(In)Validity of Egypt's Reservations to The African Charter on the Rights and Welfare of the Child

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Abstract

On May 9 2001, the Arab Republic of Egypt ratified the African Charter on the Rights and Welfare of the Child. Along with said ratification, Egypt submitted five reservations against Articles 21 (2), on child marriage, 24 on adoption, 30 (a-e) on the special treatment of children of imprisoned mothers, 44 establishing the African Committee of Experts on the Rights and Welfare of the Child's competence to receive communications and 45 (1) granting the Committee competence to undertake investigations in state parties. Botswana, Mauritania and Sudan have also collectively entered four other reservations, with Sudan entering a fifth also on child marriage (Article 21.2). While reservations to human rights treaties are the subject of torturous inquiry as to their validity, severability of invalid reservations, and competence to so determine, Egypt's last two reservations, being jurisdictional in nature, raise probably the prickliest of questions in this respect. In the context of African international human rights law's compulsory quasi-judicial treaty body competence tradition, the extent to which a state can validly reserve consent to be bound to treaty body jurisdiction attains an even more prickly status. These jurisdictional reservations and their validity, severability or otherwise, and the process international law has gone through in attempting to address these problems will be analysed here.

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1. Introduction

It is unthinkable to ask states to study the jurisprudence and advisory opinions of the Court, the general and individual reports of the Commission, the evolution of doctrine in international human rights law, and the many other sources that could put them in a position to make informed decisions [in respect of reservations]. Unfortunately, the decision-making process does not always make juridical coherence a priority in the implementation stage of the treaties.[1]

International law is a process seeking to resolve problems, or maybe even, a problematic process.[2] Not least among these is the regime of reservations applicable to multilateral human rights treaties.[3] Are the general customary standards of validity of reservations codified in the Vienna Convention on the Law of Treaties[4] applicable in all aspects to human rights treaties? Who is duly empowered to apply appropriate standards to determine such invalidity? What should be done with invalid reservations and how would such action affect the fundamental principle of state consent? Can human rights systems bear the repercussions, if any, of state backlash regarding reservations and their severability in human rights treaties?[5] Is it even desirable to clarify the legal standards applicable?

However torturous, these questions have been confronted in the universal, Inter-American and European human rights systems by treaties, international tribunals, states and scholars, with varying results, as we shall see here. Yet, it seems

[1] AE Montalvo, 'Reservations to the American Convention on Human Rights: A New Approach' (2001) 16 (2) American University International Law Review 306-7.

[2] 'Problematic process' seems closer than 'processive problem' to the description of "difficult and unanswered" questions proposed by R Higgins in *Problems and Process: International law and how we use it*, Clarendon Press, 1994, vi. The method follows, it would seem to us, that to interrogate these questions, one clarifies what the problem (question) is, what process has taken place to resolve it, and what conclusions have been reached or are likely to be reached. In this sense, we can, along with Higgins and Montlavo, disagree that "all international lawyers have to do is to identify [*rigid* rules] and apply them" R Higgins, 3. [Emphasis added]

[3] Several scholars instructively incorporate the problematic nature of this regime in the titles of their commentary. See also R Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and The Problem of State Consent' (2004) 5 Melbourne Journal of International Law 155; EA Baylis, 'General Comment 24: Confronting the problem of reservations to human rights treaties' (2012) 17 (2) Berkeley Journal of International Law; K Roth, 'The charade of US Ratification of International Human Rights Treaties' (2000) 1 Chicago Journal of International Law 347; LR Helfer 'Not Fully Committed?: Reservations, Risk, and Treaty Design' (2006) 31 Yale Journal of International Law 367; R Baratta 'Should Invalid Reservations to Human Rights Treaties be Discarded?' (2000) 11 (2) European Journal of International Law 413.

[4] [Hereinafter Vienna Convention], 1155 UNTS 331. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.

[5] Moloney 'Incompatible reservations' 166.

not nearly enough attention has been accorded this problem in the African system. It may be that the first two African human rights treaties, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[6] and the African Charter on Human and Peoples' Rights[7] attracted neither significant numbers of reservations[8] nor any objections from other state parties or the Depositary[9], nor questions from the responsible treaty body on the existing four reservations. [10]

In its turn, the African Charter on the Rights and Welfare of the Child[11] attracted even more reservations. Egypt accompanied its May 9 2001 ratification of the African Children's Charter with five reservations, the latter two concerning the competence of the African Children's Committee:[12]

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[6] Hereinafter, OAU Refugee Convention. 1001 UNTS 45. Adopted on 10 September 1969 and entered into force on 20 June 1974.

[7] Hereinafter, African Charter. OAU Doc CAB/LEG/67/3 Rev 5 (1982). Adopted 27 June 1981, entered into force 21 October 1986.

[8] There are no reservations entered against the OAU Refugee Convention. As regards the African Charter, two states entered reservations (more properly interpretive declarations). Zambia's read thus: "Article 13(3) - should be amended such that every individual has the right of access to any place, services or public property intended for use by the general public; Article 37- the Secretary-General of the Organisation, rather than the Chairman of the Assembly, should draw lots to determine the terms of office of members of the Commission; and non-State Parties to the Charter should also submit reports to the Commission." Egypt's, on the other hand, was as follows: "Article 8 and Article 18(3) - Application of Article 8 and Article 18 (3) of the Charter should be in the light of Islamic *Shariah* Law and not to its demerit; Article 9(1) - Egypt shall interpret this paragraph as being applicable only to information, the obtaining of which is authorised by Egyptian laws and regulations." See *Report on the Status of OAU/ AU Treaties (As at 4 January 2011)*, AU Executive Council, Eighteenth Ordinary Session 24-28 January 2011, Addis Ababa, Ethiopia EX.CL/638(XVIII) Rev.1, 7-8, 11.

[9] In contrast, for instance, reservations to the competence of the European Commission on Human Rights and European Court on Human Rights made by Turkey on of 28 January 1987, 28 January 1990 and 22 January 1990 respectively were objected to by Secretary-General of the Council of Europe, Greece, Sweden, Luxembourg, Denmark, Norway and Belgium. See ECtHR, *Loizidou v. Turkey (Preliminary objections)* (Application no. 15318/89) Judgment of 23 March 1995, 15-29. Also, 20 states objected to Chile's reservation on Article 2 of the Convention against Torture. See Also R Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96 American Journal of International Law 553.

[10] In April-May 2005, "Questions raised during the examination of Egypt's third report […] *suggest* that the state should withdraw its reservations to articles 8 and 18 (3)." F Viljoen, *International Human Rights Law In Africa* (2nd edition, Oxford University Press, 2012), 314; On 4 May 2011 the Cairo Institute on Human Rights Studies (CIHRS) and the Institute for Human Rights and Development in Africa (IHRDA) at the 49th Ordinary Session of the African Commission called on "the Special Rapporteur on Freedom of Expression and other relevant special mechanisms of the African Commission to engage Egypt with a view to achieving a withdrawal of these reservations" http://www.ihrda.org/2011/05/cihrs-ihrda-statement-before-african-commission-on-egypt-may-4-2011/ Accessed 14 April 2013.

[11] OAU Doc. CAB/LEG/24.9/49 (1990). Hereinafter African Children's Charter] adopted on 11 July 1990 and entered into force on 29 November 1999.

[12] http://acerwc.org/ratifications/ Accessed 15 April 2013. See also, *Report on the status of OAU/ AU treaties* (note 7 above) 14.

> Egypt: Does not consider itself bound by Article 21 (2) regarding child marriage, Article 24 regarding adoption (although this is under review and a similar reservation to the CRC has already been removed); Article 30 (a-e) regarding the special treatment of children of imprisoned mothers; Article 44 which establishes that the Committee can receive Communications; and Article 45 (1) regarding the Committee conducting investigations in member states.
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> In addition to Egypt, three other states entered reservations: [13]
>
> Botswana does not consider itself bound by Article 2 which defines the child; Mauritania does not consider itself bound by Article 9 regarding the right to freedom of thought, conscience and religion; Sudan does not consider itself bound by Article 10 regarding the protection of privacy, Article 11 (6) regarding the education of children who become pregnant before completing their education or Article 21 (2) regarding child marriage.

These reservations are all general,[14] in some cases sweeping, are not time bound and are arguably inconsistent with the object and purpose of the treaty, as we shall see.

We shall therefore review the regime of reservations in international law, measure these reservations against the "consistent with the object and purpose" standard of valid reservations and confront the problems of state consent and "pro-ratification" policy arguments that question severability. Focus will be afforded Egypt's jurisdictional reservations for these raise particular problems to the regime of reservations in Africa's peculiar practice on the compulsory jurisdiction of its human rights treaty bodies.

