



BEFORE THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

**IN THE MATTER OF A REQUEST BY THE INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT
IN AFRICA (IHRDA) FOR AN ADVISORY OPINION ON THE RESERVATIONS MADE BY THE
REPUBLIC OF BOTSWANA TO ARTICLE 2 OF THE AFRICAN CHARTER ON THE RIGHTS AND
WELFARE OF THE CHILD AND THE RESERVATIONS MADE BY THE ARAB REPUBLIC OF EGYPT TO
ARTICLES 44 AND 45 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**

**PURSUANT TO ARTICLE 42 (C) OF THE AFRICAN CHARTER ON THE RIGHTS AND
WELFARE OF THE CHILD**

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INTRODUCTION, JURISDICTION AND ADMISSIBILITY

1. This request for an advisory opinion is submitted to the African Committee of Experts on the Rights and Welfare of the Child ("Committee") by the Institute for Human Rights and Development in Africa (IHRDA).
2. The Committee is empowered to consider requests for an advisory opinion pursuant to article 42 (c) of the African Charter on the Rights and Welfare of the Child (the ACRWC) which gives the Committee the mandate '[t]o interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity; or any State Party'.
3. IHRDA thus has the competence to request for the advisory opinion as IHRDA is recognized by the Republic of The Gambia, which is a State Party to the Charter. IHRDA is registered under the laws of The Gambia as an international non-governmental organization. IHRDA's certificate of incorporation is annexed to this brief. IHRDA also enjoys observer status before both the Committee and the African Commission on Human and Peoples' Rights. IHRDA works towards the promotion of the African human rights system through litigation, training and dissemination of information about the system.
4. The subject matter of this request is not related to a matter being examined by any other international or national dispute settlement mechanism. In addition, the questions do not refer to any dispute on any contentious matter pending before any dispute settlement mechanism.

CIRCUMSTANCES GIVING RISE TO THE REQUEST

5. The Republic of Botswana ratified the Charter on 10 July 2001, making a reservation to article 2 of the ACRWC which stipulates that a child 'is every human being below the age of 18 years'.¹
6. The Arab Republic of Egypt ratified the Charter on 22 May 2001, making reservations to article 44 of the ACRWC on the competence of the Committee to receive communications and article 45 (1) of the ACRWC on the competence of the Committee to undertake investigative missions and accept communications.²

APPLICABLE LAW

7. The key applicable law in respect of this request for an advisory opinion is the ACRWC. The Committee is also urged by virtue of the provisions of article 46 of the ACRWC to take inspiration from the 1969 Vienna Convention on the Law of Treaties (VCLT) in considering this request.

ISSUES FOR DETERMINATION

8. IHRDA respectfully places before the Committee the following issues for determination: -
 - (a) Whether this Committee has the jurisdiction to grant this request for an advisory opinion?
 - (b) Whether this Committee can look into the validity of a reservation by a State Party to the ACRWC?
 - (c) Whether the Committee can lay down principles on the reservations to the ACRWC being within the object and purpose of the ACRWC?

¹ See Ratifications Table, available at <https://www.acerwc.africa>, accessed on 11 May 2022.

² Ibid.

9. If the above questions are resolved in the affirmative, the Committee is invited to provide an opinion on the following question:

- (a) Are the reservations made by the Republic of Botswana to article 2 of the ACRWC and the reservations made by the Arab Republic of Egypt to articles 44 and 45 (1) of the ACRWC within the object and purpose of the ACRWC?

WHETHER THE COMMITTEE CAN LOOK INTO THE VALIDITY OF A RESERVATION BY A STATE PARTY TO THE ACRWC

10. The Committee is established under article 32 of the ACRWC to 'promote and protect the rights and welfare of the child.' Pursuant to article 42 of the ACRWC, the functions of the Committee shall include among others, 'to promote and protect the rights enshrined in this Charter' and 'to monitor the implementation and ensure protection of the rights enshrined in this Charter.'³ In line with these provisions, it is contended that the Committee is competent to assess the permissibility of reservations by States Parties to the ACRWC in the exercise of its functions, including the compatibility of reservations with the object and purpose of the ACRWC.

