



CONSEQUENCES OF RESERVATIONS TO INTERNATIONAL HUMAN RIGHTS TREATIES, CONCLUDED IN THE AFTERMATH OF WWII¹

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Abstract. Contemporary international human rights law and the establishment of the United Nations have important historical antecedents. Concern over the protection of certain minority groups was raised by the League of Nations at the end of the First World War. However, the League floundered because the United States refused to join and because the League failed to prevent Japan's invasion of China and Manchuria and Italy's attack on Ethiopia. It finally died with the onset of the WWII. The idea of human rights emerged stronger after WWII. The extermination by Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities horrified the world. With the beginning of the UN, countries started ratifying various human rights instruments that were supposed to protect individuals. Unfortunately, significant number of countries do not want to be bound by the international treaties to the full extent, therefore they make crucial reservations that create danger to the protection of human rights. In this article the author analyses specific reservations that are being done to selected international human rights treaties and is looking for the answer whether the regime of reservations described in Vienna Convention on Law of Treaties can be fully applied to those human rights treaties. The author also discusses if the reservations that are incompatible with the object and purpose of the treaty can be made and what consequences they may bring. For this reason the author describes the practice of the state parties under the Convention on the Rights of the Child. This treaty was chosen not only because it lays down the most significant principles of the protection of children rights but also due to the great number of reservations made to the fundamental provisions of this treaty. The regulation laid down in Vienna Convention on the Law of Treaties creates difficulties for the state parties and withdrawal of reservations seems to be more problematic in reality than it is in theory. In order to find the solutions, author analyses whether the Vienna Convention on the Law of the Treaties regime works properly within the mechanism of making reservations to the human rights treaties.

Keywords: human rights, reservations, Second World War, harmful practice, object and purpose of the treaty, Vienna Convention on the Law of Treaties, Convention on the Rights of Child

Introduction

Even though many years have passed and various international human rights instruments were signed after the Second World War (hereinafter - WWII), the situation regarding human rights seems to be tentative even nowadays. Soon after WWII governments then committed themselves to establishing the UN (hereinafter – UN), with the primary goal of bolstering international peace and preventing conflict. People wanted to ensure that never again anyone would be unjustly denied life, freedom, food, shelter, and nationality. “The essence of these emerging human rights principles was captured in President Franklin Delano Roosevelt’s 1941 State of the Union Address when he spoke of a world founded on four essential freedoms: freedom of speech and religion and freedom from want and fear. The calls came from across the globe for human rights standards to protect citizens from abuses by their governments, standards against which nations could be held accountable for the treatment of

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those living within their borders. These voices played a critical role in the San Francisco meeting that drafted the UN Charter in 1945” (Shirman, 1993).

One of the major issues and threats to integrity of human rights treaties is reservations to those international instruments. Reservations have sparked intense discussions for decades, often reflecting very conflicting views, both in doctrine and practice of international law.

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 by some particular provisions of an international treaty which they do not give their consent” (Yamali, 2008).

On the other hand, international treaties, in particular the multilateral ones is the result of a crucial need to regulate the relations between states and to provide stability and 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 (Shaw, 2008).” 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 (I.C.J. Reports, 1951). “The Reservations to the Genocide Convention Advisory Opinion established new foundations in the practice of reservations to all multilateral treaties that protect 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 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.” (Fitzmaurice, 2006)

The other important feature while speaking about reservations has to be taken into consideration as well. The question has been always raised whether the regime of 1969 Vienna Convention on the Law of Treaties (hereinafter - VCLT) is applicable to the scope of the human rights documents. Even though the human rights treaties set the rules for the protection of individuals, first the states have certain obligations towards each other while entering the treaties. Reservations made by the state parties have certain influence not only on individuals of those states but also to the rest of the treaty members. While drafting the guidelines “Guide to practice on Reservations to Treaties”, International Law Commission (hereinafter – ILC) expressed their position that VCLT regime is applicable to all treaties, including those regarding human rights.

In this article the author will further analyse whether VCLT regime is sufficient enough for international human rights treaties. It should be noted that the biggest number of reservations are made to the international UN treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter - CEDAW), International Covenant on Civil and Political Rights (hereinafter - ICCPR), International Covenant on Social and Economical Rights (hereinafter - ICSEER), UN Convention on the Rights of the Child (hereinafter - CRC), UN Convention on the Rights of Persons with Disabilities (hereinafter – CRPD) and others. The author of this article have chosen to analyse the practice of making reservations under the CRC because the consequences in those countries that make reservations are crucial to individuals, especially to the most vulnerable group of people – women and children.

