

**UNIVERSITY OF PRETORIA**

**FACULTY OF LAW**



**Assessing the compatibility of Ethiopia’s reservations and ‘interpretative declarations’ with the Maputo Protocol’s object and purpose**

**Submitted in partial fulfilment of the requirements of  
the degree of LLM (Human Rights and Democratisation in Africa)**

**BY**

**Meron Eshetu Birhanu**

**Student number: 22953002**

**Prepared under the supervision of**

**Dr. Papa Fara DIALLO (University of Gaston Berger)**

**&**

**Dr. Ashwanee Budoo-Scholtz (University of Pretoria)**

**Faculty of law, University of Pretoria**

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## **Dedication**

This dissertation is dedicated to my parents who have always inspired and supported me to pursue my dreams. It is also dedicated to my boyfriend, without whom this journey would not have been possible.

## **Acknowledgement**

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## **Acronyms**

African Children's Charter	African Charter on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
FDRE	Federal Democratic Republic of Ethiopia
FGM	Female genital mutilation
HoPR	House of People Representatives
HRTs	Human Rights Treaties
ICJ	International Court of Justice
ILC	International Law Commission
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
OAU	Organisation of African Unity
VAW	Violence against women
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

# Chapter 1: Introduction

## 1.1 Background of the research

With the African Charter on Human and Peoples' Rights (African Charter) at the forefront, a number of regional human rights treaties (HRTs) are adopted based on the African legal philosophy and responsive to African needs.<sup>1</sup> The African Charter, which was adopted on 27 June 1981 by the African Union's (AU) predecessor, the Organisation of African Unity (OAU), and entered into force on 21 October 1986, is the primary legal instrument for promoting and protecting human rights in Africa.<sup>2</sup> Despite its pioneering role in promoting and protecting human rights, its provisions concerning women's rights are widely seen as inadequate and ineffective, which led to the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).<sup>3</sup> The Maputo Protocol is a binding document adopted on 01 July 2003 and entered into force on 25 November 2005 to supplement the provisions of the African Charter that dealt with women's rights.<sup>4</sup>

Ethiopia signed and ratified the Maputo Protocol on 1 June 2004 and 18 July 2018, respectively.<sup>5</sup> The instrument of ratification was deposited with the Chairperson of the Commission of the AU on 17 September 2019 as required by article 28 of the Maputo Protocol.<sup>6</sup> Besides, Ethiopia has incorporated the Maputo Protocol into its national law through the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Ratification Proclamation No.1082/2018 (Maputo Protocol Ratification Proclamation). According to the Maputo Protocol Ratification Proclamation, Ethiopia made seven reservations and six 'interpretative declarations' to the Maputo Protocol.<sup>7</sup>

Reservations to the Maputo Protocol are neither explicitly forbidden nor permitted. The silence does not however mean that reservation is prohibited. It is argued that the silence of treaties regarding reservation revealed the permission of reservation in compliance with relevant

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<sup>1</sup> R Gettleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 668.

<sup>2</sup> RN Kiwanuka 'The meaning of 'people' in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of international Law* 80.

<sup>3</sup> Centre for Reproductive Rights 'The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights' 2006 [https://reproductiverights.org/sites/default/files/documents/pub\\_bp\\_africa.pdf](https://reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf) (accessed 15 September 2022).

<sup>4</sup> Website of the African Union, <https://au.int/en/treaties/1170> (accessed 23 September 2022).

<sup>5</sup> AU 'List of countries which have signed, ratified/acceded to the Maputo Protocol' <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 23 September 2022).

<sup>6</sup> As above.

<sup>7</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Ratification Proclamation No.1082/2018 2018 (Maputo Protocol Ratification Proclamation).



international laws to the subject.<sup>8</sup> As the Maputo Protocol does not explicitly prohibit or allow reservations, article 19(c) of the Vienna Convention on the Law of Treaties (VCLT) which requires reservations to be compatible with a treaty's object and purpose<sup>9</sup> is the relevant legal rule to discuss the permissibility of Ethiopia's reservations to the Maputo Protocol.

## 1.2 Statement of the problem

Despite some progress in protecting women's rights in Ethiopia, the road to gender equality remains long and winding. Ethiopian women continue to be vulnerable as a result of deeply ingrained patriarchal attitudes in Ethiopian society, as well as inadequate legal frameworks.<sup>10</sup> They face a myriad of discriminatory socio-cultural practices on daily basis, including early marriages and domestic sexual violence.<sup>11</sup> On early marriage, the Ethiopian Demographic and Health Survey (EDHS) indicates that 40% of women aged 20-24 were married before they turned 18, while 60% of girls aged 15-19 were married before they turned 15.<sup>12</sup> Regarding violence in the private sphere, Ethiopia Central Statistical Agency research finds 34% of married women have been abused by their spouses in some form - emotional, physical, and sexual, with 10% reporting sexual abuse.<sup>13</sup> Likewise, a survey conducted by the World Health Organisation (WHO) found that 59% of Ethiopian women are victims of sexual violence committed by their partners.<sup>14</sup> Ethiopian legislations, such as the Revised Family Code (213/2000) and the Revised Criminal Code (414/2004), condone these discriminatory practices in one way or another. They contain loopholes in the requirements for minimum marriageable ages and women's rights in private spheres, which contribute to the proliferation of child marriages and domestic violence.

With this backdrop, the ratification of the Maputo Protocol was expected to lead to a change in policy and address practices that limit women's rights in the country. Ethiopia, however, makes the hope unrealistic by formulating several reservations and 'interpretative declarations' to the provisions of the Maputo Protocol, including those concerning child marriage and women's rights in the private sphere. Considering that the reservations and interpretative declarations pertain to

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<sup>8</sup> MA Baderin 'Recent developments in the African regional human rights system' (2005) 5 *Human Rights Law Review* 123.

<sup>9</sup> Vienna Convention on the Law of Treaties 1969 (VCLT) art 19.

<sup>10</sup> A Wright 'Closing the gender gap: Women's rights in Ethiopia and Mexico' (2020) 11 *Global Majority E-Journal* 47.

<sup>11</sup> E Kedir 'Major Gaps on the rights of women in Ethiopia' unpublished master's thesis, Lund University 2016 54.

<sup>12</sup> M Gavrilovic *et al* 'Child marriage and Ethiopia's productive safety net program: Analysis of protective pathways in the Amhara Region' (2020) UNICEF Office of Research – Innocenti 15.

<sup>13</sup> Central Statistical Agency 'Demographic and Health Survey' Ethiopia, (2016) 289 <https://dhsprogram.com/pubs/pdf/FR328/FR328.pdf> (accessed 14 September 2022).

<sup>14</sup> WHO 'Preventing intimate partner and sexual violence against women: taking action and generating evidence' (2010) 13.

the most relevant aspects of Ethiopian women's lives, it is imperative to determine if the reservations and interpretations are compatible with the Maputo Protocol's object and purpose, and if not, whether they should be severable.

### **1.3 Research Questions**

The main research question is whether Ethiopia's reservations and 'interpretative declarations' to the Maputo Protocol are compatible with the object and purpose of the document. Within this broad embrace, the subsequent issues are to be addressed:

- Why did Ethiopia enter reservations and 'interpretative declarations' to the Maputo Protocol?
- Do Ethiopia's reservations and 'interpretative declarations' go against the object and purpose of the Maputo Protocol?
- Has Ethiopia entered reservations and 'interpretative declarations' to analogous provisions in other HRTs?

### **1.4 Objective of the study**

#### **1.4.1 General objective**

The objective of this research is to assess the compatibility of Ethiopia's reservations and 'interpretative declarations' to the Maputo Protocol's object and purpose.

#### **1.4.2 Specific objective**

- To assess Ethiopia's reasoning for entering reservations and 'interpretative declarations' to the Maputo Protocol.
- To appraise whether Ethiopia's reservations and 'interpretative declarations' negate the normative significance of the Maputo Protocol in terms of protecting and promoting women's rights at the domestic level, thereby undermining its credibility and effectiveness.
- To determine whether Ethiopia's reservations and 'interpretative declarations' to the Maputo Protocol negate the unique feature of the Maputo Protocol that differs it from other HRTs.

