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# MASTER THESIS

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**Shari'a-based Reservations to the United Nations  
Convention against Torture and Other Cruel, Inhuman  
or Degrading Treatment or Punishment (UNCAT) –  
A Comparative Analysis between Pakistan and Qatar**

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## **Abstract**

To date, reservations to human rights treaties constitute a controversial topic of international treaty law, politically as well as legally, not least owing to their nature being capable of making essential parts of a treaty inapplicable. Reservations based on religious considerations are particularly contested and often criticized as to be of indeterminate scope, thereby impairing the treaty's object and purpose resulting in the reservations' impermissibility. While legal uncertainties remain regarding the definition of a treaty's object and purpose and of the legal consequences of invalid reservations, the concern of general reservations potentially impeding the process of treaty implementation is of particular importance with a view to reservations targeting substantive articles of a treaty. In this regard, the Islamic State of Pakistan and the State of Qatar employed far-reaching reservations to the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT/the Convention) invoking Islamic Shari'a law, thereby subordinating several articles to the Islamic imperative. While a certain trend among both states towards the withdrawal of reservations can be observed, still standing reservations, including those of the State of Qatar employed to articles 1 and 16 of the Convention, may remain a critical obstacle for the full implementation of the UNCAT and thus the aim for universality of human rights as such.

## **Abstrakt**

Vorbehalte zu internationalen Menschenrechtsverträgen sind bis heute Grund diverser politischer wie auch rechtlicher Kontroversen innerhalb des internationalen Vertragsrechts, nicht zuletzt aufgrund ihrer Eignung, die Anwendung wesentlicher Vertragsteile einzuschränken oder gar auszuschließen. Besonders umstritten sind darunter jene Vorbehalte, welche aus religiösen Überlegungen hervorgehen. Diese Art der Vorbehalte steht oftmals hinsichtlich ihrer Unbestimmtheit in der Kritik und wird aufgrund ihrer Ziel und Zweck des Menschenrechtsvertrags untergrabenden Natur meist als unzulässig zurückgewiesen. Nach wie vor wurden jedoch bestehende Rechtsunsicherheiten hinsichtlich der Definition des „Ziels und Zwecks“ eines Vertrags und der Rechtsfolgen unzulässiger Vorbehalte nicht zur Gänze beseitigt. Die Bedenken, dass zu breit gefasste Vorbehalte den Prozess der Vertragsimplementierung behindern könnten, sind von besonderer Bedeutung im Hinblick auf jene Vorbehalte, die sich auf wesentliche Vertragsbestimmungen beziehen. Auch die Islamische Republik Pakistan und der Staat Katar haben derart weitreichende Vorbehalte zum Übereinkommen der Vereinten Nationen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe von 1984 eingelegt und damit mehrere Bestimmungen der islamischen Scharia untergeordnet. Während bei beiden Staaten ein gewisser Trend zur Aufhebung von Vorbehalten erkennbar ist, können weiterhin bestehende Vorbehalte, einschließlich jener von Katar gegenüber den Artikeln 1 und 16 des Übereinkommens, ein Hindernis für die vollständige Umsetzung der „UN-Antifolterkonvention“ und damit für das Ziel der Allgemeingültigkeit der Menschenrechte als solches darstellen.

## 1. Introduction

*'Universal Human Rights apply in equal measure to every country, it is desirable in every corner of the world, regardless of the extent of diversity of one corner from the other, and it is presumed to be equally understood by every one [sic] in the world.'*<sup>1</sup>

Given their conceptualization as rights bestowed on every human being, human rights encompass the central aim for universality.<sup>2</sup> Yet, this objective, as enshrined in the 1948 Universal Declaration of Human Rights (UDHR),<sup>3</sup> has not been so far undisputed. Pursuant to the proponents of the concept of cultural relativism, 'cross-cultural judgements are erroneous, since there are no overarching moral truths, universalistic in nature.'<sup>4</sup> While the UDHR underscores human rights to be universal, international human rights treaty law accommodates the aspect of cultural relativity by permitting states under article 19 of the 1969 Vienna Convention on the Law of Treaties (VCLT),<sup>5</sup> crystallizing customary international law, to enter reservations<sup>6</sup> to international human rights agreements.<sup>7</sup> These individual statements made by states upon accession, ratification, signature, acceptance or approval<sup>8</sup> may serve various aims, including arguably the general universality of human rights due to the – at least – formal acknowledgment of the rights enshrined in the treaty and consequent reporting obligations under the treaty, while, at the same token, being able to serve the aim of preserving state-specific cultural and religious particularities.<sup>9</sup>

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<sup>1</sup> Sawad, Ahmad Ali (2017), 'Islamic Reservations' to Human Rights Treaties and Universality of Human Rights within the Cultural Relativists Paradigm', The Journal of Human Rights 12(2) 102.

<sup>2</sup> Cf UN General Assembly (GA), Universal Declaration of Human Rights, adopted on 10 December 1948, 217 A (III), UN Doc GA Res 217 A (III) [hereinafter referred to as 'UDHR'] preamble.

<sup>3</sup> UDHR (n 2).

<sup>4</sup> Sawad (n 1) 106; for further reading on the concept of cultural relativism see Donnelly, Jack (2007), 'The Relative Universality of Human Rights', Human Rights Quarterly 29(2).

<sup>5</sup> Vienna Convention on the Law of Treaties, adopted on 22 May 1969, opened for signature May 23 1969, 1155 UNTS 331 [hereinafter referred to as 'VCLT'].

<sup>6</sup> According to article 2 para d of the VCLT, a "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State', see VCLT (n 5) article 2 para d.

<sup>7</sup> Cf UN Human Rights Committee (HRC), CCPR General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant (1994), 52<sup>nd</sup> session, adopted on 4 November 1994, UN Doc CCPR/C/21/Rev.1/Add.6 (1994) para 4, according to which 'reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument'; Zemanek, Karl (2009), 'Vienna Convention on the Law of Treaties', United Nations Audiovisual Library of International Laws 1.

<sup>8</sup> VCLT (n 5) article 19.

<sup>9</sup> Çali, Başak, and Montoya, Mariana (2017), 'The March of Universality? Religion-based Reservations to the Core UN Human Rights Treaties and What They Tell us About Human Rights and Universality in the 21<sup>st</sup> century', Universal Rights Group 30.

However, it has also been purported in literature that reservations may entail a particular risk for the process of treaty implementation.<sup>10</sup> Accordingly, ‘reservations may [...] represent one of the significant assaults on international human rights treaty law’s claim of universality.’<sup>11</sup>

Reservations aiming at the preservation of domestic particularities encompass, *inter alia*, those motivated by *religious* considerations. Notably, over 40 percent of all reservations to the core human rights treaties,<sup>12</sup> including the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT),<sup>13</sup> are either based on or influenced by religion.<sup>14</sup> Reservations invoking norms of Islamic Shari’a law,<sup>15</sup> often termed as ‘Islamic reservations’ or ‘Shari’a-based reservations,’ which have been employed by several Muslim-majority states,<sup>16</sup> fall within this category.

Likewise, the Islamic State of Pakistan and the State of Qatar entered Shari’a-based reservations to either a specific number<sup>17</sup> or all provisions<sup>18</sup> of the UNCAT.<sup>19</sup> Both Islamic

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<sup>10</sup> Cf. *Moussa, Jasmine* (2011), ‘Competing Fundamentalism and Egyptian Women’s Family Rights: International Law and the Reform of Shari’a-derived Legislation’, in Cotran, Eugene et al (eds), *Brill’s Arab and Islamic Laws Series* 4 85, purporting that ‘[o]ne of the major obstacles confronting the effective implementation of CEDAW provisions is the large number and scope of reservations entered to its substantive provisions’.

<sup>11</sup> *Sawad* (n 1) 102.

<sup>12</sup> *Çali and Montoya* (n 9) 6, according to whom the seven ‘core’ UN human rights treaties comprise the 1966 UN International Covenant on Civil and Political Rights (UNICCPR), the 1965 UN International Covenant on the Elimination of all forms of Racial Discrimination (UNICERD), the 1966 UN International Covenant on Economic, Social and Cultural Rights (UNICESCR), the 1980 UN Convention on the Elimination of All Forms of Discrimination Against Women (UNCEDAW), the 1990 UN Convention on the Rights of the Child (UNCRC), the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD), and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT).

<sup>13</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by GA Res 39/46 of 10 December 1984, UN GAOR, 39<sup>th</sup> session, Supp No 51, UN Doc A/39/51 (1985), entered into force 26 June 1987, 1465 UNTS 112, reprinted in 23 ILM 1027 (1984), substantive changes noted in 24 ILM 535 (1985) [hereinafter referred to as ‘UNCAT’].

<sup>14</sup> *Çali and Montoya* (n 9) 2 and 6.

<sup>15</sup> *Auf, Yussef* (2016), ‘Islam and Sharia Law: Historical, Constitutional, and Political Context in Egypt’, Atlantic Council 2, who defines ‘Islamic Shari’a law’ as ‘the body of Islamic rules and teachings that governs Muslims’ relationships with their families, society, and nation. Sharia law derives from eleven Islamic references, primarily the Holy Quran, the holy Muslim scripture revealed to the Prophet Mohamed, and the prophetic tradition, i.e., the recorded words and actions of Prophet Muhammad that mainly illustrate and explain the Quran’.

<sup>16</sup> *Monforte, Tanya* (2018), ‘Broad Strokes and Bright Lines: A Reconsideration of Shari’a Based Reservations’, *Columbia Journal of Gender and Law* 35(1) 1; for the total number of reservations and the number of religion-based reservations, not limited to those based on Islamic Shari’a, see chapter 2.1; additionally, it is important to emphasize that not *all* Muslim-majority states employed Islamic reservations to human rights treaties, some acceding by entering non-religion-related reservations, some by employing no reservation at all, see *Mayer, Ann Elizabeth* (1998), ‘Islamic Reservations to Human Rights Conventions: A Critical Assessment’, *Recht van de Islam* 15 25; *Çali and Montoya* (n 9) 3, referring to Muslim-majority states being, yet, ‘most likely to enter religion-based reservations’, however, also several Catholic-majority states, Jewish-, as well as Hindu- and Buddhist-majority states have employed religion-based reservations to human rights treaties.

<sup>17</sup> Pakistan signed the UNCAT on 17 April 2008. The ratification of the treaty followed on the 23 June 2010, upon which the state entered a number of *specific* reservations, initially targeting the UNCAT’s articles 3, 4, 6, 8 para 2, 12, 13, 16, 20, and 30 para 1, most of which were, however, withdrawn on 20 September 2011 after a significant number of state parties lodged objections, see United Nations Treaty Collection (UNTC)

states<sup>20</sup> contended the incompatibility of several treaty provisions with Islamic law or cultural norms,<sup>21</sup> thus referring to their own Islamic cultural and religious identity.<sup>22</sup>

The majority of these reservations was, in further consequence, subjected to a high number of objections by other state parties to the UNCAT, especially concerning the reservations' 'vagueness' and their consequent incompatibility with the UNCAT's object and purpose already reflected in the Convention's preamble, namely the prevention<sup>23</sup> and full eradication

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<[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en-EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en-EndDec)> accessed 2 August 2022; UN (2014), UNTS 2677-2678, A-24841 259–260; UN (2017), UNTS 2786, A-24741 221; Amnesty International (AI), Pakistan's Reservations: A challenge to the integrity of the United Nations human rights treaty system, 23 June 2011, ASA 33/006/2011 <<https://www.amnesty.org/en/documents/ASA33/006/2011/en/>> accessed 2 August 2022.

<sup>18</sup> Qatar acceded to the UNCAT on 11 January 2000 and entered one general reservation to the UNCAT, thereby accepting the treaty's obligations only to the extent of them being in accordance with Islamic Shari'a law and Islamic religion. Pursuant to the reaction by a number of state parties lodging objections to Qatar's reservation, Qatar *partly* lifted its general reservation on 14 February 2012, yet, kept 'in effect a limited general reservation within the framework of Articles 1 and 16 of the Convention', see UN (2017), UNTS 2825, A-24841 60–61; UN (2002), UNTS 2097, A-24841 157; UNTC (n 17).

<sup>19</sup> The UNCAT was adopted on 10 December 1984 in New York and entered into force on 26 June 1987 pursuant to the ratification of a total of 20 states. To date, the treaty has 173 state parties and 84 states that are signatories. The Convention is open for signature by all states, see UNTC (n 17); *Danelius, Hans* (2008), 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', United Nations Audiovisual Library of International Law 1.

<sup>20</sup> An 'Islamic state' is here understood as a '[s]tate which is ruled in accordance with Islamic law and practice and also has a culture broadly based on Islamic religion', see *Malekian, Farhad* (2011), 'Principles of Islamic International Criminal Law: A Comparative Search, Chapter Seventeen: Torture' 251; *Weilert, Anja Katarina* (2009), 'Grundlagen und Grenzen des Folterverbotes in verschiedenen Rechtskreisen: eine Analyse anhand der deutschen, israelischen und pakistanischen Rechtsvorschriften vor dem Hintergrund des jeweiligen historisch-kulturell bedingten Verständnisses der Menschenwürde', *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 200 306, according to whom a number of criteria are accepted to make a state an 'Islamic' state, including the state's foundation on Islamic Shari'a law, an Islamic government or the explicit declaration of the Islamic belief as the state's main religion. A state can be considered 'Islamic', if the whole social and legal order is based on the narrative to seek a life in accordance with Islam: Pakistan's legal order is expressively based on Islamic Shari'a law, *ibid* 305; Pakistan's constitution refers to 'Islam', including terms such as 'Islamic' (88 times), 'Islam' (28 times), 'Islamiat' (1 time) and 'Islamabad' (17 times), in total 134 times and encompasses a provision, underscoring the inherent relevance of Islam, namely article 227, titled as 'Provisions relating to the Holy Quran and Sunnah' and enshrining that '[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah [...]' and no law shall be enacted which is repugnant to such Injunctions', see The Constitution of The Islamic Republic of Pakistan, passed on 10 April 1973 by the National Assembly of Pakistan (NAP), authenticated by the President of the Assembly on 12 April 1973, published by the NAP, as modified up to 31 May 2018 <[https://na.gov.pk/uploads/documents/1333523681\\_951.pdf](https://na.gov.pk/uploads/documents/1333523681_951.pdf)> accessed 4 August 2022; likewise, article 1 of Qatar's constitution identifies Shari'a law as the state's 'main source of its legislation', see The Permanent Constitution of the State of Qatar, decreed on 8 June 2004 by Father Amir <<https://www.gco.gov.qa/wp-content/uploads/2016/09/GCO-Constitution-English.pdf>> accessed 4 August 2022; notably, torture is particularly prevalent in states, in which religion constitutes a core element of its constitution, see *Rabbi, Fazal, Naeem, Syed and Badshah* (2019), 'Islam Sharia and the Constitutional Prohibition of Torture in Pakistan', *Al-Azhār* 4(2) 2.

<sup>21</sup> *Çalı and Montoya* (n 9) 3.

<sup>22</sup> *Augustauskaitė-Keršienė, Aistė* (2020), 'Reservations to UN Human Rights Treaties: Sovereign States seeking to avoid their Obligations?', *International Comparative Jurisprudence* 6(2) 118.

<sup>23</sup> *Edwards, Alice* (2008), 'The Optional Protocol to the Convention against Torture and the Detention of Refugees', *The International and Comparative Law Quarterly* 57(4) 798.

of torture and other forms of cruel, inhuman or degrading treatment and punishment (CIDT),<sup>24</sup> as required, *inter alia*, for the reservation's permissibility and as outlined in article 19 para c of the VCLT.<sup>25</sup>

While states' cultural and religious diversities are acknowledged by International Human Rights Law (IHRL),<sup>26</sup> reservations to multilateral human rights treaties constitute an often 'politically charged,'<sup>27</sup> as well as highly debated topic, particularly with respect to reservations of 'general' or 'vague' scope.<sup>28</sup>

Reasons for the contentiousness of the issue of far-reaching reservations are, *inter alia*, that those reservations 'were *designed* to make important parts of the treaties inapplicable.'<sup>29</sup> Treaty obligations modified or excluded by reservations consequently influence the 'treaty application not only between themselves [reserving states] and other state parties to the treaty, but also between themselves and individuals under the jurisdiction of the reserving states.'<sup>30</sup> With a view to reservations entered to the UNCAT in particular, an additional reason for concern is that torture entails particularly adverse implications for the victims, as most important facets of a human being – that being the human dignity and a person's physical and psychological integrity –<sup>31</sup> are at stake,<sup>32</sup> resulting in the outstandingly severe nature of human rights infringements associated with torture and CIDT falling under the Convention.<sup>33</sup>

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<sup>24</sup> Gaeta, Paola (2021), 'Another Step in What it Means to Be Human' – Prohibition v. Criminalization of Torture as a Private Act', *Journal of International Criminal Justice* 19(1) 425.

<sup>25</sup> VCLT (n 5) article 19 para c; for further reading on the treaty's underlying object and purpose see chapter 2.1.1; for the exact number and consequences of the state parties' objections, as well as the concerns raised therein, see chapters 5.1.2 and 5.2.2.

<sup>26</sup> Donders, Y., and Vleugel, V. (2016), Universality, Diversity and Legal Certainty: Cultural Diversity in the Dialogue between the CEDAW and States Parties, in M. Kanetake, and A. Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (56) 3, underpinning that 'respect for cultural diversity can very well be consistent with the notion of the universality of human rights'.

<sup>27</sup> Cf Monforte (n 16) 1, particularly referring to the politically delicateness of Shari'a-based reservations to the UNCEDAW.

<sup>28</sup> GA (2011), Report of the International Law Commission, 66<sup>th</sup> session, Supp No 10, UN Doc A/66/10/Add.1, Yearbook of the International Law Commission 2 part II [hereinafter referred to as 'ILC Report Addendum'] 363–368.

<sup>29</sup> Sawad (n 1) 125.

<sup>30</sup> Monforte (n 16) 2.

<sup>31</sup> HRC, CCPR General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (1992), 44<sup>th</sup> session, adopted 10 March 1992, UN Doc A/44/40 para 2.

<sup>32</sup> According to Amnesty International, torturous acts comprise, *inter alia*, 'beatings, floggings, electric shocks, stress positions, mock executions, waterboarding, sexual violence, forced administration of chemical substances, and deprivation of medical care', see AI, Iran: Detainees flogged, sexually abused and given electric shocks in gruesome post-protest crackdown – new report, 2 September 2020 <<https://www.amnesty.org/en/latest/press-release/2020/09/iran-detainees-flogged-sexually-abused-and-given-electric-shocks-in-gruesome-post-protest-crackdown-new-re-port/>> accessed 3 August 2022; for further reading on the practice of torture in Pakistan and Qatar see chapters 4.4.6 and 4.5.6.

<sup>33</sup> Çalı and Montoya (n 9) 25.