1. The regime of reservations under the Vienna Convention on the Law of Treaties

In this part of the article the author will analyse the practical problems the system of reservations cause to human right treaties in particular those relating to issues affecting children and young women. Important question at this

point arises whether the human rights treaties are of different character in the sense of making reservations and if the VCLT approach can be applied to them to full extent. All these questions will be analysed in this part as well.

It should be noted that the system of reservations causes certain problems both in 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)” (Korkelia, 2002). These problems proved to be particularly difficult to be solved in human rights treaties where reservations raise many questions concerning their permissibility and/or compatibility with the object and purpose of a treaty.

Even though the VCLT provides certain criteria for reservations, 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” (Shawn, 2008). While excluding certain provisions, states may agree to be bound by a treaty, which otherwise they might reject entirely.

Under Article 19 of VCLT, a state has 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. E.g. “in the Human Rights Committee’s General Comment No 24, 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 specifically 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.” (Dixon, 2000)

Under Article 20 (2) of the VCLT, 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 entirety 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.” (Dixon, 2000)

“Acceptance of one state’s reservation by another state means that the multilateral treaty comes into force between the members of the treaty who 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.” (Bowett, 1977) The author agrees with M. Dixon’s view that 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 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.

The 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 second question is whether the consequences of reservations made to human rights treaties are different. Even though in the “Guide to practice on Reservations to Treaties” the ILC expressed its position that VCLT regime was for all treaties, including human rights ones, it should be noted that 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”. (Korkelia, 2002) In other words “individuals are the recipients of duties

imposed on states”. (Yamali, 2008) The author upholds the position that was also expressed in Human Rights Committee’s Comment No. 24 (Human Rights Committee, General Comment 24, 1994) that VCLT regime is not enough to preclude invalid reservations to human rights treaties.

The idea behind this exception to the principle of reciprocity that was mentioned in Comment No. 24 may be generalized. In this context, the distinction between *traité s-contrats* and *traité s-lois* may be of some relevance. Wherever the purpose of the treaty goes beyond regulating purely bilateral *inter se* relations between the parties, the reciprocity principle may easily compromise the object of the treaty. This is notably the case when the obligations contained in the treaty form an inseparable whole, which cannot be divided into bilateral parts. Apart from human rights treaties, this applies for treaties within the area of international environmental law or arms control. (Dorr & Schmalenbach)

Reviewing reservations made to human rights treaties, it is clear that many have not been assessed by states as contemplated by the Vienna Convention rules, particularly those lodged in the earliest days of the human rights treaty movement. Reservations of questionable or obvious invalidity remain attached to human rights treaties primarily because the obligations *inter se* are not affected by an objection pursuant to Article 21. (McCall-Smirth, 2014)

Moreover, speaking about human rights treaties, the debate regarding reservations is always on. Some scholars argue that 1969 Vienna Convention regime is for all the treaties and the ILC Guidelines also could be applied to them. However, in author’s view, it should be analysed what is the main initiative and how this document could be addressed to human rights treaties. As noted by the original commentary on these Guidelines, “[p]ellet uses the three elements most often deemed indicative of a human rights treaty – indivisibility, interdependence and interrelatedness – in an attempt to strike a delicate balance between the right that is the subject of the reservation and the effect that a reservation to the provision produces, including the impact of the reservation. In a nutshell, states should consider the fact that a human rights treaty is a human rights treaty. This draft guideline specifically addressing reservations to human rights treaties was replaced by final guideline 3.1.5.6, which expunged direct reference to human rights treaties opting, instead, for more general terms and urging consideration of the specifics of the treaty under review. Bearing in mind the vast number of reminders about the indivisibility, interdependence and interrelatedness of human rights as well as the importance of the rights addressed and the negative effect that certain reservations might produce, the guidelines are not particularly instructive even if well-intended”. (McCall-Smirth, 2014)

Having in mind what was mentioned above, it seems that human rights treaties should be analyzed separately from other treaties, especially those that have being reserved many times. A good illustration of highly reserved international treaty is Convention on the Rights of the Child. After WWII, countries decided to pay more attention to the human rights sphere. It has to be observed that the six grave violations against children during times of armed conflict, enumerated by the Security Council in its resolutions, form the basis of the Council’s architecture in protecting children during war³. The worldwide UN Monitoring and Reporting mechanism provides solutions in order to gather evidence of grave violations against children in reporting to the Security Council. (Office of the Special Representative of Secretary General for Children and Armed Conflict, 2013)

The question is why then so many countries made numerous reservations to human rights treaties if this area is one of the most important in international community? Do the states raise their own interests over human beings? The answers could be given only after analyzing the states’ practice in a narrower way.

