely undermine the integrity of the treaty. [39] As a result, the ICJ devised the object and purpose test. [40] The ICJ seemed to imply that universality, however, was the greater goal, and restrictions on reservations were a threat to that goal. [41]

The object and purpose test set forth in the ICJ's decision requires each state to individually determine whether it perceives a proposed reservation as being against the object and purpose of the treaty. The application of this supposedly objective test, however, remains quite subjective. [42] The ICJ did not specify what criteria to consider in determining whether a reservation goes against **[*610]** the object and purpose of the treaty; [43] rather, the basis for this decision was left to each state's own perception of the treaty. [44] The ICJ's decision, therefore, established a

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[31] Genocide Convention Case, 1951 I.C.J. at 24.

[32] Clark, supra note 8, at 303-04.

[33] As will be discussed, infra, human rights treaties generally, and CEDAW specifically, do not accord state parties the incentive to make a further objection against entry of the treaty. As a result, the states that make incompatible reservations are still considered parties to the Convention as to every other state. See Clark, supra note 8, at 304.

[34] Hylton, supra note 1, at 432.

[35] Id.

[36] Id.

[37] Id.

[38] Genocide Convention Case, 1951 I.C.J. 15, 24 (May 28).

[39] Clark, supra note 8, at 293; see generally Genocide Convention Case, 1951 I.C.J. 15 (May 28).

[40] Clark, supra note 8, at 293.

[41] Id.; see generally Genocide Convention Case, 1951 I.C.J. 15 (May 28).

[42] Hylton, supra note 1, at 426.

[43] See Genocide Convention Case, 1951 I.C.J. 15 (May 28).

[44] Id. at 26.

presumption in favor of ratification operating under the limitation of the object and purpose test. [45] Because the ICJ did not create a clear standard and favored a case-by-case analysis of the treaty, [46] the ICJ remains the forum where disputes over a reservation's compatibility must be brought. [47]

Problematically, in the Genocide Convention Case decision, the ICJ assumes that states will apply the object and purpose test to reservations because of an inherent interest parties have in preserving the object of the Convention. [48] The object and purpose test was supposed to be particularly effective for human rights treaties because it allowed the state to protect its sovereign interests while still upholding the goal of the treaty. [49] Human rights treaties particularly threaten state sovereignty because they demand absolute obligation without necessarily depending on contractual relations with other state parties.

Perhaps more important, though, is that human rights treaties are not always directly amenable to a state's self-interest. [50] The member-states adopted the Genocide Convention and other similar treaties for humanitarian purposes and with the interest of establishing the standards set in the treaty. [51] Because of the nature of these conventions, the ICJ has difficulty speaking in terms of advantages and disadvantages, as often used in contractual arrangements. [52] The ICJ, therefore, should interpret the standard set by the treaty in alignment with the high ideals to be promoted. [53] In the ICJ opinion, the court explained that the

> contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the **[*611]** accomplishment of those high purposes which are the raison d'etre of the convention. Consequentially, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all of its provisions. [54]

Because of these attributes of human rights treaties, the ICJ decision provides little incentive for potential objecting states to refuse entry of a treaty between itself and other states, much less bring a dispute before the ICJ over a reservation's compatibility with the object and purpose of the treaty.

2. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties codifies the ICJ's decision and makes a contracting party's silent response to a reservation tantamount to an acceptance. [55] The Vienna Convention, Article 19(c), firmly establishes

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[45] Baylis, supra note 26, at 289.

[46] Id.

[47] Hylton, supra note 1, at 430.

[48] See Genocide Convention Case, 1951 I.C.J. at 27.

[49] Baylis, supra note 26, at 290.

[50] Id. at 291.

[51] Cook, supra note 2, at 646. Professor Cook received her J.D. from Georgetown University, her L.L.M. from Columbia University, and is an Assistant Professor and Director of the International Human Rights Programme at the University of Toronto. This article was written in partial fulfillment of the requirements for the degree of Doctor of Juridical Science at Columbia University.

[52] Id.

[53] Id.

[54] Genocide Convention Case, 1951 I.C.J. 15, 23 (May 28).

[55] Baylis, supra note 26, at 291; see Vienna Convention on the Laws of Treaties, supra note 25, at 337. The Vienna Convention on the Law of Treaties concluded in 1969 but did not come into force until 1980. The United States has not ratified the treaty.

the object and purpose test as the appropriate standard by which to judge reservations. [56] The Vienna Convention also, like the Genocide Convention Case, assumes that the treaty still exists between the parties, even in light of an objection, unless the objecting state expressly holds that the treaty is not in force between them. [57] Parties to a treaty have twelve months to object to a state's reservation, or, if they fail to object, the Vienna Convention presumes that they have accepted the reservation (tacit acceptance). [58] As one author has put it, when a state fails to object, it has an "automatic legal effect" of "acceptance by acquiescence." [59]

For the most part, provisions within the treaty in question control with respect to reservations; however, the Vienna Convention provides that, in general, reservations must be in writing - usually attached to a statement of consent (like ratification) - and the reservation can be withdrawn at any time. [60] At least one other party **[*612]** must accept the reservation; nevertheless, acceptance can be implied. [61] If the treaty contains specific criteria by which to judge the reservation's compatibility, the combination of the Vienna Convention and the treaty could yield an objective approach to evaluating reservations. [62] When the treaty is silent, however, as with CEDAW, each state party determines the object and purpose of the treaty on its own, allowing for much more subjectivity and vulnerability to outside influences and considerations. [63]

Substantively, the Vienna Convention holds to the ICJ's decision. [64] When a state makes a reservation to a treaty it affects the relationship of that state with the other state parties, but only to the extent of the reservation. [65] When a state objects to the reservation, the treaty between the reserving state and the objecting state still goes into force, unless the objecting state expressly holds otherwise. [66] If the state precludes enforcement of the treaty, then the objecting state does not have any obligations under the treaty with respect to the reserving state. [67] Following a system of reciprocity, a reserving state not only has its obligations to the treaty limited by the reservation, but it cannot demand other state parties to perform under the reserved provisions either. [68] The other states' obligations, therefore, are modified as well with respect to the reserving state. [69] This does not excuse other states from implementing the provision at all, however, as the legal relationship between the nonreserving states remains unchanged. [70]

The Third Restatement of Foreign Relations Law of the United States explains that the Vienna Convention effectively divides a multilateral treaty into separate bilateral treaties. [71] The actual provisions and obligations

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[56] Vienna Convention on the Law of Treaties, supra note 25, at 337; Clark, supra note 8, at 299-300.

[57] Vienna Convention on the Law of Treaties, supra note 25, at 337; Baylis, supra note 26, at 292.

[58] Vienna Convention on the Law of Treaties, supra note 25, at 337.

[59] Richard W. Edwards, Jr., Reservations to Treaties, 10 Mich. J. Int'l L. 362, 372 (1989).

[60] Id. at 382; see Vienna Convention on the Law of Treaties, supra note 25, at 338.

[61] Edwards, supra note 59, at 383.

[62] Piper, supra note 14, at 318.

[63] Id. at 318-19.

[64] Vienna Convention on the Law of Treaties, supra note 25, at 337.

[65] Clark, supra note 8, at 293.

[66] Id.

[67] Id. at 296-97.

[68] Id. at 296.

[69] Id.