Reservations limiting the scope of application of substantive parts of the UNCAT may thus adversely affect the human rights protection as enshrined in the Convention.

In the light of these reasons of concern, rigorous evaluation of the legality of broadly framed Shari'a-based reservations with a view to the UNCAT's object and purpose and the adherence of the state to its treaty obligations, and thus the status of implementation, is warranted.<sup>34</sup>

For this purpose, chapter 2 will provide the theoretical framework and prevalence of reservations to core United Nations (UN) treaties, including a short elucidation of the debate on how treaty reservations may potentially compromise a treaty's integrity for the sake of universality.<sup>35</sup> Subsequently, the definition of torture and CIDT under IHRL, particularly under the UNCAT, as well as the prevalent definition under Islamic Shari'a law will be delineated in chapter 3. Pursuant to a general elaboration on Shari'a-based reservations to the UNCAT and the definition of the treaty's object and purpose, the core elements of this master project, namely the extraction of Shari'a-based reservations initially entered by Pakistan and Qatar upon accession based on Islamic Shari'a law, will be addressed in the next step. Thereby, chapter 5 will particularly focus on Shari'a-based reservations entered by Pakistan and Qatar, their compatibility with the treaty's object and purpose, the grounds and consequences for their potential impermissibility, as well as objections lodged by other state parties and the respective consequences. In the final chapter 6, the legal developments as regards the issue of Shari'a-based reservations to the UNCAT, as well as the implementation status of the Convention in both states will be examined and compared.

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<sup>34</sup> However, it is important to emphasize that, while this master project mainly addresses the implications of Shari'a-based reservations entered by Pakistan and Qatar on the implementation process of the UNCAT, the author acknowledges that Islamic Shari'a may represent only one 'influencing factor', cf *Abiad, Nasrine* (2008), 'Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study', British Institute of International and Comparative Law xv, who underscores that the impact of Sharia human rights practice is largely influenced by the factors of how it is applied and by whom, see *ibid*; the only two states which employed 'general' reservations to the UNCAT are the Holy See and Qatar, the latter of which partly lifted its reservation, see n 18; and *Augustauskaitė-Keršienė* (n 22) 131; on the issue on the political motivation of states to lodge objections, or refrain from lodging objections as in the case of the general reservation entered by the Holy See to the UNCAT, see *Salem, Nora* (2020), 'Sharia Reservations to Human Rights Treaties', Max Planck Encyclopedia of Public International Law para 20.

<sup>35</sup> *Ferreira, G.M., and Ferreira-Snyman, M.P.* (2005), 'The Impact of Treaty Reservations on the Establishment of an International Human Rights Regime', *The Comparative and International Law Journal of Southern Africa* 38(2) 152.



### 1.1. Current State of Research and Relevance of the Topic

The importance of addressing the issue of Shari'a-based reservations potentially undermining the UNCAT's object and purpose and consequently its effective implementation of human rights standards enshrined in the treaty arises, primarily, from the fact that religion-based reservations as well as the concept of cultural relativism constitute highly controversial issues in IHL.<sup>36</sup>

Furthermore, notwithstanding the high number of 173 state parties to the UNCAT as of August 2022,<sup>37</sup> the practice of torture remains an issue of worldwide prevalence. Between 2009 and 2014, Amnesty International (AI) documented cases of torture and CIDT in 141 countries, in some of which torture and CIDT are exerted on systematic basis.<sup>38</sup> Many states, including Pakistan and Qatar, as well as states as, for instance, the United States of America (US), still permit corporal punishment to a certain extent,<sup>39</sup> which may fall under the prohibition of torture and other forms of ill-treatment as incorporated in the UNCAT if it is intentionally inflicted on a person and causes 'severe pain or suffering.'<sup>40</sup> As regards the states of Pakistan and Qatar, recent evidence has revealed the prevalence of torture being perpetrated particularly by law enforcement authorities and even – yet unsuccessful – efforts to allow for specific punishments by the introduction of new domestic legislation, as well as the lack of adequate laws criminalizing acts of torture in line with the UNCAT.<sup>41</sup>

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<sup>36</sup> For further reading on the concept of cultural relativism see *Donnelly* (n 4); for further reading on the debate on Islamic reservations, see *Sawad* (n 1) 102–113.

<sup>37</sup> UNTC (n 17).

<sup>38</sup> AI, 'Torture around the World: What you Need to Know', 22 June 2015 <<https://www.amnesty.org/en/latest/news/2015/06/torture-around-the-world/>> accessed 2 August 2022, highlighting that disclosure of torture remains challenging, owing to the high estimated number of unreported cases.

<sup>39</sup> Regarding the example of the US, as of May 2018, at least 18 states permit corporal punishment incorporated in school disciplines policies, see Education Commission of States (2021), 'School Discipline Policies: Is Corporal Punishment Permitted' 1 <<https://files.eric.ed.gov/fulltext/ED612963.pdf>> accessed 3 August 2022; yet, it is important to note that corporal punishment only amounts to an act of torture in the sense of the UNCAT, if it constitutes an 'act by which *severe pain or suffering*, whether physical or mental, is *intentionally* inflicted on a person for such *purposes* as [...] punishing him [...]'. Additionally, it must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public *official* or other person acting in an official capacity' to fall within the ambit of article 1 of the UNCAT, see UNCAT (n 13) article 1 para 1; the issue of corporal punishment has also been raised in recommendations to states parties issued by the UN Committee against Torture (CAT), see, *inter alia*, CAT, Concluding observations on the initial report of Bangladesh, 26 August 2019, UN Doc CAT/C/BGD/CO/1 paras 46–49; for further reading on corporal punishment in Pakistan, see End Corporal Punishment (last updated 2022), Corporal punishment of children in Pakistan <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Pakistan.pdf>> accessed 2 August 2022; for further reading on corporal punishment in Qatar, see End Corporal Punishment (last updated 2022), 'Corporal Punishment of Children in Qatar' <<http://www.end-corporalpunishment.org/wp-content/uploads/country-reports/Qatar.pdf>> accessed 2 August 2022.

<sup>40</sup> UNCAT (n 13) article 1.

<sup>41</sup> For recent reporting of torture in Pakistan, see World Organisation Against Torture (OMCT)/Justice Project Pakistan (n.d.), 'Criminalising Torture in Pakistan' 1, referring to torture perpetrated by law enforcement

By addressing Shari'a-based reservations of Pakistan and Qatar to the UNCAT, regardless of the majority of them having been lifted by the named states, this master project seeks to raise awareness on the issue of reservations, the compatibility with the treaty's object and purpose and implications for the treaty's effective implementation to potentially identify any pattern of both Islamic states in limiting their obligations under the UNCAT. Thereby, the focus will lie particularly on broadly framed reservations based on Islamic Shari'a law of Pakistan and Qatar, as employed by several Muslim-majority states,<sup>42</sup> and their compliance with the UNCAT's object and purpose.

Finally, Islamic reservations have been addressed with respect to other core human rights treaties, including the 1980 UN Convention on the Elimination of All Forms of Discrimination Against Women (UNCEDAW),<sup>43</sup> the 1990 UN Convention on the Rights of the Child (UNCRC),<sup>44</sup> and the 1966 UN International Covenant on Civil and Political Rights

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authorities as to be 'endemic and systematic'; NCHR probes 1.500 police torture cases in Faisalabad (n.a.), 30 May 2018 <<https://www.dawn.com/news/1410908>> accessed 11 August 2022; AI, 'Pakistan: Legalization of Forced Chemical Castration a Cruel and Retrograde Step', 18 November 2021 <<https://www.amnesty.org/en/latest/news/2021/11/pakistan-legalization-of-forced-chemical-castration-a-cruel-and-retrograde-step/>> accessed 29 July 2022; accordingly, on 17 November 2021, the Parliament of Pakistan introduced the Criminal Law (Amendment Bill 2021), which allows, by amending 1980 Penal Code and the 1898 Code of Criminal Procedure of Pakistan, for chemical castration as a means of punishment for re-offenders of rape, see also article 376B of The Criminal Laws (Amendment) Bill of Pakistan, 2021; this planned amendment on chemical castration was, however, dropped shortly before the act was passed following widespread criticism by human rights groups, see *Upadhya, Ananya*, 'Pakistan Amends Criminal Laws on Sexual Assault while Excluding Chemical Castration as Punishment', 19 November 2021 <<https://www.jurist.org/news/2021/11/pakistan-amends-criminal-laws-on-sexual-assault-to-exclude-chemical-castration-as-a-possiblepunishment/>> accessed 11 August 2022; Human Rights Watch (2016), "This Crooked System": Police Abuse and Reform in Pakistan' 4 and 25–42, referring, *inter alia*, to the regular use of torture during criminal investigations by Pakistan's police authorities; with respect to recent evidence of torture in Qatar, the case of Ronaldo Lopez Ulep, a Filipino national, who was convicted on the grounds of espionage and claimed to have been repeatedly tortured coercing him to confessing the crime, was of particular concern for the CAT, the monitoring body of the UNCAT, supervising the compliance of state parties with their obligations arising from the treaty, see CAT, Concluding observations on the third periodic report of Qatar, 4 June 2018, UN Doc CAT/C/QAT/CO/3 para 17; besides the mentioned case, the HRC expressed its concern on the lack of information regarding the criminalization of torture, as well as of accessible remedies for victims, see HRC, Concluding observations on the initial report of Qatar, 25 April 2022, UN Doc CCPR/C/QAT/CO/1 para 28.

<sup>42</sup> Again, not *all* Islamic states employed reservations based on religious considerations, see *Mayer* (n 16) 43; yet, a high number of reservations to the seven core human rights treaties were employed by Asian or African states, the population of which comprise a majority of Muslims, see *Sawad* (n 1) 125.

<sup>43</sup> United Nations Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by GA Res 34/180 of 18 December 1979, entered into force 3 September 1981, in accordance with article 27(1) [hereinafter referred to as 'UNCEDAW']; for further reading on Shari'a-based reservations to the UNCEDAW, see *Sawad* (n 1) 140–147; *Chinkin, Christine* (1997), 'Reservations and Objections to the Convention on the Elimination of All forms of Discrimination Against Women', in Chinkin, C. M. and Gardner, J. P. (eds), *Human Rights as General Norms and a States Right to Opt Out*; cf *Keller, Linda M.* (2014), The Impact of States Parties' Reservations to the Convention on the Elimination of all Forms of Discrimination against Women, *Michigan State Law Review* 314; *Mayer* (n 16) 28–36; and *Salem* (n 34).

<sup>44</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA Res 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49 [hereinafter referred to as 'UNCRC']; for further reading on Shari'a-based reservations to the UNCRC, see *Sawad* (n 1) 140–

(UNICCPR).<sup>45</sup> Literature, particularly addressing Shari'a-based reservations to the UNCAT, to the contrary, is relatively scarce.<sup>46</sup>

## 1.2. Description of the Issue

The relationship of reservations to international treaties has been and continues to be highly debated. Arguments range from reservations serving the overall enhancement of universality of the human rights protection system<sup>47</sup> to the view that these type of 'unilateral statements'<sup>48</sup> may indeed accommodate the claim for universality while, yet, simultaneously posing a serious threat to the treaty's integrity.<sup>49</sup> In addition, to some appear concerned about reservations producing adverse implications, particularly for a treaty's effective implementation,<sup>50</sup> and for the objective of universality as such.<sup>51</sup>

Among reservations to UN treaties, 'general' Shari'a-based reservations are considered especially controversial.<sup>52</sup> Reservations of such vague nature have also been employed by Pakistan and Qatar upon accession to the UNCAT,<sup>53</sup> both of which have consequently been

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147; Mayer (n 16) 36–43; Syed, *Safir* (1998), 'The impact of Islamic law on the implementation of the Convention on the Rights of the Child: The Plight of Non-Marital Children under Shari'a', *The International Journal of Children's Rights* 6.

<sup>45</sup> UN International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) of 16 December 1966, entered into force 23 March 1976 [hereinafter referred to as 'UNICCPR']; for further reading on Shari'a-based reservations to the UNICCPR, see Çalı, Başak, 'Qatar's Reservations to the ICCPR: Anything new under the VCLT Sun?', 19 September 2019 <<https://www.ejiltalk.org/qatars-reservations-to-the-iccpr-anything-new-under-the-vclt-sun/>> accessed 30 July 2022.

<sup>46</sup> Existing literature addresses the issue of Shari'a-based reservation by referring, *inter alia*, to their compliance with the 2011 Guide to Practice on Reservations to Treaties introduced by the International Law Commission (ILC); for the said Guide, see ILC (2011), Guide to Practice on Reservations to Treaties, 63<sup>rd</sup> session, adopted 5 to 11 August 2011, submitted to the GA as a part of the Commission's report covering the work of that session (A/66/10, para 75), Yearbook of the International Law Commission 2011 2 II [hereinafter referred to as 'ILC Guidelines']; see Çalı (n 45); and Mayer (n 16) 26, both particularly addressing the compatibility of Shari'a-based reservations with the treaty's object and purpose by referring to their often criticized indeterminate scope and vague wording, as well as elucidating the right of state parties to object a reservation and the consequences following from these objections; another aspect elucidated in existing literature constitutes the deemed conflict between provisions of the said treaties and domestic Islamic Shari'a laws, as well as the issue of states' references to internal law as enshrined in article 27 of the VCLT, see Mayer (n 16) 26.

<sup>47</sup> Çalı and Montoya (n 9) 8.

<sup>48</sup> VCLT (n 5) article 2 para 1 lit d.

<sup>49</sup> Ferreira and Ferreira-Snyman (n 35) 152.

<sup>50</sup> Moussa (n 10).

<sup>51</sup> Sawad (n 1) 102.

<sup>52</sup> Pellet, Alain, 'The ILC Guide to Practice on Reservations to Treaties: Some General Remarks', 24 March 2014 <<https://www.ejiltalk.org/the-ilc-guide-to-practice-on-reservations-to-treaties-some-general-remarks/>> accessed 4 August 2022, according to whom "sharia reservations" are but the most striking example of the political sensitivity of the subject [reservations to treaties]; Monforte (n 16), particularly referring to the political sensitivity and legal challenges of reservations entered to the UNCEDAW; for further reading on the issue of general or vague reservations in general, as well as in respect of Shari'a-based reservations and their potential conflict with a treaty's object and purpose, see ILC Report Addendum (n 28) 363–368.

<sup>53</sup> For further reading on Pakistan's reservations, see n 17; for the general reservation of Qatar, see n 18; the wording and compatibility with the UNCAT's object and purpose of the reservations entered by the named states, *inter alia*, will be addressed in chapters 5.1 and 5.2.

subjected to a great number of objections by other state parties, mainly concerning the reservation's incompatibility with the object and purpose of the treaty due to their indeterminate nature.<sup>54</sup> Pakistan subsequently lifted most of its reservations except from those targeting articles 8 para 2, 20 and 30 para 1 of the UNCAT.<sup>55</sup>

Similarly, Qatar withdrew its general reservation, 'while keeping in effect a *limited general* reservation within the framework of Articles 1 and 16 of the Convention,'<sup>56</sup> thus mainly reserving the state's duty to employ the general definition of 'torture' and other ill-treatment as included in both articles.<sup>57</sup> Notably, with respect to the still standing reservation of Qatar, the United Nations Committee against Torture (CAT)<sup>58</sup> recently raised a number of concerns, including the 'vaguely defined reservation of imprecise scope to articles 1 and 16.'<sup>59</sup>

### 1.3. Research Question and Sub-questions

The presumption of this thesis is that 'vague' reservations, including those employed by Pakistan and Qatar referring to Islamic Shari'a, conflict with the UNCAT's underlying object and purpose, some of which may have an adverse impact on the treaty implementation process.

The main research question the thesis answers is:

*To what extent are Shari'a-based reservations impeding the full implementation of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT) with a particular focus on those entered by the Islamic State of Pakistan and the State of Qatar?*

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<sup>54</sup> The response by the other state parties to the Convention to the reservations entered by Pakistan and Qatar will be further addressed in chapters 5.1.2 and 5.2.2.

<sup>55</sup> Thereby Pakistan excludes the UNCAT 'as the legal basis cooperation on extradition with other State Parties', denies the competence of the CAT under article 20, as well as any obligation arising from article 30 para 1, see UNTC (n 17).

<sup>56</sup> Ibid.

<sup>57</sup> Article 1 para 1 of the UNCAT defines 'torture' as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions', see UNCAT (n 13) article 1 para 1; article 16 para 1 defines CIDT as 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1', see UNCAT (n 13) article 16 para 1.

<sup>58</sup> As the monitoring body of the UNCAT, the CAT, a committee of ten independent experts, supervises the compliance of the state parties with their obligations under the treaty. All state parties are required to regularly report to the Committee, to which the CAT issues recommendations or 'concluding observations', see UN Office of the High Commissioner for Human Rights (OHCHR), Introduction: Committee against Torture <<https://www.ohchr.org/en/treaty-bodies/cat/introduction>> accessed 4 August 2022.

<sup>59</sup> CAT (n 41) para 7.

To guide the research and provide an answer to the main research question, the thesis addresses the following sub-questions:

- (a) Which is the UNCAT' object and purpose and which state's obligations arise from the Convention?
- (b) When do treaty reservations become impermissible, particularly with respect to those reservations coming into conflict with the UNCAT's object and purpose?
- (c) What is the current status of implementation of the UNCAT in the Islamic State of Pakistan and the State Qatar?
- (d) Which definition of 'torture' and 'punishment' is employed by the UNCAT and how does this understanding differ from the definition provided by Islamic Shari'a law?
- (e) Does Islamic Shari'a law prescribe the prohibition of torture?
- (f) Were the Shari'a-based reservations initially entered by Pakistan in accordance with the object and purpose of the UNCAT? Were the reservations employed by Qatar upon accession, and particularly those still standing, in compliance with the UNCAT's object and purpose? Which consequences follow from the impermissibility and withdrawal of reservations and the objections by other state parties?

#### *1.4. Methodology*

A legal desk research was conducted to understand the controversial question of whether general Shari'a-based reservations to the UNCAT, entered by Pakistan and Qatar, undermine the treaty's object and purpose, and which implications arise therefrom, in particular with regard to the process of implementation of the Convention. The author made use of primary sources as well as pre-existing academic and grey literature and documents for her research project.