2. Validity of Reservations to Treaties

> According to the International Court of Justice (ICJ):[15]
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> It is well established that in its treaty relations a State cannot be bound without its consent .... [N]one of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'etre* of the convention.

[13] http://acerwc.org/ratifications/ Accessed 15 April 2013.

[14] While the African treaties are silent on this point, the Convention on the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11[hereinafter European Convention] ETS 5, for instance, in Article 57 prohibits general reservations unaccompanied by a brief statement of law.

[15] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] ICJ Rep 15, ICGJ 227 (ICJ 1951), 28th May 1951, International Court of Justice [ICJ]. 15, at 21.

These two 1951 sentences of the ICJ exemplify the problem of reservations to human rights treaties and the careful balancing act it calls for.

2.1 The Emergence of Human Rights Specificity in Genocide Convention *Case*

Let us recap, at the risk of oversimplification, the process that has attempted to resolve this problem. Prior to the *Genocide Convention reservations case* it was assumed that the validity of reservations would be controlled by state objections. When Britain entered a reservation to one of the 1899 Hague Conventions, the Netherlands, acting as depositary, found it necessary to consult the other state parties as to the reservation's *acceptability* before depositing the ratification instrument.[16] This consultation was adopted as the *modus operandi* by states through the League of Nations era. Its logic lay in the view of multilateral treaties as "contracts", an exchange of obligations and benefits among sovereigns.[17] Thus a reserving state's ratification needed to be approved by the other contractees who would have to decide whether the reservation in question presented an acceptable give and take proposition.

However, in the *Genocide Convention Reservations Case*, the additional problem of human rights treaties presented itself. These could not simply be viewed as reciprocal contracts among states as the multilateral human rights treaty only creates obligations for a state party and "the intangible benefits of prestige and the promotion of values it supports"[18]. The real benefits, instead, go to a third party, the human beings under the jurisdiction of said state parties[19]. This development of "'treaty-law' changed the traditional idea of the 'treaty-contract' that had previously governed relations among states."[20]

[16] Montalvo, 'Reservations to the American Convention on Human Rights', 273. [Emphasis added]. As we shall see, the validity test today is worlds apart from the acceptability one of a century ago.

[17] Baylis, 'General Comment 24', 287.

[18] Baylis, 'General Comment 24', 290

[19] "In a traditional treaty which has reciprocal obligations and benefits between the parties, this rule produces a logical and direct relationship among the states parties, because contractual dynamics are at work. A state party will share obligations and benefits with those states parties which accept the terms of its ratification, and it will not share obligations and benefits with those which do not accept those terms. This rule does not have the same logic in a human rights treaty in which each state has obligations to individuals, not to the other parties. In a human rights treaty, the ratifying state's obligations remain the same, regardless of whether some states parties do not accept its reservations or ratification." Baylis, 'General Comment 24', 293.

[20] Montalvo, 'Reservations to the American Convention on Human Rights', 276.

Since states had little by way of traditional benefits, as would accrue in say, a trade or arms reduction treaty, equally little was the incentive to effectively use objections to control invalid reservations. The *Genocide Convention reservations case* therefore faced the problem of adopting a view that would at once avoid upheaval in the established principle of state consent while nevertheless encouraging ratification. However desirable a preclusion of the Soviet Union from joining the Genocide Convention by reason of the threat its reservations would pose to the progress towards outlawing the singular tragedy of the 1939-45 War, the reservations' significance could not simply be cast aside.

Yet, requiring universal approval for reservations would be unwieldy. Thus, the ICJ effectively abolished the universal approval standard that precluded a reserving state's ratification[21], asserting in lieu that a reservation in question and objections to it would only modify the obligations between the reserving and objecting state. Moreover, instead of disparate standards of validity that states were then applying[22], the ICJ asserted that a reservation's acceptability/validity would be tested against the object and purpose of the treaty[23]. This dictum was later codified in the Vienna Convention's Articles 21 and 19 (c).

However, state practice of the 1960s to 1980s would soon reveal objections and modified obligations as an unworthy match for invalid reservations to human rights treaties. Just like the African system in the 1980s and 1990s as we have seen above, the Inter-American system for instance suffered a lack of objection to invalid reservations, "probably best explained by the dearth of palpable direct effects on one country by another country's reservations."[24] Clearly, in the context of regional arrangements, "the importance of cordial relations and comity outweigh[ed] other considerations and [led] states to avoid the issue."[25]

[21] The Pan American Union, predecessor of the Organisation of American States (OAS) had in 1928 at the Sixth Inter-American Conference in Havana approved a "Convention on Treaties" and a "Rules of Procedure" which recognised that a reserving state could become party to a convention. Noteworthy is that the ICJ sought the OAS' views when deliberating the *Genocide Convention reservations case.* See also the 1973 OAS General Assembly approved "Standards on Reservations to the Inter-American Multilateral Treaties" and the 1987 "Standards on Reservations to the Inter-American Multilateral Treaties and Rules for the General Secretariat as Depositary of Treaties". Montlavo, 'Reservations to the American Convention, 274-5, notes 14-15.

[22] "Because there are no tangible relational obligations and benefits, a state party cannot test the reasonableness of a reservation according to its own self-interest." Baylis, 'General Comment 24', 291.

[23] Baylis, 'General Comment 24', 287.

[24] Montalvo, 'Reservations to the American Convention, 270.

[25] Montalvo, 'Reservations to the American Convention, 270.

Further still, the human rights treaties of this era were to have a new innovation: treaty monitoring and enforcement bodies. State parties were to face not just a vehement objection and modified bilateral obligations, but supra-national bodies, creatures conjured of states parties will but supervisory over them.[26] States would mandate these treaty bodies to hold them to account for their obligations to the human beings beneficiary to the treaty guarantees.

By 1982, the Inter-American Court was called upon to advice on *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*.[27]

Pivoted upon whether the 12 month consultation period established by the Vienna Convention's Article 20(5) delayed the entry into force of the Convention for Mexico and Barbados, this opinion needed not fundamentally pronounce itself on the entire regime of reservations, save to affirm that a pro-ratification policy would need to again be tested against the object and purpose standard established in the Vienna Convention's Article 19 (c) and the American Convention on Human Rights' Article 27 on suspension of guarantees. In effect, what was established here are two standards for testing validity of reservations: the object and purpose, and non-contradiction with other Convention rights.[28]

Suffice it to say at this point, that despite disinclination from the International Law Commission,[29] the *sui generis* nature of human rights treaties in the reservations regime had been recognised.[30]

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[26] J Klabbers, *Introduction to international institutional law*, (Cambridge University Press, 2002) 307-308; See also J Klabbers, "The paradox of international institutional law" (2008) 5 International Organizations Law Review1-23.

[27] Advisory Opinion OC-2/82, Inter-American CourtonHuman Rights (ser A) no 2, para. 2 (September 4, 1982) [hereinafter *American Convention reservations*].

[28] Montalvo, 'Reservations to the American Convention', 280. Two later advisory opinions of the Inter-American Court pronounced on effect of reservations on substantive rights, with some disappointing results for Montlavo: *Restriction to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83, Inter-AmCtHR (ser. A), no. 3 (Sept. 8, 1983) and *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Inter-Am CtHR (ser. A), No. 8 (Jan. 30, 1987).

[29] UN Doc A/CN.4/470/Corrs I & 2; see also UN Doc A/CN.4/477/Add.1; UN Doc A/CN.4/491/Adds. 1-6 (including the analysis of Alain Pellet, ILC's Special Rapporteur for the subject); Baylis, 'General Comment 24', 322-26; Montalvo, 'Reservations to the American Convention', 274.

[30] Montalvo, 'Reservations to the American Convention', 276.

2.2 *Belilos Case and General Comment 24: Clarifying the Human Rights Reservations Regime*

In time, the question of reservations came up in contentious cases. In 1988, the European Court of Human Rights in *Belilos v Switzerland*,[31] not only had to determine the validity of Switzerland's reservations to Article 6 (1) of the European Convention,[32] but also what action to take after finding said reservation invalid. Theoretically, three options are to be considered:

Option 1: The state remains bound to the treaty except for the provision(s) to which the reservation related; Option 2: The invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the agreement; Option 3: An invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provision (s) to which the reservation related.[33]

In *Belilos,* Switzerland had elected to remain bound by the Convention in the event its self-styled "declaration"[34] was found invalid.[35] Therefore, it was not deemed contrary to state consent to severe the reservation and still hold Switzerland bound to the Convention. It reaffirmed this position in 1990 in *Weber v Switzerland* regarding the very same reservation,[36] prompting Baratta to call this, the "Strasbourg Approach."[37] In addition, the European Court did affirm the 'paradox of international institutional law' alluded to above by asserting that "the silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment."[38]

In 1992, the US finally ratified the International Covenant on Civil and Political Rights (ICCPR), 26 years after its adoption. Controversially,[39] the US

[31] [Hereinafter *Belilos*] (Application no. 10328/83) Judgment of 29 April 1988.

