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THE ILC GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES PUT TO THE TEST IN THE *HOSSAM EZZAT* CASE BEFORE THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

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SUMMARY: 1. The Guide to Practice on Reservations to Treaties: the objective of a clarification and development of the regime concerning reservations under the 1969 Vienna Convention on the Law of Treaties. — 2. The report of the African Commission on Human and Peoples' Rights in the *Hossam Ezzat* case and the "Sharia reservation" of Egypt to freedom of religion under Article 8 of the African Charter on Human and Peoples' Rights. — 3. The vague or general nature of the Egyptian reservation against the backdrop of the ambiguities of the Guide to Practice on Reservations to Treaties. — 4. Perplexities about the recourse to the "reservations dialogue" to determine the scope of the Egyptian reservation. — 5. Redundancy and intricacy of certain guidelines that would have been relevant to the identification of the object and purpose of the African Charter on Human and Peoples' Rights.

1. In 2011 the International Law Commission adopted the Guide to Practice on Reservations to Treaties (henceforth, Guide on Reservations) (1). It is a non-binding instrument the dissemination of which was recommended by the United Nations General Assembly (2). The Guide on Reservations was aimed at clarifying and developing the regime concerning reservations under the 1969 Vienna Convention on the Law of Treaties on the assumption that the legal framework therein established by Articles 19 to 23 left several matters unregulated or in any event obscure (3), considering also the evolution of State practice

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(1) See *Report of the International Law Commission on the work of its sixty-third session, 26 April-3 June and 4 July-12 August 2011* (UN Doc. A/66/10), in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, p. 26 ff. For an "authentic" overview of the Guide on Reservations see PELLET, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, *European Journal of Int. Law*, 2013, p. 1061 ff.

(2) Resolution 68/111 of 16 December 2013, para. 3.

(3) On the inclusion of the topic in the agenda of the International Law Commission, see the *Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993* (UN Doc. A/48/10), in *Yearbook of the International Law Commission*, 1993, vol. II, Part Two, p. 96, paras. 428-430, and

following the adoption of the Vienna Convention on the Law of Treaties (4).

That need for clarification and development was particularly relevant to human rights treaties (5). Leaving aside the extreme idea of human rights treaties as "self-contained regimes" (6), the collective interest underlying human rights treaties and the ensuing integral or *erga omnes partes* nature of the relevant obligations collide with the fundamentally reciprocal nature of reservations, as basically embodied in the Vienna Convention on the Law of Treaties (7). In addition, with regard to human rights treaties some peculiar trends had emerged and did not fall within the scope of any provision of the Vienna Convention on the Law of Treaties (8), including the assessment of the permissi-

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resolution 48/31 of 9 December 1993 of the United Nations General Assembly, para. 7. The International Law Commission had previously discussed the topic of reservations within the context of wider studies dedicated to treaties: in addition to the law of treaties, treaties between States and international organisations or between international organisations, and succession of States with respect to treaties. On the return of the International Law Commission to the study of reservations, see TANZI, *The Resumed Codification of the Law of Reservations to Treaties*, *Comunicazioni e studi*, vol. XXII, 2002, p. 8 ff.

(4) On some of the relevant trends see GAJA, *Unruly Treaty Reservations*, in *International Law at the Time of Its Codification. Essays in Honour of Roberto Ago*, vol. I, Milano, 1987, p. 307 ff.

(5) The relationship between the regime concerning reservations under the Vienna Convention on the Law of Treaties and human rights treaties is a knotty issue. In deciding to include the topic of the "law and practice relating to reservations to treaties" in the agenda, the International Law Commission significantly referred to human rights treaties when citing problems with respect to which existing instruments on reservations, including the Vienna Convention on the Law of Treaties, were silent (*Report of the International Law Commission on the work of its forty-fifth session*, *cit*., p. 96, para. 428).

(6) Since the existence of "self-contained regimes" is not generally accepted, the regime concerning reservations under the Vienna Convention on the Law of Treaties is deemed to be basically applicable to reservations to human rights treaties. In this connection, see, *ex pluribus*, SEIBERT-FOHR, *The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties*, in *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Ziemele ed.), Leiden/Boston, 2004, p. 183 ff.; PELLET, MÜLLER, *Reservations to Human Rights Treaties: Not an Absolute Evil...*, in *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Fastenrath *et al.* eds.), Oxford, 2011, p. 521 ff. For a critical comment on the consideration of human rights treaties as "self-contained regimes", also with regard to reservations, see CONFORTI, *Specificità della materia dei diritti umani e diritto internazionale*, *Diritti umani e diritto int.*, 2007, p. 13 ff.

(7) See, *inter alios*, CAMPIGLIO, *Il principio di reciprocità nel diritto dei trattati*, Padova, 1995, p. 141 ff.; BARATTA, *Gli effetti delle riserve ai trattati*, Milano, 1999, p. 187 ff.; KLABBERS, *On Human Rights Treaties, Contractual Conceptions and Reservations*, in *Reservations to Human Rights Treaties*, *cit*., p. 149 ff.

(8) For an overview see COHEN-JONATHAN, *Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux*,

bility of reservations by treaty monitoring bodies (9) and the application of the "severability doctrine" (or *utile per inutile non vitiatur* principle) (10), which postulates that the impermissibility of a reservation only leads to its nullity, while the consent of the reserving State to be bound by the treaty remains unaffected (11).

The Guide on Reservations reflects the efforts of the International Law Commission to safeguard the unity of the regime concerning reservations under the Vienna Convention on the Law of Treaties and

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Revue générale de droit int. public, 1996, p. 915 ff.; BORELLI, *Le riserve ai trattati sui diritti umani*, in *La tutela internazionale dei diritti umani. Norme, garanzie, prassi* (Pineschi ed.), Milano, 2006, p. 773 ff.; VILLANI, *Tendenze della giurisprudenza internazionale in materia di riserve ai trattati sui diritti umani*, in *Individual Rights and International Justice.* Liber Fausto Pocar (Venturini and Bariatti eds.), Milano, 2009, p. 969 ff., also in VILLANI, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Bari, 2012, p. 35 ff.

(9) As regards the main manifestations of that trend see Human Rights Committee, *General Comment No. 24 on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 11 November 1994, para. 18, UN Doc. CCPR/C/21/Rev.1/Add.6; Decision on Admissibility, 2 November 1999, in the case *Kennedy v. Trinidad and Tobago*, communication No. 845/1999, paras. 6.4-6.7, UN Doc. CCPR/C/67/D/845/1999; Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of 24 September 1982, concerning *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, paras. 14-16; Advisory Opinion OC-3/83 of 8 September 1983, concerning *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, para. 45; Judgment of 1 September 2001, *Hilaire v. Trinidad and Tobago (Preliminary Objections)*, Series C, No. 80, paras. 78-80 (judgements and advisory opinions of the Inter-American Court of Human Rights are available at http://www.corteidh.or.cr/index.php/en/jurisprudencia); European Court of Human Rights, Judgment of 29 April 1988, *Belilos v. Switzerland*, application No. 10328/83, paras. 47 and 50; Judgment of 22 May 1990, *Weber v. Switzerland*, application No. 11034/84, paras. 37-38; Judgment of 23 March 1995, *Loizidou v. Turkey (Preliminary Objections)*, application No. 15318/89, para. 65 ff. (judgements of the European Court of Human Rights are available at http://hudoc.echr.coe.int). For a contextualization see *ex pluribus* RUSSO, *L'accertamento dell'inammissibilità delle riserve*, *Rivista*, 2011, p. 59 ff., especially pp. 71-74.

(10) With respect to the main instances of that trend see Human Rights Committee, *General Comment No. 24*, *cit.*, para. 18; *Kennedy v. Trinidad and Tobago*, *cit.*, para. 6.7; Inter-American Court of Human Rights, *Hilaire v. Trinidad and Tobago*, *cit.*, paras. 98-99; European Court of Human Rights, *Belilos v. Switzerland*, *cit.*, para. 60; *Weber v. Switzerland*, *cit.*, paras. 38-40; *Loizidou v. Turkey*, *cit.*, paras. 93-98.

(11) The novelty of the severability solution is plain to see once one considers that, pursuant to the consent principle, the impermissibility of a reservation should have entailed the non-participation of the reserving State in the treaty because the consent to be bound would have rested upon the — impermissible — reservation. For an overview see RUSSO, *L'efficacia dei trattati sui diritti umani*, Milano, 2012, pp. 1-70, and WALTER, *Article 19. Formulation of Reservations*, *Vienna Convention on the Law of Treaties. A Commentary*[2] (Dörr and Schmalenbach eds.), Berlin/Heidelberg, 2018, p. 263 ff., at p. 301 ff.

harmonise it with human rights treaties (12). For instance, both aforementioned trends which are typical of human rights treaties have not only flowed into the Guide on Reservations but have therein been laid down in general terms, albeit with some modulation. Accordingly, the competence of treaty monitoring bodies to assess the permissibility of reservations is acknowledged inasmuch as it is instrumental to the performance of their tasks (13) and the severability solution represents the default regime as regards impermissible reservations (14).

The efforts of the International Law Commission notwithstanding, several perplexities have been expressed in the legal literature with regard to the solutions incorporated in the Guide on Reservations in respect of human rights treaties (15). However, commentators have sometimes observed that only a case concerning the actual utilisation of the Guide on Reservations would allow it to be tested (16).