[70] Id.

[71] Id. at 297.

enforced under the treaty are different between each of the state parties, depending on what reservations or objections have been proffered. [72]

As for the two-tier test, Article 19 of the Vienna Convention contains no language that either permits or precludes objections to **[*613]** reservations. [73] One could argue, therefore, that the Convention provides for the two-tier system because it does not preclude objections for reasons other than incompatibility. [74] This means that one must examine permissibility under Article 19 before evaluating Article 20 acceptability. [75] But Article 19(a) offers the only other expressly noted objection - that the reservation is expressly forbidden, which means that it is already necessarily incompatible. [76] It could be a one-tier test, therefore, because whether a reservation is permissible under Article 19 and whether it is acceptable under Article 20 are essentially the same question. [77]

The Vienna Convention favors a policy where states make reservations in order to protect their national sovereignty, so long as the reservations do not go against the object and purpose of the treaty. [78] The Vienna Convention, however, much like the ICJ decision, does not explain who has the authority to determine whether a reservation goes against the object and purpose of the treaty. [79] The delegates to the Convention favored flexibility toward reservations, as championed in the ICJ's Genocide Convention Case decision, [80] because they believed it promoted treaties that a greater number of countries would accept. [81]

C. The Current Approach to Reservations in CEDAW

CEDAW uses the Vienna Convention Article 19(c) approach to reservations, which allows reservations unless they are contrary to the object and purpose of the treaty. [82] Article 28 of CEDAW states that the Office of the Secretary-General will collect and circulate reservations to all member states of the Convention. [83] Article 28 goes on to repeat the ICJ/Vienna Convention test whereby reservations will be invalidated if they are against the object and purpose **[*614]** of the Convention. [84] States can also remove reservations upon notification to the Secretary-General, who will notify the other member states. [85] Disputes over the compatibility of reservations will be settled by arbitration or in proceedings before the ICJ if necessary; [86] however, a member state has yet to pursue arbitration or an ICJ decision. [87]

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[72] Id.

[73] Vienna Convention on the Law of Treaties, supra note 25, at 336-37; see Clark, supra note 8, at 304.

[74] Id.

[75] Hylton, supra note 1, at 430-431.

[76] Clark, supra note 8, at 304; see also Vienna Convention on the Law of Treaties, supra note 25, at 336-337.

[77] Hylton, supra note 1, at 431.

[78] Baylis, supra note 26, at 292.

[79] Id.

[80] Clark, supra note 8, at 289.

[81] Id. at 296.

[82] Vienna Convention on the Law of Treaties, supra note 25, at 337; see Clark, supra note 8, at 282.

[83] Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, art. 28, 1249 U.N.T.S. 13, 23.

[84] Id.

[85] Id.

[86] Id. art. 29.

[87] Minor, supra note 3, at 150.

Under the Vienna Convention, a reserving state can still become a party to the treaty limited to the extent an objecting state rejects the entry of the Convention between itself and the reserving state. [88] Article 20(4)(b) of the Vienna Convention gives state parties the option of precluding entry of the Convention between a reserving and objecting state; [89] however, an objecting state under CEDAW has yet to utilize this option. [90] It is questionable whether states have an incentive to object to the entry of the Convention or what purpose such an objection might serve, given the normative nature of human rights treaties. [91] As Professor Clark points out, by preventing the enforcement of the treaty, the objecting state is, in a way, giving the reserving state the benefit of their reservation. [92] On the other hand, by "keeping the Convention in force between themselves and the reserving states, the objecting states are in effect allowing a reserving state to be a party without having to adhere to central tenants of the treaty, i.e. permitting a standard of adherence below what they consider acceptable." [93]

1. No Independent Adjudicative Body Under CEDAW

The Convention "allows reservations that do not conflict with the 'object and purpose' of the treaty, but it contains no objective criteria to determine if this requirement has been met," [94] nor does the Convention establish an independent committee to deal specifically with reservations. Because no independent body evaluates reservations, objections tend to be haphazard and subjective. Professor **[*615]** Clark points out that Mexico, Sweden, and Germany made timely objections to several state reservations as being against the object and purpose of the Convention; however, they did not timely object to the same reservations. [95] Mexico objected to reservations made by Bangladesh, [96] Jamaica, [97] Korea, [98] New Zealand, [99] and Mauritius; [100] Germany objected to Malawi, [101] Turkish, [102] and Iraqi reservations; [103] Sweden objected only to reservations by Iraq [104] and Malawi. [105] As these examples demonstrate, either the states disagreed as to which reservations were incompatible with the treaty, or else other intervening concerns about foreign relations prevented them from objecting to reservations from other states. [106]

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[88] Vienna Convention on the Law of Treaties, supra note 25, at 337; Clark, supra note 8, at 307.

[89] Vienna Convention on the Law of Treaties, supra note 25, at 337.

[90] Clark, supra note 8, at 307.

[91] Id.

[92] Id. at 308.

[93] Id.

[94] Minor, supra note 3, at 144; see generally Convention on the Elimination of All Forms of Discrimination Against Women, supra note 83.

[95] Clark, supra note 8, at 299.

[96] Convention on the Elimination of All Forms of Discrimination Against Women, Mexico Objection to Bangladesh Ratification, Feb. 21, 1985, 1390 U.N.T.S. 350-51.

[97] Convention on the Elimination of All Forms of Discrimination Against Women, Mexico Objection to Jamaica Ratification, Feb. 21, 1985, 1390 U.N.T.S. 349-50.

[98] Convention on the Elimination of All Forms of Discrimination Against Women, Mexico Objection to Korea Ratification, June 6, 1985, 1398 U.N.T.S. 389-90.

[99] Convention on the Elimination of All Forms of Discrimination Against Women, Mexico Objection to New Zealand Ratification, May 22, 1985, 1398 U.N.T.S. 388-89.

[100] Convention on the Elimination of All Forms of Discrimination Against Women, Mexico Objection to Mauritius Ratification, Jan. 11, 1985, 1389 U.N.T.S. 360-62.

[101] Convention on the Elimination of All Forms of Discrimination Against Women, Germany Objection to Malawi Ratification, Apr. 7, 1988, 1501 U.N.T.S. 332-33.

Some CEDAW members, namely Denmark and Sweden, see treaties as necessitating a change in domestic policy in order to ensure adherence to the treaty. [107] Conversely, Japan has argued that because there is no authoritative criterion for judging a reservation's validity, the Convention is able to promote universality and open the door to more widespread country participation. [108] Japan's views reservations as allowing participation in treaties without requiring changes to domestic laws to accommodate conflicting provisions. [109] Japan did concede, however, that CEDAW has resulted in sweeping reservations because no authoritative criterion **[*616]** exists by which to judge a reservation's validity. Again, however, this has promoted universality by allowing many states to participate. [110] Turkey agreed that reservations to CEDAW must be allowed because by ratifying the treaty, the country did not mean to suggest that discrimination against women had already been eliminated. [111] These statements implicitly evoke the two-tier system, where states can find a reservation incompatible with the Convention but still accept the state's ratification. [112]

2. The Reporting System Under CEDAW

Reservations are largely dealt with through the reporting system under Article 18 of the Convention, where the CEDAW Committee considers the progress and measures taken by the state parties to implement the treaty provisions. [113] The CEDAW Committee has twenty-three members from different member states. [114] The Committee meets once a year for four weeks (initially the Committee met for only two weeks) to analyze the Convention's progress, make recommendations to states, and review state reports. [115] Article 18 requires all state parties to report within one year of their ratification of the Convention and every four years thereafter, or whenever the CEDAW Committee requests a report. [116] States should not regress farther from implementing the Convention's standards, even with reservations, or they may find themselves in breach of the treaty. [117]

The country report should summarize all measures taken by the government of that country to implement CEDAW's provisions. [118] The report should also "indicate factors and difficulties affecting the degree of fulfillment of

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[102] Convention on the Elimination of All Forms of Discrimination Against Women, Germany Objection to Turkey Ratification, Mar. 3, 1987, 1457 U.N.T.S. 381.