### **1.5 Definition of terms**

#### **1.5.1 Reservation**

The term 'reservation' can be defined as a one-sided statement made by a state when it ratifies, signs, accepts, or approves a treaty, in order to exclude or modify certain provisions of it.<sup>15</sup>

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<sup>15</sup> VCLT art 2(1)(d).

Reservation therefore allows states to be parties to a treaty without retaining the legal effect of the provision to which they object.

### **1.5.2 Interpretative declaration**

The term 'interpretive declaration' connotes a unilateral statement of states that clarifies how they understand or interpret a particular provision of a treaty as opposed to excluding or altering it.<sup>16</sup> Accordingly, interpretative declarations serve the purpose of ascertaining or clarifying the scope of a treaty provision.

### **1.6 Methodology**

To achieve the objectives of the research, the researcher employs qualitative desk-based research methodology and blends both primary and secondary sources. The study uses primary sources such as the Maputo Protocol Ratification Proclamation, explanatory notes, minutes and other official documents and reports as well as relevant international laws including the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the VCLT. The study uses secondary data such as books, research studies, journals, and academic articles to supplement the primary data.

### **1.7 Literature review**

There is much written on the implementation and impact of the Maputo Protocol at the domestic level.<sup>17</sup> However, there are limited works on the assessment of whether the state's reservations and interpretative declarations are consistent with the object and purposes of the Maputo Protocol. Particularly, in the Ethiopian context, it is not yet well established whether Ethiopia's reservations and 'interpretative declarations' to the Maputo Protocol are compatible with its object and purpose.

Mujuzi argues in his paper that South Africa's reservations and interpretative declarations to the Maputo Protocol, must be clear and should not contradict with the Maputo Protocol's object and purpose.<sup>18</sup> He further insisted that South Africa's reservations made through invoking national laws are against the provision of the VCLT, which forbids states from invoking domestic laws to justify non-compliance with international obligations.<sup>19</sup>

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<sup>16</sup> GM Ferreira & MP Ferreira-Snyman 'The impact of treaty reservations on the establishment of an international human rights regime' (2005) 38 *The Comparative and International Law Journal of Southern Africa* 177.

<sup>17</sup> KS Ebeku 'A new hope for African women: overview of Africa's Protocol on Women's Rights' (2004) 13 *Nordic Journal of African Studies*; RI Danpullo 'The Maputo Protocol and the eradication of the cultural woes of African women: A Critical analysis' (2017) 20 *Recht in Afrika – Law in Africa – Droit en Afrique*.

<sup>18</sup> JD Mujuzi 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations' (2008) 12 *Law, Democracy & Development* 49.

<sup>19</sup> As above.

Birhanu in his article examines how Ethiopia's reservations and 'interpretative declarations' affect the implementation of the rights provided under the Maputo Protocol. In his paper, the writer identifies three implications of Ethiopia's reservation and 'interpretative declaration' to the Maputo Protocol. The first is reservations that have positive implications for women's rights, such as mandatory marriage registration and the right of married women to retain their husband's surname. The second is reservations with no adverse implications such as judicial decision for separation of marriage. Lastly, reservations that undermine the protection of women's rights, such as widow's right to inheritance, reduction of military expenditure, and the interpretive mandate of the African Court.<sup>20</sup> The paper, however, does not assess whether the reservations and 'interpretative declarations' are in line with the Maputo Protocol's object and purpose.

Ashine in her paper asserts that the main objective of the Maputo Protocol which is to protect women from all forms of sexual violence in the private and public spheres is undermined by Ethiopia's 'interpretative declaration' which has the effect of excluding the application of the provision to the private sphere.<sup>21</sup> According to her, Ethiopia's 'interpretative declaration' to article 4(2)(a) of the Maputo Protocol, which prohibits VAW in the public and private spheres, does not take into account the prevalence of marital rape in the country.<sup>22</sup> While pointing out a few pertinent issues regarding the compatibility of some reservations and declarations, the paper is largely concerned with assessing the impact of selected reservations on the realisation of women's rights in Ethiopia.

Referring to the response of the Ethiopian delegation to the question posed by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), Feyissa argued that Ethiopia's reservations to the Maputo Protocol are intended to strike a balance between the commitment to international norms and national priority.<sup>23</sup> The traditional norms invoked as a justification to enter reservation to the Maputo Protocol, for instance, sanctity of marriage for not criminalising marital rape and polygamy as an exception based on the culture and religion of the society reflect the discriminatory nature of customary laws and undermine the constitutional commitment of non-discrimination on the basis of sex.<sup>24</sup> Besides analysing the reasons that led to reservations, the article does not address the issues of compatibility.

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<sup>20</sup> A Birhanu 'Reflections on Ethiopia's reservations and interpretative declarations to the Maputo Protocol' (2019) 31 *Journal of Ethiopian Law* 150.

<sup>21</sup> EM Ashine 'Renewed commitment towards gender equality and women's rights in Ethiopia; promises and limits of ratification of the Maputo Protocol' 198.

<sup>22</sup> As above.

<sup>23</sup> D Feyissa 'The praxis of combating VAW in Ethiopia: A political interpretation' DIIS Working Paper (2020) 10 *Danish Institute for International Studies* 9.

<sup>24</sup> D Feyissa (n 23) 9.

The domestic implications of reservations and interpretative declarations have been studied, but there has been little assessment of their compatibility with the Maputo Protocol's object and purpose. Therefore, this study seeks to fill the gaps in literature by providing an in-depth analysis of the compatibility of Ethiopia's reservations and 'interpretative declaration' with the Maputo Protocol's object and purpose.

### **1.8 Significance of the study**

The study aims to contribute to the literature on Ethiopia's reservations and 'interpretative declarations' to the Maputo Protocol focusing on their compatibility with the object and purpose of the document. The study can be used by the House of Peoples' Representatives (HoPR) and other relevant organs such as the Minister of Foreign Affairs and the Ministry of Women, Children and Youth Affairs as a reference material to reconsider their decisions regarding reserved provisions of the Maputo Protocol.

The findings can also serve as a springboard for women rights advocacy groups to press efforts at lobbying the Ethiopian government to review and modify or withdraw the reservations and 'interpretative declarations'.

### **1.9 Scope and limitation of the study**

The study is limited to assessing the compatibility of Ethiopia's reservations and 'interpretative declarations' with the Maputo Protocol's object and purpose. The compatibility assessment focuses on those rights where most Ethiopian women and girls are likely to experience abuse, such as the prohibition of violence in the private sphere, minimum marriageable age, and mandatory registration of marriages.

### **1.10 Chapter outline**

The study consists of six chapters. Chapter one provides the background for the study. Chapter two explores the issue of reservations to HRTs in the light of the VCLT. Chapter three unpacks the object and purpose of the Maputo Protocol. Chapter four addresses the reasons for entering reservations and 'interpretative declarations' into the Maputo Protocol. The fifth chapter examines the compatibility of Ethiopia's reservations and 'interpretative declarations' with the Maputo Protocol's object and purpose. Chapter six is the conclusion and recommendations.

## Chapter 2: Reservations to human rights treaties and the compatibility test

### 2.1 Introduction

The Maputo Protocol neither prohibits nor specifies any type of permitted reservation. This does not imply that formulating reservations is forbidden, nor should it be taken to mean that states have unrestricted inherent rights to make any reservations they choose. It actually means that reservations are allowed so long as they are made in accordance with the reservation's regime established by the VCLT, which is claimed to be the laws of customary international law.

Pursuant to the VCLT, reservations to multilateral treaties are, in principle, allowed, and HRTs are no exception, even when they are silent on the issue. In applying the VCLT regime on reservations, however, the special characteristics of law-making treaties in general and HRTs in particular must be taken into account.<sup>25</sup> This is because, despite being written as a generic treaty applicable to all treaty agreements between nations, the VCLT contains a number of hidden assumptions that make remarkably little sense in the context of HRTs.<sup>26</sup>

First and foremost, the VCLT is written as if state interests are the only considerations: it deals with reciprocal treaty ties among states, where each state's right corresponds to its duty.<sup>27</sup> However, HRTs are primarily non-reciprocal<sup>28</sup> and do not imply a synallagma of duties among the parties.<sup>29</sup> Explaining this, the Human Rights Committee (HRC), the United Nations body responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), in its General Comment No 24 (HRC GC 24), stated that HRTs are 'not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place [there].'<sup>30</sup> The goal of HRTs is thus not to create 'mutual and subjective rights for high contracting parties, but to protect from violation of high contracting parties.'<sup>31</sup>

Second, as a natural consequence of treating reciprocity as the basis of a treaty, the VCLT is written in a manner that assumes states are solely responsible for ensuring a treaty's terms are followed; it

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<sup>25</sup> The United Nations Human Rights Committee General Comment 24 (1994) 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 (HRC GC 24) para 17.