2. Relevant problems of implementation of the CRC

³ Those violations include recruitment and use of children; killing or maiming of children; sexual violence against children; attacks against schools and hospitals; abduction of children; denial of humanitarian access. Those violations are the main ones in armed conflict but it should be noted that some are important in peaceful time as well.

The opportunity to adopt CRC was first raised by the government of Poland in 1978. For next 10 years, UN Member States worked in a UN Commission on Human Rights (now the Human Rights Council) group in order to draft the CRC text. The Convention was adopted by the UN General Assembly after a decade of negotiations in 1989, and entered into force in 1990. (Convention on the Rights of the Child, 1989)

Nearly all states of international community are state parties the CRC, making it a strong tool for holding governments accountable on human rights issues.

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". (Schabas, 1996)

Some argue that "instead of helping children, ratification of the CRC may serve as a facade for governments that 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". (Blanchfield, 2011)

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). (UNFPA, 2011) Even though those problems are not new, they are still relevant. These harmful practices will be analysed later in the next chapter in the context of reservations made to the 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." (Hashemi, 2007) Moreover, Article 51 of the CRC allows making reservations to the CRC, however noticing that the reservation incompatible with the object and purpose of treaty shall not be permitted. As the analysis of specific reservations shows, not all of the state parties are willing to follow this rule. The harmful practices will be analysed in this article as well.

3. Specific reservations to CRC

In this chapter of the article the author will analyse the reservations made to the CRC. Most of them are based on Shariah or Islamic law that some Muslim states have entered to. These reservations either affect the entire regime of the treaty (General Shariah Based Reservation) or are made to its specific articles (Specific Shariah Based Reservation). All fifty-seven Muslim states are signatories to the CRC, including the twenty-two states that entered reservations or declarations. Algeria, Djibouti and Kuwait have declarations on the CRC. 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". (Hashemi, 2007) 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". (Committee on the Rights of the Child, 1996)

“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 girls, young women such as early marriage, female genital mutilation and others.” (Krivenko, 2009) A number of articles within the CRC hold relevance to child marriage. Article 3 states that 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. The reservations to CRC that will be analysed further are still relevant issue for the whole international community. In the author's view, harmful practices against children are closely linked to the consequence of the reservations made by states based on the cultural aspects.

There should be some examples mentioned in the context of reservations that are incompatible with object and purpose of the treaty. Thailand became signatory of the CRC with a reservation. Article 22, Section 1 of the CRC states, “State Parties shall take measures to ensure that refugee children receive protection and assistance in the enjoyment of their rights and in other human rights to which the said States are Parties.” Additionally, Article 22, Section 2 mandates that nations to cooperate with UN organizations to aid refugee children in reunifying with their families. A reservation is a declaration made by a state that enables it to accept a treaty as a whole with the possibility not to apply certain provisions. Thailand's reservation provided that it would deal with child refugees according to its own policies and domestic laws. (Collins, 2014) This example shows that state parties often want to leave an opportunity to apply only those provisions that are comfortable for them (even though they can be incompatible with the essence of the treaty and prohibited under international treaty law norms).

As to the reservations made to the whole CRC certain issues have to be noted. Firstly, such countries as the Islamic Republic of Iran “reserve the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect”. (UN, Treaty Series, vol. 1577, 1993) The other state parties made objections stating that “this reservation poses difficulties for the States Parties to the CRC in identifying the provisions of the CRC which the Islamic Government of Iran does not intend to apply and consequently makes it difficult for States Parties to 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.”

The analysis of this practice gives the impression that most objecting states are making perfunctory objections with no discernible policy. The aforementioned perception confirms “the observations of the Human Rights Committee, set forth in its General Comment No. 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”. (Schabas, 1996)

4. Harmful practices as the consequences of reservations

The reservations that are being made to the essence of the CRC bring consequences as follows. Firstly, the reserving states can justify themselves while violating the provision of the CRC arguing that this norm of the CRC is in conflict with national law, local customs, therefore cannot be applied. Secondly, objecting states do not provide strict position that those reservations that are incompatible with the object and purpose of treaty must be withdrawn. Obviously, the objecting states lack will to say that reservations could be the main cause of harmful practice in the aforementioned countries. Such harmful practices as the consequence of invalid reservations will be analysed further.

To begin with, it's worth mentioning that: "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." (UN Committee on the Elimination of Discrimination Against Women (CEDAW), 1994) According to the sources that were analysed, 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. E.g. "[i]n 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 assessment found that in Latin America and the Caribbean, 29 per cent of women aged 15 to 24 was married before the age of 18." (Secretary-General, 2006) Those numbers show a sad situation all over the world, especially in Asian and African regions.