#### *1.5. Roadmap*

As the thesis seeks to answer the question of how reservations based on Islamic Shari'a law of Pakistan and Qatar are capable of posing a risk to the effectiveness of the UNCAT, it is imperative to define how the term of treaty 'effectiveness' can be measured. Therefore, it is a necessary step before entering the actual assessment phase to provide a clear definition of the term of 'effectiveness.' This contribution is not based on a qualitative research, but applies a specific definition of effectiveness of a treaty and, consequently, of the UNCAT, which is then used with respect to the reservations in question. Therefore, treaty 'effectiveness' is understood by the author as measured by the status or degree of implementation of the

respective treaty, especially owing to the particularly detailed provisions of the UNCAT, which is, thus, regularly considered as an ‘implementing treaty.’<sup>60</sup>

Therefore, the first step comprises the identification and definition of the specific human rights obligations entailed in the UNCAT in order to enable the analysis of whether or to which extent the named states have implemented the Convention and, hence, whether the treaty can be considered ‘effective’ in Pakistan and Qatar. The author acknowledges that a final assessment of the implementation degree warrants or implies a specific normative scale, on which the status can be measured. Therefore, this master project does not entail a final judgment on the degree of implementation, but addresses critical aspects, and particular legal actions or omissions by the named states, which are of relevance for the question of whether or not there is a perceivable movement towards and a commitment to the full realization of the human rights protection as enshrined in the UNCAT.

To answer the underlying research question, research was conducted by reviewing existing literature on the issue of Shari’a-based reservations to human rights treaties. Included sources encompass UN documents provided by the United Nations Committee against Torture (CAT), the United Nations Human Rights Committee (HRC), and reports by Special Procedures, reports by Amnesty International (AI), Human Rights Watch (HRW) and other NGOs, scholarship in English or German language, as well as critical Islamic law provisions referring or – at least – being obliged to address the issue of torture and CIDT. The inclusion of this literature allows to provide a full picture of theory and practice regarding torture and CIDT and Shari’a-based reservations of Pakistan and Qatar. Although this master project occasionally refers to documents thematically located in other disciplines, such as philosophy, sociology or political science, the main focus lies on legal documents and scholarship. This is particularly important for the question of how to measure the effectiveness of a treaty by reflecting on reservations entered by Pakistan and Qatar.

In the course of the conducted research, the author identified a number of research limitations.

Firstly, regarding the main context of the research, except from the description of the legal and actual status quo of reservations in general, the main contextual focus regarding the issue of reservations lies on those based on Islamic Shari’a. While general information, *inter alia*, is included as well regarding, for instance, the prevalence of reservations as such, this master project aims at applying the legal framework to and highlighting the reality of Shari’a-based

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<sup>60</sup> Çalı and Montoya (n 9) 3.

reservations to the UNCAT entered by Pakistan and Qatar, and is, therefore, geographically mainly restricted to the named states.<sup>61</sup> The author's decision to focus on the states of Pakistan and Qatar is based on two grounds. Firstly, as preliminary research has shown, torture is still perpetrated in both Islamic states and often met with or being at a high risk of impunity.<sup>62</sup> Secondly, both states employed far-reaching Shari'a-based reservations upon their accession to the UNCAT, which resulted in a significant number of objections<sup>63</sup> by several state parties.

Secondly, while reservations are addressed, which have already been lifted, this master project provides a broad picture of Shari'a-based reservations and their potential conflicting nature with the object and purpose of the UNCAT, particularly by referring to the highly controversial reservations entered by Pakistan and Qatar. Thus, notwithstanding the withdrawal of most of the critical reservations in question, this thesis outlines, *inter alia*, how the Islamic states of Pakistan and Qatar have used – or in the case of Qatar still employ – this type of reservations to limit their obligations under the UNCAT. Moreover, access to national legislation in the named states is rather limited.

Finally, the specific question of why torture may still be widespread in Pakistan and Qatar cannot be presented exhaustively in a purely legal work, as the author assumes that this would require an inter-disciplinary approach. A legal analysis of the torture phenomenon in Pakistan and Qatar can only be based on the extent to which the states comply with their obligations under international treaty law and the extent to which these states intended to limited their obligations by far-reaching or vague reservations and thus hinder the effective or full implementation of the UNCAT.

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<sup>61</sup> CAT, Concluding observations on the initial report of Pakistan, 1 June 2017, UN Doc CAT/C/PAK/CO/1 paras 10 and 18, particularly addressing the concern of 'a significant number of [...] extrajudicial executions involving torture' and consequent impunity for torturous acts committed by military and paramilitary forces, as well as intelligence agencies due to the state's legal possibilities for 'retroactive immunity' with respect to the named perpetrators, as well as the issue of female torture victims and existing barriers they are facing in seeking justice; with respect to Qatar, the CAT emphasized that the state is still obliged to amend the Qatari criminal law in terms of not allowing for the reduction of sentences for perpetrators of torturous acts to 'preclude any risk of impunity', see CAT, CAT/C/QAT/CO/3 (n 41) para 12.

<sup>62</sup> 'UN body to Review Pakistan's Compliance with Convention against Torture', 17 April 2017, The Express Tribune <<https://tribune.com.pk/story/1386280/un-body-review-pakistans-compliance-convention-torture>> accessed 28 July 2022, referring to an 'endemic of torture in Pakistan'; OMCT/Justice Project Pakistan (n 41) 2, concerning a 'systematic failure by the state' to promptly and impartially investigate allegations of torture by public authorities.

<sup>63</sup> The general consequences of objections will be further elucidated in the context of reservations to human rights treaties in chapter 2.1; for the particular objections entered by the state parties to the reservations of Pakistan and Qatar, see chapters 5.1.2 and 5.2.2.

## 2. Multilateral Treaties and Reservations – A Theoretical Outline

The importance to elevate human rights protection from the national to the international sphere, and thereby directly engaging the hitherto widely undisputed sacrosanctity of state's sovereignty,<sup>64</sup> has become increasingly acknowledged by states since the aftermath of the Second World War.<sup>65</sup> The recognition of human rights as not only constituting a matter of domestic concern was consequently and primarily manifested in the establishment of the UDHR and the aim for universality of human rights enshrined therein.<sup>66</sup> Nonetheless, in preserving the principles of sovereignty and state consent to some extent,<sup>67</sup> the VCLT foresees the possibility to enter reservations to international agreements.<sup>68</sup>

This chapter provides the legal framework of the concept of reservations employed by states towards international human rights treaties, before focussing on specific Shari'a-based reservations employed by Pakistan and Qatar. By doing so, it briefly delineates the prevalent definition of reservations used in IHRL, the difference between 'specific' and 'general' reservations, the variety of underlying reasons for entering reservations in the accession to a human rights treaty, specifically focussing on cultural and religious incitements, as well as the legal requirement of the compliance with the treaty's object and purpose. Additionally, the right of state parties to lodge objections to reservations is addressed. This consequently serves as a starting point for the assessment of the nature of Shari'a-based reservations entered by Pakistan and Qatar and their compatibility with the treaty's object and purpose. The assessment encompasses the question of legal consequences of impermissible reservations, objections by state parties, as well as the withdrawal of reservations.

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<sup>64</sup> Wotipka, Christine Min, and Tsutsui, Kiyoteru (2008), 'Global Human Rights and State Sovereignty: State Ratification of International Rights Treaties', *Sociological Forum* 23(4) 725.

<sup>65</sup> Ferreira and Ferreira-Snyman (n 35) 149, who purport, based on figures provided by Weissbrodt, D., Fitzpatrick, J., and Newman, F. (2001), *International Human Rights: Law, Policy and Process* (3<sup>rd</sup> edition) 18, that 'it is unlikely that any state would seriously claim that the protection of human rights should be treated exclusively as a domestic affair; Hafner-Burton, Emilie M., and Tsutsui, Kiyoteru, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology* 100(5) 1374.

<sup>66</sup> Cf Ferreira and Ferreira-Snyman (n 35) 148–149.

<sup>67</sup> Tyagi, Yogesh, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties', *British Yearbook of International Law* 71(1) 183; the principle of state consent has been used for long to argue that states have to consent to international duties, see Watson, J. Shand (1992), 'State Consent and the Sources of International Obligation', in Bodansky, Daniel, and Watson, J. Shand, *State Consent and the Sources of International Obligation, Proceedings of the American Society of International Law Annual Meeting* 86 108; pursuant to the principle of state consent, a state can only be bound by treaty obligations it was willing to accept, see Goodman, Ryan (2002), 'Human Rights Treaties, Invalid Reservations, and State Consent', *The American Journal of International Law* 96(3) 531.

<sup>68</sup> VCLT (n 5) article 19.



The VCLT provides the legal framework for reservations<sup>69</sup> to international treaties. Pursuant to article 2 para 1 lit d of the VCLT, a ‘reservation’ is defined as

*a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.*

Accordingly, whether a statement falls within the definition of a reservation depends primarily on the underlying *intention* of the state to ‘exclude or modify the legal effect of a treaty in its application to the state making the declaration,’ irrespective of its title or form.<sup>70</sup> As opposed to this kind of unilateral statements, interpretative declarations serve the objective to ‘specify or clarify the meaning or scope’ of the treaty or specific provisions.<sup>71</sup>

While certain legal limitations in the framing of reservations exist,<sup>72</sup> reservations to human rights treaties, including those based on religion, nevertheless constitute common practice. In fact, a number of states, including several Muslim-majority states, have entered religion-based reservations to the core UN human rights treaties, including most prominently, the UNCEDAW and the UNCRC, the two most reserved treaties of all, as well as to the UNCAT.<sup>73</sup> Notably, notwithstanding that the UNCAT has received a low number of reservations, namely 48 in total as of 2016, approximately a third thereof are religion-based.<sup>74</sup>

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<sup>69</sup> For the delimitation criteria of ‘reservations’ from ‘interpretative declarations’, see *Edwards Jr., Richard W.* (1989), *Reservations to Treaties*, Michigan Journal of International Law 10(2) 367–373.

<sup>70</sup> VCLT (n 5) article 2 para 1 lit d; HRC (n 7) para 3, according to which a unilateral statement by a state titled ‘reservation’ only serving more clarity of the reserving state’s understanding does not constitute a reservation; cf also *Tyagi* (n 67) 181; it has also been argued that the intention of a state to employ reservations, thereby limiting its obligations under the treaty, can be considered a ‘weaker’ commitment of the reserving state to actively engage in the treaty’s actual implementation once it has been ratified, up to even involving the danger of even adverse effects for the human rights on the ground, see *Cole, Wade M.* (2012), ‘Human Rights as Myth and Ceremony? Reevaluation the Effectiveness of Human Rights Treaties, 1981–2007’, *American Journal of Sociology* 117(4) 1131–1132, who distinguishes different levels of commitment, namely ‘signature, qualified ratification, ratification in general, and ratification with enhanced monitoring and enforcement’, see *ibid* 1137.

<sup>71</sup> ILC Report Addendum (n 28) 75, according to which the distinction between these types of unilateral statements are particularly challenging in practice, see *ibid*.

<sup>72</sup> Article 19 of the VCLT enshrines that a state may only enter a reservation if the treaty does not prohibit reservations in general or specific reservations, including the one employed by the reserving state. If the treaty does not foresee an according restriction, the reservation must be incompatible with the object and purpose of the treaty, see VCLT (n 5) article 19.

<sup>73</sup> In 2020, the treaty which received the highest number of reservations is the UNCEDAW with a total of 440, including 274 reservations based on religion, employed by 28 states. 23 states entered a total number of 425 reservations to the UNCRC, of which 202 are motivated by religion. The UNICCPR has attracted 354 reservations by nine states, including 37 which are religion-based, followed by the ICESCR, to which 151 reservations have been entered, see *Salem* (n 34) para 1; and *Çali and Montoya* (n 9) 18–19; *Augustauskaitė-Keršienė* (n 22) 118, who concluded that while there is a high number of lifted reservations, states seek to uphold

Reservations to international human rights treaties may serve a variation of reasons.<sup>75</sup> Four general intentions of states when acceding to an international agreement has been delineated in literature. First, they seek to become party to the respective treaty, while, simultaneously opposing certain provisions deemed to interfere with the state's interests. Second, while the state may be interested in becoming a state party to the international agreement, it refuses to be subjected to any kind of procedural duties. Third, for some states the preservation of *national particularities, values, or laws* in the accession to an international treaty is of utmost importance, yet often coupled with the reluctance to introduce or adapt national legislation in accordance with the respective treaty.<sup>76</sup> Fourth, a state 'may want to preclude a treaty's application to subordinate political entities in a federal system or to foreign territories.'<sup>77</sup>

Several Muslim-majority states have so far employed various reservations, many based on Islamic Shari'a law, for the sake of preserving national particularities, such as social, cultural, as well as religious values,<sup>78</sup> thereby also serving as a means of political justification,<sup>79</sup> while by the same token restricting their international obligations arising from the respective treaty.<sup>80</sup>

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general reservations, particularly those based on cultural or religious considerations, see *ibid* 132; it has been purported that the implementation of human rights treaties particularly addressing social structures, such as women's and children's rights, is often hampered by 'pervading patriarchal cultures and norms [...] in Muslim societies', see *Abiad* (n 34).

<sup>74</sup> *Çali and Montoya* (n 9) 18–19, who support that religion-based reservations to the UNCAT 'deal mainly with different religious-cultural view on crime and punishment'.

<sup>75</sup> The question of the motifs of Islamic states to ratify human rights treaties will not be addressed in this chapter; for further reading on the variety of motivations of states to become party to a treaty, see *Ferreira and Ferreira-Snyman* (n 35) 151.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Edwards Jr.* (n 69) 363.

<sup>78</sup> *Çali and Montoya* (n 9) 2 and 6, referring to a project by the Universal Rights Group (URG), between 2014 and 2016, which revealed that over 40 percent of all reservations to the most pivotal human rights treaties are either based of influenced by religion.

<sup>79</sup> *Sawad* (n 1) 103–104; *Abiad* (n 34); while internal incitements may constitute one type of motifs for entering reservations, external reasons, including economic incentives or political pressure may also be effective in inducing a state to ratify a treaty or withdraw its reservations, particularly with a view to 'tangible' economic benefits may encompass the increase of the state's chances to obtain investments or subsidies from and to enhance trans-border trade with other states, see *Hathaway, Oona A.* (2004), *The Promise and Limits of the International Law of Torture*, in *Levinson, Sanford* (ed), *Torture: A Collection* 207.

<sup>80</sup> *Ferreira and Ferreira-Snyman* (n 35) 152; the narrative of preserving domestic values is based on the premise of cultural relativism, a concept allowing the cultural and religious interests of a nation's population to flow into political decisions at the international level by means of, for instance, treaty reservations, see *Sawad* (n 1) 105–107, according to whom cultural relativism mainly serve 'the recognition of the diversity of various cultures and peoples' and is based on the premise that the understanding of human rights vary with respect to the variety of cultures, generating a vast number of moral values and convictions.

By doing so, states confer a great weight upon those national interests, thereby coming into conflict with the main idea of human rights treaties, which seek to bestow the *individual* with enforceable rights rooting in human dignity.<sup>81</sup>

As regards their nature, reservations may be ‘general’ or ‘partial’, the latter of which refers to reservations targeting only one or several specific treaty provisions. A general reservation, to the contrary, can be manifested, for instance, in states accepting the obligations enshrined in a treaty only insofar as they are in accordance with the state’s religion.<sup>82</sup>

Pursuant to article 20 of the VCLT, a state party has the right to object<sup>83</sup> a state’s reservation. In particular, with regards to the legal consequences, the VCLT enshrines in its article 20 para 4 lit b that an objection does not prevent the treaty from entering into force between both the state lodging the objection and the state employing the reservation up to the point where the objecting state explicitly intends a different legal effect. Furthermore, article 21 para 3 of the VCLT stipulates that in the case of the objecting state not rejecting the entry into force of the treaty, ‘the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.’<sup>84</sup> According to the ILC Report, the latter intention is referred to as the ‘minimum’ consequence of a state party’s objection, whereas a state explicitly rejecting the entry into force will result in the ‘maximum’ effect of the state party’s objection, thus in the treaty not entering into force between the objecting and the reserving state.<sup>85</sup> Notably, there is another form of objections expressing the intention of a state party to enter into treaty relations with the reserving state, while simultaneously wishing that the

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<sup>81</sup> Cf HRC (n 7) para 4, according to which the states’ acceptance of all duties enshrined in the respective treaty is of utmost importance owing to that fact that human rights provisions encompass all essential rights which every person is bestowed with by virtue of him or her being human.

<sup>82</sup> *Çali and Montoya* (n 9) 2; ILC, Tenth report on reservations to treaties / by Alain Pellet, Special Rapporteur (2005), 57<sup>th</sup> session, adopted on 1 June 2005, UN Doc A/CN.4/558 paras 45 and 49, referring to ‘reservations in a general manner’ and ‘specified reservations’; a general reservation in this sense has been, for instance, entered by Qatar upon accession to the UNCAT on the 11 January 2000, which excluded ‘[a]ny interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion’, see UNTS 2097 (n 18) 157; for the only still standing general reservation to the UNCAT employed by the Holy See, see UNTC (n 17); a specified reservation to the UNCAT was, *inter alia*, entered by France to article 30 para 1, which declared its wish not to be bound by the said article, see *ibid*.

<sup>83</sup> An objection constitutes ‘a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation’, see ILC Guidelines (n 46) article 2.6.1.

<sup>84</sup> VCLT (n 5) article 21 para 3.

<sup>85</sup> *Cortado, Rosa Riquelme* (2004), *Las reservas a los tratados, Lagunas y Ambigüedades del Regimen de Viena* (Universidad de Murcia) 279–280 as cited in ILC Report Addendum (n 28) 242.

reserving state does not benefit from the employed reservation, which is referred to as the ‘super-maximum’ consequence.<sup>86</sup>

While reservations do not depend on a particular treaty provision affirming the possibility to enter reservations,<sup>87</sup> it is imperative, pursuant to the International Court of Justice (ICJ), that reservations to be valid comply with the *object and purpose* of the treaty. This rule was subsequently integrated in the VCLT, which outlines, *inter alia*, the prerequisites for the formulation of reservations.<sup>88</sup> Accordingly, article 19 lit c of the VCLT enshrines the essential principle for the admissibility of reservations, namely the requirement of the conformity with the object and purpose of the treaty targeted by reservations, along with the prerequisite that the reservation is not entered against a blanket prohibition of reservations in general or a specific ban of the reservation in question prescribed in the treaty. While the scope of the latter is fairly self-explanatory, the wording of the ‘incompatibility with the treaty’s object and purpose’ leaves room for extensive interpretation resulting from the generally ‘flexible’ Vienna regime.<sup>89</sup>

Owing to the wording of ‘object and purpose’ in article 19 lit c of the VCLT being broadly phrased,<sup>90</sup> the identification of a clearer and narrower definition of the object and purpose of a treaty in general and, in further consequence of the UNCAT, is warranted. Thus, it is crucial to examine the scope of the object and purpose of a treaty,<sup>91</sup> possible methods of identification in the particular international document, whether the terms ‘object’ and ‘purpose’ treated as of equal meaning, when a reservation becomes incompatible and which

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<sup>86</sup> Ibid 300–305 as cited in ILC Report Addendum (n 28) 243; which is, however, only accepted for *invalid* reservations, see ibid 496; likewise, in order to avoid any misconceptions in this regard, many states resort to explicitly mentioning severance of the reservations to which the state has objected as consequence, see *Mccall-Smith, Kasey L.* (2014), Severing Reservations, *The International and Comparative Law Quarterly* 63(3) 626; for further reading on the wording and consequences of the objections lodged by the states parties to the reservations to the UNCAT entered by Pakistan and Qatar, see chapters 5.1.2 and 5.2.2.