[32] *Belilos,* 29.

[33] Ryan Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent', (2001) 96 The American Journal of International Law 531.

[34] The Vienna Convention in Article 2.d provides: "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".

[35] *Belilos,* 60; Baylis, 'General Comment 24', 302.

[36] (Application no. 11034/84) Judgment of 22 May 1990, 38.

[37] Baratta, 'Should invalid reservations…be discarded', 413.

[38] *Belilos,* 47.

[39] See generally, Roth 'The charade of US ratification…'; S Esterling 'The Illusion of Human Rights: The US Constitution, NSE Declarations and International Human Rights Treaty Law' (2007) 1 Malawi Law Journal 2; MS Friedman 'The Uneasy US relationship with Human Rights Treaties: The Constitutional Treaty System And Non Self-Execution Declarations' (2005) 17 Florida Journal of International Law .

attached 15 reservations,[40] whose effect was largely to preclude the US from most key ICCPR obligations.[41]

The Human Rights Committee had already called into question the reservations of Finland, Barbados, Belgium, Iceland, Austria and Congo among others during respective state report examinations.[42] The cumulative effect of these and the sheer enormity of the US reservations resulted in the 1994 *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.*[43] According to the Committee:[44]

> The US Senate did not seem to understand that the Covenant is intended to call upon each ratifying country to re-examine its own human rights standards.

In General Comment 24, the Committee affirmed its legal authority to determine which reservations are permissible;[45] the applicable test for reservation permissibility is its compatibility with the Covenant's object and purpose,[46] while noting the Vienna Convention provisions' inadequacy in dealing with invalid reservations to human rights treaties;[47] and the default response to an incompatible reservation is severance, with the effect of retaining the reserving state's ratification without its reservation.[48]

The Comment was greeted with strong pro and anti-voices. The US, UK and France, for instance, rejected the Comments' conclusions.[49] The ILC Special Rapporteur on reservations seemed to favour reservation invalidity determination by regional courts, but disagreed with the possibility of the Vienna Convention's inadequacy to fully address reservations on human rights treaties and saw severability

[40] US reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992). http://www1.umn.edu/humanrts/usdocs/civilres.html Accessed 13 April 2017; also, Roth 'The charade of US ratification…' for a discussion.

[41] Interview with Ambasador Francisco José Aguilar-de Beauvilliers Urbina, Member of the Human Rights Committee 1989-97, President (1995-97), (27 April 2013, UN University for Peace, San Jose, Costa Rica).

[42] Baylis, 'General Comment 24', 312, and note 165.

[43] [Hereinafter General Comment 24] of 11 April 1994, CCPR/C/21/Rev.1/Add.6.

[44] Baylis, 'General Comment 24', 307.

[45] General Comment 24, para. 16-18.

[46] General Comment 24, para. 6.

[47] General Comment 24, para 16.

[48] General Comment 24, para.18; Baylis, 'General Comment 24', 286.

[49] Also Baratta, 'Should invalid reservations…be discarded', notes 18-20.

as inconsistent with state consent.[50] Although Baylis admits "the policies of the Comment are neither as novel nor as extreme as they seem to initially appear," she offers significant critique as to the Committee's legal authority to sever, in part due to its then lack of precedent and the policy of severance itself as incompatible to state consent.[51] While Baratta[52] and Schabas[53] agree with this contention, Moloney[54] offers arguments in favour of severance, with Goodman asserting:[55]

> A treaty regime that precludes severing invalid reservations – or, for that matter, a severability regime that considers reservations presumptively essential to a state's ratification – contravenes the normative commitment to state consent.

Later in 1995, Chief Legal Advisers of six European nations' foreign ministries met and failed to express a "final view … on the legal effects of inadmissible reservations."[56]

To be clear, in issuing General Comment 24, the Committee did not purport to be objecting to the reservations of state parties. Indeed, that is but the province of other state parties. Instead, it is simply and clearly informing the concerned states that their purported reservations are invalid, consistent with its mandate to monitor the implementation of the ICCPR.[57] Severance of an invalid reservation from the act of ratification was the correct consequence.[58] In fact, the alternative seems less acceptable, considering that nullifying the ratification would be against the state's own consent,[59] and given that withdrawal from the ICCPR is itself deemed

[50] Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May - 18 July 1997, U.N. GAOR, 52nd Sess., Supp. No. 10, at 107, para. 85-86, U.N. Doc. A/52/10 (1997).

[51] Baylis, 'General Comment 24', 286, 296-99.

[52] Baratta, 'Should invalid reservations…be discarded'423-4.

[53] WA Schabas 'Invalid reservations to the International Covenant on Civil and Political Rights: Is the United States still a party?' (1995) 21 Brooklyn Journal of International Law 277, 325.

[54] Moloney 'Incompatible Reservations' 166-7.

[55] Ryan Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent', (2001) 96 The American Journal of International Law 531560.

[56] Baratta, 'Should invalid reservations…be discarded', 417.

[57] Interview with Amb. Aguilar-de Beauvilliers.

[58] Goodman, (n 55) 547; citing the position of Nordic states as captured by J Klabbers, 'Accepting the unacceptable? A new Nordic approach to reservations to multilateral treaties,' 69 *Nordic Journal of International Law,* (2000), 185-6, and Swedish statement on behalf of Nordic countries before UNGA Sixth Committee, 29 October 1998: "[T] he reserving state should be regarded as a party to the treaty without the benefit of the reservation. This is the so called severability doctrine which has been applied in a number of instances by ie the Nordic countries during the past few years. It is our hope that this part of the report will reflect practice adopted lately by among others the Nordic countries especially in connection with human rights treaties".

[59] Goodman, (n 55)' 549-50, 554.

impermissible.[60] In General Comment No. 26: Continuity of obligations, the Committee recalled the applicable standard for valid denunciation was to ascertain whether "parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty."[61] After finding that state parties purposely excluded provisions for withdrawal, it concluded unequivocally "international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it."[62] It is therefore unclear on which bases ILC Special Rapporteur on reservations mentioned renunciation as an option available to states unwilling to accept severance.[63]

Substantially, General Comment 24 bars three types of reservations: those to provisions "that represent customary international law",[64] those to non-derogable provisions;[65] and those to provisions requiring states to provide remedies for human rights violations or *establishing monitoring procedures.*[66] With the Committee's firm stance, and the loud disapprovals of self-styled old human rights respecting democracies, the stage was set for some significant disagreement. [67]

1995 brought with it *Loizidou v. Turkey*,[68] where the European Court was called to consider validity of Turkey's jurisdictional reservations purporting to

[60] In the run-up to the handover of Hong Kong by UK, China had initially doubted the ICCPR would continue to cover Hong Kong. The Committee held the view, later accepted by China, that once rights were granted to persons in a jurisdiction, these could not be withdrawn. Interview with Amb, Aguilar-de Beauvilliers. Also, General Comment 26, 12 August 1997. CCPR/C/21/Rev.1/Add.8/Rev.1, 4. However, the most clear expression of the impermissibility of ICCPR withdrawal is the case of North Korea. In 1997, North Korea sought to withdraw from the ICCPR in 1997 only to be informed by the Depositary that given the lack of withdrawal provisions, all state parties to the Treaty would need to agree to a withdrawal. See (n 10) 28; H Sipalla, "State defiance, treaty withdrawals and the resurgence of African sovereign equality claims: Historicising the 2016 AU-ICC collective withdrawal strategy" in HJ Van Der Merwe, Gerhard Kemp (eds) *International Criminal Justice in Africa*, 2017, 79. See also, Human Rights Committee, *General Comment 26*, affirming the deliberate nature of omission of withdrawal provisions.

[61] General Comment 26, 1.

[62] General Comment 26, 5.

[63] Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May - 18 July 1997, UN GAOR, 52nd Sess., Supp. No. 10, at 107, 85-86, UN Doc A/52/10 (1997); Baylis, 'General Comment 24', note 203.