"A forced marriage is one lacking the free and valid consent of at least one of the parties." 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. Recent European studies 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." (Kleinbach, 2003) "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." (Guidance for Education Professionals, 2005)

"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." (Secretary-General, 2008). 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." (Thomas, 2009) According to C. 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". (Thomas, 2009)

It should also be noted that such conventions as the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (hereinafter - The Convention on Consent to Marriage), as well as the CEDAW, contain all three principles articulated above. They require the consent of both 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 a 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". (Thomas, 2009) Therefore, the countries are free to set a minimum age of marriages. Per the author's view, those practices have negative impact on human rights violations.

Although the 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". (The Convention on the Rights of the Child, 1990) 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 a 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 parliaments 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.” (Thomas, 2009) 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 deal with the 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.” (UN Children’s Fund, 2006) In response to the practice of forced marriage of the girl child, human rights treaty bodies have requested states to raise 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 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”. (Human Rights Committee, 1990) 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 the CRC does not cover directly. Therefore the aforementioned acts are *lex specialis* with the CRC and help to reduce above-mentioned harmful practice.

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.” (Council of Europe: Parliamentary Assembly, 2001)

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 countries, 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 honor crimes.” (Rude-Antoine, 2005) The protection of these abuses is formulated in the CRC as well. Therefore, states making reservations to the whole treaty leave the loop to the aforementioned crimes.

Another harmful practice made to 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.” (General Assembly, 1979) 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 standard of health”, as laid down in article 24 (paras. 1 and 3) of the CRC.” (Rehman, 2007)

One of the main forms of discrimination 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 CRC. 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“. (UN, Treaty Series, vol. 1577, 1993) 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 the CRC.

It also should be mentioned that some states such as Qatar, People’s Republic of China, Egypt, and Djibouti have withdrawn certain reservations. This fact clearly shows states’ reaction to the objections of other state parties and willingness to be bound by the provisions of the CRC.

The analysis 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. The harmful practices against children 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 while giving objections to the reservations should formulate them in a stricter manner and express their strong position how those reservations violate object and purpose of the treaty and should try to convince that the reserving states have to withdraw immediately.

Conclusions

1. The author of this article upholds the position that VCLT regime is not enough to preclude invalid reservations to human rights treaties. As ILC drew the Guidelines regarding reservations to international treaties, it might seem that this document could be applied to human rights treaties and all the problems might be solved easily. The analysis of the practices and implementation of the CRC in different countries proved that the guidelines or another soft law document is not enough. The international community must take serious attention to the reserving countries while deciding whether the reservations are compatible with the object and purpose of the human rights treaties or not.
2. The ILC upholds the position that the Human Rights Committee should be responsible only for monitoring how the states implement the treaties and to leave the other responsibilities (including the determination of the validity of reservations) to member states of international treaties. The author considers that this position is not the most eligible taking into account the nature of human rights. Different states might have different interests and express their will by objecting to reservations or not. Therefore, the monitoring bodies should have greater role while deciding the validity of reservations to human rights treaties. However, monitoring bodies should decide only compatibility of reservations with the object and purpose of the treaty not going beyond this. Determination of the consequences of inadmissible reservations should be left to the Member States of the treaty.
3. Some of the reserving states while making reservations that are incompatible with the essence of the CRC, declare that the norms of the CRC will not be implemented in their national law system if they are in conflict with national law or even religion norms. This makes huge difficulties to ensure the protection of children’s rights in such countries. The solution might be found within the will of the Member States and the principle of severability. State Parties have two options towards reserving countries: either to exclude the reserving states from the parties of the treaty or try to persuade the states to withdraw invalid reservations after they become parties of the international treaties. In author’s view, for the effective implementation of international human rights instruments, the state parties must ensure that the new State Parties that made incompatible reservations must withdraw them after certain period of time.

4. The author stresses that the great attention has to be paid to the attitude of State Parties who are giving the objections to the reservations. While analyzing the objections of different countries, it should be noted that most of them have political or economic aspect and lack of strong will towards implementation of certain rights provided in human rights treaties. Therefore, the regime of objections to reservations made to human rights treaties should go beyond the VCLT regime. The objections must be formulated in a stricter manner and express strong position how those reservations violate object and purpose of the treaty and cannot be accepted.