<sup>87</sup> *Çalı and Montoya* (n 9) 8.

<sup>88</sup> Ibid; see also *Ferreira and Ferreira-Snyman* (n 35) 161; the VCLT outlines in its articles 2 para 1 lit d and 19 that reservations to be permissible under the Vienna regime have to be, first, qualified as ‘reservation’, thus aiming at the exclusion or modification of the reserving state’s treaty obligations, second, entered upon accession, ratification, acceptance, approval, or signature, third, be in accordance with the treaty’s object and purpose and fourth, entered not against an explicit prohibition enshrined in the treaty, see VCLT (n 5) articles 2 para 1 lit d and 19; Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice (ICJ), 28 May 1951 <<https://www.refworld.org/cases/ICJ,4023a7644.html>> accessed 10 August 2022.

<sup>89</sup> *Pellet, Alain* (2013), ‘The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’, *The European Journal of International Law* 24(4) 1078.

<sup>90</sup> According to the ILC Report Addendum, article 19 lit c is the provision which is the most challenging, see ILC Report Addendum (n 28) 351.

<sup>91</sup> Yet, the limitations of generally defining the ‘object and purpose’ of a treaty must be equally acknowledged, considering the finding of its meaning, as an in itself ‘subjective act’, being largely dependent on the particular situation under the treaty regime, see *Ferreira and Ferreira-Snyman* (n 35) 162.

consequences follow from the incompatibility of a reservation for the effect of the treaty, and therefore its effectiveness or implementation. These questions are, moreover, essential to consequently address whether Shari'a-based reservations to the UNCAT entered by Pakistan and Qatar are – or were before their withdrawal – compatible with the object and purpose of the UNCAT.

The determination of a treaty's object and purpose has already given rise to wide debates, particularly on whether the terms can be used as synonyms or have to be understood independently or even as opposing terms, not least because of their similar, but no identical original meaning deduced from their translation.<sup>92</sup> According to the ILC Report, the object of a treaty can to be understood as the 'actual content' of the international agreement, and the purpose if defined as the actual result pursued.<sup>93</sup>

According to the ILC Guidelines, '[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.'<sup>94</sup> For the identification of the *raison d'être* of the treaty, the treaty's terms, as well as its title and preamble play key roles in defining the scope of the object and purpose of a treaty, which are to be interpreted 'in good faith.'<sup>95</sup>

Reservations targeting *non-derogable* norms, including the prohibition of torture as enshrined in article 2 of the Convention, are most likely – yet not automatically – contrary to the treaty's underlying object and purpose, requiring specific reasons for their employment.<sup>96</sup>

Furthermore, reservations of *indeterminate* nature are considered, in general, to run contrary to a treaty's object and purpose, as their compatibility with the treaty cannot be properly examined, given the lack of clarity regarding their scope.<sup>97</sup>

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<sup>92</sup> For further reading on the conflicting views on the question of whether these terms can be used as synonyms, see *Crnici-Grotic, Vesna* (1997), Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties', Asian Yearbook of International Law 7 143–144, who, using the Oxford Advanced Learner's Dictionary of Current English, refers to 'object' as a '[...] thing to which the action [...] is directed to [...]' and 'purpose' as something '[...] one means to[intentionally] do', see *ibid*.

<sup>93</sup> *Jacqué, Jean-Paul* (1972), *Éléments pour une théorie de l'acte juridique en droit international public*, Librairie générale de droit et de jurisprudence 142 as cited in ILC Report Addendum (n 28) 356; according to *Bos*, the "object and purpose" [can be understood] as a unique expression denoting two closely related [interacting] aspects of the same idea', see *Bos, Maarten* (1984), A Methodology of International Law 153 as cited in ILC Report Addendum (n 28) 174.

<sup>94</sup> ILC Guidelines (n 46) article 3.1.5; *Çalı* (n 45).

<sup>95</sup> ILC Guidelines (n 46) articles 3.1.5, 3.1.5.1 and 3.1.5.2; *Çalı* (n 45).

<sup>96</sup> HRC (n 7) paras 8 and 10; CAT, General Comment No 2: Implementation of article 2 by States parties, 24 January 2008, UN Doc CAT/C/GC/2 para 1.

Reservations, which are found to be impermissible, by another state party or the treaty monitoring body,<sup>98</sup> are considered to be ‘null and void,’<sup>99</sup> which remains, however, highly debated. Pursuant to the ILC Guidelines, the nullity of an impermissible reservation does not depend on the objection of a state party.<sup>100</sup> The ILC Report clarifies that the nullity of reservations which fail to comply with article 19 of the VCLT is not to be understood as a ‘matter of *lex ferenda*,’ but more as a consequence ‘established in State practice’. Accordingly, states regularly lodge objections to reservations concerning their incompatibility with the treaty’s object and purpose, while simultaneously referring to the nullity of the reservation.<sup>101</sup>

With respect to the UNCAT, it has been purported that the question of incompatibility of a reservation has to be answered by the treaty’s monitoring body, the CAT. In the case of the Committee considering a reservation incompatible with the treaty’s object and purpose, the reservation is, in further consequence, to be considered null and void, resulting in the state being *fully bound* by the Convention.<sup>102</sup>

However, every reserving state party has the right to *withdraw* its reservations under the Vienna regime,<sup>103</sup> considered as an important step towards the universality of a treaty, and thus the recognition of ‘universal’ human rights.<sup>104</sup> According to the ILC Guidelines, in the case of a state party lifting its reservations, the state becomes fully bound by the provisions initially targeted by reservations. If another state party rejected the entry into force of the treaty due to the reservation, the treaty consequently becomes applicable between the rejecting and the withdrawing state.<sup>105</sup> Thus, as a legal consequence of the withdrawal, the

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<sup>97</sup> ILC (n 44) article 3.1.5.2; ILC Guidelines (n 46) 4.5.1; ILC Report Addendum (n 28) 367.

<sup>98</sup> Ibid article 3.2 lit a and c.

<sup>99</sup> Çali and Montoya (n 9) 10; see ILC Guidelines (n 46) article 4.5.1; for further reading on the consequences of reservations impermissible due to their incompatibility with the treaty’s object and purpose see *Ferreira and Ferreira-Snyman* (n 35) 178; for the controversy on the legal effects of an impermissible reservation, see *Salem* (n 34) para 21.

<sup>100</sup> ILC Guidelines (n 46) articles 3.3.3 and 4.5.2.

<sup>101</sup> ILC Report Addendum (n 28) 510–511; accordingly, whether ‘[a] reservation is or is not valid, irrespective of the individual positions taken by States [...] should [...] be *determined objectively*’, see ibid 519; see also the objections lodged by several state parties to Pakistan’s and Qatar’s reservations, see chapters 5.1.2 and 5.2.2.

<sup>102</sup> Nowak, *Manfred* (2005), UN Covenant on Civil and Political Rights: CCPR Commentary (2<sup>nd</sup> rev edition) XXVI as cited in Nowak, *Manfred, Birk, Moritz, and Monina, Guilana* (2019), The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2<sup>nd</sup> edition) 12.

<sup>103</sup> VCLT (n 5) article 22.

<sup>104</sup> Çali and Montoya (n 9) 2; in general, and as showcased above, both incentives as well as motives for states to ratify a specific treaty are manifold. While some states accede to a treaty by genuinely intending to take further actions on domestic level in the sense of taking steps to actually ‘implement’ the respective treaty, some states seek treaty ratification as a means of integration ‘into the international community’ or merely for the sake of realizing certain benefits coupled with the ratification, see Çali et al (n 111) 23–24.

<sup>105</sup> ILC Guidelines (n 46) article 2.5.7 paras 1 and 2.

provisions initially targeted by the reservation apply as ‘if the reservation had not been made.’<sup>106</sup>

As purported in literature, the possibility of entering reservations undoubtedly involve a potential danger for the treaty’s effectiveness.<sup>107</sup> Notwithstanding that reservations constitute an essential and effective tool to encourage states’ accession to a treaty,<sup>108</sup> a high number of reservations and/or reservations of sweeping scope limiting the binding force of core treaty provisions, carry the menace of ‘diluting’ the normative effect and integrity of a treaty.<sup>109</sup> In the words of the HRC,

*‘[t]he number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of State parties.’<sup>110</sup>*

By referring to the CCPR General Comment No 24, it has been argue that reservations are capable of compromising the universality of human rights treaties owing to their effect of restricting the state’s duties under the treaty resulting in a fragmentation of human rights obligations rather than enhancing a universal system of human rights protection.<sup>111</sup>

Especially *general* reservations are particularly criticized of impeding the implementation of a treaty, with regards to achieving both a permanent judicial, as well as a political transformation given the fact that the position and importance of a human rights treaty remain indeterminate in the national political and legal settings.<sup>112</sup> Thus, the concern of the ILC

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<sup>106</sup> ILC Report Addendum (n 28) 218.

<sup>107</sup> *Ferreira and Ferreira-Snyman* (n 35) 150.

<sup>108</sup> HRC (n 7) para 4.

<sup>109</sup> *Sawad* (n 1) 102; *Ferreira and Ferreira-Snyman* (n 35) 152.

<sup>110</sup> HRC (n 7) para 1.

<sup>111</sup> *Ferreira and Ferreira-Snyman* (n 35) 164; see also *Çalı and Montoya* (n 9) 2; *Çalı, Başak, Ghanea, Nazila, and Jones Benjamin* (2016), ‘Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council’, *Human Rights Quarterly* 38(1) 40, purporting that the implications of reservations to a treaty can be severe for the effective enjoyment of human rights enshrined therein, as the reluctance in accepting particular treaty obligations entail the risk of the state not taking required steps at the national level.

<sup>112</sup> Cf *Augustauskaitė-Keršienė* (n 22) 131.

regarding broadly framed reservations contradicting the treaty's object and purpose,<sup>113</sup> and being thus impermissible, is likewise reflected in literature.<sup>114</sup>

While it has been purported in literature that the instrument of reservations enable a certain movement to full universality of human rights,<sup>115</sup> Three potential adverse effects have been identified in literature resulting from the possibility of treaty reservations, namely that it '[f]irstly [...] lowers the minimum human rights standards contained in a particular treaty for the reserving states. Secondly, it dilutes the principle of universality of human rights and frustrates the attempts of the international community to establish a universally accepted human rights regime. Thirdly, it enables the reserving states to escape international accountability for human rights violations.'<sup>116</sup>

In conclusion, a reservation represents the intention of a state to modify or exclude the obligations enshrined in particular treaty's provisions, which distinguishes this type of unilateral statement from interpretative declarations. A view to core UN human rights treaties showcases that the practice of employing reservations is still widespread, including – yet to a more limited extent – to the UNCAT. Reservations may serve various reasons, such as the preservation of national particularities and laws, which is seen with, *inter alia*, some Muslim-majority states referring to Islamic Shari'a law in their formulation of reservations, some of which are particularly broadly framed. Reservations to be permissible under the Vienna regime must be in compliance with a treaty's object and purpose as enshrined in article 19 lit c of the VCLT, for which the title and the preamble of a treaty are important indicators. Reservations targeting non-derogable norms or formulated in an indeterminate manner entail the risk of running contrary to the object and purpose, a criticism which was also brought forward by a significant number of state parties in their objections to the reservations entered by Pakistan and Qatar.<sup>117</sup> The questions of the consequences of impermissible reservations – as well as of objections – and of how they can be determined are generally highly debated, yet many references can be found to the legal effect of nullity in the case of invalid reservations.

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<sup>113</sup> United Nations Committee on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women, session, UN Doc CEDAW/C/SAU/CO/2, adopted on 8 April 2008 paras 8–9; the 'vagueness' of reservations was the main issue of concern for a significant number of state parties to the UNCAT in their objections to the reservations of Pakistan and Qatar to the UNCAT, see chapters 5.1.2 and 5.2.2.

<sup>114</sup> Çali and Montoya (n 9) 10; see ILC (n 24) article 4.5.1; for further reading on the consequences of reservations impermissible due to their incompatibility with the treaty's object and purpose see Ferreira and Ferreira-Snyman (n 35) 178.

<sup>115</sup> Çali and Montoya (n 9) 8 and 27.

<sup>116</sup> Ferreira and Ferreira-Snyman (n 35) 152.

<sup>117</sup> For further reading on the objections lodged by other state parties to the reservations entered by Pakistan and Qatar, see chapters 5.1.2 and 5.2.2.



### 3. Definition of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

In order to define an important aspect of Shari'a-based reservations employed by Pakistan and Qatar, this chapter identifies the prevalent definitions of 'torture' and 'other cruel, inhuman or degrading treatment or punishment' under the UNCAT, to which both Pakistan and Qatar are state parties,<sup>118</sup> as well as under Islamic Shari'a law, which constitutes the foundation of both states.<sup>119</sup> This serves as a basis for the assessment of the states' compliance with the UNCAT in the sense of providing a definition of torture in their domestic legislation in line with the Convention, particularly considering Qatar's still standing reservation to articles 1 and 16 of the UNCAT including the definitions of torture and CIDT.

#### 3.1. Definition of Torture under the UNCAT

Pursuant to article 5 of the UDHR, which as such provided the basis for the subsequent development of core human rights treaties enshrining human rights guarantees and freedoms in a binding manner, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>120</sup> This guiding principle was consequently implemented both in articles 7 and 10 of the 1966 International Covenant on Civil and Political Rights<sup>121</sup> and the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>122</sup>

According to article 1 of the UNCAT, the only document among the aforementioned providing a definition of torture,<sup>123</sup> the crime can be understood as

*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is*

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<sup>118</sup> See n 17 and 18.

<sup>119</sup> See n 20.

<sup>120</sup> See UDHR (n 2) article 5.

<sup>121</sup> Article 7 of the UNICCPR enshrines that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment [...]'. Article 10 para 1 reads '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person', see UNICCPR (n 45) articles 7 and 10.

<sup>122</sup> OSCE Office for Democratic Institutions and Human Rights [hereinafter referred to as 'ODIHR'] (2018), Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation, CRIM-POL/325/2018 paras 14–16.

<sup>123</sup> See UDHR (n 2) and UNICCPR (n 45).

*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*<sup>124</sup>

The Convention refers to cruel, inhuman or degrading treatment in its article 16, which reads as follows:

*Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

The necessity to distinguish between acts that amount to torture and CIDT is warranted since the UNCAT prescribes certain positive obligations of states only with respect to *torture*, including the requirement to take effective legislative, administrative, judicial or other measures prohibiting the use of torture under its article 2 para 1. On the other hand, article 16 enshrines the state's responsibility to prevent other acts<sup>125</sup> of cruel, inhuman or degrading treatment or punishment which *do not amount to torture*.<sup>126</sup>

Therefore, for a conduct to be qualified as torture under IHRL, including the UNCAT, it is imperative that a public official is involved, which is an additional prerequisite to the definition of torture in IHL, in an intentional act or omission, resulting in 'severe pain or suffering, whether physical or mental' serving a particular purpose. The purpose may be to obtain information or a confession, to intimidate, coerce, punish or discriminate against the victim.<sup>127</sup>

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<sup>124</sup> UNCAT (n 13) article 1.

<sup>125</sup> While the wording of article 1 para 1 of the UNCAT could be interpreted narrowly in that only 'acts' fall within the realm of torture, *Nowak* clarified that omissions of a state's authority, including the deprivation of water or food, equally constitute impermissible 'acts', see *Nowak, Manfred* (2006), 'What Practices Constitute Torture?: US and UN Standards', *Human Rights Quarterly* 28(4) 819; thus, the definition of torture provided by the UNCAT, is relatively broad and inclusive, as it may be understood to encompass any intentional act which results in the physical or mental pain or suffering for the above-mentioned purposes.

<sup>126</sup> *Nowak* (n 125) 818; see also *Nowak et al* (n 102) 24.

<sup>127</sup> *Ibid* 2; the purpose constitutes arguably the element, by the means of which torture can be differentiated from CIDT, see *Nowak et al* (n 102) 24; whereas *Haider* refers to 'severity of pain or suffering inflicted' as the distinguishing element as understood by the European Court and European Commission of Human Rights, see *Haider, Muhammad Hamza*, 'Pakistan's Obligations under the United Nation's Convention Against Torture and the Barriers it Faces' <<https://humanrightsreviewpakistan.wordpress.com/volume-iii/pakistans-obligations-under-the-united-nations-convention-against-torture-and-the-barriers-it-faces/>> accessed on 24 July 2022; as regards the distinctive elements, *Nowak* recalled the different opinions of the Commission and the European

A clear definition<sup>128</sup> is an essential prerequisite in order to allow a victim of torture and CIDT to enjoy full protection under the UNCAT.<sup>129</sup> According to IHRL, particularly with respect to the definition provided by the UNCAT, a number of minimum elements,<sup>130</sup> have to be introduced for regional and domestic legislation to be in compliance with article 1 of the UNCAT, along with necessary aspects to be included, such as ‘mental’ torture or ‘punishment.’<sup>131</sup>

### 3.2. Torture in the Arab Charter on Human Rights (ACHR)

The Arab Charter on Human Rights (ACHR),<sup>132</sup> to which Qatar became a member in 1971,<sup>133</sup> and which was initially subjected to widespread criticism to not be in compliance with human rights standards, includes, in its article 8, provisions referring to the prohibition of torture and ill-treatment.<sup>134</sup> Accordingly, ‘[n]o one shall be subjected to physical or *psychological* torture or to cruel, degrading, humiliating or inhuman treatment.’<sup>135</sup> While article 8 para 2 entails the

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Court of Human Rights in the *Greek Case*, according to which ‘the severity of pain or suffering distinguishes inhuman treatment, including torture, from other treatment, whereas the purpose of such conduct is the critical distinguishing criterion between torture’ and cruel or inhuman treatment, see *Nowak* (n 125) 820 and 830.

<sup>128</sup> As well as the *absolute* nature of the prohibition of torture as a pivotal component of IHRL precludes any potential interferences and derogations, regardless ‘a state of war or a threat of war, internal political instability or any other public emergency’, see UNCAT (n 13) article 2 para 2; and ODHHR (n 122) para 14.

<sup>129</sup> *Trehan, Sunjay* (2006), ‘The Politicization of the Convention Against Torture: The Immigration Hearing of Luis Posada-Carriles and its Inconsistency with the ‘War on Terror’’, *The University of Miami Inter-American Law Review* 37(3) 571.

<sup>130</sup> Pursuant to the CAT, state parties are obliged to enact domestic legislation criminalizing the offence of torture, consistent ‘at a minimum’ with articles 1 and 4 of the treaty, see CAT (n 96) para 8.