<sup>26</sup> M Scheinin 'Human rights treaties and the [VCLT]— conflicts or harmony' (2005) 2 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD\(2005\)014rep-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2005)014rep-e)> (accessed 29 September 2022).

<sup>27</sup> Scheinin (n 26) 5.

<sup>28</sup> HRC GC 24 (n 25).

<sup>29</sup> J Fournie 'Reservations and the effective protection of human rights' (2010) 2 *Goettingen Journal of International Law* 445.

<sup>30</sup> HRC GC 24 (n 25).

<sup>31</sup> European Commission of Human Rights (EComHR), *Austria v Italy*, App no 788/60 (Commission Decision, 11 January 1961).

does not provide about the role courts or other monitoring bodies could play in assessing the permissibility of reservations.<sup>32</sup> The incompatibility of reservation is left to be determined along bilateral lines.<sup>33</sup> States, however, are reluctant to object to other states' reservations to HRTs because they lack a direct incentive or interest to do so given that they cannot use another state's reservations as an excuse to avoid their obligations.<sup>34</sup> Allowing HRTs monitoring bodies to assess the compatibility of dubious reservations is thus crucial to filling this gap.<sup>35</sup> In light of these and other apparent disjunction between the VCLT and the specific characteristics, or demands, of HRTs, attempts have been made by HRTs monitoring bodies and other actors including the International Law Commission (ILC) to strike a compromise by holding on to a general regime on reservations to treaties and, at the same time, keeping in view the unique features of HRTs.

In this chapter, the researcher discusses the rules governing the formulation of reservations to HRTs, with a focus on the application of the 'compatibility with the object and purpose test.' To this end, an approach that reconciles the VCLT regime with practices of HRTs monitoring bodies is employed. The ILC Guide to Practice on Reservations to Treaties (ILC Guide),<sup>36</sup> dubbed a 'Vienna plus regime,'<sup>37</sup> is especially beneficial for the researcher in achieving a successful compromise between the two regimes.

The chapter is organised in five sections, including this one. The second section is devoted to 'definitions' of reservations and interpretative declarations and attempts to distinguish them. Section three provides a brief overview of the VCLT rules governing formulation of reservations. The compatibility with the object and purpose of the treaty as a limitation of a reservation to a treaty forms section four. In this section, the researcher attempts to answer four main questions: first, how can the object and purpose of a treaty be determined; second, whether the object and purpose test is a subjective question of acceptability/opposability or an objective question of permissibility; third, who decides what 'incompatibility' means; and finally, what the legal effect of incompatibility with the object and purpose of a treaty is. The chapter comes to a close with a conclusion.

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<sup>32</sup> Scheinin (n 26) 5.

<sup>33</sup> Scheinin (n 26) 5.

<sup>34</sup> HRC GC 24 (n 25).

<sup>35</sup> R Baratta 'Should invalid reservations to human rights treaties be disregarded?' (2000) 11 *European Journal of International Law* 415–416.

<sup>36</sup> ILC Guide to Practice on Reservations to Treaties 2011 (ILC Guide).

<sup>37</sup> M Milanovic & LA Sicilianos 'The ILC's clever compromise on the validity of reservations to treaties' (24 February 2014) *European Journal of International Law: Talk* <https://www.ejiltalk.org/the-ilcs-clever-compromise-on-the-validity-of-reservations-to-treaties/> (accessed 21 September 2022).

## 2.2 Setting the scene: Conceptualising reservation and interpretative declaration

### 2.2.1 The concept of reservation

The VCLT regime on reservations is contained in articles 19-23, which, along with the definitional article, establishes what constitutes a reservation, the requirements it must meet to be accepted, and the consequences it will have. Article 2(1)(d) of the VCLT defines a reservation as follows:<sup>38</sup>

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

This definition implies at least four characteristics of a reservation. First, reservation is a ‘unilateral statement.’ Meaning, it is the reserving state's one-sided initiative.<sup>39</sup> Second, reservations should be formulated at the moment the treaty is signed, ratified, accepted, approved or acceded, not afterward.<sup>40</sup> Third, it is the effect that a reservation aims to achieve, not its wording or nomenclature that is crucial.<sup>41</sup> As the phrase ‘however phrased or named’ indicates, regardless of how it is formulated or named, the substance and content of the statement is relevant. Finally, the clause ‘whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state’ is the key element in establishing a statement as a reservation.

Given the preceding discussion, reservations appear straightforward in theory, but distinguishing them from other statements, such as interpretative declarations, has proven difficult in practice.<sup>42</sup> States often take advantage of the ambiguity to make obscure statements, which makes it difficult to determine whether the statement is a reservation or declaration.<sup>43</sup> Accordingly, there are instances where international tribunals have applied the VCLT's definition of ‘reservation’ to hold statements to be reservations when they were not labelled as such.<sup>44</sup> There is thus a need to clarify the difference between reservations and interpretative declarations. This is particularly relevant given that Ethiopia has modified or excluded certain provisions of the Maputo Protocol through its so-called ‘interpretative declarations’.

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<sup>38</sup> VCLT art 2(1)(d).

<sup>39</sup> S Wei ‘Reservation to treaties and some practical issues’ in SK Swan *et al* (eds) *Asian Yearbook of International Law* (2001) 109.

<sup>40</sup> ZI Cheema & SM Ismail ‘Law on reservations to human rights treaties: Historical development and its prospects’ (2021)10 *Academic Journal of Interdisciplinary Studies* 142.

<sup>41</sup> Wei (n 39)110.

<sup>42</sup> Wei (n 39)107.

<sup>43</sup> Wei (n 39)108.

<sup>44</sup> RW Edwards ‘Reservations to treaties’ (1989) 10 *Michigan Journal of International Law* 369.



### 2.2.2 Distinction between reservations and interpretative declarations

The VCLT does not mention, let alone regulate, interpretative declarations— a significant gap that the ILC Guide fills.<sup>45</sup> According to the ILC Guide, interpretative declarations are defined as a unilateral statement of a state or international organisation party to a treaty, ‘whereby that state or that organisation purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.’<sup>46</sup> The primary distinction between a reservation and an interpretive declaration thus lies on the intention of the state, rather than the nomenclature of the statement.<sup>47</sup> A statement of a state to exclude or modify certain provisions, regardless of what it is called, is considered a reservation. Conversely, it is not a reservation if a so-called ‘reservation’ merely clarifies the state's interpretation of a provision without excluding altering it.<sup>48</sup>

### 2.3 Formulation of reservations: Admissibility

The VCLT takes a liberal approach to the right to make reservations as a matter of principle.<sup>49</sup> However, there are three exceptions: the first is when a treaty expressly forbids reservations (article 19(a)); the second is when a treaty restricts reservations to particular matters (article 19(b)); and the third is when a reservation is inconsistent with the treaty's object and purpose (article 19(c)). The same approach is followed by the ILC Guide, which includes the concept of permissibility along with the three exceptions.<sup>50</sup> Article 19(a) and (b) can be viewed as a single exception to the right to formulate a reservation, namely if the reservation is expressly or implicitly prohibited by the treaty. Turning to the third exception, which is stated under article 19(C), it implies that where a reservation is not expressly or implicitly prohibited by the treaty, a state may formulate reservation as long as it is not incompatible with the object and purpose of the treaty. Unlike the first two exceptions, the object-purpose test applies even to treaties that do not address reservations in any way. In view of the total absence of any mention of whether reservations are permitted or prohibited in the Maputo Protocol, the object and purpose test is the only relevant measurement applicable to determining whether reservations made to its provisions are valid or not, so the discussion in the following sections is confined to this test.

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<sup>45</sup> A Pellet ‘The ILC Guide to Practice on Reservations to Treaties: A general presentation by the Special Rapporteur’ (2013) 24 *The European Journal of International Law* 1082.