[64] General Comment 24, 8. See also Baylis, 'General Comment 24', note 55.

[65] General Comment 24, 10. See also Baylis, 'General Comment 24', note 55.

[66] General Comment 24, 11. See also Baylis, 'General Comment 24', note 55.

[67] In 2003, in the context of fighting terrorism, UK Prime Minister proposed but later withdrew a proposal to denounce and re-accede to the European Convention with a reservation exempting the UK from non-refoulement obligations. See J Rozenberg, 'Should Britain twist human rights law to meet its own ends?' *Daily Telegraph*, Jan. 30, 2003, at 21; A Travis, 'Asylum in Britain - You can't quit treaties, Blair warned' *Guardian*, 6 February 2003, at 11, cited in Helfer, 'Not fully committed?'(n 3) note 26.

[68] Preliminary Objections (Application no. 15318/89) Judgment of 23 March 1995.

confine the European Convention's application to Turkish borders and not to the actions of its armed forces in Northern Cyprus. The Court reaffirmed both invalidity and severability[69] of reservations incompatible with the object and purpose of the European Convention. While distinguishing itself from the ICJ whose inter-state mandate and practice accepted limited territory jurisdiction reservations,[70] it recalled the "collective enforcement" nature of human rights treaties – not simply "reciprocal engagements" or "a network of ... bilateral undertakings."[71] In the words of the Court:[72]

> In addition, the object and purpose of the Convention as an instrument for the protection of *individual* human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.
>
> It also reaffirmed its authority to make this determination.[73]

In late 1999, a communication, *Kennedy v. Trinidad & Tobago*,[74] brought the question of invalid reservations to the ICCPR system. In 1998 and 1999, Trinidad and Tobago and Guyana had denounced the ICCPR First Optional Protocol, only to re-accede with reservations precluding the Committee from receiving individual complaints from persons on death row. Seen as a step too far, state objections were "overwhelmingly negative" with France, for instance, terming it an "abuse of process" and "a clear violation of the principle of good faith."[75] In *Kennedy*, the Committee upheld General Comment 24 standards, finding the reservation incompatible and severing it. Trinidad and Tobago, in a huff, promptly denounced the First Optional Protocol.[76]

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[69] *Loizidou* (n 9), 93-4.

[70] *Loizidou*, (n 9), 84. The European Court also indicated that similarly aimed reservations by the UK and Cyprus would not be favourably viewed. *Loizidou*, 80.

[71] *Loizidou*, (n 9) 70.

[72] Ibid, 72. [Emphasis added] The African treaties, as we shall show, are additionally keen to protect communities, further raising the standard of "ensuring protection" elaborated by the European Court.

[73] Ibid 96.

[74] Communication No. 845/1999, UN Doc CCPR/C/67/D/845/1999 (Nov. 2, 1999), reprinted in 2 *Human Rights Comm., Annual Report of the Human Rights Committee for 2000*, at 266, UN Doc A/55140 (2000).

[75] Helfer, 'Not fully committed?' (n 3)371.

[76] Helfer, 'Not fully committed?' (n 3) 372. Trinidad and Tobago, over the same question of the death penalty, also denounced the American Convention on Human Rights, which however, explicitly provides for denunciation (Article 74). Guyana also remains defiant, refusing to withdraw the reservation or comply with Committee's recommendations. Seventeenth Meeting of Chairpersons of the Human Rights Treaty Bodies, *The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties*, HRI/MC/2005/5, at 36 (Jun. 13, 2005) cited in Helfer, 'Not fully committed?'(n 3) note 23.

In this context, it can be safely argued that the second denunciation is also invalid, given the clear ill faith and weight of state party and treaty body objections. It would be unusual to arrive at a finding where a legality (second denunciation) proceeded from an illegality (re-accession with impermissible reservations).[77]

Furthermore, the Trinidad and Tobago instance is of particular import to our discussion as its contention was against ICCPR OP1 establishing the competence of the Human Rights Committee to receive complaints, thus a jurisdictional competence law, similar to the African Children's Charter's Article 44 that we will discuss below. And it is at this point in history that the problem of balancing the sometimes mischievous state consent with *sui generis* object and purpose of human rights treaties find the coming into force of the African Children's Charter in 1999.

Despite the silence of African human rights treaty bodies to the question of reservations,[78] there is an increasing trend towards reservations.[79] It is only a matter of time before these questions come to the fore.

3. 'Object and Purpose' and Specificity of African International Human Rights Law

The creation of the regional human rights systems, alongside the universal, provides, with the exception of the nascent ASEAN system, for stronger enforcement mechanisms and inevitable hues of emphasis on substantive guarantees owing to

[77] One could see parallels with the words of Lord Denning in *Macfoy v United Africa Company Limited (West Africa)*: PC 27, [1961] 3 All ER 1169:

> If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

[78] See European Court's views that silence of parties entitled to object does not preclude it from making an assessment. See *Belilos*, 47.

[79] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa has attracted eight reservations, however worded from South Africa, Uganda and Kenya. See *Report of the status of OAU-AU treaties*, 21-22.

their peculiar historical experiences[80] and "greater convergence" at the regional level than the universal.[81]

For the purposes of understanding the regime of reservations in African international human rights law, in addition to the discussion presented above, a comparison of the two systems is indispensable. Such analysis would allow the finding of tools, additional to the already discussed universal ones, to aid in understanding the necessary balance demanded by reservations to human rights treaties in our regional context. Two aspects of such comparative analysis are of paramount importance: an interrogation of the specificity of African international human rights law — a term not lightly chosen; and differences between the universal and African treaties on child rights. These must inform efforts to ascertain the object and purpose of the latter — and later — treaty.[82]

3.1 The Specificity of African International Human Rights Law

The African system has received its fair share of commentary on its origins with cultural specificity, political and economic self-determination, and the halting, if not redress, of the horrors of serious and massive human rights violations of the 1960s and 1970s standing out as key motives.[83]

Substantive specificity, for our present purposes, is the unbroken practice of vesting African quasi-judicial treaty bodies with compulsory jurisdiction. The

[80] For discussion on the peculiar history and substantive emphases of the regional systems to the universal, see RK Goldman 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) *Human Rights Quarterly* 31, 856-887; L Avonius, D Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, (Palgrave Macmillan,2008); RCA White and C Ovey 'Context Background and Institutions' in Jacobs White and Ovey, *The European Convention on Human Rights*, (5th edition, Oxford University Press, 2010); FG Isa, K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (2006).

[81] Andreas von Staden, Andrew Legg, 'The Margin of Appreciation in International Human Rights Law: Deference and Proportionality', (2013) 13 (4) Human Rights Law Review, 134-5

[82] Personal communication with Prof. Frans Viljoen, 5 March 2013 at the UN University for Peace, San Jose, Costa Rica.

[83] See generally, K Mbaye, *Les droits de l'homme en Afrique*, 1992; F Ouguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, (Brill – Nijhoff, 2003); B Ibhawoh, 'Between Culture And Constitution: Evaluating The Cultural Legitimacy of Human Rights in The African State' (2000) 22 Human Rights Quarterl 838,; SB Keetharuth 'Major African legal Instruments' in Bosl A Diescho J (eds), *Human Rights in Africa: Legal Perspectives on the Protection and Promotion*, 2009, 166-7; R Murray, M Evans (eds), *The African Charter on Human and Peoples' Rights - The System in Practice 1986-2006* (2nd edition, Cambridge University Press, 2008); Hassan B Jallow.*The Law of the African (Banjul) Charter on Human and Peoples' Rights1886-2006*, (Victoria, BC : Trafford, 2008); Hassan B Jallow, *Journey for Justice* (AuthorHouseUK, 2012).

1979 OAU Resolution[84] authorising the drafting of the African Charter required to be called:[85]

> as soon as possible [...] meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human and Peoples' Rights providing *inter alia* for the *establishment of bodies to promote and protect* human and peoples' rights.

Hassan Jallow recalls the deliberations of the drafting committee:[86]

> In the preparation of the draft, we were guided by [...] the reality that whilst the OAU member states had mandated us to prepare a draft *with machinery for protection and promotion of human rights*, the concept of state sovereignty was still jealously guarded by the members. This latter consideration would *limit the mandate and authority* of an institution which we proposed be created in this respect. Hence, we the experts proposed the creation of a commission instead of a court.