An occasion to test the usefulness of the Guide on Reservations in connection with human rights treaties has recently been provided by the report of the African Commission on Human and Peoples' Rights (henceforth, African Commission) in the *Hossam Ezzat* case (17), the first one

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(12) The fact that the issue was among the first ones addressed by the Special Rapporteur denotes its weight: PELLET, *Second Report on Reservations to Treaties* (UN Doc. A/CN. 4/477 and Add. 1), in *Yearbook of the International Law Commission*, 1996, vol. II, Part One, p. 37 ff.

(13) Guideline 3.2.1, para. 1. Consistent therewith, pursuant to guideline 3.2.1, para. 2, any such assessment would have the same legal effect as the act containing it.

(14) Provided that an impermissible reservation would be invalid and thus null and void (guideline 4.5.1), *in the absence of any contrary intention* the invalidity of a reservation would imply that the reserving State continues to be bound by the treaty without the benefit of the reservation. In principle, therefore, the consequence of an impermissible reservation would vary according to whether the reserving State intends to be bound by the treaty without the benefit of the impermissible reservation or not to be bound by the treaty at all (guideline 4.5.3).

(15) See SALAMONE, *Le riserve ai trattati sui diritti umani nelle linee guida in tema di riserve della Commissione di diritto internazionale*, *Diritti umani e diritto int.*, 2011, p. 155 ff.; MCCALL-SMITH, *Mind the Gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties*, *Int. Community Law Review*, 2014, p. 263 ff.

(16) By way of illustration see CASSELLA, *Le* Guide de la pratique sur les réserves aux traités*: une nouvelle forme de codification?*, *Annuaire français de droit int.*, 2012, p. 29 ff., at p. 60.

(17) African Commission, Report of 17 February 2016 in the case *Hossam Ezzat and Rania Enayet (Represented by Egyptian Initiative for Personal Rights and INTERIGHTS) v. Egypt*, communication No. 355/07 (published on 28 April 2018). The report was made public over two years after it had been issued because, pursuant to Article 59 of the African Charter, any measure of the African Commission, including the reports on communications, is confidential and published only upon the decision of the Assembly of the Heads of State and Government. The reports on communications and the concluding observations of the African Commission, the periodic reports of the States parties to the African Charter and their reservations and declarations that

in which the permissibility of a reservation to the African Charter on Human and Peoples' Rights (hereinafter, African Charter) (18) has so far been assessed (19). Not all the issues addressed in the Guide on Reservations came into consideration in the *Hossam Ezzat* case, but the African Commission relied on it as regards the application of the criterion of the compatibility of reservations with the object and purpose of the treaty.

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will be mentioned hereinafter are available at the official website of the African Commission: www.achpr.org.

(18) The African Charter was adopted by the Organization of the African Unity, now African Union, in Nairobi on 27 June 1981 and entered into force on 21 October 1986. Except for Morocco, all the fifty-five Members of the African Union ratified the African Charter. For a critical overview of the international protection of human rights in Africa see PASCALE, *La tutela internazionale dei diritti dell'uomo nel continente africano*, Napoli, 2017.

(19) The reason why the African Commission had never tackled the issue of the permissibility of reservations to the African Charter lies basically in the fact that there are few reservations thereto. Whereas in ratifying the African Charter South Africa limited itself to proposing specific fields of consultation among the States parties, only Zambia and Egypt formulated "reservations" to the African Charter and not all of them, in spite of their name, could be considered as such. Leaving aside the reservations formulated by Egypt (see *infra* note 27 and the relevant text), the doubt about the existence of proper reservations arises especially in relation to Zambia's statement to the effect that its ratification of the African Charter was subject to three "amendments or reservations". One of them is about the "right of access to public property and services in strict equality of all persons before the law" under Article 13, paragraph 3, of the African Charter. Zambia stated that only public property or services "intended for use by the general public" would fall within the scope of the rule. Despite the term "reservation" that Zambia used in explaining the reason for that statement, the language in which it is couched (in particular, the use of the term "should") excludes any legal effect and hence suggests that it is actually an interpretative declaration, the relevance of which appears indeed doubtful since the rationale of the norm is the *equality before the law* in respect of the access to public property or services, rather than that access in and of itself. As regards the other two Zambian "amendments or reservations" the purport to legally modify the African Charter is even more tenuous. One of them seems to be a proposal for an amendment since it deals with a matter that plainly cannot be implemented differently only as far as Zambia is concerned: the identification of the person responsible for the drawing of the names of some of the members of the first-elected African Commission. The question became devoid of any meaning following the first election of the African Commission. The other text is openly meant to be a proposal for an additional provision in the African Charter relating to the submission of periodic reports from Member States of the African Union who are not parties to the African Charter (*sic*!). Apart from the existing reservations to the African Charter, the formulation of new reservations is improbable because all but one of the Member States of the African Union are already parties thereto: the participation to the African Charter is in fact complete. "Late" reservations are equally unlikely, since States parties to the African Charter ratified it between the 1980s and 1990s (excluding South Sudan that gained independence in 2011: it ratified the African Charter on 23 October 2013 and deposited the instrument of ratification on 19 May 2016).

It is well known that that criterion is enshrined in Article 19 (*c*) of the Vienna Convention on the Law of Treaties (20), pursuant to which a reservation not explicitly prohibited by the treaty cannot be formulated if it is incompatible with the object and purpose of the treaty. Although the criterion is said to have its origins in practice relating to a human rights treaty (21), i.e. the Convention on the Prevention and Punishment of the Crime of Genocide (22), its application to reservations to human rights treaties has often proven to be difficult because of certain features of those treaties as well as of the reservations commonly formulated thereto (23).

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(20) It is only after some initial reluctance that the International Law Commission confirmed the criterion of the compatibility of reservations with the object and purpose of the treaty as previously affirmed by the International Court of Justice (*infra* note 21). In the report submitted in 1951 to the General Assembly (UN Doc. A/1858, in *Yearbook of the International Law Commission*, 1951, vol. II, p. 123 ff.), the International Law Commission affirmed that a State formulating a reservation to a treaty would be party thereto exclusively in the absence of any objection to that reservation from the other contracting parties (*ibid*., pp. 130-131, para. 34, Nos. 4 and 5). It stated that the criterion of the compatibility of reservations with the object and purpose of the treaty was "not suitable for application to multilateral conventions in general" (*ibid.*, p. 128, para. 24). The Commission had been requested to study the topic of *reservations to multilateral conventions* by the General Assembly in the same resolution (resolution 478 (V) of 16 November 1950) with which the latter invited the International Court of Justice to give the advisory opinion on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*infra* note 22). The General Assembly requested the International Law Commission not only to study the topic of reservations to multilateral treaties in the context of the codification of the law of treaties, but also "to give priority to this study and to report thereon" (para. 2).

(21) It is well known that the criterion under discussion had been previously affirmed by the International Court of Justice in its Advisory Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *I.C.J. Reports*, 1951, p. 15 ff.

(22) Adopted by the United Nations General Assembly in its resolution 260 (III) A of 9 December 1948 and entered into force on 12 January 1951. The Convention on the Prevention and Punishment of the Crime of Genocide is usually considered the first human rights treaty within the framework of the United Nations, for instance by SCHABAS, *Genocide*, in *Max Planck Encyclopedia of Public International Law*, December 2007, www.opil.ouplaw.com, para. 2. This is apparently based on the interpretation of the Convention as providing that not only individuals but also States have the obligation not to commit genocide. That interpretation is consistent with the "duality of responsibility" affirmed by the International Court of Justice, Judgment of 26 February 2007 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), *I.C.J. Reports*, 2007, p. 43 ff., paras. 163 and 173-174. This view is criticised, for example, by GAETA, *Génocide d'Etat et responsabilité pénale individuelle*, *Revue générale de droit int. public*, 2007, p. 273 ff., at pp. 278-281; ID., *On What Conditions Can a State Be Held Responsible for Genocide?*, *European Journal of Int. Law*, 2007, p. 631 ff.

(23) On the determination of the object and purpose of a treaty in specific cases see BUFFARD, ZEMANEK, *The "Object and Purpose" of a Treaty: An Enigma?*, *Austrian*

Whereas some of the difficulties related to the compatibility of reservations with the object and purpose of the treaty are tackled in the Guide on Reservations (24), the *Hossam Ezzat* report suggests that the solutions therein proposed are far from definitive: doubts arise about the fulfilment of a clarification and development of the Vienna Convention on the Law of Treaties. Beyond the overall feeling that the *Hossam Ezzat* report is a somewhat fallacious instance of the use of the Guide on Reservations, it is here submitted that the flaws in the line of reasoning of the African Commission are traceable to shortcomings in the Guide on Reservations itself. Hereinafter, following an introduction of the case, the report of the African Commission will be commented on in the light of the pertinent provisions of the Guide on Reservations (25).

2. The *Hossam Ezzat* case originated from an individual communication filed against Egypt and concerning freedom of religion and discrimination based on religious grounds. According to the complainants (26), Egypt had violated the African Charter by not recognising the Baha'i faith for the purposes of the issue of documents and marriage certificates. In particular, only officially recognised religions could be recorded in documents and considered with regard to personal and family status. Pursuant to Sharia, they are Islam, Christianity and Judaism, all of them being deemed to be "revealed".