<sup>46</sup> ILC Guide (n 36) guideline 1.2.

<sup>47</sup> HRC GC 24 (n 25) para 3.

<sup>48</sup> As above.

<sup>49</sup> Wei (n 39) 111.

<sup>50</sup> ILC Guide (n 36) guidelines 3.1 & 3.3.2.

## 2.4 Reservations' compatibility with the object and purpose

The 'object and purpose test' is the primary criterion for determining reservation permissibility, and it remains a key test for the purposes of HRTs.<sup>51</sup> It was first introduced by the International Court of Justice (ICJ) in the 1951 Advisory Opinion on Reservations to the Convention on Genocide (ICJ Opinion on Genocide).<sup>52</sup> While the test appears to be simple on the surface, its application has been fraught with controversy. Several questions remain unanswered about the test, including what the object and purpose of a treaty is, when a reservation becomes incompatible, who decides what 'incompatibility' means, and what the legal effect of incompatibility with the object and purpose of a treaty is. This section of the research, divided into five sub-sections, seeks to answer these questions.

### 2.4.1 Underlying rationale behind the test: maintaining balance between universality and integrity

The VCLT reservation regime has been 'shaped' by two visions of the international legal order: 'a world composed of autonomous states versus an integrated world order.'<sup>53</sup> Likewise, reservations-allowing HRTs take a similar compromising stance.<sup>54</sup> Having advantages and disadvantages, reservation must thus be approached with caution. On the plus side, reservation bolsters HRTs by increasing participation;<sup>55</sup> recognises global political and cultural diversity, and upholds a fundamental principle of international law, sovereign consent.<sup>56</sup> On the minus side, reservation casts doubt on states' motivations for becoming party to a treaty and, when extensive, jeopardises treaty integrity.<sup>57</sup> The VCLT and reservations-allowing HRTs thus attempt to strike a proper balance between the two values, universality and integrity. On the one hand, they seek to broaden the membership of relevant treaties by allowing the right to make reservations as a matter of principle.<sup>58</sup> On the other hand, because an excessively high level of flexibility may jeopardise the integrity and effectiveness of relevant treaties, they establish rules that limit states' rights to formulate reservations. The object and purpose test, which is provided as an automatic limitation

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<sup>51</sup> I Ziemele & L Liede 'Reservations to human rights treaties: From draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24 *European International Journal of Law* 1139.

<sup>52</sup> Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide ICJ (28 May 1951) (1951) ICJ Reports 59.

<sup>53</sup> JK Koh 'Reservations to multilateral treaties: How international legal doctrine reflects World vision' (1982) 23 *Harvard International Law Journal* 71.

<sup>54</sup> See for instance the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) art 28.

<sup>55</sup> K Zvobgo, W Sandholtz & Mulesky 'Reserving rights: Explaining human rights treaty reservations' (2020) 64 *International Studies Quarterly* 788.

<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> N Detsomboonrut 'The problem of the legal consequences of reservations incompatible with the object and purpose of the treaty' (2021) 2 *Thammasat Law Journal* 186.

of the freedom to make a reservation to a treaty, is at the heart of this limitation.<sup>59</sup> It was specifically designed to strike a balance between the desire to facilitate universality of human rights standards and the need for a common understanding of the content of those standards.<sup>60</sup> In sum, the object and purpose test, as described by UN Special Rapporteur Pellet, serves as ‘the pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of states.’<sup>61</sup>

#### 2.4.2 Defining object and purpose of a treaty

The first step in applying the compatibility test is determining the object and purpose of a treaty, which is not an easy task. To demonstrate this difficulty, Buffard and Zemanek describe a treaty's object and purpose as ‘truly something of an enigma.’<sup>62</sup> The VCLT, which uses the phrase ‘object and purpose’ eight times,<sup>63</sup> neither defines what a treaty's ‘object and purpose’ are, nor does it offer any guidelines or methods for doing so. It is thus critical to examine the approach taken by the ILC and the works of treaty monitoring bodies in order to define what it means by the object and purpose of a treaty.

According to the ILC Guideline 3.1.5, a reservation is said to be incompatible with the object and purpose of a treaty when ‘[...] it affects an *essential element of the treaty* that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty.’<sup>64</sup> The ILC noted that the ‘essential element does not have to be a specific provision, but could be a norm, a right, or a duty, as long as it is necessary to the overall tenor of the treaty and its exclusion or alteration would jeopardise the treaty's *raison d'être*.’<sup>65</sup> The *raison d'être* of a treaty is explained as its ‘*noyau fondamental*’ [fundamental core].<sup>66</sup> However, as the ILC itself admits, the Guideline 3.1.5 merely gives a direction and does not articulate ‘a clear criterion that can be directly applied in all cases.’<sup>67</sup> It, for example, does not explain how to identify what it refers to as ‘the essential element of a treaty.’<sup>68</sup>

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<sup>59</sup> CL Piper ‘Reservations to multilateral treaties: The goal of universality’ (1985) 71 *Iowa Law* 295.

<sup>60</sup> L Lijnzaad *Reservations to UN-human rights treaties: Ratify and ruin?* (1995) 3.

<sup>61</sup> A Pellet ‘Tenth report on reservations to treaties’ (2005) (UN Doc A/CN.4/558/Add.1) para 55.

<sup>62</sup> I Buffard & K Zemanek ‘The object and purpose of a treaty: An enigma?’ (1998) 3 *Austrian Review of International and European Law* 342.

<sup>63</sup> See VCLT arts 18, 19(c), 20 31, 33, 41, 58(1) & 60.

<sup>64</sup> ILC Guideline (n 36) guide 3.1.5.

<sup>65</sup> ILC Commentaries on the Guide to Practice on Reservations to Treaties (2011) Commentary on Guideline 3.1.5 Incompatibility of a reservation with the object and purpose of the treaty (Commentary on Guideline 3.1.5) para 14(a).

<sup>66</sup> Commentary on Guideline 3.1.5 (n 65) para 12.

<sup>67</sup> Commentary on Guideline 3.1.5 (n 65) para 15.

<sup>68</sup> Detsomboonrut (n 58) 193.

Likewise, although scholars and treaty monitoring bodies have proposed various solutions, none of them claim to be comprehensive.<sup>69</sup> ICJ, which established the test for the first time, did not provide comprehensive criteria that help to identify the object and purpose of a treaty.<sup>70</sup> However, a look at its case laws suggest that the purpose and object of a treaty can be identified among other things based on a treaty title, preamble, provisions that establish the treaty's objective, and the article of the treaty that reveals 'the major concern of each contracting party' when the treaty was signed.<sup>71</sup> However, as the ILC points out, using the ICJ list, compiled from its various case laws, as a 'method properly speaking' is problematic because it includes 'disparate elements' that are considered 'sometimes separately, sometimes together.'<sup>72</sup>

The HRC GC 24 also provides little guidance on how to identify the purpose and object of a treaty, as it merely explains categories of reservations that the Committee believes are incompatible with the object and purpose of ICCPR and its Optional Protocols. Without specifying the criteria it used, the HRC describes the ICCPR's object and purpose as follows:<sup>73</sup>

The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide efficacious supervisory machinery for the obligations undertaken.

The HRC also goes on to provide non-exhaustive lists of reservations that are not permissible, which include reservations that violate peremptory norms such as the prohibition of torture and arbitrary deprivation of life; reservations to the obligation to uphold and guarantee rights in a non-discriminatory manner; a reservation that rejects the Committee's jurisdiction to interpret the Covenant; and a reservation made to the ICCPR through the vehicle of the Optional Protocols.<sup>74</sup> A similar approach was taken by CEDAW Committee, which, without going into detail, stressed repeatedly that the overall impact of a group of reservations should be considered, as well as how each reservation impacts treaty integrity, in order to determine whether a reservation is incompatible with the Convention's purposes and objects.<sup>75</sup> Articles 2 and 16 are specifically stated as core provisions of CEDAW by the Committee.<sup>76</sup>

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<sup>69</sup> Detsomboonrut (n 58) 193.

<sup>70</sup> A Hamid 'Reservations to CEDAW and the implementation of Islamic family law: Issues and challenges' (2006) 1 *Asian Journal of International Law* 13.