<sup>131</sup> UNCAT (n 13) articles 1 and 16.

<sup>132</sup> The Arab Charter on Human Rights [hereinafter referred to as ‘ACHR’ or ‘the Charter’] was adopted on 15 September 1994 by the Council of the League of Arab States [hereinafter referred to as ‘LAS’], see *Conti, Bartolomeo* (2002), ‘The Arab charter of Human Rights’, *Id-Dritt* 18 174; the revised version of the Charter was subsequently adopted on 22 May 2004 by the LAS, see *Mao, Junxiang, and Gady, Ammar Ahmad Ahmad* (2021), ‘Arab Charter on Human Rights & International Conventions’, *Beijing Law Review* 12 425; the Charter proclaims the protection of fundamental rights as outlined in the UDHR, while simultaneously showcasing the Islamic religious perspective on human rights, see *ibid* 425–426; accordingly, cultural and religious, including Islamic, values constitute the foundation of many Middle Eastern countries, and are thus of significant importance for the conceptualization and understanding of human rights, see *Sawad* (n 1) 104; as of 2022, the regional organization of the LAS comprises 22 member states of North Africa and the Middle East, including Qatar, see source: <<https://arab.org/directory/league-of-arab-states/>> accessed 10 August 2022.

<sup>133</sup> The Arab League (n.a., n.d.) <<https://archive.crin.org/en/guides/un-international-system/regional-mechanisms/arab-league.html>> accessed 10 August 2022.

<sup>134</sup> *Rishmawi, Mervat* (2005), ‘The Revised Arab Charter on Human Rights: A Step Forward’, *Human Rights Law Review* 5(2) 361–362.

<sup>135</sup> ACHR (n 128) article 8 para 1.

obligation to enact appropriate legislation, criminalizing,<sup>136</sup> redressing and eradicating the crime of torture, it does not provide for a clear *definition* of the crime itself.<sup>137</sup>

There are a number of additional shortcomings, which have already been addressed in literature as regards torture-related provisions in the ACHR, namely, besides the missing definition of ‘torture,’ that the Charter does not oblige states to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture,’ as it is prescribed in the UNCAT, nor does it include the principle of absolute prohibition of torture or any reference to *punishment*.<sup>138</sup>

In conclusion, two discrepancies in the relation between the ACHR and IHRL can be observed. First, the ACHR does not include any reference to torturous *punishment*, as encompassed under article 5 of the UDHR, article 1 of the UNCAT or article 7 of the UNICCPR. Second, and more generally, the ACHR lacks a clear *definition* in the sense of the UNCAT of the required elements of torture and CIDT to allow identifying a certain act or omission as torture or CIDT. With respect to the relation between national laws and the ACHR, it is important to note, that the ACHR prohibits domestic legislation allowing any ‘statutes of limitations’ regarding the criminalization of torture,<sup>139</sup> as well as includes ‘psychological’ ill-treatment in its prohibition of torture.<sup>140</sup>

### 3.3. *Definition and Prohibition of Torture in Islamic Shari’a Law*

It has been argued in scholarship that different cultures may result in different understandings of crime and punishment,<sup>141</sup> justice<sup>142</sup> and the implications for human dignity,<sup>143</sup> and that

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<sup>136</sup> According to article 8 para 2 of the ACHR, national laws prescribing sanctions for acts of or participation in torture shall not include any *limitations provisions*, see ACHR (n 128) article 8 para 2.

<sup>137</sup> Çali et al (n 111) 31, according to whom Qatar is not subjected to any form human rights monitoring on the sub-regional level, yet, the state is party to the Arab League and the Arab Charter.

<sup>138</sup> Rishmawi (n 134) 372–373; furthermore, contrary to the Optional Protocol to the UNCAT (OPCAT), the ACHR does not permit for prison visits and investigations or individual complaints, allowing victims of human rights violations to lodge a complaint directly, which would be of particular importance given the UN individual complaint mechanisms are still lacking the broad acceptance of most Arab states, see ibid 365; GA, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002, 57<sup>th</sup> session, UN Doc A/RES/57/199, open for signature, ratification and accession as from 4 February 2003 [hereinafter referred to as ‘OPCAT’]; which enshrines, in its article 1, the establishment of ‘a system of regular visits [...] by international and national bodies to places where people are deprived of their liberty’ as the OPCAT’s main aim, see ibid article 1; neither Pakistan nor Qatar ratified or signed the OPCAT, see OHCHR, Status of Ratification Interactive Dashboard <<https://indicators.ohchr.org/>> accessed 10 August 2022

<sup>139</sup> See ACHR (n 128) article 8 para 2.

<sup>140</sup> Ibid article 8 para 1; this, as well as the prohibition of limiting statutes will be of further importance with respect to the national legislation introduced by the states of Pakistan and Qatar, see chapters 5.1.5 and 5.2.5.

<sup>141</sup> Çali and Montoya (n 9) 3 and 19.

<sup>142</sup> Sawad (n 1) 105.

cultural convictions predetermine all rights and values.<sup>144</sup> Therefore, it is crucial to compare the definition of ‘torture’ as it is understood under Islamic Shari’a law<sup>145</sup> with the already outlined understanding of torture provided by IHRL.

On the international level,<sup>146</sup> the prohibition of torture has been firstly included in article 7 of the non-binding 1981 Universal Islamic Declaration of Human Rights (UIDHR),<sup>147</sup> according to which<sup>148</sup>

*[n]o person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him.*<sup>149</sup>

Additionally, the article 20 of the 1990 Cairo Declaration on Human Rights in Islam (CDHRI)<sup>150</sup> provides that<sup>151</sup>

*[i]t is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity.*<sup>152</sup>

Likewise, article 13 lit a of the ACHR prescribes the state’s obligation to protect individuals from torture, as well as to take effective preventive measures by prescribing that

*[t]he State parties shall protect every person in their territory from physical or psychological torture, or from cruel, inhuman, degrading treatment. They shall take effective measures to prevent such acts and shall regard the practice thereof, or participation therein, as a punishable offence.*

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<sup>143</sup> Ibid 102; *Weilert* (n 20) 335, who refers to the prioritization of the community of believers over the individual dignity in traditional Islam as to be prevalent prior to the first Western influences relating to the modern understanding of human dignity of each individual.

<sup>144</sup> *Tharoor, Shashi* (1999/2000), ‘Are Human Rights Universal?’, *World Policy Journal* 16(4) 1.

<sup>145</sup> For further reading on the various sources of Shari’a law, see *Weilert* (n 20) 307; *Auf, Yussef* (n 15) 2; and *Salem, Nora* (2017), ‘The Impact of the Convention on the Elimination of All Forms of Discrimination against Women on the Domestic Legislation in Egypt’, *International Studies in Human Rights* 124.

<sup>146</sup> For the question of whether the national constitutions and criminal codes of Pakistan and Qatar include a provision containing a clear definition of torture, see also the chapters 4.4.5 and 4.5.5.

<sup>147</sup> Universal Islamic Declaration of Human Rights, adopted by the Islamic Council in Paris on 19 September 1981 [hereinafter referred to as ‘UIDHR’].

<sup>148</sup> *Weilert* (n 20) 342; *Burgers, Herman, and Danelius, Hans* (1988), ‘The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, *Martinus Nijhoff* 11.

<sup>149</sup> UIDHR (n 142) article 7.

<sup>150</sup> Cairo Declaration on Human Rights, adopted by the Organisation of Islamic Cooperation on 5 August 1990, revised in 2020 and adopted on 28 November 2020 by the Council of Foreign Ministers, 47<sup>th</sup> session, Res No 63/47-POL, UN Doc A/CONF.157/PC/62/Add.18 [hereinafter referred to as ‘CDHRI’].

<sup>151</sup> *Weilert* (n 20) 342.

<sup>152</sup> See CDHRI (n 146) article 20.

Notwithstanding the general postulation of the prohibition of torture in international Islamic human rights instruments, *none* of them provides a clear definition of the crime of torture.<sup>153</sup>

With respect to the question of legality of torture, the Islamic jurisprudence based on the Qur'an and Islamic traditions tend to be inconsistent, leading *Reza* to the statement that 'it depends on whom you ask.' While the legality of criminal punishments in Islamic Shari'a is considered fairly known and undoubted,<sup>154</sup> the possibility to employ tortuous methods in the course of criminal investigations under Shari'a law, continues to be highly debated.<sup>155</sup> Accordingly, to answer the question of whether torture is permitted in Islamic Shari'a is challenging, given the ambiguity of the Qur'an with respect to the practice of torture. Likewise, regarding the Islamic traditions (*sunna*),<sup>156</sup> there are references to permitted tortuous actions, including flogging and beating of suspects, to obtain confessions.<sup>157</sup>

The views, regarding the question of legality of investigative torture, range from an absolute prohibition, which aligns with IHRL's standards and the Islamic declarations of human rights, including the CDHRI,<sup>158</sup> to the perception that torture employed in the course of criminal investigations for the purpose of extracting information is legal.<sup>159</sup>

While a number of Muslim states prohibit torture in their constitutions and prescribe criminal sanctions in their criminal legislation, the practice of torture remains prevalent in several Muslim-majority states,<sup>160</sup> including Pakistan and Qatar.<sup>161</sup> Most strikingly, according to the CDHRI, to which Pakistan and Qatar are both members and which acts as a tool of general guidance comparable to the UDHR, 'safety from bodily harm is a guaranteed right. It is [...]

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<sup>153</sup> See ACHR (n 128), UIDHR (n 142) and CDHRI (n 146).

<sup>154</sup> *Rishmawi* (n 134) 367, who notes that article 8 para 1 of the ACHR interdicts any acts of torture and CIDT, but lacks an explicit prohibition of corporal punishment; see also *Mao* and *Ammar* (n 132) 434; for further references to the legal construction of criminal punishment in Pakistan and Qatar, see n 169 below.

<sup>155</sup> *Reza, Sadiq* (2007), 'Torture and Islamic Law', *Chicago Journal of International Law* 8(1) Article 4 22.

<sup>156</sup> *Ibid* 21, according to which these traditions 'record the statements and actions of Muhammad and his Companions and are the most authoritative source of Islamic law after the Qur'an'.

<sup>157</sup> *Ibid* 21–22.

<sup>158</sup> According to article 20 of the CDHRI, '[i]t is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity', see CDHRI (n 146) article 20; likewise, article 13 lit a of the ACHR prescribes the state's obligation to protect individuals from torture, as well as to take effective preventive measures, see ACHR (n 128) article 13 lit a.

<sup>159</sup> *Rabbi et al* (n 20) 3–4.

<sup>160</sup> *Reza* (n 155) 22; see also UN body to review Pakistan's compliance with convention against torture (n 62).

<sup>161</sup> See n 41.

prohibited to breach it *without a Shari'ah-prescribed reason*.<sup>162</sup> This wording has been understandably criticised as to facilitate the use of torture and CIDT.<sup>163</sup>

As regards the developments of the prohibition of torture in Shari'a law, the classic Islamic law, prevalent in the 10<sup>th</sup> to the 12<sup>th</sup> century, interdicted torturous acts and omissions for the purpose of obtaining confessions.<sup>164</sup> Pursuant to a political transformation between the 13<sup>th</sup> and the 16<sup>th</sup> century, resulting in the view of the public interest outweighing the rights of an individual culprit, torture was considered permitted under Islamic Shari'a law.<sup>165</sup> While the modern Shari'a law forbids the use of torture to coerce a person to confess a crime,<sup>166</sup> a possibility remains that tortuous acts and omissions for the purpose of preventing hazards are permitted under contemporary Shari'a law.<sup>167</sup> With respect to the legality of punishment under Shari'a law,<sup>168</sup> it has been purported in literature that 'questioning the *hudūd* punishments is considered as questioning the divine wisdom underlying them and impugning the divinity of the Qur'an and the theocentric nature of Islamic law.'<sup>169</sup>

In conclusion, the lack of legal certainty with respect to the question of which acts constitute 'torture' is a significant shortcoming, which pervades a number of the legal instruments based on Islamic Shari'a. Neither the Islamic declarations, i.e. the CDHRI and the UIDHR, nor the ACHR foresee a clear definition, which is also reflected in national constitutions, such as the constitutions of Pakistan<sup>170</sup> and Qatar.<sup>171</sup> These deficits, *inter alia*, may not only result in significant obstacles in addressing and in particular criminalizing the crime of torture, but will

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<sup>162</sup> CDHRI (n 146) article 2 para d; see also Human Rights in Qatar (n.a.), 12 April 2016 <<https://fanack.com/qatar/human-rights-in-qatar/>> accessed 13 August 2022.

<sup>163</sup> *Rishmawi* (n 134) 367.

<sup>164</sup> *Weilert* (n 20) 336–337.

<sup>165</sup> *Ibid* 339–340.

<sup>166</sup> *Ibid* 341.

<sup>167</sup> *Ibid* 343–350.

<sup>168</sup> In general, Islamic criminal law incorporates two types of crimes. The first group encompasses 'divine' crimes, namely the *hudūd* or punishments for severe crimes under Islamic Shari'a law imposed by Allah, the *diya*, 'blood money paid to the victim or the victim's heirs', and the *qisas*, referring to 'retributive justice'. The second group includes crimes enacted by domestic legislation, the so-called *tazir* crimes, see *Hassanein, Ahmed Samir* (2018), *The Impact of Islamic Criminal Law on the Qatari Penal Code*, *Arab Law Quarterly* 32(1) 61.

<sup>169</sup> *Weilert* (n 20) 357; for further reading of '*hudūd*', see *Alhargan, Raed Abdulaziz* (2012), 'Islamic Law and International Human Rights Norms', *Muslim World Journal of Human Rights* 9(1) article 2 11; for the legal construction of *hudūd* in Pakistan, see *Usmani, Muhammad Taqi* (2006), 'The Islamization of Laws in Pakistan: The Case of *Hudud* Ordinance', *The Muslim World* 96; and National Legislative Bodies / National Authorities, Pakistan: Ordinance No VII of 1979, Offence of Zina (Enforcement of Hudood) Ordinance, 1979, 10 February 1979, amended in 2006, which still allows for *hudūd* punishments in Pakistan; for the legal construction of *hudūd* Qatar, see *Hassanein* (n 168) 62, according to whom 'criminal judges in Qatar [if the commitment of a *hudūd* crime is certain] are required to apply Islamic criminal law'.

<sup>170</sup> The Constitution of The Islamic Republic of Pakistan (n 20).

<sup>171</sup> The Permanent Constitution of the State of Qatar (n 20).

also ‘continue to perpetuate the perception that Arab States are not truly committed to universal human rights.’<sup>172</sup>

#### **4. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)**

In this section, the thesis addresses the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) by firstly outlining the ratification and reservation status of the Convention in general, followed by identifying specific reservations based on Islamic Shari’a employed by Pakistan and Qatar. Furthermore, this chapter seeks to define the object and purpose of the UNCAT and the state parties’ obligations. The two subsequent sub-chapters particularly focus on Pakistan and Qatar and the states’ relation to the UNCAT, addressing firstly the accession of and Shari’a-based reservations entered by both states, followed by an outline of the response by the international community, as well as an analysis of the reservations’ compatibility with the aim and purpose of the UNCAT. Therefore, the thesis addresses the nature and scope of the reservations, focussing on the articles mainly targeted. Moreover, the implementation status of the UNCAT and the prevalence of torture and other ill-treatment in Pakistan and Qatar are included in the analysis.

##### *4.1. Ratification and Reservation Status*

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted on 10 December 1984. At the time, notwithstanding the fact that both the UDHR and the UNICCPR had already prescribed an absolute prohibition of the use of torture, the widespread practice of torture in Latin American countries and elsewhere, had ascribed torture and the fundamental concern of impunity thereof a prominent role in the IHRL discussion. Against the backdrop of fighting impunity of the practice of torture, already included in the 1975 UN Declaration against Torture,<sup>173</sup> the discussion finally culminated in the adoption of the UNCAT in 1984.<sup>174</sup>

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<sup>172</sup> Rishmawi (n 134) 376.

<sup>173</sup> UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res, 3452 (XXX), 9 December 1975.

<sup>174</sup> Nowak, Manuel (2021), ‘Can Private Actors Torture? An Interview with Manfred Nowak’, Journal of International Criminal Justice 19 416.



As of 7 August 2022, 173 States are parties to the UNCAT and further 4 signatories,<sup>175</sup> 26 of which still employ ‘reservations,’<sup>176</sup> targeting either one provision or several norms of the Convention.<sup>177</sup> Accordingly, the provisions mostly targeted comprise article 20, enshrining that the CAT is competent to conduct ‘confidential inquiries,’<sup>178</sup> and article 30 para 1, allowing for the referral of any dispute regarding the questions of interpretation or application of the treaty to the ICJ.<sup>179</sup> Further articles targeted by standing ‘reservations’ include articles 1,<sup>180</sup> 8,<sup>181</sup> 14,<sup>182</sup> 16,<sup>183</sup> 21 and 22,<sup>184</sup> and those referring to extradition.<sup>185</sup>

#### 4.2. *Religion-based Reservations to the UNCAT*

As of 2016, 16 religion-based reservations, making up over one third of all reservations to the Convention, had been entered, which were extended by three state parties. The articles mainly targeted by reservations comprise article 16, to which the majority of reservations were entered, article 1 and article 4, the latter of which refers to the obligation of criminalization of torture. Religion-based reservations to the UNCAT were either employed to specific provisions, such as those entered by Pakistan upon accession, or to the treaty as a whole, including the reservations of the Holy See, the only still standing general reservation to the Convention, or the reservation initially entered by Qatar. According to one explanation for

<sup>175</sup> Source: <<https://indicators.ohchr.org/>> accessed 14 July 2022.

<sup>176</sup> Here, the number of 26 only comprises those unilateral statements made by states expressly titled ‘reservations’ in the UNTC, see UNTC (n 17); thus, the number of reservations in total will be higher as some statements intend to modify or exclude the treaty obligations, and thus fall under the definition of a reservation, see for instance the ‘declaration’ made by Sudan, in which the state declares that it excludes the binding effect of article 30 para 1 of the treaty, see UNTC (n 17); furthermore, each of these reservations may target more than one article of the UNCAT.

<sup>177</sup> According to the UNTC, states employing ‘reservations’ to the UNCAT comprise the Bahamas, Bahrain, Botswana, China, Ecuador, Equatorial Guinea, Eritrea, Fiji, France, Indonesia, Israel, Kuwait, Lao People’s Democratic Republic, Mauritania, Monaco, Morocco, New Zealand, Oman, Pakistan, Qatar, Samoa, Saudi Arabia, Thailand, Turkey, United Arab Emirates and the US, see UNTC (n 17).