Review of Int. and European Law, 1998, p. 311 ff., especially pp. 341-342 as far as general human rights treaties are concerned. From a broader perspective see Crnić-Grotić, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, *Asian Yearbook of Int. Law*, 1997, p. 141 ff.

(24) They are the difficulties relevant to vague or general reservations, reservations to a provision reflecting a customary rule, reservations to provisions concerning rights from which no derogation is permissible under any circumstances, reservations relating to internal law, reservations to treaties containing numerous interdependent rights and obligations, and reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty. See respectively guidelines 3.1.5.2 to 3.1.5.7.

(25) The fact that the African Commission made extensively reference to the Guide on Reservations is conceivably due to the absence of provisions in the Vienna Convention on the Law of Treaties specifically dealing with the issues coming into consideration in the *Hossam Ezzat* case, namely the permissibility of vague or general reservations and the identification of parameters to assess the compatibility of reservations to a human rights treaty with the object and purpose thereof.

(26) The complainants were two non-governmental organisations representing the victims, namely Egyptian Initiative for Personal Rights and INTERIGHTS. The latter, though, ceased operations at the end of May 2014 and no longer represented the victims. See African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 50.

As regards religious freedom as enshrined in Article 8 of the African Charter, Egypt had formulated a reservation to the effect that the provision "be implemented in accordance with the Islamic Law" (27). The African Commission confirmed that the Egyptian statement amounted to a reservation (28) because Egypt had meant to legally modify the effects of Article 8 of the African Charter (29). On the other hand, the complainants had alleged that the Egyptian reservation was general, discriminatory and incompatible with the object and purpose of the African Charter (30). Since the non-recognition of the Baha'i faith was based on the distinction between revealed and non-revealed religions as drawn under Islamic law, the "Sharia reservation" of Egypt was crucial in the case.

The African Commission deduced from its own mandate that it was competent to evaluate the permissibility of reservations to the African Charter (31): such an assessment would be instrumental in interpreting and applying the African Charter and therefore in protecting the human rights there incorporated (32). In the absence of any

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(27) The same reservations also refers to Article 18, paragraph 3, dealing with the elimination of discrimination against women and protection of the rights of women and the child. With regard to the Egyptian statement concerning the obligation to guarantee the right to receive information under Article 9, paragraph 1, of the African Charter, the phrasing (in particular, the modal verb "should") makes it difficult to ascertain Egypt's intention, although the restriction of the scope of the obligation to "such information as could be obtained within the limits of the Egyptian laws and regulations" would legally modify the rule.

(28) Pursuant to Article 2, paragraph 1, (*d*) of the Vienna Convention on the Law of Treaties, the feature of a reservation lies in the purport of the reserving State to legally exclude or modify certain provisions of a treaty in their application as far as it is concerned. The definition is restated in guideline 1.1, paragraph 1, of the Guide on Reservations, which differs from the definition contained in the Vienna Convention only for the reference to a reserving international organisation and to a State making a notification of succession to a treaty, in accordance with the scope of the Guide on Reservations.

(29) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 152. The finding was consistent with the definition of "reservation" enshrined in the Vienna Convention on the Law of Treaties, which the African Commission had recalled (*ibid.*, para. 150). Since it is a well-established definition, it is worthy of note that the African Commission referred not only to the Guide on Reservations but also to the aforementioned General Comment No. 24 of the Human Rights Committee as well as to the case law of the International Court of Justice and the European Court of Human Rights (*ibid.*, note 29).

(30) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, paras. 115 and 153.

(31) *Ibid.*, para. 154. In refraining from citing any authority corroborating that competence, including the Guide on Reservations, the African Commission seemingly confirmed the deep-rooted nature of the competence of treaty-monitoring bodies to assess the permissibility of reservations in their respective constitutive treaties.

(32) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 154. Indeed, in mentioning the said functions, the African Commission limited itself to referring to

provision regulating reservations in the African Charter (33), the African Commission considered the parameter of the compatibility with the object and purpose of the treaty pursuant to Article 19 (*c*) of the Vienna Convention on the Law of Treaties (34).

In order to assess the permissibility of the Egyptian reservation it was necessary for the African Commission to determine the content of the freedom of religion under Article 8 of the African Charter. There is no mention of the right to adopt, have or change religion in that provision (35), so one could question whether and to what extent the States parties to the African Charter are under an obligation to guarantee the *forum internum* of the freedom of religion (36). The reference to the "profession and free practice of religion" seems to relate to the *forum externum* of the freedom of religion, to wit the freedom to manifest religion. The African Commission had not shed light on this point, either in those cases that were mainly concerned with the *forum externum* (37) or in those where the *forum internum* could have come additionally into consideration: in any event the

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Article 45, paragraph 3, of the African Charter (*ibid.*, note 31), which seems to be specifically concerned with the advisory competence of the African Commission.

(33) The proposal to insert an article on reservations was rejected during negotiations, although it would have been a mere restatement of the criterion of the compatibility with the object and purpose of the treaty. See OUGUERGOUZ, *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague/London/New York, 2003, pp. 787-789; the text of the proposed article is quoted in note 2610. From a broader perspective see also PASCALE, *op. cit.*, pp. 110-118.

(34) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 156.

(35) Indeed, there is no reference at all to "freedom of religion" as such. This catches the eye as in the main universal and regional human rights instruments freedom of conscience – expressly mentioned in Article 8 of the African Charter – goes hand in hand with freedom of thought and freedom of religion.

(36) The question came especially into consideration in respect of the freedom to change religion. In this connection, it should be borne in mind that several States adopting Sharia as the basis for domestic law are parties to the African Charter. Pursuant to Sharia, recanting Islamic faith amounts to the crime of apostasy, which is evidently incompatible with the freedom to change religion. See PASCALE, *op. cit.*, pp. 48-49.

(37) For instance, the *Garreth Anver Prince* case dealt with the South Africa domestic ban on possession and use of cannabis as impinging upon the manifestation of the Rastafari religion (African Commission, Report of 7 December 2004, *Garreth Anver Prince v. South Africa*, communication No. 255/02). The *Centre for Minority Rights Development* case concerned the removal of Endorois from their ancestral lands and the denial of their access thereto as hindrance to the freedom to practice their religion (African Commission, Report of 25 November 2009, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, communication No. 276/03).

African Commission gave prominence to the freedom to manifest religion (38).

Drawing inspiration from other human rights instruments (39) and the pertinent case law or practice (40), in the *Hossam Ezzat* report the African Commission eventually made it clear that Article 8 of the African Charter guarantees both the *forum internum* and the *forum externum* of the freedom of religion. As regards the former, it stated that the "freedom to profess a religion" entails the freedom to adopt, have, maintain or hold a religion, which would in turn include the freedom to recant or denounce a religion (41). As regards the latter, it held that the "freedom to practice a religion" allows every manifestation of religion, both privately and in community (42). In the light of Article 18, paragraph 2, of the International Covenant on Civil and

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(38) By way of illustration, it is unlikely that the alleged harassment of the Jehovah's Witnesses in the *Free Legal Assistance* case, "including arbitrary arrests, appropriation of church property, and exclusion from access to education" (African Commission, Report of 11 October 1995, published on 4 April 1996, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, communications nos. 25/89-47/90-56/91-100/93, para. 3), did not impinge also on their right to adopt or have the persecuted religion. Nonetheless, the African Commission had made no reference thereto. Rather, it had mentioned only the freedom to practice religion in a — very terse — reasoning and eventually found a breach of Article 8 as a whole (*ibid.*, para. 45). Similarly, in the *Amnesty International v. Sudan* case allegations had included the application of Sharia to non-Muslims by State courts, persecution of non-Muslims aimed at their conversion to Islam, oppression of Christians, expulsion of missionaries (Report of 15 November 1999, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, communications nos. 48/90-50/91-52/91-89/93, paras. 73-76): acts as such could hardly be compatible with the freedom to adopt, have or change religion, in addition to the freedom to manifest religion. Yet, in finding a violation of Article 8 of the African Charter the African Commission had limited itself to observing that the described "attacks on individuals on account of their religious persuasion considerably restrict[ed] their *ability to practice freely the religion*" (*ibid.*, para. 76, emphasis added), without any reference to the *forum internum* of the freedom of religion.

(39) In particular, at the universal plane, Article 18 of the Universal Declaration of Human Rights and Article 18 of the Covenant on Civil and Political Rights and, at the regional plane, Article 9 of the European Convention on Human Rights and Article 12 of the American Convention on Human Rights. In fact, in Article 18 of the Covenant on Civil and Political Rights there is no reference to the freedom to change religion, but in General Comment No. 22 the Human Rights Committee clarified that such freedom is however enshrined in the provision (UN Doc. CCPR/C/21/Rev.1/Add. 4 of 27 September 1993, para. 5).

(40) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, note 17.

(41) *Ibid.*, para. 130.

(42) *Ibid.*, para. 132.

Political Rights prohibiting any coercion impairing that freedom (43), the African Commission also affirmed the absolute nature of the *forum internum* of the freedom of religion (44).

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(43) *Ibid.*, note 19.