In other words, while a court with powers to bind states was considered too much for "jealously guarded state sovereignty," a treaty without protection powers was also out of the question. To be clear, African international human rights law is as much a project of cultural specificity, political and economic self-determination and redress of past horrors as it is *a correction of misgivings in universal system*, despite African states taking no peripheral part their creation.[87] While African states were wary, at the founding of the African system to immediately emulate the examples of Europe and the America, they nevertheless made it clear that the African system was to improve on the universal system, hence, for instance, the unification of indivisible, equally justiciable and inter-dependent generations of rights and the establishment of protective and promotional bodies.[88]

[84] AHG/Dec.115 (XVI).

[85] Cited in HB Jallow *Journey for Justice* (2012) 63. Emphasis added.

[86] Jallow *Journey for Justice*, 64. Emphasis added.

[87] Speaking on the creation of the ICCPR, Christian Tomuschat notes, "While both the Western and the Socialist States were still not fully convinced of their usefulness, it was eventually pressure brought to bear upon them from Third World countries which prompted them to approve the outcome of the protracted negotiating process. Accordingly, on 16 December 1966, the two Covenants were adopted by the General Assembly by consensus, without any abstentions (resolution 2200 (XXI))." C Tomuschat 'International Covenant on Civil and Political Rights', United Nations Audiovisual Library of International Law, New York, 16 December 1996.

[88] See, speeches by then President Dawda Jawara of The Gambia on the importance of a balanced treaty that recognises the non-hierarchical complementarity between civil and political rights on one hand and economic social and cultural rights on the other, Jallow *Journey for Justice*, 65.

4. Object and Purpose through CRC-African Children's Charter Comparison

The African Children's Charter was elaborated and adopted barely seven months[89] after the United Nations Convention on the Rights of the Child,[90] a speed and resolve rarely seen in international law. Again, what else, other than to express their jealously guarded peculiarities did African states act so fast to establish an Africa specific child rights treaty? It surely could not have been that African states were dissatisfied with the CRC's implementation, for it had not even come into force. We must therefore look to the texts to find the answers.

4.1 African Children's Charter Article 3 – Best Interest of the Child

The 'best interests of the child' is *the* guiding principle of child rights law. More than any other concern, the 'best interests principle' overrides other considerations "in all actions concerning the child undertaken by any person or authority."[91] It is, so to speak, the *jus cogens* of child rights law, in so far as the child's *best* interests override the interests of "any person or authority." This needs be said: this principle binds the actions of the African Children's Committee too. It would indeed be highly irregular to attempt to sustain it binds not the state parties to the treaty.

4.2 African Children's Charter Article 1.1 – General Obligation of State Parties

Both CRC and African Children's Charter elaborate on the obligation to take all necessary measures, legal or otherwise, to give effect to guarantees but in distinctly different terms.[92] The African Children's Charter is consistent with the African Charter's motif of opening with an explicit elaboration of the extent of

[89] Note 11 above.

[90] [hereinafter CRC], G A res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) Convention on the Rights of the Child, adopted on 20 November 1989, has been ratified by 196 states – all UN member states (including Somalia and South Sudan on 1 October 2015 and 23 January 2015 respectively) apart from the United States. UN Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en Accessed on 16 January 2017. Odongo notes that more countries have ratified CRC than any other human rights treaty in history. See G Odongo 'Caught Between Progress, Stagnation and A Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms' (2012) 12 African Human Rights Law Journal 113.

[91] Article 3.1, African Children's Charter. This is a similarity with the CRC, see Article 3.1, CRC.

[92] Article 4 CRC and Article 1, African Children's Charter.

state party obligations,[93] indicating an important aspect of the object and purpose of African international human rights law to be its effective domestication and protection at the municipal level. It follows that a state reserving from the obligation to give legal and other effect to Charter provisions under Article 1 is incompatible with the object and purpose of the African Charter and African Children's Charter. The African Commission has held repeatedly that any violation of the substantive guarantees is *ipso facto* a violation of Art. 1 obligations.[94]

While CRC offers a blanket progressive realisation obligation for economic social and cultural rights,[95] the African states in the African Children's Charter, elect to expressly bind themselves to its obligations as the default position, singling out the precise obligations that are not subject to immediate realisation.[96] It would seem that African states elected to establish for themselves, in this respect, a more stringent obligation regime.

4.3 African Children's Charter as Minimum Obligation - Article 1.2

As part of state obligations, the African Children's Charter recognises itself as a minimum standard, whose provisions shall not in any way affect "more conductive" guarantees in national or international laws binding on the state party.[97]

> Nothing in this Charter shall affect *any provisions that are more conductive* to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State. [emphasis added]

This has several implications. First, reservations are by definition inimical to treaties establishing minimum guarantees, a situation clarified by the Geneva Conventions and other international laws of war, and the Second Optional Protocol to the ICCPR that admits no reservations.[98]

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[93] Article 1, African Charter on Human and Peoples' Rights.

[94] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*, ACmHPR comm no. 279/03-296/05, 27 May 2009, para 227; *Abdel Hadi, Ali Radi & Others v Sudan*, ACmHPR comm no, 368/09, 5 November 2013, para 91.

[95] Article 4, CRC.

[96] Article 11.3, 13.3, 14.2, African Children's Charter.

[97] Article 1.2, African Children's Charter. The CRC provides similarly but in a stand-alone Article 41.

[98] While it is true that the ICCPR OP2 explicitly prohibits reservations, this fact does not vitiate the legal reasoning behind such explicit prohibition and therefore, its applicability to other human rights treaties.

Second, this African Children's Charter provision has the double edged legal effect of ensuring that the guarantees introduced in African Children's Charter are unique to and from the explicit object and purpose of the African Children's Charter. In other words, any provisions included in CRC but left out explicitly in African Children's Charter remain binding for the state party, *for the purposes of the African Children's Charter*.

To satisfy ourselves as to these legal effects, one need only contemplate the "control experiment", as it were. The African Children's Charter needed not state itself as not prejudicing the legal obligations of state parties with greater obligations in other national and international laws. This is inherent in treaty practice and is precisely the effect of the legal principle *lex specialis derogat lex generali.* But the African Children's Charter did explicitly — for the avoidance of doubt it surely must be — affirm that in the event its provisions constitute a lower standard of guarantee, the higher standard remains in force for the state party. It surely therefore must have done it for its own purposes of affirming "the realisation of the rights and welfare of the child". In other words, African Children's Charter Article 1.2 not only precludes state parties from using the African Children's Charter as an excuse for not fulfilling their greater obligations elsewhere, if any, but in the context of Article 1, establishes an obligation under itself to fulfil said higher obligations.

4.4 African Children's Charter Article 1.3 – The Supremacy Clause

In Article 1.3, the African Children's Charter provides a "constitutional clause" explicitly according the African Children's Charter supremacy over "any custom, tradition, cultural, or religious practice inconsistent" with its guarantees to the effect of nullifying such inconsistencies, but only creating an obligation on the state party to discourage said inconsistencies. Later African Children's Charter provisions engage higher obligations to "appropriate penalties or other sanctions"[99] "effective action, including legislation."[100]

Such constitution-like supremacy is absent in the CRC. This is very significant given that cultural diversity and hence the need for a greater margin of appreciation has dominated the debate concerning the law when affecting children (including child rights law)[101].

[99] With respect to child labour. Article 15.2.c, African Children's Charter.

[100] With respect to the prohibition of child betrothal and marriage. Article 21.2 African Children's Charter.

[101] Legg *The margin of appreciation*, 159-63; ECtHR *Handyside v UK* Application no. 5493/72 (1976); Human Rights Committee, *Hartikainen v Finland* CCPR/C/12/D/40/1978 (1981); IACtHR *Yean Bosico v Dominican Republic* Series C No.130 (2005).

4.5. Definition of the Child

Almost inarguably, the most striking difference between CRC and African Children's Charter constituting the object and purpose of the treaty, is the definition of a child. The CRC, in Article 1, does not definitively define a child, but rather sets a maximum possible age of majority, by granting a wide margin of appreciation to states to establish lower ages of majority. The African Children's Charter is unequivocal and unambiguous in this, its shortest article. "For the purposes of this Charter, a child means every human being below the age of 18 years."[102] It further cements this standard in Article 21.2 on the prohibition of child marriage.

Suffice it to say that the validity of Botswana's reservation to Article 2 is impossible to sustain. That Botswana's reservation is itself silent on Article 21.2, makes the impossible even harder. With an objection to the definition of a child while not even suggesting what age Botswana considers to constitute attainment of majority, Botswana "may just as well not have bothered to ratify the [African] Children's Charter at all."[103]

In another instance, while universal child rights and criminal law set the bar at 15 years for the children in direct hostilities,[104] the African Children's Charter remains adamant, setting the bar at 18 years by virtue of Article 2.