<sup>178</sup> Source: <<https://www.ohchr.org/en/treaty-bodies/cat/confidential-inquiries-under-article-20-convention-against-torture>> accessed 7 August 2022; 17 states, including Pakistan, employ a reservation to article 20 in accordance with article 28 para 1 of the Convention, see UNTC (n 17), including three reservations to article 20 titled by the UNTC as ‘declarations’, see Viet Nam and the Syrian Arab Republic, or referred to by only mentioning ‘upon signature’, see *ibid*.

<sup>179</sup> In total, 22 states, again including Pakistan, still have a standing reservation to article 30 para 1 of the Convention, see UNTC (n 17).

<sup>180</sup> See reservations employed by Botswana, Qatar and the US.

<sup>181</sup> See reservation entered by Pakistan.

<sup>182</sup> See reservations made by the Bahamas, Fiji, New Zealand, Samoa and the US.

<sup>183</sup> See reservation employed by Qatar.

<sup>184</sup> See reservation made by Fiji.

<sup>185</sup> See reservation entered by Ecuador, not permitting for extradition of nationals; for other reservations targeting the provisions of extradition enshrined in the Convention, see reservations made by the Lao People’s Democratic Republic, and Pakistan.

religion-based reservations to the UNCAT, states aim at the preservation of, for instance, of ‘traditional punishments,’ which are often based on religious laws.<sup>186</sup>

The preservation of a state’s domestic socio-cultural and religious particularities by the means of reservations to international treaties has been, although employed by some Muslim-majority states, considered outdated in international law. Accordingly, it is the core narrative of human rights instruments to serve the interests of the *individual* instead of domestic interests,<sup>187</sup> including a state’s religion.<sup>188</sup> In other words, the premise of universal human rights is that they are not the rights of states per se, but rather the rights of the *individuals* living within a state.<sup>189</sup>

It has been purported that reservations which are based on national cultural or religious considerations reflect or demonstrate, on the one hand, a state’s commitment, may it be strong or weak,<sup>190</sup> to become involved in the development of international human rights protection,<sup>191</sup> thereby serving the ‘desire to increase standing in the international community,’<sup>192</sup> while simultaneously maintaining and preserving the support of its citizens and consequently the state’s underlying cultural and religious values.<sup>193</sup>

In case of a state entering *general* reservations, the commitment of the ratifying state has been – yet not always –<sup>194</sup> subjected to broad criticism,<sup>195</sup> not only due to the fact that general or ‘blanket’ reservations constitute a critical obstacle for the monitoring of the implementation and the state’s compliance with the treaty.<sup>196</sup> General reservations are directed either at the ‘interpretation, implementation or force of the instrument as a whole,’<sup>197</sup> and are most common among Arab States of the Gulf (GCC), regularly limiting the application of the treaty

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<sup>186</sup> Çali and Montoya (n 9) 25; according to the reservation of the Holy See, the treaty shall be applicable ‘insofar as it is compatible, in practice, with the peculiar nature of that State’, see UNTC (n 17).

<sup>187</sup> Ferreira and Ferreira-Snyman (n 35) 156 and 165.

<sup>188</sup> Ibid.

<sup>189</sup> Sawad (n 1) 104.

<sup>190</sup> Cole (n 70) 1131 and 1133.

<sup>191</sup> For further reading on the reasons of states to ratify a treaty, see Cole (n 70) 1134–1137.

<sup>192</sup> Çali et al (n 111) 22.

<sup>193</sup> Sawad (n 1) 103.

<sup>194</sup> See the general reservation entered by the Holy See, to which no objection has been lodged by the state parties, see UNTC (n 17).

<sup>195</sup> Likewise, a high number of state parties to the UNCAT objected by mainly referring to the concern of ‘vagueness’ of reservations entered by Pakistan and Qatar to the treaty, see chapters 5.1.2 and 5.2.2.

<sup>196</sup> Çali and Montoya (n 9) 4.

<sup>197</sup> Çali et al (n 111) 38.

as such in the sense of requiring its interpretation being required to be compatible with Islamic Shari'a.<sup>198</sup>

Consequently, states invoking Islamic Shari'a law in entering reservations to human rights treaty provisions, including the UNCAT, may likely result in uncertainty regarding the scope of application of the treaty obligations, given the fact that Islamic Shari'a 'is not a monolithic legal system but rather a complex set of rules, which vary significantly among the different Islamic schools of thought.'<sup>199</sup>

#### 4.3. *Object and Purpose*

##### 4.3.1. Definition

References to the object and purpose of the UNCAT suggest that the treaty primarily aims at the prevention and full eradication of torture and CIDT and guaranteeing liability for committed acts and omissions of these forms of ill-treatment.<sup>200</sup> This can also be deduced from the treaty's preamble prescribing that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,'<sup>201</sup> thereby indicating the full eradication of torture and CIDT as the main objective of the treaty. Furthermore, it refers to enhancing the 'effectiveness' of the fight against torture and CIDT by prescribing a number of obligations.<sup>202</sup> Likewise, Hungary and Poland echoed this understanding of the UNCAT's objective in their objections to Pakistan's reservations to the Convention, which is considered by both states as the protection of 'entities from torture and other cruel, inhuman or degrading treatment or punishment and to make the struggle against such violations of human rights more effective.'<sup>203</sup> Therefore, reservations undermining the goal of full eradication of torture and CIDT can be considered as to undermine the UNCAT's object and purpose and therefore as to be impermissible.

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<sup>198</sup> Ibid.

<sup>199</sup> *Salem* (n 34) para 17.

<sup>200</sup> Redress Ending Torture, Seeking Justice for Survivors (2018), The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Guide to Reporting to the Committee against Torture 8; CAT, General Comment No 2: Implementation of article 2 by States parties, 24 January 2008, UN Doc CAT/C/GC/2 para 11.

<sup>201</sup> UNCAT (n 13) preamble.

<sup>202</sup> UNCAT (n 13) preamble.

<sup>203</sup> See objections lodged by Hungary and Poland to the reservations entered by Pakistan to articles 3, 4, 6, 12, 13 and 16 of the UNCAT, see UNTC (n 17).

#### 4.3.2. State's obligations

As illustrated above, in acceding to a treaty, states voluntarily accept to be subjected to particular human rights obligations outlined in the respective treaty,<sup>204</sup> the compliance with which must be ensured by each state party. The adherence to, and thus the full implementation of the treaty is subjected to continuous scrutiny of the treaty monitoring body, the CAT, which supervises the adherence to the treaty's obligations, including whether the states align their national legislations with the provisions of the Convention.<sup>205</sup>

Article 2 para 2 of the UNCAT includes the core rationale of non-derogability of the prohibition of torture by clarifying that '[n]o exceptional circumstances whatsoever [...] may be invoked as a justification of torture,'<sup>206</sup> which encompass the impossibility of vindicating the use of torture and other ill-treatment<sup>207</sup> in the state of war, due to internal political instability, and as a means to protect public safety. Moreover, the CAT objects to any justification that is based on religion or a state's tradition, which runs contrary to the absolute nature of the prohibition of torture.<sup>208</sup>

It follows from the absolute prohibition of torture that states are primarily obliged to *refrain* from interfering with the individual's non-derogable right not to be subjected to torture. This negative obligation encompasses both the use and omission of torture by state's authorities, such as during interrogations.<sup>209</sup> Therefore, state parties can be held legally accountable 'for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law,' including in the context of detention situations.<sup>210</sup>

As the mere duty of non-interference with the absolute scope of protection may not, in isolation, suffice for the full eradication of torture and CIDT, the UNCAT imposes on the state parties a number of positive obligations. The state's positive obligations under the UNCAT are, in general, threefold. Article 4 of the UNCAT stipulates the duty of the state to enact national law *criminalizing* the act or omission of torture, thereby serving the first key

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<sup>204</sup> Çali and Montoya (n 9) 2.

<sup>205</sup> Ibid.

<sup>206</sup> UNCAT (n 13) article 2 para 2.

<sup>207</sup> Accordingly, the Committee opposes efforts by states to justify 'torture and ill-treatment' by referring to the protection of 'public safety', see CAT (n 96) para 5.

<sup>208</sup> CAT (n 96) para 5.

<sup>209</sup> ODHIR (n 116) para 14.

<sup>210</sup> CAT (n 96) para 15.

rationale of the Convention, namely the fight against impunity. Secondly, articles 10 and 11 address the obligation of states to prevent its authorities from engaging in conduct amounting to torture by ensuring that law enforcement members are adequately *trained* and interrogation methods as well as arrangements for custody and detention are in accordance with the UNCAT. The third core aspect covered by the protection of the UNCAT addresses the *compensation and rehabilitation* of victims, as enshrined in its article 14.<sup>211</sup> Therefore, the states' positive duties under the Convention comprise primarily the criminalization, including the guarantee of prompt and appropriate investigations of law enforcement officials in alleged cases of torture and CIDT, and prevention of the torture and CIDT, as well as the provision of available and adequate support for victims.<sup>212</sup>

## 5. Reservations by the Islamic State of Pakistan and the State of Qatar

### 5.1. Pakistan's Reservations

#### 5.1.1. Pakistan's Accession and Reservations to the UNCAT

In the accession to the UNCAT on 23 June 2010, Pakistan employed nine Shari'a-based reservations<sup>213</sup> to the treaty.<sup>214</sup> Initially, seven of the UNCAT's 'substantive'<sup>215</sup> articles were targeted, namely articles 3, 4, 6, 8, 12, 13, 16, along with articles 20 in accordance with article 28 para 1, and article 30 para 1.<sup>216</sup>

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<sup>211</sup> Nowak (n 174) 415–416.

<sup>212</sup> ODHIR (n 122) para 14; Besides articles 10 and 11 of the UNCAT, particularly addressing 'law enforcement personnel, civil or military, medical personnel, public officials and other persons [...] involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment', the general rationale of *prevention* is already included in article 2 para 1 of the UNCAT imposing on the states the duty to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction', see UNCAT (n 13) article 2 para 1.

<sup>213</sup> All reservations employed by the state of Pakistan and Qatar, as well as the objections by other state parties were accessed via the United Nations Treaty Collection (UNTC) Database, see UNTC (n 17).

<sup>214</sup> Çali and Montoya (n 9) 33; The reasons and motivations for a state to accede to a treaty have been delineated in the section above. Regarding the underlying incentives of the state of Pakistan, it is crucial to note that due to the state's ratification of the UNCAT, Pakistan ensured its qualification 'for its GSP+ scheme, a preferential trade status that has seen the country's exports rise by 22 per cent and 5.5 billion [sic] Euros in 2014, making it one of the largest countries to reap benefits from the status granted in the very same year', see UN body to review Pakistan's compliance with convention against torture (n 62); therefore, while the preservation of cultural and religious particularities and values, thereby simultaneously serving the maintenance of political acceptance on national level, may be considered as an important factor in Pakistan's decision of acceding to the UNCAT, one may argue that economic incentives also played a decisive role for Pakistan's ratification of the treaty.

<sup>215</sup> The UNCAT contains three main parts, the first of which, ranging from article 1 to 16, include the 'substantive' provisions of the treaty, which the state parties of the Convention are obliged to incorporate in their domestic laws. Articles 17 to 24 constitute provisions addressing the mandate of the CAT, and articles 25 to 33 refer to issues of 'technical' nature, see Wendland, Lene (2002), *A Handbook on State Obligations under the UN Convention against Torture* 15.

<sup>216</sup> AI (n 17).

These reservations entered upon accession to the UNCAT read as follows:

- 1. Article 3 – The Government of the Islamic Republic of Pakistan declares the provisions of Article 3 shall be applied as to be in conformity with the provisions of its laws relating to extradition and foreigners.*
- 2. Article 8 – The Government of the Islamic Republic of Pakistan declares that pursuant to Article 8, paragraph 2, of the Convention, it does not take this Convention as the legal basis for cooperation on extradition with other States Parties.*
- 3. Articles 4, 6, 12, 13 and 16 – The Government of the Islamic Republic of Pakistan declares the provisions of these Articles shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.*
- 4. Article 28 – In accordance with Article 28, paragraph 1, of the Convention, the Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 20.*
- 5. Article 30 – The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 30, paragraph 1 of the Convention.<sup>217</sup>*

By entering the named reservations, Pakistan expressed its intention to modify or exclude the application of the enumerated provisions of the UNCAT, some of which, namely the substantive provisions of articles 3, 4, 6, 8, 12, 13 and 16, the state expressively deemed incompatible with the constitution of Pakistan, as well as the state's Shari'a and other national laws,<sup>218</sup> however, 'without specifying its contents.'<sup>219</sup>

#### 5.1.2. Response to Reservations by the International Community

Pakistan's Shari'a-based reservations were consequently subjected to a significant number of objections upon accession, namely by the states of Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, the United Kingdom, and the US, as well as, on 30 June 2011, by the Netherlands.<sup>220</sup>

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<sup>217</sup> UNTS 2677-2678 (n 17) 259–260.

<sup>218</sup> See objection made by Austria.

<sup>219</sup> See objection made by the Czech Republic.

<sup>220</sup> See UNTC (n 17).

The majority of these states objected Pakistan's reservations to articles 3, 4, 6, 12, 13 and 16 as to running contrary to the UNCAT's object and purpose.<sup>221</sup> The Czech Republic additionally objected to Pakistan's reservation entered to article 8 of the UNCAT by criticizing that the said, along with the other substantive reservations, 'would result in restriction and *weakening* of the universal prohibition of torture [and in the restriction running] contrary to the object and purpose of the Convention.'<sup>222</sup>

Many of the objecting states referred to a lack of clarity on the commitment of Pakistan to the UNCAT's object and purpose and obligations arising thereof,<sup>223</sup> owing to the 'vagueness and general nature,'<sup>224</sup> 'indeterminate scope,'<sup>225</sup> or 'general and indeterminate'<sup>226</sup> or 'extensive,'<sup>227</sup> nature of those reservations.<sup>228</sup>

With respect to the wording of the lodged objections, one can distinguish between, first, those objections expressively intending to 'not preclude the entry into force' of the UNCAT between the objecting state and Pakistan,<sup>229</sup> second, objections explicitly referring to the entry into force of the Convention 'in its entirety,'<sup>230</sup> as well as those objections aiming at the entry into force of the entire Convention 'without Pakistan benefiting from the reservation.'<sup>231</sup> Only two of the state parties merely 'objected' without referring to further consequences for the treaty effect between them and Pakistan.<sup>232</sup> The US were the only objecting state party that referred to the entry into force and additionally the application of the provision 'except to the extent of Pakistan's reservations.'<sup>233</sup>

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<sup>221</sup> See objections made by Austria, Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Norway, Poland, Portugal, Spain, Switzerland, the US and the Netherlands. Canada only objected to Pakistan's reservations to articles 4, 6, 12, 13 and 16. Greece objected to Pakistan's reservations to 3, 4, 12, 13 and 16. No reference to specific articles targeted by Pakistan's reservations was found in the objections of Australia and Sweden. Slovakia expressively referred to the incompatibility with the UNCAT's object and purpose of Pakistan's reservation to article 3.

<sup>222</sup> See objection made by the Czech Republic.

<sup>223</sup> See objections made by Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Poland, Portugal, Slovakia, Spain, United Kingdom of Great Britain and Northern Ireland,

<sup>224</sup> See objection made by Belgium, cf also objections made by Canada.

<sup>225</sup> See objection made by Canada.

<sup>226</sup> See objection made by France.

<sup>227</sup> See objection made by Norway.

<sup>228</sup> Furthermore, some of the objecting states additionally referred to article 27 of the VCLT, which enshrines that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty', see objections made by Australia, Belgium, Czech Republic, Hungary, Latvia, Poland and Spain.

<sup>229</sup> See objections made by Australia, Austria, Belgium, France, Germany, Hungary, Ireland, Italy, Poland, Portugal, Spain, and Switzerland.

<sup>230</sup> See objections made by Canada and Denmark.

<sup>231</sup> See objections made by the Czech Republic, Finland, Latvia, Norway, Slovakia, and Sweden.

<sup>232</sup> See objections made by Greece and United Kingdom of Great Britain and Northern Ireland.

<sup>233</sup> See objection made by the US.

According to the ILC Report, in the case of state parties not objecting the entry into force of the UNCAT, the treaty applies without the provisions to which the reservations had been entered.<sup>234</sup> Those states, which affirmed the entry in force of the treaty ‘in its entirety’ or ‘without Pakistan benefiting from the reservation,’ the UNCAT will apply accordingly in its entirety.<sup>235</sup>

In conclusion, the main point of criticism and concern, expressed by the objecting states, referred to the failure of Pakistan to comply with the treaty’s object and purpose by subjecting imminent articles of the UNCAT, in particular articles 3, 4, 6, 12, 13 and 16, to existing Islamic Shari’a, constitutional and/or national laws, resulting the reservations’ vague and indeterminate nature, running contrary to the critical principle of international treaty law enshrined in article 19 lit c of the VCLT.

### 5.1.3. Compatibility with the Purpose of the UNCAT

As outlined in chapter 2.1, according to the core principle of article 19 lit c of the VCLT concerning the scope of reservations, reservations must be compatible with the fundamental object and purpose of a treaty under international law, and thus the ‘*raison d’être*’ of the UNCAT,<sup>236</sup> thus the prevention and full eradication of torture and CIDT.<sup>237</sup>

The most important concern by a number of state parties to the Convention regarding several of Pakistan’s reservations, particularly those targeting articles 3, 4, 6, 12, 13 and 16, was their indeterminate nature. In particular, the formulations of ‘Article 3 shall be applied as to be *in conformity with the provisions of its* [Pakistan’s] *laws,*’ as well as ‘these Articles [4, 6, 12, 13 and 16] shall be so *applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws*’ were considered not to be in compliance with the UNCAT’s object and purpose, as the states’ adherence to the targeted treaty provisions cannot be properly examined.<sup>238</sup>

While recollecting the concern of political motivations underlying the decision of objections regarding the equally general, still standing, reservation entered by the Holy See<sup>239</sup> which has

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<sup>234</sup> ILC Guidelines (n 46) article 4.3.6 para 1.

<sup>235</sup> ILC Report Addendum (n 28) 243, noting that while the consequence of objections aiming at a ‘super-maximum’ effect have been contested, the ILC position regarding the validity of this type of objections is ‘completely neutral’, see *ibid*.

<sup>236</sup> ILC Guidelines (n 46) article 3.1.5; Çalı (n 45).

<sup>237</sup> UNCAT (n 13) preamble.

<sup>238</sup> ILC (n 44) article 3.1.5.2; ILC Guidelines (n 46) 4.5.1; ILC Report Addendum (n 28) 367.