(44) *Ibid.*, para. 131. Looking at the previous cases, one may observe that only in the *Garreth Anver Prince* case had the African Commission held *incidenter tantum* and cautiously that "the right to hold religious beliefs *should* be absolute" (*Garreth Anver Prince v. South Africa*, *cit.*, para. 41, emphasis added). In the *Hossam Ezzat* report the African Commission went further in excluding that, by reason of its absolute nature, the *forum internum* of the freedom of religion would fall within the limitation clause in Article 8 of the African Charter, pursuant to which restrictive measures are lawful conditionally on "law and order". In so stating, the African Commission confirmed its tendency to reduce the width of the limitation clauses in the African Charter (a tendency illustrated by PASCALE, *op. cit.*, p. 125 ff.). However, in restricting the scope of the limitation clause to the *forum externum* of the freedom of religion, the African Commission went beyond the wording of Article 8 of the African Charter, which reads as follows: "[f]reedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms". The reference to "these freedoms" in the second sentence of the provision, where the limitation clause is incorporated, could not but include *all* the freedoms mentioned in the first sentence of that provision, viz. both the freedom to profess religion and the freedom to practice religion. Inasmuch as the freedom to profess religion is regarded as a reference to the *forum internum* of the freedom of religion (*supra* text accompanying note 41), this should have fallen within the scope of the limitation clause. Indeed, the African Commission deemed it superfluous to apply the limitation clause in the case at hand owing to the Egyptian reservation (African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 167). As a result, it missed the opportunity to clarify the "law and order" condition, which, as observed by OLANIYAN, *Civil and Political Rights in the African Charter: Articles 8-14*, in *The African Charter on Human and Peoples' Rights. The System in Practice, 1986-2006*[2] (Evans and Murray eds.), Cambridge, 2008, p. 213 ff., at p. 216, is far from clear. It may be argued that it alludes to public order, because in the — equally authentic — French version of Article 8 of the African Charter the corresponding expression is "ordre public". Restrictive measures to the freedom to manifest religion would accordingly be lawful should they be based on public order grounds, regardless of their being established by law. In this connection, the findings of the African Commission in the previous cases were far from decisive. In the *Free Legal Assistance Group* report the African Commission had limited itself to stating that the respondent State had "presented no evidence that the practice of [the Jehovah Witnesses'] religion in any way threaten[ed] law and order" (*Free Legal Assistance Group v. Zaire*, *cit.*, para. 45). In the *Garreth Aver Prince* report the African Commission had found that the restriction to the freedom of religion was legitimate after having inexplicably considered the general duty of everyone to exercise freedoms and rights "with due regard to the rights of others, collective security, morality and common interest" under Article 27, paragraph 2, of the African Charter (*Garreth Anver Prince v. South Africa*, *cit.*, para. 43), rather than the limitation clause relevant to the freedom of religion under Article 8. In the *Centre for Minority Rights Development* report the African Commission had stated only in general terms, i.e. with regard to the rights and freedoms under the African Charter, that restrictions thereon had to be "established by law" (*Centre for Minority Rights v. Kenya*, *cit.*, para. 172). Whereas the African Commission drew inspiration from the General Comment of the Human Rights Committee on the freedom of religion as enshrined in the Covenant on Civil and Political Rights (*ibid.*),

On the basis of that interpretation of Article 8 of the African Charter, the African Commission proceeded to a two-step reasoning, on which the following sections of this study will be focused. Firstly, it limited the scope of the Egyptian reservation to the *forum externum* of the freedom of religion. That limitation allowed the African Commission to factor out the Egyptian reservation as far as the *forum internum* of the freedom of religion was concerned: thus it stated that Egypt — without the benefit of the reservation — had breached the African Charter in compelling the victims to both disclose their religion in order to be provided with official documents and have one of the recognised religions indicated in their identity cards (45). Secondly, on account of the non-absolute nature of the *forum externum* of the freedom of religion, the African Commission found that the Egyptian reservation did not affect an essential element of the African Charter. It hence came to the conclusion that the consequences of the non-recognition of the Baha'i faith on the freedom to manifest religion had not amounted to a breach of the African Charter (46).

3. The first step of the reasoning of the African Commission was the determination of the scope of the Egyptian reservation. It deemed the Egyptian reservation to be general because, with respect to the application of Article 8 of the African Charter, Islamic law as a whole is mentioned rather than specific domestic rules (47). The African Commission observed that, whereas general reservations are explicitly prohibited under the European Convention on Human Rights (48), there is no such prohibition in the African Charter (49). In the light of

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it refrained from assessing that solution against the wording of the limitation clause under Article 8 of the African Charter.

(45) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 138. The related Egyptian acts, namely the refusal to issue official documents to the victims and the confiscation of the previous documents recording their Baha'i faith, were found to be discriminatory and incompatible with the obligation to ensure that every individual be entitled to equal protection of the law, under Article 3 of the African Charter together with Article 2 (*ibid.*, para. 177). The African Commission held that Egypt had violated Articles 2 and 3 of the African Charter also because of the absence of a neutral civil law allowing official certification of marriages and the ensuing application of the Islamic Sharia as the default regime regulating marriages of the adherents to religions other than the recognised ones (*ibid.*, para. 180 f.).

(46) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 167.

(47) *Ibid.*, para. 159.

(48) The second sentence of Article 57, paragraph 1, of the European Convention on Human Rights reads as follows: "[r]eservations of a general character shall not be permitted".

(49) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 160 and note 34.

the Guide on Reservations, it held that general reservations are not *per se* incompatible with the object and purpose of the African Charter and thus impermissible. Generality would merely make it difficult to assess the compatibility of a reservation with the object and purpose of the treaty (50).

The conclusion that vague or general reservations are just problematic and not necessarily incompatible with the object and purpose of the treaty is far from persuasive. Vague or general reservations are those that are formulated in a far-reaching wording with regard to either a specific treaty provision or the entire treaty (51). If the permissibility of a reservation depends on the compatibility with the object and purpose of the treaty and if the assessment of that compatibility requires that reservations be specific enough to allow the identification of their scope, then vague or general reservations impeding that identification and the ensuing assessment should be impermissible (52). The opposite conclusion would render the criterion of the compatibility of reservations with the object and purpose of the treaty devoid of any meaning because reserving States would then be able to escape that assessment by formulating vague or general reservations (53). That would in turn provide the reserving States with a broad margin of discretion in complying with the obligations to which the reservation refers.

International practice tends to confirm the interpretation of the criterion of the compatibility of reservations with the object and purpose of the treaty as implying the impermissibility of vague or general reservations. With respect to various treaties one may observe that contracting States have objected to reservations owing to their vague or general character, which is considered one of the reasons for the incompatibility of the objected reservation with the object and

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(50) *Ibid*., paras. 158, 160 and note 35.

(51) On the definition of vague or general reservations see SASSI, *General Reservations to Multilateral Treaties*, *Comunicazioni e studi*, vol. XXII, 2002, p. 92 ff., at pp. 93-94. There is some overlap between vague or general reservations and reservations relating to internal law. According to SEIBERT-FOHR, *op. cit*., p. 191 ff., especially pp. 193-194, the reference to internal law makes *per se* a reservation vague or general.

(52) See also SASSI, *op. cit*., pp. 105 ff., 109, pointing out that, whereas vague reservations to treaty provisions would be impermissible, a general reservation to the entire treaty would not even fall within the definition of reservations pursuant to Article 2, paragraph 1, (*d*) of the Vienna Convention on the Law of Treaties, making reference to reservations to "*certain provisions* of the treaty" (emphasis added).

(53) In the telling words of SASSI, *op. cit*., p. 106, "imprecise reservations are often meant to 'cheat' the requirements of the Vienna Convention, since it is very difficult to apply the article 19 test".

purpose of the treaty (54). It is significant that the trend at issue is often concerned with "Sharia reservations" relevant not only to the application of the entire treaty but to specific provisions thereof (55), like the Egyptian reservation to Article 8 of the African Charter (56).

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(54) The said trend cannot be explored in depth in the present study. By way of example only, Laos and the United Arab Emirates formulated a declaration deemed to amount to a reservation to Article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by United Nations General Assembly resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987) to the effect that, respectively, only "torture as defined in both national law and international law" would fall within the concept of torture (26 September 2012) and "lawful sanctions applicable under national law" would not be there included (19 July 2012). Owing to the vague reference to national law these reservations were considered incompatible with the object and purpose of the treaty and thus objected to respectively by Austria (23 September 2013), Finland (20 September 2013), Germany (25 September 2013), Ireland (18 September 2013), Latvia (26 September 2013), Portugal (13 September 2013), Sweden (23 September 2013), and by Austria (31 January 2013), Belgium (23 July 2013), Finland (22 July 2013), Germany (22 July 2013), Ireland (18 July 2013), Poland (17 July 2013), Sweden (7 March 2013) and Switzerland (1 July 2013). Similarly, Iran formulated a declaration amounting to a reservation to the United Nations Convention on the Rights of Persons with Disabilities (adopted by United Nations General Assembly resolution 61/106 of 13 December 2006 and entered into force on 3 May 2008) to the effect that it would not "consider itself bound by any provisions of the Convention, which may be incompatible with its applicable rules" (23 October 2009). By reason of the general reference to any provisions of the Convention and its vagueness, the reservation was deemed to be incompatible with the object and purpose of the treaty and therefore objected to by Austria (1 November 2010), Belgium (28 June 2010), Czech Republic (28 July 2010), France (30 March 2010), Germany (1 November 2010), Ireland (20 March 2018) and the Netherlands (14 June 2016).