[103] Convention on the Elimination of All Forms of Discrimination Against Women, Germany Objection to Iraq Ratification, Mar. 3, 1987, 1457 U.N.T.S. 382.

[104] Convention on the Elimination of All Forms of Discrimination Against Women, Sweden Objection to Iraq Ratification, Mar. 3, 1987, 1457 U.N.T.S. 383.

[105] Convention on the Elimination of All Forms of Discrimination Against Women, Sweden Objection to Malawi Ratification, Apr. 15, 1988, 1501 U.N.T.S. 333-34.

[106] Clark, supra note 8, at 301.

[107] Id.

[108] Id. at 284.

[109] Id. at 285.

[110] Id. at 284.

[111] Id. at 285.

[112] Id.

[113] Convention on the Elimination of All Forms of Discrimination Against Women, supra note 83, at 22; Cook, supra note 2, at 662.

[114] Minor, supra note 3, at 140.

[115] Id.

obligations under the Convention." [119] Specifically in regard to reservations, the state must explain why the reservation is necessary, show that the reservation is consistent with reservations it has made to other treaties, and state the effect **[*617]** it intends with the reservation. [120] The state should also address how it will limit the reservation, in other words, whether and when it might withdraw the reservation. [121] The Committee has also requested that the Secretary-General send letters to states with substantial reservations as a way of expressing the Committee's interest in having the reservation limited or withdrawn. [122]

The CEDAW Committee, in its meetings, has commented specifically on country reports and on its dismay at the large number of reservations that are incompatible with the object and purpose of the Convention. [123] "Members of CEDAW have asked penetrating questions of state parties presenting their national reports about their reservations, in order to determine the extent to which the goals of the Convention are impeded due to their reservations." [124] CEDAW, moreover, encourages state parties to review and amend their laws and policies in compliance with the Convention in order to facilitate withdrawal of reservations. [125] This process of reviewing state reports has commonly been called "constructive dialogue." [126] Instead of the Committee focusing its discussion on specific instances of human rights violations, it engages in a "joint enterprise" with the states to advance the provisions of the treaty. [127] Professor Andrew Byrnes points out that although report reviews are generally not antagonistic, some members will call contradictory or insufficient policies to the attention of the Committee. [128]

Many observers have acceded to the Committee's approach to reservations through the reporting process. "The Vienna Declaration and Program of Action stated that 'the Committee on the Elimination of Discrimination Against Women should continue its **[*618]** review of reservations to the Convention.'" [129] Furthermore, the chairpersons of the treaty bodies agreed that:

Treaty bodies should systematically review reservations made when considering a report and include in the list of questions to be addressed to reporting Governments a question as to whether a given reservation was still

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[116] Convention on the Elimination of All Forms of Discrimination Against Women, supra note 83, at 22.

[117] Cook, supra note 2, at 683.

[118] Id. at 662.

[119] Id.

[120] United Nations, Committee on the Elimination of Discrimination Against Women, Guidelines for Preparation of Reports by States Parties, at http://www.un.org/ womenwatch/daw/cedaw/guide.htm (last visited Feb. 5, 2002).

[121] Id.

[122] William A. Schabas, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, 1997 Wm. & Mary J. Women & L. 79, 95 (1997).

[123] Clark, supra note 8, at 287.

[124] Cook, supra note 2, at 708.

[125] Id.

[126] Andrew C. Byrnes, The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women, 14 Yale J. Int'l L. 1, 19 (1989). Andrew Byrnes received his L.L.M. from Harvard Law School and was a member of the law faculty at the University of Hong Kong. This article was written in partial fulfillment of the requirements for the degree of Doctor of Juridical Science in the faculty of law at Columbia University.

[127] Id. at 19-20.

[128] Id. at 20.

[129] Schabas, supra note 122, at 94.

necessary and whether a State party would consider withdrawing a reservation that might be considered by the treaty body concerned as being incompatible with the object and purpose of the treaty. [130]

As a result of this comment and the overall concern among the Committee members about the overly broad state-proffered reservations, the Committee further amended its guidelines for country reports, requiring that states with substantive reservations provide information about the status of those reservations as discussed above. [131]

Conversely, Professor Rebecca Cook states that active review taken by the CEDAW Committee may actually encourage reservation making. [132] "The accountability of state parties to the Women's Convention may have encouraged state parties to make reservations to forestall criticism from the progress reports submitted by states to CEDAW concerning the steps they have taken to implement the Convention." [133] In other words, in order to avoid adhering to provisions it does not intend to implement, a state will try to define its obligation as narrowly as possible. [134] Notwithstanding the Committee's power to comment and criticize reservations, as do other human rights committees, its power to both investigate and determine compatibility is limited, or possibly nonexistent. [135]

3. Reporting Under the Human Rights Committee

Under the ICCPR, the Human Rights Committee has undertaken the role of examining state reservations using the reporting process. [136] The Committee used this method when it called on Belgium to withdraw its reservation as to gender equality for crown **[*619]** succession. [137] This incident shows that the members of the Committee regard evaluating reservations as a part of their mandate. [138] The Committee's conclusions are not binding on the states, as they are only oral comments, but can serve as encouragement. [139]

In the case of Austria, the Committee expressed concern over Austria's numerous and broad reservations. [140] It suggested that Austria withdraw its reservations or enter new, more specific reservations. [141] The Committee has been particularly hostile to reservations that the member state has demonstrated no inclination to remove. [142] Notwithstanding their questioning through the reporting process, however, the "Committee's frustration with what it regarded as inappropriate reservations and with its impotence to deal with them became evident. The result was General Comment 24." [143]

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[130] Id. at 93 (quoting Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, Note by the Secretary General, U.N. GAOR, 47th Sess., Agenda Item 97, at para. 36, U.N. Doc. A/47/628 (1992)).

[131] Id at 94.

[132] Cook, supra note 2, at 673.

[133] Id.

[134] Id.

[135] Id. at 708-9.

[136] See International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 40, 999 U.N.T.S. 171, 181; see Baylis, supra note 26, at 311.

[137] Baylis, supra note 26, at 311.

[138] Id.

[139] Id.

[140] Id. at 311-12.

[141] Id. at 312.

[142] Id. at 311.

[143] Id. at 312.

D. New Developments in International Law

New developments in international law bring into question the effectiveness of the treatment of reservations under the Genocide Convention Case and the Vienna Convention on the Law of Treaties.