<sup>239</sup> See UNTC (n 17).



not received any objections,<sup>240</sup> the concern of ‘vagueness’ remains. Thus, the incompatibility of reservations with the treaty’s object and purpose does not result from the mere fact that Pakistan refers to *Islamic Shari’a law*, but from the fact that the compatibility of the reservations cannot be determined.<sup>241</sup> Accordingly, regarding the permissibility of vague reservations in general, regardless whether they are based on religion, ‘it is the *impossibility of assessing the compatibility* of such reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them [reservations] fall within the purview of article 19’ para c of the VCLT.<sup>242</sup>

Owing to the same indeterminate nature of Pakistan’s reservations to the reservations, which were found to be ‘incompatible’ with the treaty’s object and purpose by a high number of state parties, the respective reservations are therefore impermissible. While the consequences of impermissible reservations are generally contested, the ILC Report refers to the nullity<sup>243</sup> of reservations failing to respect article 19 VCLT, which is ‘established in State practice.’<sup>244</sup> Consequently, Pakistan’s impermissible reservations are nullified in the cases the state parties referred to the entry into force in its entirety, without Pakistan benefiting from the respective reservations, and thereby the nullity of the particular reservations, resulting in the state being fully bound by the Convention.<sup>245</sup>

According to the ILC Guidelines, for the assessment of the compatibility of a reservation with the object and purpose of the treaty, ‘account shall be taken of that *interdependence* as well as the importance that the provision to which the reservation relates has within the general tenor of the treaty, and the extent of the impact that the reservation has on the treaty.’<sup>246</sup> With regards to the question of which provisions of the UNCAT constitute non-derogable norms, the CAT clarified states’ duties arising from articles 2, 15, and 16 ‘must be observed in all circumstances.’<sup>247</sup> According to the CAT, article 2, enshrining the treaty’s obligation of prevention, constitutes an absolute and non-derogable norm of *jus cogens*. Article 16 para 1,

<sup>240</sup> Which may justify the assumption of a political motivation underlying the decision of the enumerated state parties to lodge objections to Pakistan’s reservations, cf *Salem* (n 34) para 20.

<sup>241</sup> ILC Report Addendum (n 28) 366.

<sup>242</sup> Ibid 367.

<sup>243</sup> *Çali* and *Montoya* (n 9) 10; see ILC (n 24) article 4.5.1; for further reading on the consequences of reservations impermissible due to their incompatibility with the treaty’s object and purpose see *Ferreira* and *Ferreira-Snyman* (n 35) 178.

<sup>244</sup> ILC (n 44) article 3.2 lit a and c; see also *Nowak et al* (n 102) 12, according to whom, by referring to the HRC General Comment No 24/52 on issues relating to reservations and the respective jurisprudence of the ECtHR and IACtHR, the question of a reservation’s compatibility has to be in the end decided by the CAT; on the controversy of who determines whether a reservation is impermissible, see also *Salem* (n 34) para 20.

<sup>245</sup> *Nowak* (n 102).

<sup>246</sup> ILC Guidelines (n 46) article 3.1.5.6.

<sup>247</sup> CAT (n 96) para 6.

addressing prevention of CIDT, is considered by the Committee as to be ‘interdependent and interrelated’ with article 2, and thus likewise of non-derogable nature.<sup>248</sup>

As the CAT referred to article 16 as to be non-derogable, Pakistan’s reservation targeting the said article can be considered – yet not automatically – as to undermine the treaty’s object and purpose, and thus impermissible.

#### 5.1.4. Withdrawal of Reservations

On 20 September 2011, Pakistan withdrew most of its reservations initially entered, except from those targeting articles 8 para 2, 28 and 30 of the Convention.<sup>249</sup> In the cases of state parties not explicitly referring to the nullity of the reservations entered by Pakistan in their obligations, the reservations lifted consequently apply as ‘if the reservation had not been made,’<sup>250</sup> thus being *fully bound* in the relationship to all state parties of the UNCAT.

#### 5.1.5. Pakistan’s Obligations – Status quo of Implementation of the UNCAT

According to a recent publication of HRW, there is evidence of Pakistan’s law enforcement authorities engaging in a severe practice of torture, which have not yet been adequately addressed and prosecuted by the state.<sup>251</sup> Journalists, students, lawyers, activists, as well as other intellectuals critical of the government had been predominantly targeted by torture as well as killings in the past, which has been even referred as amounting to ‘intellecticide.’<sup>252</sup> Similarly, the HRC referred to an ‘allegedly [wide practice of torture] employed by the police, military and security forces and intelligence agencies.’<sup>253</sup> Pakistan had been criticized for not making sufficient efforts, since the state’s accession to the UNCAT, to fully eradicate torturous acts.<sup>254</sup> While the accession to an international human rights treaty, such as the UNCAT, and the withdrawal of reservations contradicting the object and purpose of the treaty constitute first important steps, Pakistan’s genuine commitment to actively engage in

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<sup>248</sup> Ibid paras 1–3.

<sup>249</sup> UNTC (17).

<sup>250</sup> ILC Guidelines (n 46) article 2.5.7. para 1; ILC Report Addendum (n 28) 218.

<sup>251</sup> HRW (n 260).

<sup>252</sup> Sarwar, Beena (2015) ‘Unsilencing Pakistan’, Economic and Political Weekly 50(20), Economic and Political Weekly 19–21.

<sup>253</sup> HRC, Concluding observations on the initial report of Pakistan, 23 August 2017, UN Doc CCCPR/C/PAK/CO/1 para 25.

<sup>254</sup> UN body to review Pakistan’s compliance with convention against torture (n 62).

eradicating crimes of torture by introducing adequate laws and measures, can be called into question, based on recent footage showing a still prevailing practice of torture.<sup>255</sup>

As a state party to the UNCAT, Pakistan is not only obligated to refrain, *inter alia*, from any interference with the individual's right not to be subjected to ill-treatment that amounts to torture, but also to take appropriate positive measures to prevent the use of torture or CIDT, including the enactment or revision of domestic laws and statutes,<sup>256</sup> investigations, as well as appropriate punishment of acts or omissions amounting to torture or CIDT.<sup>257</sup> The latter includes the obligation to enact appropriate criminal legislation introducing a legal offence of torture allowing for the prosecution of respective conduct. As outlined above, the CAT underscored the necessity of such legislation to outline 'at a minimum' the elements of torture in accordance with articles 1 and 4 of the UNCAT, thereby particularly referring to the requirement of applying a definition of torture in line with article 1 of the Convention.<sup>258</sup>

Pakistan's national legislation foresees a general prohibition of torture, firstly in its constitution, as well as in a number of statutes, resulting in a significant legal fragmentation and insecurity.<sup>259</sup> According to article 14 para 2 of Pakistan's constitution, '[n]o person shall be subjected to torture for the purpose of extracting evidence.' Notwithstanding the fact that Pakistan's constitution prescribes a general prohibition of torture in the context of 'extracting evidence' and refers to acts of torture of '[g]overnment, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such a servant' in its article 212,<sup>260</sup> the constitution lacks a clear definition of torture in line with article 1 of the UNCAT.

First, the act or omission of 'torture' itself is not defined. Second, reducing the prohibition of torture to the context of the extraction of evidence significantly limits the prohibition's scope of application, notwithstanding that the use of torture in the course of investigations constitute, indeed, a considerable concern in Pakistan. Accordingly, the UNCAT enumerates various other purposes, as potential underlying motifs of tortuous acts, including the purposes of punishment, intimidation, coercion or discrimination.<sup>261</sup> However, as regards the element

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<sup>255</sup> For recent footage on the practice of torture in Pakistan, see n 41 and 62.

<sup>256</sup> Justice Project Pakistan (2015), *Policing as Torture*, A report on systematic brutality and torture by the police in Faisalabad, Pakistan 23; CAT (n 200) paras 2 and 4.

<sup>257</sup> CAT (n 200) para 7.

<sup>258</sup> *Ibid* para 8.

<sup>259</sup> Justice Project Pakistan (n 256) 23.

<sup>260</sup> The Constitution of The Islamic Republic of Pakistan (n 20) article 212.

<sup>261</sup> UNCAT (n 13) article 1.

of the ‘instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,’ which can be interpreted according to the CAT’s elaborations in its General Comment No 2 (CAT/C/GC/2),<sup>262</sup> this element may be considered as fulfilled.

In 2017, ten years after Pakistan’s accession to the UNCAT, Pakistan had been criticised for not making sufficient attempts to adequately address the crime of torture in its legislation, particularly with respect to the state’s Penal Code and Criminal Procedure Code, which neither provide a reference to the offence of torture, nor ‘consider any act of mental torture, cultural humiliation, or any act of physical torture that does not leave any lasting marks a punishable offence.’<sup>263</sup> While the Pakistani Police Order of 2002<sup>264</sup> prescribes the punishment of torturous acts by the police, no definition in line with the UNCAT’s article 1 and criminalization in accordance with articles 2 para 1 and 4 of the treaty have been included.<sup>265</sup>

Yet, according to recent news, on 1 August 2022, the NAP passed the Torture and Custodial Death (Prevention and Punishment) Bill, 2022 aiming, *inter alia*, at the criminalization and prevention of torture by public officials,<sup>266</sup> which would be an important step towards treaty compliance. It remains to be seen, whether this Bill will include a clear definition of torture.

In conclusion, reports referring to cases of systematic torture employed by the Pakistani police, showcase the breach of the state’s duty of non-interference with the absolute scope of the protection against torture under the UNCAT.<sup>267</sup> Furthermore, Pakistan has so far not sufficiently complied with its obligation of introducing national legislation adequately criminalizing the commitment of torture and CIDT, owing to the lack of references in the state’s Penal Code and Criminal Procedure Code. Additionally, ‘torture’ itself has not been defined in line with the minimum elements of the UNCAT. The lack of adequate legal provisions criminalizing torture on national level and the failure to hold law enforcement

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<sup>262</sup> CAT (n 96) para 15.

<sup>263</sup> UN body to review Pakistan’s compliance with convention against torture (n 62); see The Code of Criminal Procedure 1898 (Pakistan), as amended by Act II of 1997; and Pakistan Penal Code of 6 October 1860, Act XLV of 1860.

<sup>264</sup> See Police Order 2002, C.E. Order No 22 of 2002 article 156 lit d.

<sup>265</sup> CAT (n 61) para 14.

<sup>266</sup> Torture and Custodial Death (Prevention and Punishment) Bill, 2022 sails through NA (n.a.), 1 August 2022 <<https://www.app.com.pk/national/torture-and-custodial-death-prevention-and-punishment-bill-2022-sails-through-na/>> accessed 13 August 2022.

<sup>267</sup> CAT (n 61) para 6.

authorities engaging in the practice of torture accountable,<sup>268</sup> makes existing general and broadly framed prohibitions of torture appear as rather unsubstantial ‘empty promises.’<sup>269</sup>

## 5.2. Qatar’s Reservations

### 5.2.1. Qatar’s Accession and Reservations to the UNCAT

Qatar<sup>270</sup> acceded the UNCAT on the 11 January 2000,<sup>271</sup> entering a general reservation, which reads as follows:

*‘[...] Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion; [...]’*<sup>272</sup>

While Qatar partly withdrew the said reservation, it kept ‘in effect a limited general reservation within the framework of Articles 1 and 16 of the Convention.’<sup>273</sup> As outlined above, article 1 of the UNCAT includes the definition of ‘torture,’<sup>274</sup> whereas article 16 delineates that

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<sup>268</sup> HRW, Pakistan: Events of 2020 <<https://www.hrw.org/world-report/2021/country-chapters/pakistan>> accessed 13 August 2022.

<sup>269</sup> For further reading on the ‘paradox of empty promises’ with respect to the ratification of human rights treaties, see *Hafner-Burton and Tsutui* (n 65) 1374; HRC/OMCT/SPARC, Shadow Report to the Committee against Torture on the Occasion of the Examination of the Initial Report of Pakistan at its 60<sup>th</sup> Session, March 2017 5.

<sup>270</sup> Qatar is a member state of the Gulf Cooperation Council or ‘Cooperation Council for the Arab States of the Gulf’ [hereinafter referred to as ‘GCC’]. While a certain trend of core treaty ratification of the GCC member states has been noticed, the ‘domestic rationales and subsequent effects of treaty ratification in the GCC are under-studied and under-theorized’. Yet, there has been data elucidating the on-ground effects resulting from treaty ratification have so far been relatively limited, particularly with respect to ‘primary’ implications, including the introduction of domestic legislation pursuant to or domestic jurisprudence based on the treaty content, see *Çali, Ghanea and Jones* (n 107) 22–24.

<sup>271</sup> Pursuant to the legal framework of Qatar, enshrined in articles 24 and 68 of the state’s constitution, an international human rights treaty enters into force after its signature, ratification, and publication in the official gazette, which bestows the treaty provisions with a legal effect equal to national laws, see *Çali, Başak, and Ghanea, Nazila*, ‘The Domestic Effects of International Human Rights Treaty Ratification in the Member States of the Cooperation Council for the Arab States of the Gulf (GCC)’, Qatar National Research Fund National Priority Research Program 13; Nonetheless, the constitution of Qatar prescribes human rights treaties as of falling within the definition of ‘treaties [...] relating to [...] public or private rights of citizens’, see The Permanent Constitution of the State of Qatar (n 20) article 68; thus, treaties are of not self-executing nature, consequently requiring the adoption of respective domestic legislation for their direct applicability; *Çali, et al* (n 245) 32; notwithstanding the national ‘enactment’ of treaty provisions, a study has shown that ‘treaty commitments do not enjoy the status and weight of *Qanoon*’, see *ibid* 33; the term ‘*Qanoon*’ describes a state’s positive and binding law enacted by the government, see *Delta, Ria, and Pane, Erina* (2020), ‘The Implementation of Islamic Qanun Law in the Modern Aceh Society’, Proceedings of the 1<sup>st</sup> Raden Intan International Conference on Muslim Societies and Social Sciences 196.

<sup>272</sup> UNTC (n 17).

<sup>273</sup> *Ibid*.

<sup>274</sup> As regards the provision enshrining a definition of inhuman and degrading punishment in the UNICCPR, namely article 7, Qatar also employed a restriction of application in the form of an interpretive statement noting that ‘interpretations of Articles 7 [...] will be guided by Islamic Sharia’, see *Çali* (n 45).

*[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I [...].*<sup>275</sup>

Thereby, Qatar expressed concerns of the compatibility of Islamic Shari'a law with the provisions of the UNCAT outlining the definition of the crimes of torture and CIDT.<sup>276</sup>

#### 5.2.2. Response to Reservations by the International Community

Qatar's general reservation was subjected to a number of objections upon accession of Qatar to the UNCAT, namely by the states of Finland, France, Germany, Luxembourg, Netherlands, Norway, Spain, Sweden, Italy, Denmark, Portugal, United Kingdom and Northern Ireland, which expressed in their objections that they consider the general reservation employed by Qatar upon accession to not be in compliance with the UNCAT's object and purpose. The main reason purported by the objecting states was the lack of clarity and vagueness of Qatar's reservation,<sup>277</sup> leaving doubts regarding the state's will to fully adhere to the obligations arising from the UNCAT,<sup>278</sup> and resulting in the reservation to be incompatible with the treaty's object and purpose.<sup>279</sup> With respect to the remaining concerns of Qatar's limited commitment to consider itself bound by the UNCAT, Portugal underscored in its objection that 'this reservation goes against the general principle of treaty interpretation according to which a State party to a treaty may not invoke the provisions of its internal law as justification for failure to perform according to the obligations set out by the said treaty.'<sup>280</sup>

With respect to the wording of the lodged objections, one can distinguish between, first, those objections expressively intending to 'not preclude the entry into force' of the UNCAT between the objecting state and Qatar,<sup>281</sup> second, objections explicitly referring to the entry into force of the Convention 'without Pakistan benefiting from the reservation.'<sup>282</sup> Only

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<sup>275</sup> UNCAT (n 13) article 16.

<sup>276</sup> Cf *Mayer* (n 16) 26; it has been noted that there is a possibility that domestic authorities in charge of the treaty's implementation may question the compatibility with Shari'a law, see *Çali et al* (n 111) 33.

<sup>277</sup> For the argument of the reservation lacking sufficient clarity see objections made by Finland, France, Luxembourg, Norway, Spain, Sweden, Denmark and United Kingdom of Great Britain and Northern Ireland.

<sup>278</sup> For raised doubts of the commitment of Qatar to fully adhere its obligations under the UNCAT see objections made by Germany, Luxembourg, Netherlands, Spain, Sweden, Italy, Denmark, Portugal and United Kingdom of Great Britain and Northern Ireland.

<sup>279</sup> For the finding of the reservation being incompatible with the treaty's objective and purpose see objections made by Germany, Luxembourg, Netherlands, Norway, Spain, Sweden, Italy, Denmark and Portugal.

<sup>280</sup> See objection made by Finland, see UNTC (n 17).

<sup>281</sup> See objections made by Germany, Luxembourg, Spain, Netherlands, Italy, Denmark and the United Kingdom of Great Britain and Northern Ireland.

<sup>282</sup> See objections made by Sweden, Norway and Finland.

France merely ‘objected’ without referring to further consequences for the treaty effect between France and Qatar.<sup>283</sup> Portugal was the only objecting state party that referred to the expression of ‘its disagreement’ to Qatar’s reservation.<sup>284</sup>

Consequently, in the case of state parties not objecting the entry into force of the UNCAT, the treaty applies without the provisions to which the reservations had been entered.<sup>285</sup> Those states, which intended the entry in force of the treaty ‘without Qatar benefiting from the reservation,’ the UNCAT will apply accordingly in its entirety.<sup>286</sup> However, in the case of impermissibility of the still standing reservation of Qatar to articles 1 and 16, owing to the non-compliance with the UNCAT’s object and purpose, the reservation may be nullified irrespective of the state parties objections, which are examined in following chapter.

### 5.2.3. Compatibility with the Purpose of the UNCAT

Reservations which engage the *raison d’être* of a treaty are considered as to not be in compliance with the treaty’s object and purpose. Thus, the provisions subjected to the reservation have to be examined as to whether they run contrary to the main object and purpose of the UNCAT. Particularly reservations of vague nature and those directed at non-derogable provisions are considered most likely to undermine the treaty’s object and purpose.

As outlined in chapter 5.1.3, according to the CAT, article 2, enshrining the state’s obligation of prevention of torture, constitutes an absolute and non-derogable norm of *jus cogens* and is interrelated with the treaty’s likewise non-derogable article 16. Notably, the CAT urged Qatar to consider lifting its reservation to articles 1 and 16 of the UNCAT, ‘*in accordance with article 19 of the Vienna Convention on the Law of Treaties.*’<sup>287</sup> Thereby, the CAT explicitly referred to the withdrawal of the still standing reservations of Qatar to articles 1 and 16 *in order* for the state *to be in accordance* with article 19.

As the CAT referred to article 16 as to be non-derogable, the still standing reservation targeting the said article can be considered – yet not automatically – as to undermine the treaty’s object and purpose, and thus impermissible.

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<sup>283</sup> See objection made by France.

<sup>284</sup> See objection made by Portugal.

<sup>285</sup> ILC Guidelines (n 46) article 4.3.6 para 1.