4.6. Children and Incarceration Systems

Unlike the CRC which is silent in this regard, the African Children's Charter in Article 30 creates obligations to children whose mothers are incarcerated for criminal liability. Special treatment is due such mothers, expectant or with infant or young children. Three options are afforded states in fulfilling this obligation: first ensure non-custodial sentences are considered (Art 30.1.a); second, establish and promote alternatives to institutional confinement (Art 30.1.b); establish

[102] Article 2, African Children's Charter.

[103] Viljoen, *(*n 10) 396.

[104] Article 38.2-3, CRC; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000); Article 8.2.b.xxvi, Rome Statute of the International Criminal Court (UN Doc. A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002); *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute (including Annexes, Separate Opinions & Dissenting Opinions), ICC-01/04-01/06-2842 (ICC TC I, 14 March 2012).

special alternative holding facilities (Art 30.1.c). It also requires that children not be imprisoned with their mothers (Art 30.1.d) which has implications for foster care and alternative family upbringing obligations.[105] States are also obligated to ensure "such mothers" – expectant or those with infants and young children – are not sentenced to death (Art 30.e).

The African Children's Charter also effectively outlaws punitive policies in the penitentiary system, requiring instead, "reformation, the integration of the mother to the family and social rehabilitation."[106] Again, the CRC is silent on this matter. Why else did African states so quickly and resolutely adopt a treaty text guaranteeing these protections if not to add missing protections at the universal level, hence constituting the very reason the treaty was created?

4./ The Wider Extent of the African Children's Committee's Mandate

4.7.1 To "Ensure Protection"

On measures of safeguard, the CRC only mandates its Committee to monitor the treaty through state party reports in language clearly designed to limit its Committee's powers:

"*For the purpose of examining the progress* made by States Parties in achieving the realisation of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided."[107]

The African Children's Committee suffers no such limitations. In fact, its first function is "[t]o monitor the implementation and *ensure protection* of the rights enshrined in this Charter."[108]

4.7.2 Authoritative Advisory Jurisdiction

Similarly empowered as the African Commission under the African Charter, the African Children's Committee is also empowered to "interpret the provisions of the present Charter"[109] with the provision granting standing to an advisory

[105] Arts. 24.a, 25.1, 25.2.a and 25.3, African Children's Charter.
[106] Art. 30.1.f, African Children's Charter.
[107] Articles 43.1, 44, 45, CRC. [Emphasis added]
[108] Article 42.b, African Children's Charter. Emphasis added. See also Article 42.a, African Children's Charter.
[109] Article 42.c, African Children's Charter. See also, Article 45, African Charter, in particular, 45.3.

jurisdiction.[110] While a fuller treatment of the nature of the Committee's advisory jurisdiction is beyond our scope, it is important to note that such jurisdiction is not necessarily a feeble tool for a body empowered expressly to "*ensure protection*" of provisions of its founding instrument. A contentious case, even in courts with powers to issue binding decisions, *stricto sensu* only binds the parties in the case[111] and the standards set by the judgement resonate system-wide by virtue of the almost compelling character of the principle of legal certainty. The advisory opinion jurisdiction, on the other hand, offers clear systemic effects. By clarifying the scope of the instrument's provisions, such jurisdiction can be a very potent tool for protection of guaranteed rights.[112]

For the African Children's Committee, such potency is accentuated by the very wording of its treaty, in relation to the African Charter. While the African Charter mandates the African Commission "to formulate and lay down, principles and rules *aimed at solving legal problems* relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations,"[113] the African Children's Committee is empowered to "formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa".[114]

While the former has be traditionally understood to only grant the African Commission powers to issue soft law, it is doubtful that a similar conclusion can be supported by a plain reading of the African Children's Charter. In the words of the Supreme Court of Kenya on the binding nature of its advisory jurisdiction, "The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce

[110] Article 45.1.b, African Charter.

[111] Article 59, Statute of the International Court of Justice.

[112] The practice of the ICJ is quite well established. See also, the IACtHR discussed herein. In the words of the Supreme Court of Kenya, when an advisory opinion is requested by an entity with standing, "it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts […], it must be treated as an authoritative *statement of the law*." Emphasis of the Supreme Court in *Re The Matter of the Interim Independent Electoral Commission*, Supreme Court of Kenya Constitutional Application 2 of 2011, para. 93.

[113] Article 45.1.b, African Charter.

[114] Article 42.a.ii, African Children's Charter.

Article 163(6) of the Constitution to an 'idle provision', of little juridical value."[115]

Again, African states elected to elaborate a far more unequivocal text than was adopted at the universal level.

4.7.3 'Suo moto' Authority Under State Reporting

Another aspect of the African Children's Committee is that its various functions under Article 42 are granted tools with guidance on how to use these. In this way, the provisions of Articles 43 (reporting procedure), Article 44 (the power to receive communications) and Article 45 (powers to "resort to *any* appropriate method of investigating *any* matter falling within the ambit of the present Charter") are necessary corollaries of the functions in Article 42. In particular, while Article 43 guides state parties as to their time and content obligations in state reporting, Article 45.1 provides the "how" by granting the Committee discretionary powers to:

> request from the States Parties *any* information relevant to the implementation of the Charter and may also resort to *any* appropriate method of investigating the measures the State Party has adopted to implement the Charter.

In clear recognition of the weakness of corresponding powers granted the UN Children's Committee to "request from States Parties *further* information relevant to the implementation of the Convention,"[116] African states elected to again raise the bar for themselves.

Similarly, receiving communications (Article 44) is the tool by which the African Children's Committee fulfils is protection mandate under Article 42.b.

4.7.4 African Children's Charter Exclusion of Explicit Reservation and Withdrawal Provisions

Penultimately, for our purposes, the CRC expressly provides for reservations and denunciation.[117] Since the African Children's Charter was adopted with the text of the CRC so fresh in their minds seven months later, African states did not provide any such provisions.

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[115] *Re The Matter of the Interim Independent Electoral Commission,* Supreme Court of Kenya Constitutional Application 2 of 2011, para. 93.

[116] Article 44.4, CRC.

[117] Articles 51 and 52, CRC.

Finally, as at 11 July 1990 when the African Children's Charter was adopted, 27 AU states had signed[118] and three had ratified[119] the CRC, with another seven ratifying in the succeeding four weeks[120]. By 29 November 1999 when the African Children's Charter came into force with 15 ratifications, all AU states had ratified the CRC, with the understandable exception of Somalia. Eric Njugwe asks, "if the specific protection of African children was so urgent that it necessitated a separate treaty, why did it take so long for African leaders to ratify their own treaty?"[121]

Viljoen holds the role of UNICEF and hesitation at the "higher rights threshold and more invasive procedures"[122] to account for this discrepancy. The continued ratification of the African Children's Charter, at 46 states as at 31 July 2011, therefore demonstrates not just a longer term payoff[123] but an indubitably conscious decision by African states to create and bind themselves to these higher *legal standards*, regardless of underlying political intentions.[124]

5. Applying the Above Standards on Egypt's Reservations

"There is an indissoluble nexus between the *pro-homine* nature and the object and purpose principles, a nexus that should inform the *ratione materiae* analysis of reservations."[125]

[118] Out of a possible 50 states (excluding Eritrea, Namibia – which nevertheless signed on 26 Sep 1990 and ratified 4 days later, South Africa, South Sudan). These are Algeria, Angola, Benin, Burkina Faso, Burundi, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Liberia, Madagascar, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Togo, Tunisia, Tanzania. Zimbabwe. United Nations Treaty Collection, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en#top Accessed 15 April 2013.

[119] Egypt, Ghana, Sierra Leone.

[120] Benin, Guinea, Kenya, Mauritius (accession), Senegal, Sudan, Togo.

[121] EN Njungwe 'International Protection of The Children's Rights: An Analysis of African Attributes In The African Charter on The Rights And Welfare of The Child' (2009) 3 *Cameroon Journal on Democracy and Human Rights* 11

[122] Viljoen (n 10) 396.

[123] Ibid

[124] See Goodman's (n 55) 551-5, discussion of human rights treaty ratification intent by nondemocratic states, 'Human rights treaties, invalid reservations…'; See also generally, Nyawo J, 'Through Antonio Gramsci's lens: Understanding the Dynamic Relationship Between the AU and the ICC' in Stormes J (eds) *Transitional justice in post-conflict societies in Africa*, (Paulines Publications Africa, 2016) 216-33 in the context of African states and Rome Statute ratification.