<sup>71</sup> Commentary on Guideline 3.1.5.1 (n 65) para 3.

<sup>72</sup> Commentary on Guideline 3.1.5.1 (n 65) para 4.

<sup>73</sup> HRC GC 24 (n 25) para 7.

<sup>74</sup> HRC GC 24 (n 25) paras 8-20.

<sup>75</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation 20 (Reservations to the Convention) (1992). See also Amnesty International 'Reservations to the CEDAW: Weakening the protection of women from violence in the Middle East and North Africa region' (2004) 13 <https://www.amnesty.org/en/wp-content/uploads/2021/09/ior510092004en.pdf> (accessed 21 September 2022).

<sup>76</sup> CEDAW Committee General Recommendation 21 (Equality in marriage and family relations) (1994).

The preceding discussion demonstrates that there is no comprehensive approach to determining what constitutes the object and purpose of a treaty, nor is there consistent practice among HRTs monitoring bodies in this regard. Rather than specifying criteria to identify the object and purpose of a treaty, treaty monitoring bodies such as the CEDAW Committee and the HRC choose to highlight specific provisions in their respective treaties that they believe are not open to reservation.

Recognising the complexities, the ILC stated that articulating ‘a single set of methods’ for identifying the object and purpose of a treaty is difficult given the potential variations of situations and their proclivity to change over time.<sup>77</sup> Consequently, it recommends the determination to be made in light of the VCLT rules of interpretation, which *inter alia* require a treaty ‘to be interpreted in good faith in accordance with the ordinary meanings of its terms in their context and in light of its object and purpose.’<sup>78</sup> This includes, among other things, considering the preamble, annexes, and, where applicable, the parties' subsequent conduct.<sup>79</sup> Furthermore, the ILC Guidelines provide guidance in four specific scenarios, three of which deserve special mention here.<sup>80</sup> First, it states that when ‘determining whether a reservation is compatible with a treaty's object and purpose, the indivisibility, interdependence, and interrelatedness of the rights’ in a treaty shall be taken into consideration.<sup>81</sup> Second, it forbids formulating a reservation to a treaty provision that contains rights that cannot be derogated under any circumstance, except where the reservation is compatible with the essential rights and obligations of the treaty.<sup>82</sup> Lastly, the Guide stipulates that a reservation aimed at maintaining the integrity of specific internal law rules of the reserving state may be made only if it does not impact the crucial aspect of the treaty or its general tenour.<sup>83</sup>

In sum, the object and purpose of a treaty should be determined in good faith and on a case-by-case basis, including by reviewing its title, preamble, preparatory works, circumstances surrounding its conclusion, and, where appropriate, the parties' subsequent conduct. Once that is determined, it is critical to ensure that any reservations made to the treaty in question do not affect its object or purpose, or any clause vital to the attainment of the object or purpose, even if the clause is not part of the object or purpose of the treaty.<sup>84</sup>

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<sup>77</sup> Commentary on Guideline 3.1.5.1 (n 65) para 2.

<sup>78</sup> VCLT art 31.

<sup>79</sup> VCLT art 32.

<sup>80</sup> ILC Guideline (n 36) guides 3.1.5.4–3.1.5.7.

<sup>81</sup> ILC Guideline (n 36) guide 3.1.5.6.

<sup>82</sup> ILC Guideline (n 36) guide 3.1.5.4

<sup>83</sup> ILC Guideline (n 36) guide 3.1.5.5.

<sup>84</sup> DS Jonas & TN Saunders ‘The object and purpose of a treaty: three interpretive methods’ (2010) 43 *Vanderbilt Law Review* 609.

### 2.4.3 Nature of the object and purpose test: Permissibility or opposability?

Another point of contention when applying the object and purpose test is whether it is a subjective question of acceptability/opposability or an objective question of permissibility. The VCLT fails to provide a clear answer on this issue, resulting in the development of two opposing viewpoints: the permissibility and opposability doctrines.<sup>85</sup> According to proponents of the opposability doctrine, the test of compatibility is a subjective criterion of acceptability/opposability. They argue that the only real test for the admissibility of a reservation is acceptance by other states,<sup>86</sup> rather than the requirement that it be compatible with the treaty's object and purpose. The object and purpose test is regarded as 'a mere doctrinal assertion, which may serve as a basis for guidance to states regarding acceptance of reservations, but no more than that.'<sup>87</sup> Meaning, a reservation cannot be nullified for its failure to comply with the treaty's object and purpose unless other state parties express their objections within 12 months in light of article 20(4) of the VCLT, which endowed states with the power of objecting reservations which are *inter alia* incompatible with the object and purpose of a treaty.<sup>88</sup>

In contrast, the proponents of permissibility doctrine argue that the object and purpose test is a matter of permissibility. It is their contention that a reservation that is incompatible with a treaty's object and purpose is invalid from the outset, regardless of the reaction of other states.<sup>89</sup> The logical consequence of this approach is that incompatible reservations do not need to be objected to because they are void *ab initio* from the start.<sup>90</sup> Their impermissibility cannot also be remedied by the acceptance of other states because the reasons for their impermissibility — incompatibility with the treaty's object and purpose — apply *ipso facto* and cannot be reversed by a mere acceptance.<sup>91</sup> It was further argued that determining impermissibility pursuant to article 19 of the VCLT is a matter of treaty interpretation rather than a political issue influenced by state reactions.<sup>92</sup>

Though both doctrines' arguments have their own merit, the permissibility doctrine's point of view is becoming more widely accepted as a correct interpretation of the nature of the object and

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<sup>85</sup> Detsomboonrut (n 58) 196.

<sup>86</sup> HRC GC 24 (n 25) para 18.

<sup>87</sup> JM Ruda 'Reservations to treaties' (1977) 146 *Collected Courses of the Hague Academy of International Law* 182–190.

<sup>88</sup> R Moloney 'Incompatible reservations to human rights treaties: Severability and the problem of state consent' (2004) 5 *Melbourne Journal of International Law* 156.

<sup>89</sup> DW Bowett 'Reservations to non-restricted multilateral treaties' (1976) 48 *British Yearbook of International Law* 77.

<sup>90</sup> J Klabbbers 'Accepting the unacceptable? A new Nordic approach to multilateral treaties' (2000) 69 *Nordic Journal of International Law* 179.

<sup>91</sup> M Fitzmaurice 'On the protection of human rights, the Rome Statute, and reservations to multilateral treaties' (2006) 10 *Singapore Yearbook of International Law* 141.

<sup>92</sup> M Coccia 'Reservations to Multilateral Treaties on Human Rights' (1985) 15 *California Western International Law Journal* 24.

purpose test. The ILC Guide states unequivocally that an objective validity test under article 19 takes precedence over state subjective objections under article 20,<sup>93</sup> adding that the nullity of a reservation is determined objectively, rather than by state reactions.<sup>94</sup> Allowing a state party to assess the compatibility of a reservation, according to the ILC, would deprive article 19 of the VCLT of ‘any real impact because it allows states to validate a reservation that is not in conformity with the conditions for permissibility.’<sup>95</sup>

Most importantly, the permissibility doctrine has long been supported in the context of HRTs, owing to their distinguishing features.<sup>96</sup> For instance, the HRC noted that due to the unique nature of HRTs, ‘the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles.’<sup>97</sup> In standard treaties, which are reciprocal in nature, such as those governing commercial and territorial rights, states are expected to object to any reservations they perceive as affecting their interests. However, HRTs are not governed by reciprocity.<sup>98</sup> The lack of inter-state reciprocity, combined with the administrative resources required to track all reservations and determine their compatibility, thus deprives states of the incentive to object to questionable reservations to HRTs. The permissibility doctrine, which holds that any incompatible reservation is null and void regardless of the reactions of other states, is thus the appropriate approach for those seeking to preserve the integrity of HRTs.

That being said, the permissibility school has two major flaws: first, it fails to identify the entity with the authority to assess the permissibility of reservations, and second, it fails to explain the legal consequences of an incompatible reservation in relation to the reserving state's status as a treaty party.<sup>99</sup> The researcher attempts to provide insight into the organ competent to assess compatibility from the standpoint of HRTs here, leaving the issue of legal ramification of reservation to be addressed in the next subsection.