11. The jurisprudence of human rights treaty bodies also trumpets human rights treaty bodies as the arsenal for addressing the issue of reservations by States Parties. For example, the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR),⁴ in its General Comment No. 24 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 provides that:

³ Article 42 (a) and (b) of the ACRWC.

⁴ Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.⁵

12. In examining State reports, the Human Rights Committee has also criticized several states concerning the compatibility of their reservations with the object and purpose of the ICCPR.⁶ The Human Rights Committee has also formally declared that the reservations by the United States of America concerning application of the death penalty were incompatible with the ICCPR and consequently invalid.⁷

13. Other human rights treaty bodies have also looked into the issue of reservations by States Parties. For instance, the Committee Against Torture, which monitors the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁸ challenged Chile's reservation to article 2 as incompatible with the object and purpose of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁵ Adopted at the Fifty-Second Session of the Human Rights Committee, on 4 November 1994, CCPR/C/21/Rev.1/Add.6, General Comment No. 24 (General Comments), para 18.

⁶ For example, Finland, Report of the Human Rights Committee, UN Doc A/34/40 (1980); Australia, Report of the Human Rights Committee, UN Doc A/38/40 (1984) and France, Report of the Human Rights Committee, UN Doc A/38/40 (1984).

⁷ Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Comments of the Human Rights Committee, UN Doc CCPR/C/79/Add.50 (1995).

⁸ Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1).

(CAT).⁹ In addition, the Committee for the Elimination of Discrimination Against Women, which monitors implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰ has often questioned States Parties about their reservations to CEDAW.¹¹

14. The fact that human rights treaty bodies are competent to look into the validity of reservations to human rights treaties by States Parties is further stressed by the jurisprudence of the European Court of Human Rights (ECtHR). In *Belilos v Switzerland*, the European Commission on Human Rights' counter-argument was that where a treaty makes provision for judicial review of the obligations undertaken by the States and expressly limits the making of reservations, the judicial bodies have jurisdiction to review the validity of reservations in cases that come before them. The ECtHR was persuaded by the Commission's argument. It stated that '[t]he silence of the depositary and the Contracting States does not deprive the Convention institutions [Commission and Court] of the power to make their own assessment.'¹²

15. In determining the 'assessment of permissibility of reservations', the Guide to Good Practice on Reservations to Treaties drawn by the International Law Commission provides that:

The following may assess within their respective competencies, the permissibility of reservations to a treaty formulated by a State or an international organization:

(a) contracting States or contracting organizations

(b) dispute settlement bodies

⁹ Report of the Committee Against Torture, UN GAOR, 45th Session, Supp No 44, [349], UN Doc A/45/44 (21 June 1990).

¹⁰ Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27 (1).

¹¹ Report of the Committee for the Elimination of Discrimination Against Women, UN Doc A/39/45, Vol II (1985) (Initial Report of Egypt); Report of the Committee for the Elimination of Discrimination Against Women, UN Doc A/44/38 (1990) (Initial Report of Ireland) and Report of the Committee for the Elimination of Discrimination Against Women, UN Doc A/44/38 (1990) (Report of Belgium).

¹² Application No. 10328/83, para 47.

(c) **treaty monitoring bodies.**¹³

16. Furthermore, guideline 3.2.1 of the Guide to Good Practice on Reservations to Treaties states that '[a] treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.'
17. In line with the above jurisprudence and principles, we submit that the Committee, in the exercise of the functions entrusted to it by the ACRWC, is competent to look into the validity of reservations by States Parties to the ACRWC.

THE POSITION OF THE LAW PERTAINING TO RESERVATIONS TO HUMAN RIGHTS TREATIES

a. The reservation made by the Republic of Botswana to article 2 of the ACRWC is incompatible with the object and purpose of the treaty

18. The ACRWC has no express provision which allows States Parties to make reservations. However, the issue of reservations under the ACRWC is governed by the Vienna Convention on the Law of Treaties (VCLT).¹⁴ Article 19 (c) of the VCLT provides as follows:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in

¹³ Guideline 3.2 of the Guide to Good Practice on Reservations to Treaties.