[125] Montalvo, 'Reservations to the American Convention on Human Rights', 290.

5.1 On Child Marriage

African Children's Charter Article 21.2 prohibits child marriage and betrothal, and requires "effective action including" to specify a minimum age of 18 and establish mandatory universal marriage registration. Egypt's reservation to this provision is general. It is not transitional, nor is it accompanied by a statement of law offering its preferred minimum age. Neither does it show what cultural elements and socio-economic policies, if possible, are available in Egypt to protect childhood and child rights even in the event of marriage before the age of 18. Moreover, as Viljoen opines, child marriage can adversely affect enjoyment of other Charter rights and "when it is assumed to be followed by child birth, is a denial of the essence of childhood"[126].

When compared with another critical child right whose violation endangers the very essence of childhood, participation in hostilities, the higher unequivocal standards of the African Children's Charter are clear. Indeed, a generally worded reservation that could jeopardise the enjoyment of a myriad of other rights cannot be permissible, as would a limitation or derogation.

5.2 On Adoption

It is difficult, on a plain reading of the provisions on adoption,[127] to see how this blanket reservation would be permissible. Children, whose situation require the removal from care of biological parents, or whose parents willingly offer their children for adoption and particularly inter-state adoption, are exceptionally vulnerable not only to abuse in the extreme,[128] but a loss of identity and culture.[129] Adoption is the exceptional option, brought into effect when the normal cultural and legal child care structures fail.[130] Moreover, states have been known to exercise great exception to the diplomatic protection of their child nationals adopted by non-nationals.[131] Egypt withdrew its CRC reservations[132] on adoption on 31 July 2003. That it maintains its African Children's Charter reservations in this regard

[126] Viljoen, (n 122) 397.

[127] Article 24, African Children's Charter.

[128] Article 24.d, African Children's Charter.

[129] Article 25.3, African Children's Charter, on separation of children from their parents.

[130] Article 24.b, African Children's Charter.

[131] 'Malawi accuses Madonna of exaggerating humanitarian efforts' *The Guardian* 11 April 2013; 'Toddler death stirs Russian polemic over US adoption' *BBC News* 26 February 2013; '8 years after Elián, a Cuban Custody Battle' *New York Times* 2 September 2007.

[132] Egypt and Botswana reserved against the African Children's Charter and CRC in identical fashion. Viljoen(n 10) 396.

lends weight to Viljoen's contention that the discrepancies in ratification and reservations by African states to the CRC and African Children's Charter may indicate a cost-benefit analysis "informed by their view of the ineffectiveness of the African Children's Committee."[133]

5.3 On Special Treatment of Children of Imprisoned Mothers

As noted above, the relevant African Children's Charter provisions offer states 3 options to implement said special treatment. Given the CRC's lack of corresponding obligations, it is difficult to divine Egypt's motivations for reserving against Article 30.a-e, especially since it does not reserve against Article 30.f which simply explains the reasoning behind the five reserved against provisions. Upon closer examination, it would be interesting to see if or which options were offered by Egypt to presumably preserve the rights guaranteed therein without engaging in the penal system reform the provisions require.

What however is troubling is that the provisions aim first and foremost to ensure that criminal punishment remains individual and that no person other than the accused duly found guilty by a competent court is subjected to punishment of a non-cruel inhumane or degrading nature. Egypt has not consistently reserved against penal reform requiring provisions in African Children's Charter's Article 17.1. Moreover, Egypt would need to show how its places of detention for children are not penal but correctional and that the best interests of the child regarding survival and development (Article 5), freedoms of expression and association (Articles 7 and 8), rights to privacy, education and leisure and culture (Articles 10, 11 and 12), to which it has not reserved itself.

If it is to be assumed the reservation covers all women duly convicted of all crimes regardless of severity of custodial punishment provided for by law, subjecting children, unborn and below the age of criminal liability, to incarceration on account of their mothers can hardly be said to be compatible with the object and purpose of the treaty. Again, read along with Egypt's continued reservation against adoption and its text of reservation to the CRC that affirmed the existence in *Shariah* of "the provision of every means of protection and care for children by numerous ways and means,"[134] suffice it to say it would be interesting to see

[133] Viljoen, (n 10) 396.

[134] United Nations Secretary General, 'Egypt: Reservation made upon signature and confirmed upon ratification' *Multilateral treaties deposited with the Secretary General: Status as at 31 December 2001*, United Nations Publications, 2002, 297.

what options Egypt would offer to preserve the said rights jeopardised by non-implementation of special treatment for children of imprisoned mothers.

5.4 On the Jurisdictional Reservations

The inextricability of quasi-judicial competence with the object and purpose of African human rights law has been discussed above. Measured against the tools presented above, the reservations to Articles 44 and 45.1 are hardly permissible. If any viable options that preserve the rights in jeopardy from the substantive reservations discussed above were offered, how again would the African Children's Committee "ensure protection" of these?

6. Are the Incompatible Reservations Severable while Retaining the Act of Ratification?

6.1 Severability as Usual and Precedential Practice

Severance of a reservation is neither unusual nor unprecedented. In *Bellilos,* the ECtHR opined thus: "it is beyond doubt that Switzerland is, and regards itself as, bound by the [European] Convention irrespective of the validity of the declaration."[135]

In the later *Loizidou*, the ECtHR went further, noting that Switzerland "in drafting the terms of these declarations, had taken the risk that the restrictions would be declared invalid. It should not now seek to impose the legal consequences of this risk on the Convention institutions."[136] It follows that "reservations, which were previously indications of non-consent to be bound by certain provisions, are now merely indications of lesser preferences that do not affect the general presumption of consent to be bound to all treaty terms."[137] This is noteworthy given that while the 1962 draft of the Vienna Convention explicitly defined a reservation as a condition to consent to be bound; this was dropped in a final convention text.[138]

[135] *Belilos*, para 60.

[136] *Loizidou*, para. 91.

[137] Baylis, 'General Comment 24', note 110.

[138] Waldock, First Report on the Law of Treaties, [1962] 2 *Yearbook of the International Law Commission* 27, 31-32, UN Doc A/CN.4/144; 1962 ILC Report, [1962] 2 *Yearbook of the International Law Commission* 157, 161, UN Doc AICN.4/SER.A/1962/Add.1). See also, RW Edwards Jr 'Reservations to Treaties' (1989)10 Michigan Journal of International Law. 362, 373(n 90), cited in Baylis, 'General Comment 24', note 143.

Also instructive from *Loizidou* is that the ECtHR noted that all but two state parties to the European Convention had unconditionally accepted the competence of the Commission. This "consistent practice" the Court noted "should have placed Turkey on notice that its 'restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs,' especially since the Commission had previously argued to the Court that any jurisdictional reservations were impermissible."[139]

This is significant on three levels. First, as already shown, the specificity of African international human rights law, measured against the universal system, is precisely to progress substantive guarantees and provide compulsory protection mechanisms, albeit quasi-judicial in nature. This is a higher standard than the European. Second, it is not a question of accepting the Committee's competence as provided for in the express language. Such competence is already an indispensable part of the treaty. Third, such competence is also the *consistent practice* in African international human rights law. Moreover, the impermissibility of jurisdictional reservations had already been argued, even in a Convention that expressly provided for a separate acceptance of competence procedure. Suffice it to say that by the *Loizidou* standard in Europe's optional competence model, Egypt's jurisdictional reservations would be both impermissible and severable.

6.2 Transitional Reservations and Intention to Comply

In its practice, the Human Rights Committee has not hesitated to question states on their reservations and offering responses as to their permissibility. Nevertheless, given the immediate realisation of civil and political rights, it welcomed temporary reservations that had a clear intention of affording the state party time to change domestic law and implement guarantees, as was the case with Finland[140] and Australia, in the case of its reservation to Article 4 of the Convention on the Elimination of Racial Discrimination[141], for instance.

[139] Baylis, 'General Comment 24', 305.

[140] Baylis, 'General Comment 24', note 166.

[141] Goodman, (n 55) 550: "Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a)." Goodman also cites the case of Canada in the *Fisheries Jurisdiction (Spain v. Canada)*, 1998 ICJ Reports, p. 432 *case*, though this relates not to a human rights treaty.

So significant are transitional reservations to the ICCPR and the Committee that Barbados was criticised for not making them.[142] This can be understood from the basis that a transitional reservation shows clearly the reserving state is so keen to give effect to the treaty guarantees that it has carefully indicated those that will take time and publicly announces this. In contrast, the US, Belgium, Iceland, Austria and Congo for instance drew the critique of the Committee for permanent reservations.[143] Permanent reservations indicate an unwillingness to rise to the standards of the Covenant, thus demonstrating that such reserving state fails to understand that the purpose of the treaty as not simply locking in national standards but advancing them to international ones.