(55) In this connection, the Sharia reservation formulated by Somalia to the Convention on the Rights of the Child (adopted by United Nations General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990) is telling in that it refers to both certain provisions and residually to the Convention as a whole. In particular, in ratifying that Convention on 1 October 2015 Somalia stated that it would not "consider itself bound by Articles 14 [freedom of thought, conscience and religion], 20 [care for a child deprived of their family environment], 21 [adoption] of the above stated Convention and any other provisions of the Convention contrary to the General Principles of Islamic Sharia". The reservation was deemed to be incompatible with the object and purpose of the treaty because (or also because) of its general or vague nature and accordingly objected to by Austria (31 March 2016), Belgium (9 May 2016), Bulgaria (27 September 2016), Czech Republic (17 May 2016), Finland (26 April 2016), Hungary (26 August 2016), Ireland (25 May 2016), Latvia (23 March 2016), the Netherlands (8 March 2016), Norway (29 September 2016), Portugal (28 September 2016) and Switzerland (6 July 2016).

(56) The objections to the reservation formulated by Mauritania to Article 18 of the International Covenant on Civil and Political Rights are particularly indicative, considering the comparability of that reservation with the Egyptian reservation to Article 8 of the African Charter. In acceding to the Covenant on 17 November 2004, Mauritania stated that the application of "the provisions set out in Article 18 concerning freedom of thought, conscience and religion [...] shall be without prejudice to the Islamic Shariah". Several States objected (some of them actually after the expiration of

It is here submitted that the conclusion of the African Commission that the general nature of the Egyptian reservation made it just problematic to be assessed has its roots in the ambiguity of the Guide on Reservations, to which the African Commission indeed referred, as mentioned before. Pursuant to guideline 3.1.5.2 "[a] reservation shall be worded in such a way as to allow its meaning to be understood". Since the International Law Commission was silent about the existence of any customary rule equivalent to that guideline, it is just a recommendation to States not to formulate vague or general reservations (57): it leaves open what the consequence of the formulation of a vague or general reservation would be on the permissibility of the reservation itself.

Whereas the International Law Commission alluded to the possibility that in specific cases vague or general reservations may be incompatible with the object and purpose of the treaty, it abstained from explicitly inferring the impermissibility of vague or general reservations as inherently incompatible with the object and purpose of the treaty (58). The International Law Commission prudently asserted that it would be "difficult, *a priori*, to maintain that they are invalid *ipso*

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the twelve-month period) to that reservation: the majority of them associated the vagueness or generality of the Mauritanian reservation with the incompatibility thereof with the object and purpose of the treaty. They are Finland (15 November 2005), France (18 November 2005), Germany (15 November 2005), Latvia (15 November 2005), the Netherlands (31 May 2005) and Sweden (5 October 2005). Albeit implicitly, that association also emerges from the objection made by Portugal (21 November 2005), affirming that the Mauritanian reservation "*create[d] doubts* as to the commitment of the reserving State to the object and purpose of the Convention" (emphasis added). It seems that Poland referred separately to the incompatibility with the object and purpose of the treaty and to the vagueness or generality of Mauritanian reservation in objecting thereto (22 November 2005), whereas the objections formulated by Greece (24 October 2005) and the United Kingdom (17 August 2005) were in any event based on the vague or general nature of the Mauritanian reservation, even though they did not invoke the incompatibility with the object and purpose of the Covenant.

(57) By reason of its non-binding nature, guideline 3.1.5.2 differs from Article 57 of the European Convention on Human Rights explicitly prohibiting "[r]eservations of a general character". However, the International Law Commission stated in the commentary that guideline 3.1.5.2 "reflects this fundamental notion" (see *Guide to Practice on Reservations to Treaties with Commentaries*, in *Report of the International Law Commission on the work of its sixty-third session, 26 April-3 June and 4 July-12 August 2011 [Addendum]* (UN Doc. A/66/10/Add.1), p. 367, paras. 9-10).

(58) Differently, draft guideline 3.1.7, as proposed by the Special Rapporteur, did provide that "[a] reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty". See PELLET, *Tenth Report on Reservations to Treaties* (UN Doc. A/CN.4/558 and Add.1-2), in *Yearbook of the International Law Commission*, 2005, vol. II, Part One, p. 141 ff., at p. 170, para. 115. In 2007 the text of draft guideline 3.1.7 had already changed to what became guideline 3.1.5.2, as one may observe in the *Titles and Texts*

jure" (59). By the same token, it stated that the formulation of a vague or general reservation "is not, *strictly speaking*, a case in which the reservation is incompatible with the object and purpose of the treaty: it is rather a *hypothetical* situation in which it is impossible to assess this compatibility" (60).

The outcome is problematic: on the one hand, the non-incompatibility of vague or general reservations with the object and purpose of the treaty implies that they may be compatible therewith and thus permissible; on the other hand, one needs to identify the scope of a vague or general reservation in order to assess the compatibility with the object and purpose of the treaty. That Gordian knot cannot be untied until such time as the State author of a vague or general reservation reduces the scope thereof and hence renders it more precise.

4. Given that the possibility to assess the compatibility of a vague or general reservation with the object and purpose of the treaty depends upon the specification of that reservation by the reserving State, it is plain to see why the International Law Commission attached special importance to the "reservations dialogue" with respect to vague or general reservations (61). Since the "reservations dialogue" is meant to lead to the withdrawal or modification of reservations, it could prove particularly useful with regard to a vague or general reservation should

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of the Draft Guidelines adopted by the Drafting Committee on 9, 10, 11 and 22 May 2007 (UN Doc. A/CN.4/L.705).

(59) *Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, p. 368.

(60) *Ibid.*, p. 363, emphasis added. Another telling extract is the following: "it is the impossibility of assessing the compatibility of [vague or general] reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them fall within the purview of Article 19 (*c*) of the Vienna Convention on the Law of Treaties" (*ibid.*, p. 367). Ambiguities as such seem to be intrinsic to the Guide on Reservations since they emerge also from the relevant "presentation by the Special Rapporteur": see PELLET, *The ILC Guide*, *cit.*, pp. 1087-1088, confirming the inclusion of vague or general reservations among the "examples bearing upon the most usual difficulties" deriving from the determination of the object and purpose of the treaty rather than among instances of impermissible reservations but asserting that the "reason why [general reservations making reference to Sharia] are *not admissible* [...] lies in the fact that their vagueness makes it impossible 'to assess [their] compatibility with the object and purpose of the treaty'" (emphasis added).

(61) In the words of the International Law Commission, vague or general reservations "should lend themselves particularly well to a 'reservations dialogue'" (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, p. 368).

it induce the reserving State to partially withdraw that reservation or in any event reduce its scope (62).

Although there is no definition of the "reservations dialogue" in the Annex to the Guide on Reservations titled "Conclusions on the Reservations Dialogue" (henceforth, Annex on the Reservations Dialogue) as well as in the relevant report of the Special Rapporteur (63), it is basically an exchange of views on reservations (64). Whereas a reserving State should explain the reasons underlying its reservations (65), the other contracting States as well as the monitoring body established by the relevant treaty should explain the reasons for their concerns, if any, about the reservations in question and, where appropriate, request clarification (66) and invite the reserving State to reconsider its reservations for the purposes of withdrawing them or reducing their scope (67). In turn, the reserving State should take these observations into account in order to reconsider, modify or withdraw its reservations (68).

Nonetheless, any reliance on the "reservations dialogue" in order to reduce the scope of vague or general reservations risks leading to a deadlock, because the "reservations dialogue" may or *may not* take place. The "reservations dialogue" has no normative value and the provisions in the relevant Annex are but mere recommendations to States and treaty monitoring bodies to constructively exchange their views on reservations. Accordingly, the problem will remain as to the legal status of vague or general reservations, if a "reservations dialogue" never occurs or fails to induce the reserving State to withdraw or modify its reservations, or until contracting States and treaty monitoring bodies enter into a "reservations dialogue" with the reserving State.

The *Hossam Ezzat* case demonstrates that a risk of deadlock is real: before the relevant communication procedure, no "reservations dia-

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(62) On the issue of modification aimed at reducing the scope of a previously formulated reservation, see *infra* note 84 and the accompanying text.

(63) In the absence of any commentary to the Annex on Reservations Dialogue, the pertinent report of the Special Rapporteur is the only source of clarification within the work of the International Law Commission. See PELLET, *Seventeenth Report on Reservations to Treaties* (UN Doc. A/CN.4/647 and Add.1), in *Yearbook of the International Law Commission*, 2011, vol. II, Part One, p. 1 ff.

(64) For some elucidation see PELLET, *The ILC Guide*, *cit*., pp. 1074-1075.

(65) Annex on the Reservations Dialogue, para. 2.

(66) *Ibid*., para. 6.

(67) *Ibid*., para. 7.