Despite state opposition, HRT monitoring bodies are taking on the duty of determining whether reservations are compatible.<sup>100</sup> In its GC 24, the HRC said it has the competence to assess the compatibility of state’s reservations with the object and purpose of the ICCPR.<sup>101</sup> Likewise, the

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<sup>93</sup> ILC Guideline (n 36) guide 4.5.1.

<sup>94</sup> ILC Guideline (n 36) guide 4.5.2(1).

<sup>95</sup> Commentary on Guideline 3.1.5 (n 65) para 6.

<sup>96</sup> R Goodman ‘Human rights treaties, invalid reservations, and state Consent’ (2002) 96 *American Journal of International Law* 537; Fournie (n 29) 445.

<sup>97</sup> HRC GC 24 (n 25) para 18.

<sup>98</sup> Fournie (n 29) 445.

<sup>99</sup> Fitzmaurice (n 90).

<sup>100</sup> S Dey ‘Legal Consequences of invalid reservations to human rights treaties’ (2018) 7 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3342723](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3342723) (accessed 23 August 2022).

<sup>101</sup> HRC GC 24 (n 25) para 18.

European Commission of Human Rights (ECHR), in *Temeltasch v Swizerland* Case, found itself competent to consider the validity of the reservations made by Switzerland.<sup>102</sup> In its decision, the ECHR stated that its competence to consider the validity of states' reservations stemmed from its jurisdiction over the interpretation and application of the convention.<sup>103</sup> Similarly, in *Girón et al v Guatemala* case, the Inter-American Court of Human Rights (IACHR) deems itself to be a competent body to assess the compatibility of Guatemala's reservation to the object and purpose of the American Convention on Human Rights.<sup>104</sup> Taking a similar route, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) considered itself competent in the *Bassiouny v Arab Republic of Egypt* case,<sup>105</sup> noting that Egypt's reservation that purported to limit its jurisdiction is incompatible with the object and purpose of the African Children's Charter.<sup>106</sup>

The researcher submits that the claim, made by HRTs monitoring bodies, that they have the power to determine the validity of reservations to treaties over which they assume monitoring responsibilities, flows from their very *raison d'être* and should be supported. They 'could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction vis-à-vis the states concerned.'<sup>107</sup> Some states, however, refuse to accept this fact. The reactions of some states, including France and the United States of America, to HRC GC 24, where the HRC, among other things, notes that it has the competence to decide the compatibility of reservation, are instructive in this regard.<sup>108</sup> The approach of HRTs monitoring bodies including HRC was perceived not only as a power grab and interference with states' sovereign rights, but also against the VCLT.<sup>109</sup>

To ease the tension, the ILC has decided to address the issue in its Guidelines, though in a remarkable compromise way. On the one hand, the ILC makes it clear that HRTs monitoring bodies have the authority to assess the permissibility of a reservation when they are exercising their functions.<sup>110</sup> On the other hand, it makes it clear that having authority to assess the permissibility of reservations made to the treaties establishing them does not allow them to go

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<sup>102</sup> S Hélaoui 'Cultural relativism and reservations to human rights treaties: The legal effects of the Saudi reservation to CEDAW' unpublished master thesis, University of Lund, 2004 40.

<sup>103</sup> Hélaoui (n 102) 40.

<sup>104</sup> Hélaoui (n 102) 41.

<sup>105</sup> As above.

<sup>106</sup> BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 145.

<sup>107</sup> Pellet (n 61).

<sup>108</sup> Pellet (n 61).

<sup>109</sup> Milanovic & Sicilianos (n 37).

<sup>110</sup> ILC Guideline (n 36) guide 3.2.1.



beyond what they could otherwise do.<sup>111</sup> For instance, the HRC's views would not suddenly become binding or equal to those of the European Court of Human Rights (ECtHR).

#### **2.4.4 Legal ramifications of an impermissible reservation**

The legal consequence of an impermissible reservation can be viewed from two angles: first, the consequence of an invalid reservation, and second, the consequence of the invalid reservation on the status of the reserving state as a treaty party. In section 2.4.2 above, the first dimension—which deals with the effects of invalid reservation—is covered. Despite ideological disagreement, it is established that the test of compatibility with a treaty's object and purpose is an objective test of permissibility, and any reservation that is incompatible with a treaty's object and purpose is regarded as void and without any legal force. This is especially true in light of the ILC Guideline and the practices of the HRTs monitoring bodies.

The second dimension, which deals with the legal ramifications of an invalid reservation on the reserving state's status as a treaty party, was a contentious subject. There are three competing doctrines in this regard: surgical, backlash, and severability.

The first point of view, known as the surgical doctrine, allows a reserving state's ratification to stand so that the state remains a party to the treaty, but it precludes the provisions to which the invalid reservation is related from applying to the reserving state.<sup>112</sup> It is referred to as 'surgical' because it entails removing the 'infected elements, which include the incompatible reservation and the associated provisions,' while leaving the undisputed sections to apply to the reserving state.<sup>113</sup> This approach is extremely problematic, as it jeopardises the object and purpose test's *raison d'être*, which is to protect the essential elements of a treaty that are necessary to its general tenor, by permitting a reserving state to be unbound by treaty clauses containing essential aspects.<sup>114</sup> By preventing the specific provision against which the invalid reservation was made from applying to a reserving state, the surgical doctrine would have the same effect as what the invalid reservation intended.<sup>115</sup> This permits a reserving state to earn a benefit it desires, notwithstanding the reservation's invalidity.

The second point of view, known as the 'backlash doctrine,' contends that the legal ramifications of an incompatible reservation render both the reservation and the consent of a reserving state

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<sup>111</sup> ILC Guideline (n 36) guide 3.2.1.

<sup>112</sup> Detsomboonrut (n 58) 202.

<sup>113</sup> I Cameron & F Horn 'Reservations to the European Convention: The Belilos Case' (1990) 33 *German Yearbook of International Law* 115.

<sup>114</sup> Detsomboonrut (n 58) 202.

<sup>115</sup> R MacDonald 'Reservations under the European Convention on Human Rights' (1988) 21 *Revue Belge de Droit International* 449.

invalid.<sup>116</sup> It is labelled as ‘backlash’ because ‘the invalidity of the reservation lashes back at the instrument of consent and invalidates it.’<sup>117</sup> Because the backlash effect renders a reserving state’s consent invalid, ‘the reserving state remains an outsider to the treaty.’<sup>118</sup> To justify their position, proponents of this doctrine rely on the principle of state consent, stressing that ‘states shall not be bound by a provision they have never given their consent to be bound by.’<sup>119</sup> This doctrine has both strong and weak sides. Its strength stems from its adherence to the notion of state consent.<sup>120</sup> Moving on to its flaw, the backlash effect, which invalidates a reserving state’s consent, hinders treaty membership expansion.<sup>121</sup> This flaw is magnified when it comes to treaties whose objective is to preserve the international community’s core interests, such as HRTs.<sup>122</sup>

The last one, namely the severability doctrine, argues that when an incompatible reservation is formulated, the reserving state will be bound to the treaty without the benefit of the reservation.<sup>123</sup> The nullity of the reservation, according to severability doctrine, means that it has no legal effect, as if it had never been formulated.<sup>124</sup> This approach is considered human rights-friendly because it maintains the integrity of a treaty by severing impermissible reservations while also achieving the goal of universality by requiring the reserving state to remain a party to such a treaty without the benefits of the reservation. It should come as no surprise, then, that many HRTs monitoring bodies have adopted it.<sup>125</sup> It was first judicially sanctioned by the ECtHR in the *Belilos v Switzerland* case, where it chose to hold Switzerland to the treaty without the benefit of its reservation.<sup>126</sup> The ECtHR, in *Loizidou v Turkey* case, also severed what it calls ‘disguised reservations’ by Turkey for incompatibility with the object and purpose of the European Convention.<sup>127</sup> In the same vein, the HRC, in its GC 24, stated that if states formulate an impermissible reservation they remain to be a party to the ICCPR without the benefit of their reservation.<sup>128</sup> The HRC also applied the severability doctrine in *Kennedy v Trinidad and Tobago* case, where it severed the reservation of Trinidad and Tobago to the Optional Protocol to the

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<sup>116</sup> Detsomboonrut (n 58) 202; Cameron & Horn (n 113) 115.