7. Desirability of Reservation Adjudication and the Impact Problem

Having considered the legal regime of reservations to human rights treaties, now let us turn to the policy/international relations questions that inevitably arise from the application of this stringent legal regime.

From the *Genocide Convention opinion,* through the *American Convention opinion,* to *Bellilos*, General Comment 24 and *Loizidou,* a high value has been placed on a reservations adjudication policy that most favours successful ratification. The desirability of such a pro-ratification policy can hardly be argued against. But a word of caution need be sounded against a policy argument that would discourage a review of reservations against the object and purpose of a human rights treaty test on the basis that it could discourage further human rights treaty ratification and even instigate treaty withdrawals.

First such a policy argument may override the legal construct within which a reservation can be validly made, leading to legal absurdity. Second, consent to be bound cannot be divorced from the object and purpose of that which is being consented to. To ratify a treaty and expect to continue pre-ratification *modus operandi* should be unthinkable.

Third, is the impact problem and the danger that a pro-ratification policy that unduly fears state non-ratification or backlash may cheapen the value of human rights treaty ratification. To elaborate on our point, we propose a thought experiment. The African human rights system undeniably exists along with, if not, tragically, co-exists, with egregious and widespread human rights abuses. The

[142] Baylis, 'General Comment 24', note 166.
[143] Baylis, 'General Comment 24', 312, and note 165.

African Charter enjoys universal ratification and has been in force since 1986 yet its impact on changing state behaviour, the very purpose for which it was created, is not always evident. The same can probably be said of every human rights instrument on the continent. Can this state of affairs be attributed to a duplicitous their ratification intent?[144]

Consider then the impact when the available adjudication mechanisms have been effective, with special reference to the ECOWAS Court of Justice, the SADC Tribunal[145] and to a lesser extent, the African Commission. The adjudication of these mechanisms has brought remedy to the injured and effect to the ratification of the instruments they enforce even to the point of exposing, as with the case of the SADC Tribunal, the smokescreen of ratification that African states have come to rely. Placed against the background of prolific human rights treaty making in Africa since the 1990s, probably what Africa now needs is not more instruments or their duplicitous ratification but effective implementation of existing ones.

Africa's tragic flaw is that all and sundry, within and around the geographical land mass are invited to the party without entry requirements.[146] Human rights treaties do not create obligations and benefits among states, and therefore the incentive to fulfil obligations cannot be successfully based state self-interest and the checking of other state parties. As a policy argument, it is strongly opined here that Africa is better off with fewer ratifications urging states to reform and progress their human rights records than with universal ratifications that offer no incentive for reform. Even at the cost of current treaty withdrawals. It is to be remembered that the possibility of states ratifying human rights treaties with the ulterior motive of gaining prestige without the obligations was rightly frowned upon as far back as the *Genocide convention* case.[147]

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[144] Viljoen, (n 10)396, arguing that African states may have expected the African Children's Committee to be ineffective.

[145] Alter J, Gathii J and Helfer R, 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *The European Journal of International Law* 2

[146] H Sipalla (n 60) 'The people vs their leaders' *Mail and Guardian* 2 June 2009.

[147] In the *Genocide Convention reservations case*,(n 15) the United Kingdom argued that a treaty of the Genocide Convention's universal humanitarian purpose could not permit any reservations. In treaties with reciprocal duties and benefits, there is an incentive to limit one's reservations in order to gain the maximum benefit from the treaty. The Genocide Convention did not offer benefits but only obligations, so there was no incentive to limit reservations. Furthermore, states might be ratifying from the ulterior motive of desiring the prestige of having ratified, rather than for the purpose of a substantive commitment to the Convention. In this case, the temptation to ratify with many reservations is great, to gain the prestige but not the responsibility of becoming a party. […] Since there is no reciprocity between states in a human rights treaty, such a system would be nonsensical. See Written Statement of the United Kingdom, 1951 ICJ Pleadings (Genocide Convention case) 48, 62-70 (January, 1951). Cited in Baylis, 'General Comment 24', 312, and note 77.

8. Confronting Renunciation Threats Upon Severability of Incompatible Reservations

African states have been known to threaten renunciation when human rights related treaties begin requiring progress beyond their political comfort.[148] *Ingabire v Rwanda* exemplifies this point.[149]

What is more pertinent here is whether state parties can simply withdraw from human rights treaties as a countermeasure to implementing a reservations adjudication policy, as seen above in the case of Trinidad and Tobago.

The Vienna Convention in its Articles 42 and 56:[150]

> allows unilateral withdrawal from a treaty only if the treaty expressly permits withdrawal, if the nature of the treaty implies a right of withdrawal, or if it can be demonstrated that the parties intended to allow withdrawal.

The African Children's Charter permits no withdrawal, and the nature of the human rights of children, as argued earlier, is not contractual among states *inter se;* therefore it is neither temporary nor implicit of withdrawal.[151] There is also definitive evidence that the parties did not intend to allow withdrawal. Again, the differences between the African Children's Charter and the CRC should inform as to the intention of the parties. The CRC in its Article 52 provides for denunciation. No such provision exists in the African Children's Charter.

As the Human Rights Committee noted in *General Comment 26*, "[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party," … "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them," regardless of any act taken by the state party or of a change or end

[148] H Sipalla, (n 60) 'State defiance, treaty withdrawals 63ff.

[149] AfCHPR, *In the matter of Ingabire Victoire Umuhoza v. Rwanda*, Ruling on the effects of the withdrawal of the declaration under Article 34(6) of the Protocol, Application 003/2014, 3 June 2016, read along with AfCHPR, *Ingabire v Rwanda*, Corrigendum to Ruling, 5 September 2016.

[150] Baylis, 'General Comment 24', 319.

[151] In the absence of express provisions, commercial and trading treaties, also arguably being of a temporary nature are those open to unilateral withdrawal. See Sinclair, supra note 121, at 186-88, cited in Baylis (note 3 above), notes 210. Instead, treaties intended for a permanent purpose, are classed outside those from which states can unilaterally withdraw. See Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*, (9th edition 1992) 647(, cited in Baylis, 'General Comment 24', n210. Human rights treaties which cannot be argued to foresee a time when human being loses their inherent dignity fit precisely here.

to the government of the state.[152] While in the Inter-American system, Trinidad and Tobago and Venezuela have in May 1998 and September 2012 respectively denounced the American Convention on Human Rights, such action is expressly provided for in said convention. Likewise, in 1999, Peru purported to renounce the competence of the Inter-American Court but retain that of the Inter-American Commission, which the Inter-American Court affirmed as impermissible.[153] The state party could not pick and choose the protection mechanism of its convenience to the detriment of the American Convention.

It may therefore be the better policy argument, if strengthening the African human rights system is the goal here, to incentivise a purposely perturbing ratification rather than a cosmetic one[154] if the system is to survive the disregard it frankly currently suffers among African states, citizenry and beyond.

9. Conclusion

A closer look at the reservations and in the course of an earnest and *pro-persona* interactive dialogue, it may very well be that Egypt needs not suffer severance of its incompatible reservations by the responsible treaty body. In this regard, it behoves on the African Children's Committee to engage Egypt and other reserving states, first and most preferably during state reporting, on these issues, to indicate to said states the object and purpose of the African Children's Charter and the inter-dependent and indivisible nature of its guarantees and afford said states the opportunity to withdraw their reservations. This would be in the best interests of the child in Africa.

[152] General Comment 26, para 4. See also Baylis, 'General Comment 24', 319.

[153] IACtHR, *Ivcher-Bronstein v. Peru*, Judgment of 24 September 1999 (Competence), paras.32-54 and 56(1,b); Pascualucci JM, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge, 2013, 145; also, RK Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' *Human Rights Quarterly* 31 (2009), 877. The AfCHPR relied on *Ivcher-Bronstein*, in determining *Ingabire*.

[154] Similar sentiments have been expressed as regards the tension between "universality" – achieving universal hemispherical adherence to the Inter-American human rights instruments – and integrity – which is weakened by silence over reservations with a view to encourage adherence. "The absence of integrity implies, by definition, that human rights protected by some international conventions remain unprotected. […] I maintain that it is necessary to force a political decision, absent so far in the Inter-American System, to address this problem and to explore effective alternatives of control to limit its negative effects in accordance with the evolution of international human rights law." Montalvo, 'Reservations to the American Convention', 270-1.