¹⁴ Opened for Signature on 23 May 1969, 1115 UNTS 331 (entered into force 27 January 1980). Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980, that is, after entry into force of the African Charter on the Rights and Welfare of the Child- its terms reflect the general international law (customary international law) on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951. See also R K Gardiner *Treaty Interpretation* (2015) 211.

question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), ***the reservation is incompatible with the object and purpose of the treaty.***¹⁵

19. Article 19 (c) of the VCLT confirms the position taken by the International Court of Justice in its *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,¹⁶ namely, that reservations should not be incompatible with the object and purpose of a treaty. Similarly, the Human Rights Committee in its General Comment No 24 on Issues Relating to Reservations,¹⁷ the Convention on the Elimination of All Forms of Discrimination Against Women¹⁸ and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)¹⁹ also stress the importance of ensuring that reservations are not incompatible with the object and purpose of the treaty.
20. In interpreting the 'object and purpose' test, the Guide to Good Practice on Reservations to Treaties drawn by the International Law Commission states that:

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the

¹⁵ See also Guideline 3.1 of the Guide to Practice on Reservations to Treaties.

¹⁶ The ICJ remarked as follows on 24 that '[i]t has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of state sovereignty could lead to a complete disregard of the object and purpose of the Convention.' The report appears in Yearbook of the International Law Commission, 2011, Vol II, Part Two. The Concept of the 'object and purpose of a treaty' also appears in articles 18; 20 (2); 31 (1); 33 (4); 41 (1) and 58 (1) of the Vienna Convention on the Law of Treaties.

¹⁷ CCPR, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in Relation to Declarations under Article 41 of the Covenant, Adopted at the Fifty-Second Session of the Human Rights Committee on 4 November 1994, UN Doc CCPR/C/21/Rev.1/Add.6, General Comment No. 24 (General Comments).

¹⁸ Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27 (1). Article 28 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women provides that 'a reservation incompatible with the object and purpose of the present Convention shall not be permitted.'

¹⁹ Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with article 19. Article 20 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination provides that 'a reservation incompatible with the object and purpose of this Convention shall not be permitted.'

circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.²⁰

21. In addition, the International Law Commission in addressing the matter of reservations to human rights treaties has stated that:

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right of provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.²¹

22. The object and purpose of the ACRWC is to ‘create legally binding standards for children’s rights and to place these standards in a framework of obligations which are legally binding for those States which ratify it.’²² It sets out the civil, political, economic, social and cultural rights of every child regardless of their race, ethnic group, colour, language, sex or other status.
23. From the Preamble, at least three specific occupations of the ACRWC are evident. The first has to do with conceptualizing the rights of children from an African perspective taking into account African values, cultural heritage and background. The second relates to the recognition that ‘the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed

²⁰ Guideline 3.1.5.1 of the Guide to Good Practice on Reservations to Treaties, 2011. Adopted by the International Law Commission at its Sixty-Third Session in 2011 and submitted to the General Assembly as part of the Commission’s Report covering the work of that session (A/66/10, para 75). The Report appears in Yearbook of the International Law Commission, 2011, Vol II, Part Two.

²¹ Guideline 3.1.5.6 of the Guide to Practice on Reservations to Treaties.

²² African Committee of Experts on the Rights and Welfare of the Child, Concept Note for Forum for Experience Sharing and Best Practices, Mauritius, July 2007, available at <https://acerwc.africa/wp-content/uploads/2018/07/Concept-Note> Forum for Experience Sharing and Best Practices Mauritius July 2007-2017-Copy.pdf, accessed on 6 May 2022, para 7.

conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care' and that on account of children's physical and mental immaturity, they need special safeguards and care. The third relates to the recognition that 'the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security'. The substance of the ACRWC addresses these concerns through various rights that are guaranteed in the ACRWC.²³

24. The definition of a child is a fundamental provision that basically determines the scope and application of the ACRWC. Article 2 of the ACRWC states that '[f]or the purposes of this Charter, a child means every human being below the age of 18 years'. It defines who is a child for the purposes of the ACRWC and therefore determines who benefits from the protection, provision and participation rights incorporated in the ACRWC. The Committee has noted that 'the provision of the Charter that defines the child (article 2) is an indispensable provision without which other rights enshrined in the Charter cannot operate.'²⁴
25. Botswana's reservation to article 2 of the ACRWC is incompatible with the object and purpose of the treaty in that it challenges the very core and scope of application of the Charter. Furthermore, the reservation to article 2 of the ACRWC excludes certain groups of children from the protection rights incorporated in the ACRWC.
26. In this context, the Committee has noted that '[e]ntering into reservations on a provision dealing with the definition of a child is equal to not recognizing all rights enshrined in the Charter at least with respect to children that can be excluded by the definition of the child provided by domestic legislation'²⁵ and that '[e]ntering a reservation on a provision dealing with the definition of a child goes against the foundation on which the whole child rights system is established'.²⁶

²³ See articles 1-31 of the ACRWC.