(68) *Ibid*., para. 8. Regardless, the reserving States should periodically review the reservations with the aim of "limiting their scope or withdrawing them where appropriate" (*ibid*., para. 4).

logue" between Egypt and the other States parties to the African Charter or the African Commission had taken place. In particular, none of the contracting States had objected to the Egyptian reservation to Article 8 nor had otherwise expressed its views in relation thereto, at least by means of statements deposited with the Secretary General of the African Union. By the same token, Egypt and the African Commission had not entered into a "reservations dialogue" on the occasion of the periodic reports submitted by Egypt. In one of them, Egypt had limited itself to recalling the reservation to the implementation of Article 8 of the African Charter (69): differently than in a "reservations dialogue", it had abstained from reconsidering that reservation with the aim of reducing its scope or withdrawing it as well as from providing any reason for the need to maintain that reservation without modification (70). For its part the African Commission had simply urged Egypt to withdraw the reservations to the African Charter without providing any relevant explanation (71), as would conversely have been expected in the context of a "reservations dialogue" (72).

In the absence of any definitive solution to the problem of vague or general reservations in the Guide on Reservations and in consideration of the related reliance of the International Law Commission on the possibility of a successful "reservations dialogue", the African Commission should have decided to tackle the described *impasse* in the *Hossam Ezzat* case by entering then and there into a "reservations dialogue" with Egypt (73). On the basis of the submissions made by

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(69) *Periodic Report (7th and 8th) of Egypt Presented to the African Commission on Human and Peoples' Rights for the Period 2001 to 2004*, submitted on 11 May 2005, p. 6. Indeed, in the last periodic report made public Egypt abstained from even mentioning its reservations to the African Charter (*Periodic Report of Egypt to the African Commission on Human and Peoples' Rights, 2001-2017*, submitted on 26 October 2018). That report will be considered by the African Commission at its Sixty-Fourth Ordinary Session, 24 April-14 May 2019.

(70) Annex on the Reservations Dialogue, para. 4.

(71) African Commission, *Concluding Observations and Recommendations on the Seventh and Eighth Periodic Report of Egypt*, Thirty-Seventh Ordinary Session, 27 April-11 May 2005, Banjul, The Gambia, para. 25.

(72) Annex on the Reservations Dialogue, para. 6. Indeed, such an explanation would have been very important: the recommendation to withdraw the reservation is plainly incongruous with the conclusion of the permissibility of the Egyptian reservation to Article 8 of the African Charter that the African Commission eventually reached in the report on the *Hossam Ezzat* case.

(73) In entering into the assumed "reservations dialogue" the African Commission referred to the Guide on Reservations (African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 160). Indeed, as noted by Wood, *Institutional Aspects of the Guide to Practice on Reservations*, *European Journal of Int. Law*, 2013, p. 1099 ff., p. 1107, the "reservations dialogue is not a term of art in international law [and] was introduced

Egypt (74), it observed that the "Islamic law in question" was the consensus of Islamic scholars not recognising the Baha'i faith as one of the three "revealed" religions (75). Hence the African Commission came to the conclusion that the reservation was meant "to exclude the obligation to recognise religions other than Islam, Christianity, and Judaism in any form for purposes of implementing Article 8 of the [African] Charter" (76).

What emerges is a forced "reservations dialogue", the consequences of which call into question the effective contribution of the Guide on Reservations to the solution of the problem of vague or general reservations. Three factors should have dissuaded the African Commission from having recourse to the "reservations dialogue" in the *Hossam Ezzat* case.

Firstly, as a quasi-contentious mechanism the communication procedure before the African Commission was unsuitable for a dialogic exchange of views between the reserving State and the treaty monitoring body (77). It must be admitted that in the Annex on the Reservations Dialogue there is no clarification about the occasions for a "reservations dialogue": the International Law Commission just recommended the General Assembly to invite States and treaty monitoring bodies "to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner" (78). However, in the report of the Special Rapporteur concerning the "reservations dialogue" there is no reference to contentious cases or communication procedures. Conversely, the review of periodic reports was indicated as the occasion for

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into the legal discourse on reservations by the Special Rapporteur". Had the African Commission not considered the possibility of a "reservations dialogue", it should have arguably deemed the Egyptian reservation to be impermissible owing to its general nature and the ensuing impossibility to assess the compatibility with the object and purpose of the treaty.

(74) Although there is no specific reference to the Egyptian submissions, it is evident that in applying the "reservations dialogue" the African Commission took into account the Egyptian submissions as recapitulated in para. 108 of the *Hossam Ezzat* report.

(75) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 161.

(76) *Ibid.*

(77) As noted by Yahyaoui Krivenko, *Revisiting the Reservations Dialogue: Negotiating Diversity while Preserving Universality Through Human Rights Law*, in *The Rule of Law at the National and International Levels. Contestations and Deference* (Kanetake and Nollkaemper eds.), Oxford/Portland, 2016, p. 289 ff., at p. 302, "[t]he distinguishing feature of the reservations dialogue is obviously its dialogical nature": in a contentious or quasi-contentious procedure the relationship between the respondent State and the treaty monitoring body is evidently not of a dialogic type.

(78) Annex on the Reservations Dialogue, section II.

a "reservations dialogue" between the reserving State and the treaty monitoring body (79).

Secondly, the African Commission was unable to take into account any Egyptian submission properly relating to the reservation at issue. As the African Commission itself admitted, Egypt had "not had the opportunity to make observations on the validity of its reservations to the [African] Charter" (80) since it was only in the rejoinder that the complainants had alleged the incompatibility of the reservation with the object and purpose of the African Charter as well as the general nature and discriminatory effects of that reservation (81). One is therefore under the impression that the African Commission entered into a "reservations monologue", rather than into a "reservations dialogue".

Thirdly, even conceding that Egypt had meant to reduce the scope of its reservation to Article 8 of the African Charter (in submissions immaterial to the permissibility of that reservation), submissions like those presented within the context of a communication procedure could hardly have had the effect to retroactively limit the scope of that reservation, as the African Commission deemed to be the case. As mentioned before, it appraised the Egyptian reservation as assumedly reformulated in the Egyptian submissions with respect to the period *prior* to the submissions themselves, viz. the period of the alleged breach of the African Charter. The reduction of the scope of an earlier formulated reservation, including its retroactivity, represents a thorny

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(79) PELLET, *Seventeenth Report*, *cit*., pp. 13-16, paras. 39-53. With regard to the "reservations dialogue" between the reserving State and contracting States, such instances were indicated as objections, acceptance, and other — similar — reactions not "codified" in the Vienna Convention on the Law of Treaties (*ibid*., pp. 4-13, paras. 4-39). Accordingly, the "reservations dialogue" is said to be partly within and partly outside the Vienna Convention on the Law of Treaties. In this connection see YAHYAOUI KRIVENKO, *The "Reservations Dialogue" as a Constitution-Making Process*, *Int. Community Law Review*, 2013, p. 381 ff., at pp. 388-391.

(80) African Commission, *Hossam Ezzat v. Egypt*, *cit*., para. 155.

(81) *Ibid*., para. 153. However, the African Commission deemed the available information to be sufficient for the assessment of the permissibility of the Egyptian reservation (*ibid*., para. 155). It would have then been difficult not to come to the aforementioned conclusion that the Egyptian reservation was limited to the non-recognition of religions other than Christianity, Islam, and Judaism, and therefore inapplicable to the *forum internum* of the freedom of religion. As the complaint was about the non-recognition of the Baha'i faith, Egypt had obviously explained that only Christianity, Islam, and Judaism were recognised pursuant to Islamic law (*ibid*., para. 108). Submissions as such were not meant to indicate the scope of the reservation. The same holds true in respect of the submissions where Egypt had affirmed the absolute nature of the freedom to adopt a religion (*ibid*., para. 143). When so stating, Egypt was unaware about any challenge to the permissibility of its reservation (*ibid.*, para. 104) and thus it is unlikely that it intended to identify the scope thereof.

issue: the fundamental problem is whether the modification reducing the scope of a previously formulated reservation should be regarded as identical to a partial withdrawal, basically requiring the communication to the other contracting States (82), or a late reservation, requiring the unanimous acceptance by the other contracting States (83). Both solutions are indeed controversial (84). Pursuant to the Guide on Reservation, a State may reduce the scope of a previously formulated reservation through a partial withdrawal (85): hence the reformulation of a reservation aimed at reducing the original scope thereof would not

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(82) To the extent that the possibility of partial withdrawal is in principle admitted, it is reasonable to argue that the rules enshrined in Article 22 of the Vienna Convention on the Law of Treaties as regards withdrawal apply by analogy to partial withdrawal (see also *infra* note 91 and the relevant text). It is well known that, pursuant to Article 22, paragraph 1, of the Vienna Convention on the Law of Treaties, "[u]nless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal". In this connection, it is worth bearing in mind that, within the context of the works of the International Law Commission concerning the law of treaties, the position had eventually prevailed that withdrawal of a reservation would be a unilateral act not requiring the acceptance of the other contracting States including those having accepted that reservation, on the assumption that the ultimate interest of all the parties would lie in the integral application of the treaty. For an overview see CAMPIGLIO, *Il principio di reciprocità*, *cit.*, pp. 222-226. See also the commentary to guideline 2.5.1 of the Guide on Reservations, basically restating Article 22, paragraph 1, of the Vienna Convention on the Law of Treaties (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, pp. 198-203).

(83) On late reservations, see GAJA, *Unruly Treaty Reservations*, *cit.*, pp. 310-313; ID., *Le riserve tardive ai trattati: un fenomeno a molti inviso (ma non sempre visto bene)*, *Rivista*, 2003, p. 463 ff.; CAMPIGLIO, *Qualche riflessione a proposito delle riserve tardive*, *Comunicazioni e studi*, vol. XXII, 2002, p. 36 ff.