<sup>286</sup> ILC Report Addendum (n 28) 243, noting that while the consequence of objections aiming at a ‘super-maximum’ effect have been contested, the ILC position regarding the validity of this type of objections is ‘completely neutral’, see *ibid*.

<sup>287</sup> CAT (n 41) para 8 lit b.

Regarding the obligation to introduce criminal laws imposing appropriate sanctions on the commitment of torture, the CAT underscored that state parties are required to introduce national legislation criminalizing torture, consistent *at a minimum with articles 1 and 4* of the treaty.<sup>288</sup> Thus, for national legislation addressing the issue of torture, the elements of torture outlined in articles 1 and 4 must be incorporated in regional or domestic laws to be in compliance with the treaty's duty underlying articles 1 and 4. States not providing for a definition of the said offence will consequently face the obstacle of not easily being able to establish a legal respective framework.<sup>289</sup>

As Qatar does not provide for a clear definition in its domestic laws, which are based on Islamic Shari'a, in line with the UNCAT's article 1, which will be further addressed in chapter 5.2.5, Qatar's reservation to article 1 invoking Islamic Shari'a law, itself inconsistent on the question of torture and allowed punishment – is of imprecise and indeterminate nature. Thus, one may argue that the reservation entered by Qatar to article 1 is to be considered impermissible and hence nullified irrespective of the objections entered by the state parties.

#### 5.2.4. Withdrawal of Reservations

On 20 September 2011, Qatar withdrew its general reservations initially entered.<sup>290</sup> In the cases of state parties not explicitly referring to the nullity of the reservation entered by Qatar in their objections, the lifted general reservation consequently applies as if it has not been entered.<sup>291</sup> Thus, Qatar is fully bound in the relationship to all state parties of the UNCAT, except from articles 1 and 16, to which Qatar continues to employ a general reservation.

#### 5.2.5. Qatar's Obligations under the UNCAT – Status quo of Implementation

Recent evidence, provided by Amnesty International, revealed the issue of enforced disappearances in Qatar, as well as solitary confinement as a consequence thereof, such as in

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<sup>288</sup> Ibid para 8.

<sup>289</sup> *Wendland* (n 215) 36; yet, the according to the International Criminal Tribunal for the former Yugoslavia, the definition of torture as enshrined in article 1 of the UNCAT 'cannot be regarded as [...] customary international law which is binding [...]', and 'was meant to apply at an inter-state level [...], directed at the states' obligations', see *Prosecutor v Kunarac, Kovac and Vukovic*, Case No IT-96-23/1-T, 22 February 2011 para 482

<sup>290</sup> UNTC (17).

<sup>291</sup> ILC Guidelines (n 46) article 2.5.7 para 1; ILC Report Addendum (n 28) 218.



the case of the Kenyan labour rights activist *Malcolm Bidali*.<sup>292</sup> According to the Ministry of Interior, 375 cases of flogging as a means of punishment were reported in 2019.<sup>293</sup>

In 2006, Amnesty International enumerated essential steps which Qatar is still required to take in order to fully adhere to the state's obligations under the UNCAT. Accordingly, Qatar is obliged to enact legislation, which provides for a clear definition of torture, as well as appropriate criminal sanctions for those, who engage in the crime of torture. Furthermore, the state has to ensure that all allegations of tortuous acts and omissions are 'promptly and independently' investigated and that victims receive adequate compensation. Finally, Qatar is required to take efforts in reducing the risks of detainees to fall victim to torture by, *inter alia*, reducing the period of detention of persons being held without respective charge, as well as to adequately address the issue of violence against women.<sup>294</sup> In short, along with the state's prior negative duty of non-interference, Qatar is, therefore, obliged to ensure adequate investigation and criminalization of torture, compensation, rehabilitation and support for the victims, as well as preventive measures, including appropriate training and sensitization of the state's authorities.<sup>295</sup>

Regarding, *inter alia*, the concluding observations by the CAT on the third periodic report of Qatar of 2018,<sup>296</sup> it will be observed in a following step, whether these essential prerequisites relating to the issue of eradicating torture have already been met by Qatar, in order to be in full compliance with its obligations under the UNCAT.

In its concluding observations, the CAT initially criticized Qatar's reservation to articles 1 and 16 of the UNCAT as 'vague' and 'of imprecise nature,' thereby underlining the necessity of Qatar to 'unambiguously reaffirm' its commitment to the Convention.<sup>297</sup> The issue of legal ambiguity was also addressed by the Committee with regards to the state's Criminal Code,

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<sup>292</sup> Prolonged solitary confinement can amount to torture under certain circumstances and are therefore not in accordance with the state's obligation under the UNCAT to primarily refrain from acts or omissions that amount to torture or CIDT, see AI, Qatar: Kenyan labour rights activist in solitary confinement, May 28 2021 <<https://www.amnesty.org/en/latest/press-release/2021/05/activist-malcolm-bidali-in-solitary-confinement-in-qatar/>> accessed 10 August 2022, according to which, in 2020, the UN Special Rapporteur on Torture noted that 'solitary confinement of more than 15 consecutive days is considered a form of torture'.

<sup>293</sup> Qatar 2020 Human Rights Report 2 <<https://www.state.gov/wp-content/uploads/2021/03/QATAR-2020-HUMAN-RIGHTS-REPORT.pdf>>.

<sup>294</sup> AI, Qatar: Briefing to the Committee Against Torture (May 2006), MDE/22/002/2006 1–2.

<sup>295</sup> ODHIR (n 116) para 14; *Nowak* (n 174) 415–416.

<sup>296</sup> CAT (n 41).

<sup>297</sup> *Ibid* paras 7–8.

still encompassing the possibility to impose corporal punishments, including ‘flogging, stoning and other corporal punishment as criminal sanctions.’<sup>298</sup>

Furthermore, the CAT recalls its General Comment No 2 (2007) on the implementation of article 2, in which, the Committee underscored that ‘it rejects any religious or traditional justification that would violate that prohibition [of torture].’<sup>299</sup> In its concluding observations, the CAT also raised concerns with respect to all above-mentioned, and more, aspects necessary for the full implementation of the UNCAT, namely the aspects of criminalization, investigation, redress, prevention, and training.

As regards the issue of criminalization, article 36 of the constitution of Qatar prescribes that ‘[n]o one shall be subjected to torture or degrading treatment [and that t]orture shall be punishable by law.’<sup>300</sup> Yet, it has been criticized by the CAT that the national Criminal Code imposes inadequate penalties, failing to provide sufficient safeguards to mitigate impunity.<sup>301</sup>

An even more recent picture of the measures undertaken by Qatar relating to the issue of torture is provided by the HRC, the monitoring body of the UNICCPR, to which Qatar acceded on 21 May 2018,<sup>302</sup> in its concluding observations on the initial report of Qatar.<sup>303</sup> Accordingly, the HRC was deeply concerned about the national legislation of Qatar still not providing for an explicit absolute prohibition of torture and the non-derogability of the freedom of the said crime,<sup>304</sup> the lack of certainty as regards the minimum sanctions for torture and the definition of acts and omissions falling under article 159, 159bis and 161 of the Penal Code. Additionally, it was criticized that Qatar has not managed to ensure an adequate complaint mechanism, thereby referring to the underlying issue of insufficiently available and effective remedies for victims of torture.<sup>305</sup>

With respect to other crucial facets of implementation, the CAT underscored that Qatar’s failure to provide sufficient information on existing preventive mechanisms, such as regular

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<sup>298</sup> Ibid para 31.

<sup>299</sup> Ibid paras 8.

<sup>300</sup> The Permanent Constitution of the State of Qatar (n 20) article 36.

<sup>301</sup> Ibid paras 10 and 12.

<sup>302</sup> *Çali* (n 45).

<sup>303</sup> HRC (n 41).

<sup>304</sup> The same concern has already been raised by the CAT, see CAT (n 41) para 7.

<sup>305</sup> HRC (n 41) paras 28–29.

inspection of detention facilities, as well as on adequate investigations, the effect of existing training possibilities for public officials and avenues of redress provided for victims.<sup>306</sup>

In conclusion, Qatar's efforts in complying with its obligations arising from the UNCAT have been subjected to wide criticism by the CAT and the HRC. While a number of shortcomings have been identified, the lack of a domestic provision including a clear definition in accordance with the UNCAT is of particular importance for this thesis, taking into consideration the articles of the UNCAT targeted by Qatar's reservation, namely articles 1 and 16. As reservations motivated by considerations based on Islamic Shari'a law express a certain concern of its compatibility with the UNCAT.<sup>307</sup> Thus, a reservation to the UNCAT's provision delineating the definition of torture, may be understood as an expression of a different understanding of torture under Islamic Shari'a law.

Accordingly, the HRC was deeply concerned about the national legislation of Qatar still not providing for an explicit absolute prohibition of torture and the non-derogability of the freedom of the said crime,<sup>308</sup> the lack of certainty as regards the minimum sanctions for torture and the definition of acts and omissions falling under article 159, 159bis and 161 of the Penal Code. Furthermore, it was criticized that Qatar has not managed to ensure an adequate complaint mechanism, thereby referring to the underlying issue of insufficiently available and effective remedies for victims of torture.<sup>309</sup>

With respect to other crucial facets of implementation, the CAT underscored that Qatar's failure to provide sufficient information on existing preventive mechanisms, such as regular inspection of detention facilities, as well as on adequate investigations, the effect of existing training possibilities for public officials and avenues of redress provided for victims.<sup>310</sup>

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<sup>306</sup> CAT (n 41) paras 21, 23, 29 and 35.

<sup>307</sup> *Mayer* (n 16) 26.

<sup>308</sup> See also CAT (n 41) para 7.

<sup>309</sup> HRC (n 41) para 28.

<sup>310</sup> CAT (n 41) paras 21, 23, 29 and 35.

## 6. The UNCAT in Pakistan and Qatar – A Comparison

The analysis of the reservations entered by Pakistan and Qatar has shown a number of similarities. First, both Pakistan's initially employed reservations and the reservation of Qatar expressed its concern of incompatibility of the precepts of Islamic law and Islamic religion with the provisions of the UNCAT targeted by the reservations, and the consequently deemed necessity for limiting the scope of several treaty obligations. Second, as a clear response, both states' reservations were subjected to a significant number of objections, referring to the same main issue of the reservations' 'vagueness' or indeterminate wording, and the state parties' doubts of the states' commitment to the treaty's obligations. Third, similar developments can be identified in the states' reactions to the high number of objections. Pakistan withdrew most of its substantive reservations. Likewise, Qatar lifted its general reservation, while, however, leaving a 'partly general' reservation in force. Fourth, as regards the provisions targeted, article 16, which is considered a non-derogable norm of jus cogens according to the CAT, has been targeted by both states' reservations and remains subjected to the reservation of Qatar.

On the same token, differences have been identified. First, Pakistan initially entered reservations targeting a specific number of provisions of the UNCAT, whereas Qatar employed one general reservation to the whole treaty, the latter of which is particularly contested regarding its compatibility with the treaty's object and purpose. Second, while the lifting of Pakistan's reservations is considered a case of an 'externally-imposed' withdrawal, 'rather than one that has its genesis in domestic political dynamics and debate,' Qatar still employs its 'partly general' reservation to articles 1 and 4 of the UNCAT by Qatar, despite of a comparable number of objections by other state parties.

As regards the status of implementation, both states were subjected to criticism referring to inadequate legal actions in addressing the issue of torture, comprising the concern of the lack of appropriate criminal sanctions and of a provision including a clear definition of torture in line with article 1 of the UNCAT. Furthermore, shortcomings of both states with respect to ensure prompt and independent investigations and adequate redress for the victims were brought forward as well by the UN monitoring bodies and NGOs.

Due to the fact that presumably universal terms, such as 'crime and punishment',<sup>311</sup> 'justice',<sup>312</sup> and the 'implications for human dignity',<sup>313</sup> may be understood differently in other

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<sup>311</sup> Çali and Montoya (n 9) 3 and 19.

<sup>312</sup> Sawad (n 1) 105.

regions of the world, the withdrawal of vague and sweeping reservations employed by states of other cultural hemispheres is a desirable step towards the aim of universality of human rights. Not least because, in withdrawing broadly framed reservations, states acknowledge a number of adverse implications following from reservations for the full implementation of human rights standards, thereby simultaneously recognizing the compatibility of domestic religion and culture with the principles and rights enshrined in the respective treaty.<sup>314</sup>

## 7. Conclusion

Reservations to international human rights treaties, including the UNCAT, remain controversial to this day, not least owing to their nature being capable of making substantive parts of a treaty inapplicable. While the UNCEDAW and the UNCRC remain the treaties mostly targeted by reservations, the UNCAT, aiming at the full eradication of torture and CIDT, also continues to be subjected to a limited number of reservations, some of which were employed out of religious considerations.

As of 2016, over 40 percent of all reservations were based on religion, including those invoking Islamic Shari'a law. Likewise, the Islamic State of Pakistan and the State of Qatar employed far-reaching reservations to the UNCAT upon accession directed at a number of substantive articles of the Convention, including articles 1 and 16, to both of which Qatar still employs a standing 'partly general' reservation subordinating the named articles to Islamic precepts.

Most of the substantive reservations targeted by Pakistan and Qatar were subjected to a high number of objections by other state parties to the UNCAT concerning their vague and indeterminate nature, therefore undermining the UNCAT's object and purpose, the compliance with which is required under article 19 para c of the VCLT. According to the ILC Report, reservations not in compliance with article 19 can be considered impermissible, and thus nullified. However, this effect of invalid reservations remains controversial.

Notwithstanding that a certain positive trend can be observed with regards to the number of Shari'a-based reservations to the UNCAT employed by Pakistan and Qatar as several reservations have so far been withdrawn, thereby fully binding the states to the respective provisions, some key obligations arising from the treaty have not yet been put into practice.

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<sup>313</sup> Ibid 102; *Weilert* (n 20) 335.

<sup>314</sup> *Çali* and *Montoya* (n 9) 27.

Accordingly, similar shortcomings were identified regarding the status of implementation of the treaty in Pakistan and Qatar. The lack of a clear definition of torture and CIDT under domestic criminal law in line with article 1 of the Convention was one shortcoming, also addressed by the Committee. Other issues of concern refer to the lack of adequate criminal laws, investigation procedures and redress for victims of torture in line with the obligations arising from the UNCAT.

As regards the lack of definition of torture under national laws, it has been purported in literature that this shortcoming may result in the ineffectiveness of a treaty, and thus may constitute a critical obstacle in the implementation process of the UNCAT, particularly with respect to the obligation of the enactment of domestic laws criminalizing acts of torture. The importance of providing a legally binding definition of torture, as constituting one obligation under the UNCAT, becomes particularly critical, if a state, such as Qatar, refers to Islamic Shari'a law, a varying and 'complex set of rules,'<sup>315</sup> in its standing reservation to the treaty without specifying its content. While neither Pakistan nor Qatar provide for a clear definition of torture in line with article 1 of the Convention, Qatar's reluctance is additionally bolstered by its still standing reservation to articles 1 and 16 of the Convention, thereby preserving the state's underlying Islamic imperative.<sup>316</sup>

The withdrawal of reservations is considered a vital step towards treaty universality, not least because of the state becoming fully bound by the provisions initially targeted by reservations resulting in the state's obligation to continuous reporting to the CAT.<sup>317</sup> This is desirable, in particular as vague reservations are capable of impeding the treaty's full implementation. For this purpose, the Committee should question still standing reservations, as well as the relation between substantive provisions of the UNCAT and 'the contemporary domestic status quo as it pertains to issues of religion, belief, culture, or tradition,' in order to stimulate national consultation, potentially resulting in legal reforms in line with the Convention to render still standing reservations to the UNCAT obsolete.<sup>318</sup>

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<sup>315</sup> *Salem* (n 34) para 17.

<sup>316</sup> Cf *Sawad* (n 1) 105.

<sup>317</sup> *Salem* (n 34) para 28.

<sup>318</sup> Cf *Augustauskaitė-Keršienė* (n 22) 131.

## List of Abbreviations

ACHR or the Charter	2004 Arab Charter on Human Rights
AI	Amnesty International
App	Application
CAT or the Committee	United Nations Committee against Torture
CCPR	Committee on Civil and Political Rights
CDHRI	1990 Cairo Declaration on Human Rights in Islam
Cf/cf	Confer/confer
CIDT	other Cruel, Inhuman or Degrading Treatment and Punishment
Doc	Document
eds	editors
ECHR	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
et al	et alia
GA	General Assembly
GAOR	General Assembly Official Record
GCC	Gulf Cooperation Council
GSP	Generalised Scheme of Preferences
HRC	United Nations Human Rights Committee
HRCP	Human Rights Commission of Pakistan
HRW	Human Rights Watch
Ibid/ibid	Ibidem/ibidem
ICC	International Criminal Court
ICJ	International Court of Justice
i.e.	id est
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILC Guidelines	International Law Commission (2011), Guide to Practice on Reservations to Treaties, 63 <sup>rd</sup> session, adopted 5 to 11 August 2011, submitted to the GA as a part of the Commission's report covering the work of that session (UN Doc A/66/10, para 75)

ILC Report	United Nations General Assembly (2011), Report of the International Law Commission, 66 <sup>th</sup> session, Supp No 10, UN Doc A/66/10/Add.1
ILM	International Legal Materials
IRP	Islamic Republic of Pakistan
LAS	League of Arab States
lit	litera
n	note or footnote
n.a.	no author
NAP	National Assembly of Pakistan
NCHR	National Commission on Human Rights
n.d.	no date
NGO, NGOs	non-governmental organisation, non-governmental organisations
No/no, nos	Number/number, numbers
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OMCT	World Organization against Torture
OPCAT	2002 Optional Protocol to the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment
OSCE	Organization for Security and Co-operation in Europe
pp	page, pages
Pakistan	the Islamic State of Pakistan
para, paras	paragraph, paragraphs
Qatar	the State of Qatar
Res	Resolution
sic	sic erat scriptum
SPARC	Society for the Protection of the Rights of the Child
SPT	Subcommittee on the Prevention of Torture
Supp	Supplement
UDHR	1948 Universal Declaration of Human Rights
UIDHR	1981 Universal Islamic Declaration of Human Rights
UN	United Nations



UNCAT or the Convention	1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment
UNCEDAW or CEDAW	1980 United Nations Convention on the Elimination of All Forms of Discrimination Against Women
UNCRC	1990 United Nations Convention on the Rights of the Child
UNCRPD	2006 Convention on the Rights of Persons with Disabilities
UNICCPR	1966 International Covenant on Civil and Political Rights
UNICERD	1965 International Convention on the Elimination of All Forms of Racial Discrimination
UNICESCR	1966 International Covenant on Economic, Social and Cultural Rights
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
URG	Universal Rights Group
US	United States of America
v/v./vs	versus
VCLT	1969 Vienna Convention on the Law of Treaties
Vol	Volume

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