²⁴ African Committee of Experts on the Rights and Welfare of the Child, Concept Note for Forum for Experience Sharing and Best Practices (n9 above) para 7.

²⁵ Ibid.

²⁶ Ibid.

27. The Children's Act of Botswana defines a child as any person below the age of 18 years.²⁷ This is a general definition of childhood which means that ideally all children below the age of 18 years must be afforded the guarantees contained in the ACRWC. However, section 27 of the Botswana Penal Code provides that '[s]entence of imprisonment shall not be passed on any person under the age of 14 years.'²⁸ There are no such provisions to protect persons who are between the ages of 14 and 18 who are considered children under the provisions of the ACRWC. This means that such persons could be sentenced to imprisonment.
28. We therefore submit that the reservation made by the Republic of Botswana to article 2 of the ACRWC is incompatible with the object and purpose of the treaty in that it excludes many children from the protection rights incorporated in the treaty.

b. The reservations made by the Arab Republic of Egypt to articles 44 and 45 (1) of the ACRWC are incompatible with the object and purpose of the treaty

29. In order to achieve its stated objectives and purpose, the ACRWC establishes the Committee with the mandate to promote and protect the rights enshrined in the ACRWC.²⁹ In terms of article 44 of the ACRWC, the Committee has the power to consider individual and inter-state communications. To date, the Committee has dealt with several communications covering a wide range of child rights issues. For instance, the first communication decided on its merits, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya*³⁰ dealt with the question of the right of the child to acquire a nationality and not to be discriminated against in assessing services on the basis of nationality.

²⁷ Act No. 8 of 2009, Part 1.

²⁸ Chapter 08:01.

²⁹ Articles 32 and 42 of the ACRWC.

³⁰ No. 1/Com/1/2005.

30. The second communication, *Hansungule and Others (on behalf of children in Uganda) v Uganda*³¹ revolved around the obligation of the Ugandan government to protect children in armed conflict, and in particular, not to recruit or use persons below the age of 18 in armed conflict in line with article 22 of the Charter. The third communication decided on its merits is *The Centre for Human Rights (University of Pretoria) and La Recontre Africaine sur la Defense des Droits de l'Homme (Senegal) v Senegal*,³² finding the Senegalese government in violation of protecting children, in particular against enforced begging by religious teachers. These cases demonstrate that the individual complaints mechanism under the ACRWC holds a very strong potential to protect the rights of children in Africa.³³
31. In terms of article 45 (1) of the ACRWC, the Committee may use any appropriate method to investigate any matter covered by the Committee and to investigate measures taken by State Parties to implement the ACRWC. Investigative missions enable the Committee to directly gather information relevant for monitoring the implementation or violation of the ACRWC by States Parties. The investigative mandate of the Committee also holds a lot of potential for the protection of children's rights in Africa. For instance, the report resulting from the investigative mission undertaken to Tanzania on the situation of children with albinism in temporary holding shelters has been pivotal for advocacy.³⁴
32. Other investigative missions undertaken to South Sudan (2014) and Central African Republic (2014), two non-state Parties to the Charter at the time of the mission, further evidence the positive impact this mandate can contribute to the protection and promotion of children's rights in Africa. It can be argued that the object and purpose of the Charter, which in general is to

³¹ No. 2/Com/002/2009.

³² No. 3/Com/001/2012.

³³ Other cases include: *The African Centre of Justice and Peace Studies (ACJPS) and Peoples' Legal Aid Centre (PLACE) v Sudan* No. 5/Com/001/2015, deals with issues related to the right to acquire a nationality and non-discrimination; *The Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* No. 7/Com/003/2015, raises important questions related to contemporary forms of slavery and the Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon No. 6/Com/002/2015, revolves around issues such as access to justice and right of appeal in a criminal case involving sexual abuse of a child.