<sup>117</sup> Cameron & Horn (n 113) 115.

<sup>118</sup> As above.

<sup>119</sup> J Goldsmith & D Levinson ‘Law for states: International law, constitutional law, public law’ (2009) 122 *Harvard Law Review* 436–437.

<sup>120</sup> Moloney (n 80) 159.

<sup>121</sup> As above.

<sup>122</sup> As above.

<sup>123</sup> L Mullins ‘The ramifications of reservations to human rights treaties’ (2020) 8 *Groningen Journal of International Law* 152.

<sup>124</sup> Cameron & Horn (n 113) 115.

<sup>125</sup> Detsomboonrut (n 58) 206.

<sup>126</sup> *Belilos v Switzerland* ECHR (29 April 1988) Ser A 132.

<sup>127</sup> *Loizidou v Turkey* ECHR (23 March 1995) Ser A 310, para 96; See Baratta (n 35) 415.

<sup>128</sup> HRC GC 24 (n 25) para 18.

ICCPR.<sup>129</sup> The severability approach is also employed by the IACtHR in several occasions to severe reservations that failed to meet the object and purpose test.<sup>130</sup>

The above analysis shows that there is a noticeable uptake on severability as a doctrine by HRTs monitoring bodies. This is because of its facilitating effect on the expansion of membership of a treaty. This approach of HRTs monitoring bodies, however, is not without criticism. States have voiced their opposition saying that the severability approach represents a departure from the principle of state consent.<sup>131</sup> France and the United States, for example, were the most vocal opponents of the HRC GC 24.<sup>132</sup> Likewise, the ECtHR has been chastised for adopting the doctrine of severability.<sup>133</sup>

Claiming to put the debate to rest, the ILC developed what it refers to as ‘the principle of a middle solution.’<sup>134</sup> According to this hybrid approach, the ramification of invalid reservation on the reserving state’s status as a party to the treaty depends on the intention expressed by the reserving state, which has two options: remain a party to the treaty without the benefit of the invalid reservation, or declare that it no longer considers itself bound by the treaty.<sup>135</sup> The ILC Guide operates under the rebuttable presumption that, absent express declaration to the contrary, a state intends to be bound by a treaty it ratified, even in the event that its reservation is found to be invalid.<sup>136</sup>

Though the presumption of severability caused disagreement among states - those who supported it like South Africa, Mexico, and Nordic countries and those who opposed it such as Germany Italy, Portugal, Egypt, United Kingdom, Thailand, and United States of America-<sup>137</sup> the Guideline has been hailed as a brilliant compromise that balances the principle of state consent with the integrity of treaties.<sup>138</sup>

## 2.5 Conclusion

This chapter addressed issues concerning the formulation of reservations to HRTs, including under what circumstance reservation could be made, what limitations apply to the right to formulate reservations, and which subjects are best suited to evaluate the validity of reservations, as well as

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<sup>129</sup> As above.

<sup>130</sup> *H v T and T* IACHR (1 September 2001) Ser C/ 82 para 49; See for more Detsomboonrut (n 58) 207.

<sup>131</sup> Mullins (n 123)160.

<sup>132</sup> Ziemele & Liede (n 51) 1137.

<sup>133</sup> Mullins (n 123) 160.

<sup>134</sup> Commentary on Guideline 4.5.3 (n 65) para 1.

<sup>135</sup> ILC Guideline (n 36) Guideline 4.5.3 para 1.

<sup>136</sup> ILC Guideline (n 36) Guideline para 49.

<sup>137</sup> See ILC ‘Comments and observations received from Governments: Document of the sixty-third session’ (2011) [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_639.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_639.pdf) (accessed 23 September 2022).

<sup>138</sup> Milanovic & Sicilianos (n 37).

the consequences of invalid reservations, all while taking into account the VCLT, the ILC Guideline, and the practices of HRT monitoring bodies. It is noted that pursuant to the VCLT, reservations to multilateral treaties are, in principle, allowed and HRTs are not exempt from this, even where they are silent on the matter. However, there are three exceptions that circumscribe the right to formulate reservation: the first is when a treaty expressly forbids reservations; the second is when a treaty restricts reservations to particular matters; and the third is when a reservation is inconsistent with the treaty's object and purpose. The first two tests only apply when a treaty contains provisions regarding reservations, but as a default rule, the object-purpose test will apply even if there is no mention of reservations in a treaty. In light of the total absence of any mention of whether reservations are permitted or prohibited in the Maputo Protocol, the object and purpose test is the only relevant measurement applicable. Although there is widespread controversy surrounding the application of this test, the researcher, based on an analysis of the different approaches proposed by different institutions and scholars, and particularly a consideration of the ILC Guidelines and the practices of HRT monitoring bodies, draws the following conclusions that are relevant to the next chapter discussion. First, the object and purpose of a treaty refers to an essential element of the treaty that is necessary to its general tenor. It should be determined in good faith, taking into account *inter alia* its title, preamble and articles that establish the objective of the treaty, if any. Second, a reservation that runs foul of the 'object and purpose' test is invalid from its inception, regardless of the reaction of other states. Finally, treaty monitoring bodies are entitled to assess the invalidity of the reservation and the silence of the state to that assessment leads to a presumption that the reserving state consents to the severance of that reservation. In the case of HRTs, these conclusions are particularly true because, first, HRTs have special characteristics that align with the conclusions drawn and second, the practices of HRTs monitoring bodies support the conclusions.

## Chapter 3: Object and purpose of the Maputo Protocol

### 3.1 Introduction

The Maputo Protocol was adopted on 11 July 2003 by the AU in accordance with article 66 of the African Charter to supplement the latter's protections for women's human rights. It came into effect 18 months after it was adopted; making it the quickest African human rights instrument to enter into force.<sup>139</sup> Although not perfect, it is referred to as a 'bill of rights for African women' because it unequivocally upholds the rights of women as outlined in HRTs adopted before it, elaborates on the particular and distinctive experiences of African women,<sup>140</sup> and establishes the bar for women's human rights in Africa.<sup>141</sup>

The purpose of this chapter is to lay the groundwork for the subsequent chapters' discussions. In four sections, including this one, it elaborates on the Maputo Protocol provisions related to the dissertation's thematic areas. Section two elaborates the distinguishing characteristics of the Maputo Protocol. The third section discusses its object and purpose. The final section is the conclusion.

### 3.2 Unique features of the Maputo Protocol vis-a-vis African Charter and CEDAW

In comparison with other HRTs like CEDAW and the African Charter, the Maputo Protocol shares many characteristics, but also has peculiar features. The Maputo Protocol, as a supplement to the African Charter, reaffirms the African Charter's indivisibility and interdependence approach to human rights by recognising both civil and political rights, as well as socio-cultural rights, as described above.<sup>142</sup> It emphasises and expands on the rights enshrined in the African Charter while also introducing novel provisions, such as the right to food security and adequate housing,<sup>143</sup> which are not expressly stated in the African Charter but were read into it through interpretation by the African Commission on Human and Peoples' Rights (African Commission).<sup>144</sup> The Maputo Protocol further aims to fill the void left by the African Charter's failure to adequately address issues concerning women's rights. Women's rights were mentioned in the African Charter only once, in article 18, and even then, they were included alongside the rights of other vulnerable

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<sup>139</sup> Equality Now 'The Maputo Protocol: protecting African women's rights' [https://www.equalitynow.org/promoting\\_african\\_womens\\_rights/](https://www.equalitynow.org/promoting_african_womens_rights/) (accessed 21 September 2022).

<sup>140</sup> A Budoo-Scholtz 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18 *African Human Rights Law Journal* 61-62; FJ Mohamed 'African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign' in R Musa *et al* (eds) *Breathing life into the African Union Protocol on Women's Rights in Africa* (2006) 15.

<sup>141</sup> F Viljoen *International human rights law in Africa* (2012) 253.

<sup>142</sup> As above.

<sup>143</sup> F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 18.