1. General Comment 24

In General Comment 24, the Human Rights Committee under the ICCPR decided that it should have the legal authority to judge the compatibility of reservations instead of leaving it up to the state parties to the treaty. [144] The test to determine if a reservation is permissible is whether or not the reservation is compatible with the Covenant's object and purpose. [145] Reservations that the Committee deems invalid are severed, leaving the state a full party to the treaty without the benefit of the reservation. [146]

While the object and purpose test represents accepted international law, as shown in the ICJ's decision in the Genocide Convention Case and the Vienna Convention, the severance of the reservation **[*620]** is rare and controversial. [147] The Human Rights Committee criticized the presumption toward acceptance of reservations established in the ICJ's decision. [148] The Committee concluded that "reservations to human rights treaties must be specific and transparent," [149] and interpretive declarations should not construe treaty provisions to not require changes to domestic law. Thus, the Committee sought to favor ratification, but not to presume the validity of the reservations. [150]

2. The Belilos Case

In the Belilos Case, the European Court of Human Rights (ECHR) found that Switzerland entered an illegal reservation to the European Convention for the Protection of Human Rights and Fundamental Freedoms and severed the reservation while still holding Switzerland to the treaty. [151] Marlene Belilos alleged that Switzerland had violated the Convention when it tried her on criminal charges before a police board, after which the parties could appeal to the courts only on matters of law. [152] Article 6(1) of the Convention states that individuals are entitled to a hearing before an independent and impartial tribunal. [153] Switzerland defended by claiming it had made a reservation on this provision. [154] ECHR, however, held that Switzerland's reservation was invalid because Article 64 of the European Convention on Human Rights requires, first, that reservations be specific, and second, that reservations be accompanied by a statement of the law involved. [155] Switzerland failed to comply with either

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144 General Comment 24, U.N. GAOR, Hum. Rts. Comm., 52d sess., available at http://www1.umn.edu/humanrts/gencomm/hrcom24.htm (last visited Feb. 6, 2002) [hereinafter General Comment 24].

145 Id.

146 Id.

147 Baylis, supra note 26, at 286.

148 General Comment 24, supra note 144.

149 Gay J. McDougall, Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination, *40 How. L.J. 571, 589 (1997).*

150 Baylis, supra note 26, at 302.

151 Belilos Case, 132 Eur. Ct. H.R. (ser. A) at 28 (1988).

152 Edwards, supra note 59, at 370.

153 Belilos Case, 132 Eur. Ct. H.R. (ser. A) at 28 (1988).

154 Id. at 20.

155 Belilos Case, 132 Eur. Ct. H.R. (ser. A) at 26-28 (1988); Cook, supra note 2, at 654-55.

provision. [156] ECHR accordingly rejected Switzerland's offer to rephrase its reservation and instead severed the reservation and held Switzerland bound by the treaty. [157] As a result, ECHR required Switzerland to uphold every **[*621]** provision of the Convention as if it had never made a reservation in the first instance. [158]

Professor Cook points out that the specificity requirement in the European Convention on Human Rights might just be an explicit statement of what is already implied in human rights treaties. [159] An imprecise reservation clearly undermines the effectiveness of the treaty; however, past experience in international law may point to the fact that states are only bound to that which they consent. [160]

Switzerland objected to ECHR's decision, arguing that it undermined state consent as a requirement for a treaty obligation. [161] Because accession to Article 6 of the Convention had serious consequences for Switzerland's criminal procedures, the effect of the reservation played a major part in the country's decision to ratify the treaty. [162]

Under the rationale of ECHR, if a state accepts the treaty with the exception of the reservation, then that state accepts that it cannot make an incompatible reservation. [163] Therefore, the reserving state has already assented to the severance of any incompatible reservations. [164] In the Belilos Case , the reservation was supposed to be made with a certain level of specificity. [165] The reservation is not given force because the state failed to satisfy this requirement, but the acceptance of the treaty is still valid and is not limited by the false reservation. [166] ECHR's decision appears to limit the Vienna Convention, therefore, in that if a reservation goes against the object and purpose of the treaty, it not only fails as a reservation, but it does not limit the state's acceptance of the treaty either. [167]

Whether ECHR would sever the reservation may depend on other elements, such as the state's demonstrated consent to be bound to the treaty, as was the case with Switzerland. [168] To apply severance to other cases, the deciding body may have to look at other sources, such as the state's ratification instrument and debates concerning ratification, to determine if a state cares more about being a party to the treaty than preserving the rights it **[*622]** thought it protected with the reservation. [169] "One is essentially assessing the political will of the State." [170] In the

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[156] Belilos Case, 132 Eur. Ct. H.R. (ser. A) at 26 (1988); Cook, supra note 2, at 655.

[157] Edwards, supra note 59, at 377-78.

[158] Cook, supra note 2, at 654.

[159] Id.

[160] Id.

[161] Edwards, supra note 59, at 377.

[162] Id.

[163] Cook, supra note 2, at 655.

[164] Id.

[165] Id.

[166] Id.

[167] Id.

[168] Edwards, supra note 59, at 374.

[169] Id. at 375.

[170] Id.

Belilos Case, however, ECHR did not rely on domestic evidence of the country's desire to be a party to the treaty; rather, it merely used Switzerland's oral testimony. [171]

Similar to the reaction to General Comment 24, critics have complained that ECHR did not have the authority to sever Switzerland's reservation. ECHR's decision, however, has a clearer line of authority than the United Nations Human Rights Committee in General Comment 24. [172] The European Convention gave ECHR jurisdiction, Switzerland considered itself bound to ECHR's decision, and ECHR did not act without Switzerland's consent. [173] Moreover, Switzerland had already voiced its preference to be bound to the Convention. [174] Under the ICCPR, however, no direct consequences exist for parties who violate the provisions of the Covenant; in fact, the Covenant works through the nonbinding reporting system. [175] Though ECHR has more express authority than the CEDAW Committee, its severance of reservations has a more damaging effect on state sovereignty than would a similar decision by the ICCPR Committee would. [176] Therefore, although critics may question a treaty body adopting a similar action - as severing a state reservation appears too extreme an action - the severing may be more feasible given the inherent weaknesses of the treaty regime.

III. Analysis

The ICJ/Vienna Convention approach to reservations encourages states to adopt treaties because it allows a state to both ratify the treaty and, at the same time, to limit its obligations to the treaty and the effect the treaty may have on the state's domestic policy. CEDAW has undoubtedly benefited from allowing signatory states to make broad reservations in that it has maximized the number of ratifications, and thereby has maximized universality. These broad reservations, however, undermine CEDAW's effectiveness and compromise the integrity of the document.

[*623]

A. Universality Versus Integrity in Treaty Law

It has been argued that

the greater the number of nations joining the treaty, the greater the force and effect of the laws rising out of the treaty. The broader the scope and purpose of the treaty, however, the more difficult it becomes to get universal acceptance, due to the diversity of actors on the international stage. [177]

A treaty's ability to establish law is undermined if few countries ratify its provisions. [178] But a treaty containing many signatures has limited value when the signatures come at the cost of so many reservations that the treaty provisions have little to no effect on the domestic policy of its state parties.

These two seemingly conflicting ideas, integrity and universality, "have shaped the development of the law of reservations." [179]

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[171] Id. at 376.

[172] Baylis, supra note 26, at 302.

[173] Id. at 302-03.

[174] Id. at 303.

[175] Id.

[176] Id.

[177] Piper, supra note 14, at 296.

[178] Id. at 296.