³⁴ The report is available at <http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694>, accessed on 11 May 2022.

protect and promote children's rights is directly linked to its individual communications process and investigations procedure.

33. The reservations entered by Egypt to articles 44 and 45 of the ACRWC deprive the Committee from exercising its mandate in full and undermine the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation of any of the rights of the ACRWC. Accordingly, such reservations would be contrary to the object and purpose of the ACRWC.³⁵ This also negatively affects the rights of Egyptian children to remedies offered by the ACRWC. This is particularly important as many Egyptian children suffer violations of their human rights.
34. Child arrest, detention and imprisonment is a major children's rights issue in Egypt. Reports indicate that hundreds of children as young as 12 have been arbitrarily arrested, mistreated and tortured by Egyptian security forces without warrants.³⁶ Children are sometimes detained at police stations and prisons with adults and in prison conditions which amount to cruel, inhuman and degrading treatment.³⁷ Girls in detention are vulnerable to violence, including beatings, harassment and threats of and actual sexual assaults.³⁸
35. Child marriage is also another area of concern in Egypt. Child marriage mainly affects girls in poor rural areas and is estimated to be on the rise particularly in Upper Egypt.³⁹ Although child marriage is prohibited, it continues to be quite prevalent in rural areas. It is estimated that nearly 1 in every 20 girls (4%) between the ages of 15-17 years and 1 in every 10 (11%) adolescent girls

³⁵ Human Rights Committee, General Comment No. 24 on Issues Relating to Reservations at para 11 noting that '[t]he Committee's role under the Covenant, whether under article 40 or under the Optional Protocols necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence.' Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.' See also at para 12 noting that failure to allow individual complaints to be brought is contrary to the object and purpose of the treaty.

³⁶ Human Rights Watch 'No One Cared He Was a Child: Egyptian Security Forces- Abuse of Children in Detention' (23 March 2020), available at [hrw.org/report/2020/03/23/no-one-cared-he-was-a-child/Egyptian-security-forces-abuse-children-detention](https://www.hrw.org/report/2020/03/23/no-one-cared-he-was-a-child/Egyptian-security-forces-abuse-children-detention), accessed on 10 May 2022.

³⁷ Ibid.

³⁸ Ibid.

³⁹ CAPMAS, 2020.

between the ages of 15-19 years are either currently married or were married.⁴⁰ Child marriage exposes the girl child to further human rights violations such as gender-based violence, curtailment of education and poor sexual and reproductive health.

36. Female genital mutilation, even though outlawed, continues to be a problem in Egypt. A recent survey indicated that 92% of women and girls between the ages of 15-49 years have been circumcised.⁴¹
37. The above indicate violations of the Charter which the Committee could look into and make recommendations to Egypt to ensure compliance with the ACRWC. However, the reservations deprive the Committee from exercising its mandate in full and undermine the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation of any of the rights of the ACRWC.
38. In its Concluding Recommendations to Egypt's state report, the Committee has recommended that the State Party should waive the reservations entered into the ACRWC.⁴² The Committee has also noted that 'reservations on Article 44 and 45 by Egypt are contrary to Article 19 (c) of the Vienna Convention on the Law of Treaties, mainly because the provisions subjected to reservations were among the core rationale for the creation of the Charter'⁴³ and that 'placing a reservation on procedural matters of a human rights treaty is generally incompatible with the purpose and objective of the treaty under international human rights law'.⁴⁴

⁴⁰ Ibid.

⁴¹ UNFPA 'Female Genital Mutilation', available at <https://egypt.unfpa.org/en/node/22544>, accessed on 11 May 2022.

⁴² Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Arab Republic of Egypt Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child.

⁴³ Communication No. 008/Com/002/2016/Decision on Admissibility No. 001/2017, para 2.

⁴⁴ Ibid. see also Human Rights Committee, General Comment No. 24 noting that 'reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose'.

39. We therefore submit that the reservations by Egypt to articles 44 and 45 (1) of the ACRWC are incompatible with the object and purpose of the treaty.