(84) It seems easy to equate the modification aimed at lessening the scope of a previously formulated reservation with partial withdrawal in the event that the reference to certain provisions only is eliminated among those mentioned in the reservation. Such an equation could get more complicated if a *general* reservation to the *entire* treaty is modified in order that only certain provisions — now indicated — would fall within the scope of the reservation (for an example see *infra* note 89 the modifications notified by Libya and Maldives with respect to their reservations to the Convention on the Elimination of All Forms of Discrimination against Women), even though such a modification could still be regarded as the same as the withdrawal of the part of the reservation relevant to all the provisions of the treaty other than those now indicated. The equation under discussion would be even more problematic should the modification consist of the specification of the effects of a previously formulated reservation, unless that modification would be considered as the withdrawal of all the possible meanings of the reservation but the one now pointed out. In fact, in this last case it seems difficult not to equate the modification with a new reservation.

(85) See guideline 2.5.10 dealing with partial withdrawal of reservations and the commentary thereto (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, p. 226 ff.): "nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal" (*ibid.*, p. 226, para. 1).

amount to a new, late reservation (86). The International Law Commission abstained from clarifying whether a *partial* withdrawal could be retroactive (87), although it admitted that, as far as human rights treaties are concerned, withdrawal of a reservation could be retroactive should the reserving State so intend (88). Be that as it may, the relevant practice is inconsistent and little heed has so far been paid thereto in legal literature (89). Whereas the issue of modification or retroactive modi-

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(86) The International Law Commission drew a distinction between modifications widening the scope of an earlier formulated reservation, to be equated to late reservations, and modifications lessening the scope of an earlier formulated reservation, to be equated to partial withdrawals. See guideline 2.3.4 concerning the widening of the scope of a reservation and the commentary thereto (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, p. 187 ff., mainly p. 187, para. 1), as well as the commentary to the aforementioned guideline 2.5.10 (*ibid.*, p. 226 ff., especially pp. 230-231, paras. 14-17).

(87) Guideline 2.5.9, with respect to which the International Law Commission referred to the retroactive operation of withdrawals of reservations (*infra* note 88), is not included among those equally applicable to partial withdrawals, but its application to partial withdrawal is not excluded either: "guidelines 2.5.1, 2.5.2, 2.5.5, 2.5.6 and 2.5.8 [...] fully apply to partial withdrawals. The same is not true, however, for guideline 2.5.7" (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit*., pp. 231-232, para. 18). Such a *lacuna* is baffling since it comes into view in a Guide meant to fill the gaps (see *supra* note 3 and the relevant text).

(88) See the commentary to Guideline 2.5.9 concerning cases in which the author of a reservation may set the effective date of withdrawal of the reservation (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit*., p. 225, paras. 4-5).

(89) It is worth bearing in mind the practice concerning the Convention on the Elimination of All Forms of Discrimination against Women (adopted by United Nations General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981). "Modifications" of previously formulated reservations were communicated to the Secretary-General as the depositary of the Convention by Lesotho (25 August 2004, nine years after ratification), Libya (5 July 1995, over six years after accession), Malaysia (6 February 1998, around three years after accession), Maldives (29 January 1999, about five years accession), and Singapore (30 June 2011, over fifteen years after accession). One may observe incongruity as for the assimilation of those modifications with partial withdrawals or late reservations, as emerges from a comparison between the modification notified by Libya and that notified by Maldives. On the one hand, these modifications were similar. Upon accession, on 16 May 1989, Libya had formulated a reservation to the effect that compliance with the Convention would not conflict with the laws on personal status under the Islamic Sharia, but in 1995 it "reformulated" that reservation to reduce the scope of the reference to the Islamic Sharia to Articles 2 and 16 (*c*) and (*d*). By the same token, whereas upon accession Maldives had formulated a reservation to the effect that its compliance with the Convention would not include the provisions deemed to be conflicting with Islamic Law or requiring any change in the Constitution or domestic laws (1 July 1993), in 1999 it notified the Secretary-General of a modification to the effect that only the application of Article 16 would be subject to the Islamic Sharia (in addition, Article 7 (*a*) would be applied only to the extent that it would not conflict with the Constitution of Maldives, but this reservation was eventually withdrawn in 2010). On the other hand, the Secretary-General treated these modifications differently. It regarded the modification notified by Libya as a partial withdrawal, but the modification notified by Maldives as

fication of reservations cannot be further explored in the present study, in the *Hossam Ezzat* case the Egyptian submissions lacked what seems to be an essential requirement at all events: the communication to the other contracting States. Whether the modification of a reservation is regarded as the same as a partial withdrawal or the formulation of a new (late) reservation replacing the previous one, it needs to be communicated to the other contracting States. That is not only logical but also consistent with the provisions of the Vienna Convention on the Law of Treaties on withdrawal and the procedure concerning reservations (90), the former applying by analogy to partial withdrawals (91).

5. Once it had determined the scope of the Egyptian reservation, the African Commission proceeded to the second step of its reasoning: the very assessment of the compatibility of the reservation with the object and purpose of the African Charter. To this end, it relied on guideline 3.1.5 of the Guide on Reservations, pursuant to which a reservation would be incompatible with the object and purpose of the treaty when it affects "an essential element of the treaty that is necessary to its general tenour" and thus impairs "the *raison d'être* of the treaty".

The African Commission stressed that the object and purpose of the African Charter were not consisting only in the protection of the freedom of religion (92); rather, it identified them in the protection and promotion of human and peoples' rights (93). Although it admitted that a single right or obligation could be "essential to the general tenour of the treaty", so that a reservation thereto would impinge upon the *raison*

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a new reservation: accordingly, only the acceptance for deposit of the latter was subordinated to the absence of objection by any of the contracting States within a period of ninety days from the date of notification thereto (25 March 1999). Albeit after the expiration of that ninety-day period (23 June 1999), Germany objected to the modification notified by Maldives in deeming it to constitute neither a withdrawal nor a partial withdrawal of the original reservation but a new reservation (16 August 1999).

(90) Article 22, paragraph 3, (*a*) of the Vienna Convention on the Law of Treaties reads as follows: "[t]he withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State". Pursuant to Article 23, paragraph 1, of the same Convention "[a] reservation [...] must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty".

(91) That is confirmed by the Guide on Reservations. Article 22, paragraph 3, (*a*) of the Vienna Convention, quoted *supra* (note 90), is basically restated in guideline 2.5.8, which, as said before (*supra* note 87), is one of the guidelines the application of which is mentioned with respect to partial withdrawals.

(92) African Commission, *Hossam Ezzat v. Egypt*, *cit.*, para. 165.

(93) *Ibid.*, para. 163.

d'être of the treaty (94), the African Commission held that freedom of religion was not the essence of the African Charter and differed from the prohibition of discrimination under Article 2 concerning the enjoyment of all the rights guaranteed by the African Charter (95). The African Commission remarked that the scope of the Egyptian reservation was limited to a specific aspect of the freedom of religion, namely the "freedom to manifest religions other than those recognised by the State" (96). It came therefore to the conclusion that the Egyptian reservation was compatible with the object and purpose of the African Charter and hence permissible (97).

In applying guideline 3.1.5 and drawing the distinction between freedom of religion and prohibition of discrimination, the African Commission adopted a formalistic approach that risks having paradoxical effects with respect to human rights treaties. It deemed the prohibition of discrimination to be an essential obligation in consideration of formal characters: the "general and cross-cutting" nature of the prohibition and the relevance to the enjoyment of *all* the rights guaranteed in the African Charter (98). These features could hardly be found in substantive obligations other than prohibition of discrimination; rather, they are peculiar to procedural or structural rules since they usually have a bearing on all the rights enshrined in a human rights treaty. Suffice it to say that, in the light of the line of reasoning of the African Commission, one should conclude that the prohibitions on slavery and torture in Article 5 of the African Charter are not "essential" norms because they are neither relevant to all or a plurality of rights nor, consequently, "cross-cutting". Of course, that would be at variance with the value attached to these rules in international law.

In view of the formalistic approach adopted by the African Commission and the implications thereof, the exclusive focus on guideline 3.1.5 raises the question as to why the African Commission disregarded the subsequent guidelines that, as specifications of guideline 3.1.5, would have been more relevant to the case, namely guidelines 3.1.5.4 and 3.1.5.6 (99). The former deals with reservations to provisions concerning rights from which no derogation is permissible, the latter

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(94) *Ibid.*, para. 164.
(95) *Ibid.*, para. 165.
(96) *Ibid.*
(97) *Ibid.*, para. 166.
(98) *Ibid.*, para. 165.
(99) As regards the problematic cases with respect to which the application of the criterion of the compatibility with the object and purpose of the treaty is clarified in the Guide on Reservations, see *supra* note 24.

with reservations to "treaties containing numerous interdependent rights and obligations". They make reference both to the importance of the rights enshrined in provisions that cannot be derogated from and to the interdependence of human rights (100).