[179] Id. at 297.

The expanded scope and complexity of the international community and the greater reliance on the use of multilateral treaties as a source of international law have mandated greater flexibility in allowing states to formulate reservations. A law of reservations that allows a state to alter or amend the treaty encourages greater participation in the agreement and thus gives the treaty law a greater consensual force. The alteration of a treaty through reservations, however, acts to minimize the total depth of obligation and may undermine the treaty's purpose. This balancing between universality and integrity of the treaty has made the law of reservations one of the most complex and difficult areas of treaty law. [180]

The current reservation system has proven inadequate in dealing with the competing values of universality and integrity. This is particularly true in the case of CEDAW. Because CEDAW adopted the approach championed by the ICJ and the Vienna Convention without implementing any other safeguards against broad and incompatible reservations, it necessarily worked under the presumption that universality was the ultimate goal of treaty law. The ICJ decided in the Genocide Convention Case (as codified in the Vienna Convention on the Law of Treaties) to allow a state to remain a party to a treaty and have the benefit of a reservation, regardless of the fact that other states rejected the reservation. [181]

Furthermore, the Vienna Convention on the Law of Treaties effectively eliminated any difference between accepting and **[*624]** rejecting a reservation. [182] If a state accepts the reservation, the reserved clause is modified for both parties. [183] If a state objects to the reservation but does not challenge that state's ratification of the treaty, then the reserved provision does not apply between the states. There is no difference, therefore, between accepting a reservation and objecting to a reservation. "If a state objects to the reservation, the reserved clauses do not take effect for both parties." [184] A state that challenges another party's reservation as being against the object and purpose of the treaty by way of precluding entry of the treaty between them cannot enforce any of the treaty provisions against that state. [185] Oddly, only by accepting the state's reservations can one enforce any of the treaty provisions. [186]

The ICJ/Vienna Convention approach is not as compatible with multilateral human rights treaties as it may be with other multilateral treaties. Multilateral treaties are based on "corresponding reciprocal obligations between the state parties to the treaty." [187] This is based on traditional contract principles, in other words, negotiation. [188] All parties can determine what they promise to perform as long as it is done in good faith, which means that a state is only bound to that to which it has consented. [189]

Human rights treaties are different from contract-like treaties because there are no direct advantages or disadvantages to the state parties. There is no direct advantage to the state because the actual beneficiaries of the treaty are individual citizens; there is "no direct harm to a state party if another state promulgates a reservation against some aspect of the [treaty]." [190] The usefulness of the ICJ/Vienna Convention approach to reservations, therefore, is limited when states do not have a direct incentive to police state reservations. The ICJ/Vienna

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[180] Id. at 297.

[181] Baylis, supra note 26, at 289.

[182] Id. at 294.

[183] Id.

[184] Id.

[185] Id.

[186] Id.

[187] Id. at 287-88.

[188] Id.

[189] Id.

[190] Id. at 289.

Convention's use of the object and purpose test could preserve the integrity of treaty provisions, but not if states fail to judge and object to reservations. Under CEDAW no state has felt compelled to bring the issue to arbitration or before the ICJ, and relatively few states have formulated objections. [191] **[*625]** The incompatible reservation does not adversely affect the other state parties, whereas risking good foreign relations through the process of bringing a complaint for adjudication might. Even when considering those states that have brought objections, therefore, one notices that the objections have been inconsistent. "For example, Canada objected to the Republic of Maldives' reservation to the Women's Convention, but took no action with respect to a subsequent and comparable reservation by Kuwait." [192] Arguably, Canada, like many state parties, has a vested interest in protecting its relationship with an oil-producing country like Kuwait.

A lenient standard toward reservations to human rights treaties may prove useful for promoting universality, particularly when human rights treaties address controversial subject matter or potentially threaten state sovereignty. Because most human rights treaties try to set normative standards for the recognition of civil, political, or socio-economic rights and the enforcement of those rights depends on a state party's own initiative of implementing the standards into their domestic legislation, allowing compromising reservations to a human rights treaty undermines its integrity to the point that it might destroy the purpose and value of the treaty.

B. Dealing With Reservations to CEDAW

Many of the reservations to CEDAW, including reservations to Articles 2, 5, 7, and 16, have allowed states to avoid any obligation to change domestic legislation and are broad enough to be considered against the object and purpose of CEDAW.

1. CEDAW Articles 2, 5, 7, and 16

Articles 2, 5, 7, and 16, along with several other articles, have been the subjects of the majority of reservations to CEDAW. [193] These articles tend to address sensitive issues with regard to state sovereignty or cultural and religious practices. Article 2 provides that state parties "agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." [194] It also addresses discrimination against women in the public sphere, whether in national or local governments or in business or other organizations, and it requires states to change their national **[*626]** constitutions in order to assure women legal equality. [195] Article 7, like Article 2, primarily deals with women's rights in the public sphere; it ensures women the right to vote in elections, to run for public office, to participate in building and enforcing government policy, and to participate in organizations outside of the government. [196]

Article 5(a) mandates the modification of "social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." [197] Article 5(b) also requires that states educate citizens to recognize the equal role and responsibility both parents have in the rearing of children, which is also intricately connected with cultural values. [198]

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[191] Schabas, supra note 122, at 90.

[192] Id.

[193] See text infra Part II.C.1 for a discussion of state reservations to CEDAW.

[194] Convention on the Elimination of All Forms of Discrimination Against Women, supra note 83, at 16 (emphasis added).

[195] Id.

[196] Id. at 17.

[197] Id.

[198] Id.

Article 16 addresses marital and family issues. Article 16(1)(a)-(h) provides that states must ensure women and men equal rights to marry, to exercise free and full consent, to dissolve marriage, to make parental decisions, to decide on the number and spacing of children, to act as guardian to their children, to choose a profession, to own and manage property, etc. [199] Article 16(2) also outlaws the marriage of children and compels state parties to adopt legislation to set a minimum marital age requirement in order to prevent child betrothals. [200]

2. Explanation of State Reservations

There are several common state reservations to CEDAW. For example, many states have relied on Article 29(2), which expressly allows states to opt out of submitting disputes concerning the interpretation or implementation of CEDAW to arbitration or the ICJ. [201] Several states, like Spain and Luxembourg, have limited the effect of Articles 2 and 7 by refusing to consider women for succession to the crown. [202]

[*627] More substantively, however, state parties to CEDAW have also made reservations on certain provisions to avoid conflict with the Islamic law of Shari'a. [203] For example, Libya made a general reservation citing that CEDAW cannot conflict with Islamic laws having to do with "personal status derived from the Islamic Shari'a." [204] Bangladesh reserved on Articles 2, 13(a), and 16(1)(c) and (f) because "they conflict with Shari'a law." [205] Egypt also reserved on Articles 2 and 16 in regard to marriage and family relations, though it stated that Shari'a "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." [206] India reserved on Articles 5(a) and 16, citing a policy of "noninterference in the personal affairs of any Community" and "[the country's] variety of customs [and] religions," [207] while Iraq reserved on Article 2 without offering any explanation at all. [208]

Julie Minor maintains that:

All of these reservations have been accepted, even though they appear to conflict with the object and purpose of the treaty. The purpose of the Convention is the elimination of discrimination, and all of these reservations clearly hinder that objective. In essence, they permit discrimination. The Convention allows states to commit themselves to women's equality, while simultaneously admitting that they have no intention of granting women equality. [209]

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[199] Id. at 20.