THE CONSEQUENCES OF IMPERMISSIBLE RESERVATIONS TO HUMAN RIGHTS TREATIES

40. The ACRWC is silent on the legal consequences of impermissible reservations. However, the jurisprudence on reservations to human rights treaties has developed the severability doctrine. In terms of the severability doctrine, the incompatible reservation is severed from the treaty and the reserving state is considered to be bound by the treaty in its entirety (in other words without the benefit of the reservation) as if no reservations have been drawn. In this context, the Human Rights Committee in its General Comment on Issues Relating to Reservations states that:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation.⁴⁵

41. The ECtHR has also endorsed the severability rule. In *Belilos v Switzerland*⁴⁶ and *Loizidou v Turkey*,⁴⁷ the ECtHR severed reservations it found to be incompatible with the object and purpose of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁸ Similarly, the International Court of Justice has declared that unessential and invalid reservations should be severable from the reserving state's instrument of ratification.⁴⁹

⁴⁵ Para 18.

⁴⁶ 1988 132 ECtHR (Ser A) 7, 10 EHRR 466.

⁴⁷ 1995 310 ECtHR (Ser A) 7; 20 EHRR 99.

⁴⁸ Drafted in 1950 by the then newly formed Council of Europe, entered into force on 3 September 1950.

⁴⁹ See *Case of Certain Norwegian Loans (France v Norway)* (Preliminary Objections) 1957 ICJ Reports 9 at 55-56 and *Interhandel Case (Switzerland v United States of America)* (Preliminary Objections) 1959 ICJ Reports 6 at 95-119.

42. The Guide to Good Practice on Reservations to Treaties has also endorsed the severability rule. Guideline 4.5.1 entitled 'Consequences of an invalid reservation' asserts that:

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.⁵⁰

43. In line with the above jurisprudence, we submit that the reservation made by the Republic of Botswana to article 2 of the ACRWC and the reservations made by the Arab Republic of Egypt to articles 44 and 45 of the ACRWC should be severed and that both countries remain bound by the ACRWC without the benefit of the reservation.

44. **OBJECTIONS BY STATES TO RESERVATIONS MADE BY OTHER STATES**

45. Article 20 of the VCLT provides for the possibility of a State to object to a reservation made by another State. For instance, the Committee against Torture challenged Chile's reservation to article 2 as incompatible with the object and purpose of CAT, with 20 other states also objecting to the reservation on the same basis.⁵¹
46. Although States are allowed to object to reservations made by another State, the absence of such does not suggest that the reservation is compatible or incompatible with the object and purpose of the treaty. In this context, the Human Rights Committee in its General Comment on Issues Relating to Reservations has noted that:

The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been

⁵⁰ Guideline 4.5.3 of the Guide to Practice on Reservations to Treaties.

⁵¹ Report of the Committee against Torture, UN GAOR, 45th Session, Supp No 44, [349], UN Doc A/45/44 (21 June 1990). See also Note 16 in United Nations, Multilateral Treaties Deposited with the Secretary-General: Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Punishment, available at <http://untreatt.un.org/ENGLISH/bible/englishinternetbible/part1/chapterIV/treaty14.asp>, accessed on 30 May 2022.

occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have been States inter se. however, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.⁵²

47. We submit that the absence of objections from other States on the reservations made by the Republic of Botswana and the Arab Republic of Egypt does not imply that the reservations are compatible with the object and purpose of the ACRWC.

48. **Conclusion and Prayers**

49. We respectfully urge the Committee to provide an advisory opinion on the question:

(a) Are the reservations made by the Republic of Botswana to article 2 of the ACRWC and the reservations made by the Arab Republic of Egypt to articles 44 and 45 (1) of the ACRWC within the object and purpose of the ACRWC?

(b) We suggest that the question may be answered thus:

a. The reservations made by the Republic of Botswana to article 2 of the ACRWC and the reservations made by the Arab Republic of Egypt to articles 44 and 45 (1) of the ACRWC are incompatible with the object and purpose of the ACRWC.

⁵² Human Rights Committee, General Comment No. 24 on Issues Relating to Reservations, para 17.

50. We also request the Committee to grant the following:

- a. A Recommendation that the Republic of Botswana withdraw its reservation to article 2 of the ACRWC.
- b. A Recommendation that the Arab Republic of Egypt withdraw its reservations to articles 44 and 45 (1) of the ACRWC.

Dated this 5th day of July 2022



Gaye Sowe

Executive Director

IHRDA