References

- A short history of human rights. Retrieved from <https://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm>.
- Blanchfield, L. (2011). *The UN Convention on the Rights of the Child: Background and Policy Issues*. Congressional Research Service 7-5700.
- Bowett, D.W. (1977). Reservations to Non-Restricted Multilateral Treaties. *XLVIII British Yearbook of International Law*.
- Collins, J. (2014). The Convention on the Rights of the Child: Is Thailand to Blame? *Children's Legal Rights Journal*.
- Convention on the Rights of the Child, 20 November 1989, UN, Treaty Series, vol. 1577.
- Council of Europe: Parliamentary Assembly, Resolution 1468 (2005) on Forced Marriages and Child Marriages, 5 October 2005, 1468 (2005). Retrieved from: <http://www.refworld.org/docid/43f5d5184.html>.
- Dixon, M. (2000). *Textbook on international law* (4th ed). Oxford: Oxford University.
- Dorr, O., Schmalenbach, K. (2012). *Commentary of Vienna Convention on the Law of Treaties*. Berlin: Springer-Verlag Berlin Heidelberg.
- Fact Sheet No 23, Harmful Traditional Practices Affecting the Health of Women and Children. Retrieved from <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>.
- Fitzmaurice, M. (2006). On the protection of human rights, the Rome statute and reservations to multilateral treaties. Singapore: Singapore Year Book of International Law and Contributors.
- 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.
- Hashemi, K. (2007). *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, Johns Hopkins University Press.
- Home Office, Dealing with Cases of Forced Marriage: Guidance for Education Professionals (2005). Retrieved from http://www.forcedmarriage.net/media/images/FMU-FM-Guidance-EducationProfessionals_70.pdf.
- Human Rights Committee, General Comment 24 (52) (1994) General comment on 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, UN Doc. CCPR/C/21/Rev.1/Add.6.
- Yamali, N. (2008). *How adequate is the law governing reservations to human rights treaties?* Ankara: General Directorate of International Laws and Foreign Affairs Turkey.
- In-depth study on all forms of violence against women Report of the Secretary-General (2006). Retrieved from <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomestudydoc.pdf>.
- Kleinbach, R. (2003). Frequency of Non-Consensual Bride Kidnapping in the Kyrgyz Republic. *International Journal of Central Asian Studies*, vol. 8, No. 1.
- Korkelia, K. (2002). New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights. *European Journal of International Law* Vol. 13.
- Krivenko, E. (2009). *Women, Islam and International law*. Geneva: Graduate Institute of International and Development Studies.
- McCall-Smith, K. (2014). Mind the Gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties, *International Community Law Review*.
- Office of the Special Representative of Secretary General for Children and Armed Conflict (2013). Retrieved from https://childrenandarmedconflict.un.org/publications/WorkingPaper-1_SixGraveViolationsLegalFoundation.pdf.
- Rehman, J. (2007). 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, doi: 10.1093/lawfam/eb1023 Advance Access Publication
- Reservations to the Convention on Genocide Advisory Opinion: I.C. J. Reports 1951.
- Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, Committee on the Rights of the Child (1996), UN Doc. CRC/C/2/Rev.5.
- Rude-Antoine, E. (2005). Forced Marriages in Council of Europe Member States. Council of Europe, Retrieved from [http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-MF/CDEG\(2005\)1_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-MF/CDEG(2005)1_en.pdf).
- Schabas, W. A. (1996). Reservations to the Convention on the Rights of the Child. *Human Rights Quarterly*, Vol. 18.2.
- Shaw, M.N. (2008). *International Law* (6th. ed.), Cambridge: Cambridge University Press.
- Status of Women Fifty-second session 25 February-7 March 2008 Forced marriage of the girl child Report of the Secretary-General (2008). Retrieved from <http://www.refworld.org/pdfid/46c5b30d0.pdf>.
- Thomas, Ch. (2009). Forced and early marriage: a focus on Central and Eastern Europe and former Soviet Union countries with selected laws from other countries, UN Division for the Advancement of Women UN Economic Commission for Africa Expert Group Meeting on good practices in legislation to address harmful practices against women, UN Conference Centre Addis Ababa, Ethiopia.

UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No 21: Equality in Marriage and Family Relations (1994), Retrieved from <http://www.refworld.org/docid/48abd52c0.html>.
UN Children's Fund, The State of the World's Children, 2006: Excluded and Invisible (2006) Retrieved from https://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf.
UN, Treaty Series, vol. 1577, p. 3; depositary notifications C.N.147.1993.TREATIES-5 of 15 May 1993 [amendments to article 43 (2)]; and C.N.322.1995.TREATIES-7 of 7 November 1995 [amendment to article 43 (2)].
Women rights are human rights (2011). Retrieved from <http://www.unfpa.org/swp/2000/pdf/english/chapter6.pdf>.

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