[200] Id.

[201] Convention on the Elimination of All Forms of Discrimination Against Women, supra note 83, at 23.

[202] Convention on the Elimination of All Forms of Discrimination Against Women, Spain Ratification, Jan. 5, 1984, 1351 U.N.T.S. 364; Convention on the Elimination of All Forms of Discrimination Against Women, Luxembourg Ratification, Feb. 2, 1989, 1527 U.N.T.S. 372.

[203] Bharathi Anandhi Venkatraman, Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?, *44 Am. U.L. Rev. 1949, 1951-52 (1995).* Shari'a is Islamic religious law based on the Koran. Katarina Tomasevski, Women and Human Rights 124 (1995).

[204] Convention on the Elimination of All Forms of Discrimination Against Women, Libya Accession, May 16, 1989, 1527 U.N.T.S. 478.

[205] Convention on the Elimination of All Forms of Discrimination Against Women, Bangladesh Accession, Dec. 6, 1984, 1379 U.N.T.S. 336.

[206] Convention on the Elimination of All Forms of Discrimination Against Women, Egypt Ratification, July 16, 1981, 1249 U.N.T.S. 125.

[207] Convention on the Elimination of All Forms of Discrimination Against Women, India Ratification, July 30, 1980, 1249 U.N.T.S. 129.

[208] Minor, supra note 3, at 144-45.

[209] Id. at 145.

Kristin Choo adds that though France, Bolivia, and Madagascar are members of CEDAW, they have national laws that ban women from working night shifts. [210] Similarly, Japan and Mexico have domestic laws that mandate a specific waiting period after divorce **[*628]** before women can remarry, while men have no such limitation. [211] Children in countries like Bangladesh and Kenya can receive their citizenship status from their father but not their mother, [212] and Jordan allows reduced penalties for "honor killings," where male relatives murder women for "alleged sexual offenses." [213]

The reservations to Article 2 are particularly disconcerting. In 1998, the head of the CEDAW Committee, Salma Kahn, stated, "when you enter a reservation on article 2, you are violating and nullifying the whole concept and sense of the Convention." [214] Article 2 arguably forms the crux of CEDAW by essentially requiring the ratifying states to "incorporate the convention into domestic policy." [215] Generally, international law does not recognize domestic law as an adequate excuse for failing to comply with an international treaty. [216]

Many states have counter-argued that CEDAW represents a Western attack on Islamic countries; in fact, some have argued that Western secularism or globalization has resulted in the reestablishment of Shari'a in both public and private law. [217] Furthermore, because most of the broadest reservations to CEDAW are ascribed to Shari'a, proposals to limit reservations have been objected to as being anti-Islamic. [218] As a result, even so-called Third World states that have objected to reservations in the past have become less open about their criticism, and divisions between the two camps of member states have deepened. [219]

3. Inadequacy of the CEDAW Reporting System

The reporting system under CEDAW, while encouraging contracting parties to articulate a policy that raises the status of **[*629]** women, has largely failed to convince states to remove their reservations to CEDAW.

The CEDAW Committee has limited powers to enforce the provisions under the treaty. In particular the CEDAW Committee lacks sufficient time and reliable information and suffers a geographic disadvantage. Article 20 limited the Committee to two weeks to consider country reports. [220] This was an "overzealous effort [by the United Nations] to reduce expenditures;" however, CEDAW was the only human rights treaty subjected to such

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[210] Kristin Choo, Unequal Under Law: In Many Nations, Laws Sanction Discrimination Against Women, 86 A.B.A. J. 48, 50 (2000).

[211] Id.

[212] Id.

[213] Id. See also Venkatraman, supra note 203, at 1964. Venkatraman states that some reservations to CEDAW are not necessary to satisfy Shari'a. Reservations can be formulated more narrowly so that neither the object and purpose of CEDAW nor the fundamentals of Shari'a are compromised. Id.

[214] Thalif Deen, Women: Reservations Grow Over U.N. Women's Treaty, Inter Press Service, Mar. 15, 1998, available in LEXIS, News Library, CURNWS File.

[215] Valerie A. Dormady, Status of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1998, 33 Int'l Law. 637, 638 (1999).

[216] Venkatraman, supra note 203, at 1962.

[217] See Abdullahi An-Na'im, The Rights of Women and International Law in the Muslim Context, 9 Whittier L. Rev. 491 (1987).

[218] Katarina Tomasevski, Women and Human Rights 119 (1995).

[219] Clark, supra note 8, at 284.

[220] Convention on the Elimination of All Forms of Discrimination Against Women, supra note 83, at 22.

constraints. [221] Some commentators feel that these constraints prevented the Committee from examining the country reports thoroughly and meaningfully. [222] The reporting system is at least three years behind, and many states simply fail to file their report according to the system at all. [223] There is also no guarantee that the information in the country reports is even accurate. [224]

CEDAW is isolated geographically because it was placed in the smaller Vienna office instead of with the other human rights treaty bodies in Geneva. [225] Many feel that because of this separation CEDAW received less attention from the United Nations organs than it might have otherwise. [226] CEDAW also tends to suffer the brunt of international skepticism toward "second-generation rights." [227] Because CEDAW concerns itself more with about social and economic rights instead of purely civil and political, or first-generation rights, it sits lower in the hierarchy of United Nations-recognized human rights. [228] As Professor Byrnes explains, "there is a perception among the members of the Committee that it is the poor cousin of the human rights treaty bodies and is provided with technical and legal resources at a level far below that provided to the other treaty bodies." [229]

The Committee not only receives less in terms of resources and meeting time as compared to other bodies under the United **[*630]** Nations but it also lacks the power to interpret the substantive parts of the Convention. [230] The Committee has no "quasi-judicial powers enabling it to pronounce a State Party in violation of the Convention and to order an appropriate remedy;" its means of enforcement are limited to publicly reviewing country reports. [231] The Committee is also undermined in its unwillingness to issue formal recommendations, in part because it has no procedures for written comments on country reports. [232]

Additionally, the CEDAW Committee lacks any mandate or authority to independently determine whether a reservation goes against the object and purpose of the treaty. General Assembly and the United Nations Economic and Social Council (ECOSOC) statements imply that the CEDAW Committee is discouraged from criticizing reservations. [233] Some states argue that CEDAW should be under an even lesser standard than the Vienna Convention because CEDAW contains culturally sensitive provisions. [234] Furthermore, the United Nations Legal

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[221] Theodor Meron, Enhancing the Effectiveness of the Prohibition of Discrimination Against Women, *84 A.J.I.L. 213, 214 (1990).*

[222] Id.

[223] Minor, supra note 3, at 148-50.

[224] Id. at 149.

[225] Meron, supra note 2211, at 215.

[226] Id.

[227] Lisa A. Crooms, Indivisible Rights and Intersectional Identities or, "What Do Women's Rights Have to Do With the Race Convention?", *40 How. L.J. 619, 627 (1996).*

[228] Id.

[229] Byrnes, supra note 126, at 57.

[230] Minor, supra note 3, at 148-49. See also Laura A. Donner, Gender Bias in Drafting International Discrimination Conventions: The 1979 Women's Convention Compared with the 1965 Racial Convention, 24 Cal. W. Int'l L.J. 241 (1994).