Had the African Commission taken into account guidelines 3.1.5.4 and 3.1.5.6, it could have come to a different conclusion (101), one more consistent with its previous case law. In fact, it has constantly emphasised the interdependence and equal value of human rights and interpreted the absence of a derogation clause in the African Charter in the sense that derogation from all the human rights therein enshrined is prohibited (102). On the contrary, the distinction between prohibition of discrimination and freedom of religion entails the idea of a hierarchy according to which — owing to formalistic reasons — prohibition on discrimination has a higher rank. Indeed, considering that Article 60 of the African Charter provides that the African Commission "shall draw inspiration from international law on human and peoples' rights" including instruments adopted by the United Nations (103), the African Commission could have at least consid-

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(100) Whereas, as it will be pointed out, both factors were disregarded by the African Commission. Generally speaking, neither the importance of the rights that cannot be derogated from nor the interdependence of human rights are decisive in the determination of the object and purpose of a human rights treaty. In the words of McCall-Smith, *op. cit.*, p. 290, as regards the application of the "object and purpose test" to human rights treaties "the guidelines are not particularly instructive even if well-intended".

(101) Indeed, had the African Commission dwelled upon the commentaries to guidelines 3.1.5.4 and 3.1.5.6, it could even have reached the conclusion that the Egyptian reservation was permissible, but without drawing the puzzling distinction between the prohibition of discrimination and freedom of religion. Conversely, it could have maintained the importance of the freedom of religion: according to the commentaries to guidelines 3.1.5.4 and 3.1.5.6, a reservation to a provision from which derogation is not allowed or to a human rights treaty provision guaranteeing an essential right may be compatible with the object and purpose of the treaty if it has an impact only on "certain limited aspects of the implementation" of the right at issue (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, pp. 379, para. 5, and 386, para. 5). Having found that the Egyptian reservation applies only to a specific aspect of the *forum externum* of the freedom of religion, viz. the freedom to manifest a religion other than those recognised by the State (*supra* note 96 and the relevant text), the African Commission could have relied on the commentaries to guidelines 3.1.5.4 and 3.1.5.6.

(102) On this practice see Österdahl, *The Surprising Originality of the African Charter on Human and Peoples' Rights*, in *Nordic Cosmopolitanism. Essays in International Law for Marti Koskenniemi* (Petman and Klabbers eds.), Leiden/Boston, 2003, p. 5 ff., at pp. 6-9.

(103) To be specific, Article 60 of the African Charter reads as follows: "[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted

ered that under the Covenant on Civil and Political Rights a special importance is attributed to freedom of religion since it is one of the rights from which derogation is prohibited (104).

It is arguable that the usefulness of guidelines 3.1.5.4 and 3.1.5.6 is undermined by redundancy: the text of general guideline 3.1.5 has been basically repeated. According to guideline 3.1.5.4 a State may not formulate a reservation to provisions concerning rights from which derogation is not permissible "unless the reservation in question is compatible with the essential rights and obligations arising out of the treaty", which makes one think of "the essential element of the treaty" mentioned in guideline 3.1.5. By the same token, guideline 3.1.5.6 invites one to take into account the "importance" that the provision subject to the reservation has "within the general tenour of the treaty" as well as "the impact that the reservation has on the treaty", which bears a resemblance to the impairment of "an essential element of the treaty that is necessary to its general tenour" and accordingly "the *raison d'être* of the treaty" as mentioned in guideline 3.1.5.

The relevance of guideline 3.1.5.6 is further undermined by the non-immediateness of the language: the connection of that guideline with human rights treaties is concealed behind the reference to "interdependent rights and obligations" (105). The association of "interde-

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by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members." For an analysis of this provision see DECAUX, *Article 60*, in *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme. Commentaire article par article* (sous la direction de Kamto), Bruxelles, 2011, p. 1105 ff.

(104) See Article 4, paragraph 2, of the Covenant on Civil and Political Rights.

(105) It is only the pertinent commentary that eventually reveals that the issue of the permissibility of reservations to human rights treaties falls within the scope of the guideline on reservations to "treaties containing numerous interdependent rights and obligations" (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, pp. 383-387). Indeed, the International Law Commission admitted that "[i]t is in the area of human rights that reservations to treaties of this type [...] have most often been formulated" (*ibid.*, pp. 383-384). However, it chose not to address the issue of the permissibility of reservations to human rights treaties in an *ad hoc* guideline in order to exclude any assumed special nature of human rights treaties. Accordingly, draft guideline 3.1.12, which specifically concerned human rights treaties in connection with the criterion of the compatibility of reservations with the object and purpose of the treaty, was eventually discarded. That draft guideline had been provisionally adopted by the International Law Commission at its 59th session, held in 2007: see *Yearbook of the International Law Commission*, 2007, vol. II, Part Two, p. 15 ff., especially pp. 52-53. For a comment see ZIEMELE, LIEDE, *Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6*, *European Journal of Int. Law*, 2013, p. 1135 ff., at pp. 1144-1148.

pendent rights *and* obligations" in guideline 3.1.5.6 is puzzling since it seemingly equates interdependence as a conceptual characteristic of human rights to interdependence as a legal characteristic of certain rights and obligations. The interdependence of human rights basically reflects the following idea (106): the effective protection of each human right is said to rest on and reinforce the effective protection of the others (107). Accordingly, human rights could be regarded as interdependent, but it would be difficult to so consider human rights *obligations* (108). The breach of an interdependent obligation justifies non-compliance thereof by *any* of the other parties, beyond the "mutual" legal relationship of each of the parties with the non-performing one (109): of course, this is not the case in respect of human rights obligations (110). Human rights treaties give rise to obligations that do

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(106) The idea that all human rights are "universal, indivisible and interdependent and interrelated" had been enshrined in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, section I, para. 5, UN Doc. A/CONF.157/24, and since then has been repeatedly reaffirmed in human rights instruments adopted both within and outside the United Nations framework. One may respectively think of resolution 60/1 of 16 September 2005 of the United Nations General Assembly (*2005 World Summit Outcome*), para. 13, or, on the sub-regional plane, of Article 7 of the ASEAN Human Rights Declaration, adopted by the Association of Southeast Asian Nations on 18 November 2012.

(107) For an overview see *ex pluribus* VAN BOVEN, *Categories of Rights*, in *International Human Rights Law* (Moeckli, Shah and Sivakumaran eds.), Oxford, 2010, p. 173 ff., at pp. 178-181, highlighting the link between interdependence of human rights and enhancement of economic, social and cultural rights through civil and political rights.

(108) It is noteworthy that in the aforementioned draft guideline 3.1.12 concerning reservations to general human rights treaties (*supra* note 105) there was no reference to human rights *obligations* as regards the interdependence of human rights. The draft guideline read as follows: "[t]o assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness *of the rights set out in the treaty* as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it" (emphasis added).

(109) On that definition of interdependent obligations see FITZMAURICE, *Third Report on the Law of Treaties* (UN Doc. A/CN.4/115), in *Yearbook of the International Law Commission*, 1958, vol. II, p. 20 ff., at pp. 27-28.

(110) As explained by SICILIANOS, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, *European Journal of Int. Law*, 2002, p. 1127 ff., p. 1135, "there is a conceptual difference between 'interdependent' obligations – such as those contained in disarmament agreements – and obligations concerning the environment or human rights. The former can certainly not be brought under a bundle of bilateral relations; they are nonetheless dominated by a sort of global reciprocity in the sense that each State disarms because the others do likewise. One can, therefore, easily understand that breach of this sort of obligation might 'radically change' the situation of all the other States as to the further performance of, for example, their own disarmament obligation. The case is different for obligations relating to environmental protection or human rights".

not depend upon compliance by any of the other parties to the treaty: they set out integral or *erga omnes partes* obligations, rather than interdependent obligations even though neither the former nor the latter are mutually reciprocal (111).

MARIO GERVASI

Abstract. — In 2011 the International Law Commission adopted the Guide to Practice on Reservations to Treaties (Guide on Reservations) to clarify and develop the regime concerning reservations under the 1969 Vienna Convention on the Law of Treaties. The report of the African Commission on Human and Peoples' Rights (African Commission) in the *Hossam Ezzat* case provides an occasion for reflecting on the usefulness of the Guide with regard to some problems having a bearing on human rights treaties. In the report, the "Sharia reservation" formulated by Egypt to Article 8 of the African Charter on Human and Peoples' Rights enshrining religious freedom was at stake. The author argues that weaknesses of the Guide on Reservations underlie certain shortcomings of the reasoning of the African Commission. In particular, as the Guide on Reservations does not specify whether vague or general reservations are permissible, the African Commission considered the Egyptian reservation to be merely problematic. In order to determine the scope of the reservation, the African Commission artificially resorted to a "reservations dialogue", as introduced in an Annex to the Guide on Reservations. Ambiguities in the guidelines relating to reservations to provisions concerning rights from which no derogation is permissible and to treaties containing interdependent rights and obligations may explain why the African Commission did not follow them.

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(111) In mentioning "integral and interdependent treaties" (*Guide to Practice on Reservations to Treaties with Commentaries*, *cit.*, p. 384), the International Law Commission made reference to Special Rapporteur Fitzmaurice and the text of his report on the law of the treaties where he had "promoted the concept" (*ibid.*, note 1770). Yet, in the relevant quotation he had not only distinguished interdependent and integral treaties from treaties "of the mutually reciprocating type", but also drawn a distinction between interdependent treaties and integral treaties: he referred to treaties *either* of the interdependent type *or* of the integral type.