[231] Byrnes, supra note 126, at 6.

[232] Minor, supra note 3, at 149-50.

[233] Clark, supra note 8, at 285-86.

[234] Id.

Advisor gave an opinion "that neither the Secretary-General, as depository, nor CEDAW has the power to determine the compatibility of reservations." [235]

Even though the CEDAW Committee has attempted to pressure states to remove reservations, they have no recognized authority to define the object and purpose of CEDAW, much less to set standards for reservations and invalidate reservations deemed incompatible. As a result, few states have removed their reservations, and the implementation of CEDAW provisions has been particularly discouraging in states with broad reservations. [236]

C. Alternative Methods to Deal with Reservations under CEDAW

1. Severing Reservations under General Comment 24

Establishing an independent committee or at least empowering the existing CEDAW Committee would allow the Committee to reject reservations contrary to the object and purpose of CEDAW without relying on the contracting parties.

[*631] The Committee can best evaluate and adjudicate disputes over state reservations because: 1) the Committee has jurisdiction to hear disputes under it; 2) the Committee likely knows more with regard to the relationships between CEDAW's member states; and 3) the Committee can provide constant oversight over the implementation of the treaty. [237] The Committee could simply ask the states to amend incompatible reservations, which would be an action similar to the reporting system. This goes one step further than the existing reporting system, however, because allowing the Committee to request that member states amend incompatible reservations gives the Committee the authority to judge the reservation. [238] The Committee can then use its powers of "dialogue, persuasion, and international embarrassment" to encourage the state to withdraw its reservation. [239]

If the Committee sets the standards for party reservations, states may have an incentive to raise objections without risking diplomatic or economic relations with the reserving country. States would have an objective standard to which they can point. Article 20 of the Vienna Convention "allows other factors, such as political ties and importance, to intrude on a state's analysis of a reservation's acceptability, biasing that state's individual determination." [240] In General Comment 24 the Human Rights Committee argued that because human rights treaties are not reciprocal, states do not have a legal interest or a need to object to another state's reservations. [241] The task of evaluating reservations, therefore, necessarily falls to the Committee. [242] Furthermore, for the Committee to meaningfully adjudicate state compliance with the treaty (through the reporting system), the Committee must be able to draw conclusions as to the reservation's compatibility. [243]

The International Law Commission appointed a Special Rapporteur, who concluded that human rights treaties were not exempt from the Vienna Convention, nor could global treaty committees alter the treaty regime without express consent of the state parties. [244] The Special Rapporteur, however, went on to say that human rights bodies could

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[235] Cook, supra note 2, at 708-09 (citing UN Doc. A/39/45, Report of CEDAW, 3d session, vol. II, Annex III at 55 (1984)).

[236] Minor, supra note 3, at 144-50.

[237] Baylis, supra note 26, at 314.

[238] Id. at 318.

[239] Id.

[240] Hylton, supra note 1, at 438.

[241] Baylis, supra note 26, at 312-13 (quoting General Comment 24, P 1, 18).

[242] Id. (quoting P 18).

[243] Id.

[244] Id. at 323.

evaluate reservations for the purpose of **[*632]** fulfilling their functions under the treaty. [245] This statement aids CEDAW because the ICCPR Human Rights Committee claimed that General Comment 24 was necessary to fulfill its duties and functions under the treaty body. [246] The Special Rapporteur, however, stated that treaties depended on state consent and that unilateral severance of reservations went against the body's authority and international law. [247]

Elena Baylis raises the argument that adopting a General Comment 24 procedure may discourage states from ratifying the treaty in the first place. [248] Moreover, the CEDAW Committee may lack the power to establish itself as the authority to deal with reservations. [249] The Committee may have authority by virtue of Article 20(3) of the Vienna Convention, which states that international organizations can decide reservations to its main instrument; [250] however, others argue that Article 20 refers to the charter of an international organization, which has further reaching powers. [251] The primary purpose of CEDAW is not to give effect to the Committee, but to establish norms regarding the particular aspect of human rights; [252] that is, the Committee is subordinate to CEDAW, not the other way around. [253] Professor Byrnes, however, states that even though the CEDAW Commission does not have any formal power to interpret CEDAW, it interprets it anyway through the course of its work. [254] An attempt by the Committee to interpret CEDAW so as to determine the compatibility of a reservation does not have to be a unilateral assertion of power over the states but can be worded so that it is within the Committee's power to make general recommendations and suggestions. [255] Both the Committee under the Race Convention and the Human Rights Committee already do this. [256]

The Human Rights Committee, in an acceptance-by-acquiescence argument, stated that it had the requisite authority to adjudicate **[*633]** reservations because state parties to CEDAW have not really challenged General Comment 24. [257] Regardless of this, however, no precedent exists for the Committee to sever state reservations to the Covenant without consent, otherwise states would have had notice of the possibility of being held to provisions that might jeopardize their national sovereignty. [258] Thus, General Comment 24 arguably undermines state consent to be bound to the treaty. [259]

The Committee under the ICCPR, like the CEDAW Committee, was given feeble powers. [260] The Committee can only criticize state parties that fail to comply with the Covenant. [261] By enacting General Comment 24, the

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[245] Id. at 323-24.

[246] Id.

[247] Id.

[248] Baylis, supra note 26, at 314.

[249] Id.

[250] Vienna Convention on the Law of Treaties, supra note 25, at 337; Baylis, supra note 26, at 297.

[251] Baylis, supra note 26, at 297.

[252] Id.

[253] Id.

[254] Byrnes, supra note 126, at 46.

[255] Id. at 46-47.

[256] Id.

[257] Baylis, supra note 26, at 299.

[258] Id. at 305.

[259] Id.

[260] Id. at 315.

Committee is trying to give itself the power to unilaterally sever a state's reservation to the treaty. [262] On the other hand, even if the Human Rights Committee had the authority to sever state reservations, General Comment 24 almost seems useless because the Committee lacks the power to enforce the reserved provision anyway. [263]

Other alternatives, such as asking the ICJ for an advisory opinion, amending CEDAW, circulating reservations, or adopting the model used in the Convention on the Elimination of Racial Discrimination may prove more effective for dealing with reservations to CEDAW.

2. Advisory Opinions under the ICJ

In order to avoid criticism for surpassing their allotted authority if they did indeed adopt a General Comment 24 system, the CEDAW Committee could petition the ICJ to issue an advisory opinion on the power of the Committee to evaluate reservations. [264] The question remains, however, whether states would abide by the ICJ decision in the event it ruled that the Committee has the authority to evaluate and take action against state parties' reservations. [265]

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3. Amending CEDAW and the Optional Protocol

CEDAW could be amended to expressly give the Committee power to adjudicate reservation disputes, while simultaneously meeting the requirements of state consent and notice. The state parties, not the CEDAW Committee, however, must propose amendments. An amendment to CEDAW may take years to accomplish, and questions exists whether adequate support could be gained at all. [266] The ICCPR provides for amendments if they are proposed by one-third of the parties and accepted by two-thirds; however, the amendments are only binding on the parties that accept them. [267] They would most likely, therefore, only affect those countries that have compatible reservations to begin with.

More probable than an amendment to CEDAW is the adoption of the Optional Protocol. The Optional Protocol gives individuals and nongovernmental organizations the ability to complain to the CEDAW Committee about their country's failure to comply with CEDAW. [268] The state in question must be a party to the Protocol. [269] The Protocol gives the Committee additional powers. It can request states to take interim measures to protect the alleged victims; it can demand statements from the states and respond with comments and recommendations. [270] Within six months the state must submit a report indicating any actions it has taken in response to Committee recommendations. [271] The Committee may also receive information from outside sources, such as NGOs. [272] If

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[261] Id.

[262] Id.

[263] Id.

[264] Id. at 316-17.

[265] Id. at 317.

[266] Id.

[267] Id. at 320.

[268] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 109, 54th Sess., at 3, U.N. Doc. A/Res/54/4 (1999) [hereinafter Optional Protocol]; see also Dormady, supra note 5, at 642.

[269] Optional Protocol, supra note 268, at 3.

[270] Id. at 4.

[271] Id.

[272] Id. at 4-5.

the Committee decides it is necessary, it could ask the state to cooperate in an investigation and again make findings and give recommendations. [273] The CEDAW Committee could also use the provisions under the Optional Protocol to review state reservations and recommend ways to amend or remove those reservations that are contrary to the object and purpose of CEDAW. Article 10 limits the effectiveness of the Protocol, however, because it allows ratifying states to not recognize the Committee's competence to investigate **[*635]** complaints and to make findings and recommendations. [274] On the other hand, Article 17 of the Optional Protocol helps to avoid some of the problems associated with CEDAW itself by disallowing reservations. [275]

Under the Optional Protocol, individuals or NGOs can bring state reservations to the attention of the Committee, and the compatibility of those reservations and the effects they have on the women within the state can be analyzed through the reporting and investigation procedures. The Protocol's main limitation is that it still fails to provide the Committee with any sanctioning power. [276] Only public embarrassment may compel state action. [277] As of this writing, seventy-three nations have signed the Optional Protocol and thirty-three states have ratified it, as compared to forty-two signatories and four ratifications just one year earlier. [278] The Optional Protocol entered into force on December 22, 2000, when it received its tenth ratification. [279]

4. Alternate Reservation Regime under the Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of Racial Discrimination (CERD) is considered "the most effective international human rights instrument in existence today." [280] Under CERD reservations can be deemed incompatible and rejected as invalid with a two-thirds vote by the state parties. [281] The original plan proposed for CEDAW included a provision similar to CERD's reservation procedures. [282] Laura Donner argues that CEDAW would have been more effective if its drafters had not failed to include the stronger provisions of CERD. [283] CERD's procedures have yielded more positive results; with 128 state parties, only four reservations exist that modify obligations under the treaty. [284] Furthermore, CERD has procedures **[*636]** for individual complaints built into the treaty. [285] Article 14 states that individuals can file a complaint with the Committee, which can then make comments and suggestions. [286] This provision entered into force in 1982. [287]

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[273] Id. at 5.

[274] Id.

[275] Id. at 7.

[276] Choo, supra note 210, at 50.

[277] Id.

[278] United Nations, Division for the Advancement of Women, Optional Protocol Enters into Force 22 December 2000, at http://www.un.org/womenwatch/daw/cedaw/ sigop.htm (last visited Mar. 31, 2002).

[279] Id.

[280] Donner, supra note 230, at 241.

[281] Clark, supra note 8, at 287.

[282] Cook, supra note 2, at 675-76.

[283] Donner, supra note 230, at 242.

[284] Id. at 252.

[285] Theodor Meron, The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination, *79 A.J.I.L. 283, 313 (1985).*

[286] Id.

[287] Id.; see also Connie de la Vega, Civil Rights During the 1990s: New Treaty Law Could Help Immensely, *65 U. Cin. L. Rev. 423, 440-41 (1997).*

As evidenced by the results of CERD, requiring a two-thirds majority may not only help formulate a more concrete standard for the object and purpose test by way of establishing a line of precedent, but it may also prevent a reservation from being treated differently because of foreign policy concerns and may prevent fragmentation of the treaty along political lines. [288] The two-thirds vote may help states find an incentive to object to incompatible reservations because the state will be able to take refuge in the number of other states that also object to the reservation in order to avoid any politically negative repercussions that arise from objecting to another state's reservations. [289]

IV. Conclusion

The historical development of treaty law has moved from the unanimity rule to a reservation regime that places universal acceptance of multilateral treaties above preserving the integrity of each individual document's provisions. The ICJ's decision in the Genocide Convention Case and the Vienna Convention together comprise the modern approach to reservations. The ICJ abolished unanimous consent to state reservations and held that states could ratify a treaty notwithstanding the existence of objectionable reservations. The ICJ also established the object and purpose test as a standard for states to object to reservations. The Vienna Convention adds that the failure to object to reservations is tantamount to accepting the reservation through silence.

CEDAW adopted the ICJ/Vienna Convention approach to deal with reservations by its state parties. Given the large number of broadly stated reservations to CEDAW, however, the ICJ/Vienna Convention approach has jeopardized CEDAW's integrity. Similarly, the CEDAW reporting process has been inadequate, due to **[*637]** the Committee's lack of resources and legal authority, in convincing states to limit or withdraw their reservations.

For CEDAW to accomplish its purpose of eliminating discrimination against women, it must adopt procedures that will more effectively deal with state reservations by rejecting reservations that are overly broad or against the object and purpose of the treaty. This is especially true of those reservations to key CEDAW provisions that vividly show the reserving state's refusal to implement the treaty's provisions in its domestic legislation. The current procedures under CEDAW have failed to provide member states with a firm standard by which to judge state reservations, which has resulted in few and inconsistent objections to reservations.

Adopting an approach similar to the Human Rights Committee's General Comment 24 or the ECHR's decision in the Belilos Case would allow the CEDAW Committee to sever reservations that go against the treaty's object and purpose. The CEDAW Committee, however, would undoubtedly suffer criticism for exceeding its mandate and authority, and such action may induce states to leave the Convention altogether.

More promising alternatives include amending CEDAW to implement reservation procedures similar to those found in CERD, where reservations can be deemed invalid with objections by two-thirds of the state parties. Mimicking CERD, along with the recent adoption of the Optional Protocol, would give the Committee more power in terms of interpreting CEDAW and investigating state compliance by allowing individuals and groups to bring complaints to the CEDAW Committee. This would effectively create two separate methods to condemn incompatible reservations: 1) through objections by state members to CEDAW and 2) by determination of the Committee.

One can hope that such an approach will help states to not only develop a standard by which to judge reservations but also give states an incentive to object to reservations. Even if invalidating state reservations does not solve the problem of discrimination, at least the state could not point to its ratification of CEDAW to rebut criticism of its human rights record. Furthermore, though reservations may persist, perhaps the increased scrutiny and public embarrassment would provide enough incentive for states to at least restrict their reservations through greater specificity and time limits. If a state maintains a reservation but alters it from a general denial of rights to a granting of some of the rights listed in CEDAW, such as, for example, increasing a woman's ability to own **[*638]** property or implementing a minimum age for marriage, it would be an improvement from the status quo. In other words,

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[288] Hylton, supra note 1, at 446-47.

[289] Id.

CEDAW needs to adopt these additional procedures to make it impossible for states to get the political goodwill of treaty membership without reciprocally obligating themselves to essential treaty provisions.