<sup>144</sup> *Social and Economic Rights Action Centre (SERAC) v Nigeria*, Communication 155/96, para 60.

groups, such as the elderly, children, and the disabled, which proved problematic and insufficient.<sup>145</sup> The African Charter also fails to define gender discrimination and address related offenses such as child marriage and female genital mutilation (FGM).<sup>146</sup> In a similar vein, while emphasising the importance of traditions in African society, the African Charter neglects to include harmful traditional practices (HTP) that infringe women's rights.<sup>147</sup> In an attempt to fill the African Charter's gaps, the Maputo Protocol establishes criteria to distinguish cultural values that should be preserved from those that should be changed or eliminated, defining 'positive African cultural values' as 'those founded on the principles of equality, peace, freedom, dignity, justice, solidarity, and democracy.'<sup>148</sup> As a result, it calls for the prohibition of HTPs that endanger women's health and general well-being, as well as all other practices that emphasise the inferiority or superiority of one sex over the other, including, wife abuse, child marriages, denial of property rights and inheritance.

In comparison to CEDAW, the Maputo Protocol broadens the scope of protected rights beyond what is provided there and adds specificity to rights already protected by CEDAW.<sup>149</sup> It is worth noting that it highlights the importance of the private sphere as a critical domain in which rights must be realised.<sup>150</sup> It is the first HRT to explicitly urge for the abolition of FGM;<sup>151</sup> to address HIV/AIDS from a human rights perspective by guaranteeing the right to self-protection and protection against sexually transmitted infections,<sup>152</sup> as well as the right to be informed of one's own and one's partner's HIV status;<sup>153</sup> and to provide a woman's right to an abortion in cases of incest, incest, and when the continuation of the pregnancy threaten the mother's life.<sup>154</sup> National legislation to combat domestic violence and the criminalisation of marital rape are both required by the Maputo Protocol as a necessary manifestation of the prohibition of VAW and 'unwanted or forced sex' in private setting.<sup>155</sup> The Maputo Protocol also reiterates the necessity of providing women refugees with international law protection and goes into greater detail regarding protection of women in armed conflict than CEDAW does.<sup>156</sup> The Maputo Protocol dictates that the

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<sup>145</sup> Viljoen (n 143) 19.

<sup>146</sup> M Nsibirwa 'A brief analysis of the Protocol to the African Charter on Human and People's Rights of Women' (2001) 1 *African Human Rights Law Journal* 41.

<sup>147</sup> F Banda 'Blazing a Trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 79.

<sup>148</sup> As above, see also Maputo Protocol preamble para 10.

<sup>149</sup> Viljoen (n 143) 21.

<sup>150</sup> Viljoen (n 143) 21.

<sup>151</sup> Viljoen (n 143) 21.

<sup>152</sup> Banda (n 147) 89.

<sup>153</sup> Maputo Protocol 14(1)(e).

<sup>154</sup> Maputo Protocol 14(2)(c).

<sup>155</sup> Banda (n 147) 79.

<sup>156</sup> Banda (n 147) 81.

‘minimum age of marriage’ must be 18 years old, and all marriages must ‘be recorded in writing.’<sup>157</sup> More specifically than CEDAW, which restricted some socio-economic rights to ‘rural women,’ it broadens the scope of socio-economic rights.<sup>158</sup> The Maputo Protocol is also notable for its recognition that, even among women, some are more vulnerable due to the death of a spouse, old age, disability, and poverty and, as such, require special protection.<sup>159</sup> Taking a distinctly transformative stance, the Maputo Protocol also urges state parties to take ‘corrective’ and ‘specific positive’ action, including the adoption of measures that may favour women over men, such as electoral quotas, to ensure substantive equality.<sup>160</sup> These and other features of the Maputo Protocol distinguish it from the CEDAW Convention's normative protection, but the CEDAW Committee tries to fill the normative gaps in the CEDAW through its general comments, resolutions, concluding observations, and recommendations, allowing one to argue that the distinction between the Maputo Protocol and CEDAW are more apparent than real. However, even if the CEDAW Committee's clarifications are highly persuasive, they do not constitute binding obligations, so the Maputo Protocol, which makes those ‘clarifications’ unequivocally binding, should be praised as it represents an undeniable normative step forward in the protection of women's rights.

### **3.3 Object and purpose of the Maputo Protocol**

The question of whether Ethiopia's reservations and ‘interpretative declarations’ to the Maputo Protocol are ‘compatible’ with the Maputo Protocol's object and purpose hinged on the question of what its object and purpose are. It is thus important to identify the purpose and object of the Maputo Protocol. As elaborated in the previous chapter, the phrase ‘object and purpose’ refers to the specific ends sought by a treaty, as well as the logic and normative character of the rights and obligations established by the treaty to achieve those ends. Thus, to understand the Maputo Protocol's object and purpose, we must first ask why it was adopted in the first place.

The overarching goal that motivated the adoption of the Maputo Protocol, as can be inferred from its preamble, was the concern that, despite international HRTs having been ratified, African women and girls continue to suffer discrimination and harmful practices.<sup>161</sup> Responding to these assumptions and acting as a change agent, the Maputo Protocol seeks to achieve two interconnected goals. The first goal is to improve the implementation and fill normative gaps in

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<sup>157</sup> Maputo Protocol art 6(b).

<sup>158</sup> Viljoen (n 143) 22.

<sup>159</sup> Equality Now (n 139).

<sup>160</sup> Viljoen (n 143) 23.

<sup>161</sup> Viljoen (n 143) 30; See also Maputo Protocol preamble para 12.

existing women's rights standards, which is expected to contribute to the achievement of the second ultimate goal, which is to combat discrimination against women in Africa.

To begin with the first, the Maputo Protocol seeks to improve African women's actual enjoyment of relevant rights by consolidating existing women's rights standards for African states, allowing the governments to meet their agreed-upon commitments, and expounding on specific and unique experiences of African women through the introduction of innovative provisions that protect women's rights. In this light, it is reasonable to conclude that the Maputo Protocol seeks to strengthen the protection of women's rights already provided by existing instruments such as CEDAW and the African Children's Charter. States cannot, therefore, compromise their existing obligations by reserving the Maputo Protocol, as this would contradict the Maputo Protocol's goal of reinforcing existing standards.<sup>162</sup> The non-regression principle of international human rights law, as codified in article 31 of the Maputo Protocol, which prioritises the application of any pre-existing regulations more favourable to the realisation of women's rights and may be found, for example, in the domestic legislations of state parties or any other international or regional treaties in force for the state parties, serves to further solidify this interpretation. A closer examination of article 31 reveals two key messages: first, the Maputo Protocol favours improved and expanded protection for women; and second, it subtly rejects any regressive measure that jeopardises previously established protection. As a result, any actions taken in relation to the Maputo Protocol, whether ratification or other related actions such as reservations and interpretative declarations, must not diminish the existing protection provided by HRTs applicable to concerned states such as CEDAW and the African Children's Charter.

Turning to the Maputo Protocol's overall objective and purpose, as implied by its preamble and substantive provisions, is the abolition of all forms of discrimination against women. All of the rights enshrined therein, which include civil, political, economic, social, and cultural rights, are woven together by the principle of equality and non-discrimination, which runs through them like a thread in confronting the continual discrimination, abuse and marginalisation of African women. The words equality and non-discrimination appear 24 times in the Maputo Protocol, either separately or together, including 9 times in the preamble and 15 times in the substantive provisions, demonstrating this. Article 2, the Maputo Protocol's core provision aimed at eliminating discrimination against women, calls on member states to take the necessary legislative, administrative, and other measures to eradicate all forms of discrimination against women, including corrective and positive action in areas where discrimination against women exists in law

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<sup>162</sup> Budoo-Scholtz (n 140) 71; Banda (n 147) 445.



and in practice. The goal of achieving gender equality is specifically realised in the elimination and modification of harmful practices that risk the health and general well-being of women, as well as any other practices that are founded on the notion that one sex is superior to the other, as reflected in articles 2(1)(b), 2(2) and 5 of the Maputo Protocol. To remove any doubt about its stance on HTP, the Maputo Protocol states that women have equal rights as men in marriage and divorce and re-emphasises the minimum age for marriage as eighteen years. As emphasised in the African Commission and ACERWC joint general comment, the principle of gender equality and the elimination of discrimination serves as the foundation for interpreting all the Maputo Protocol's provisions, many of which recognise gender inequality as a root cause of women's discrimination. As a result, reservations to the Maputo Protocol's core provision, article 2, or to any other provisions that give specific application to its object and purpose, that is, fighting discrimination, are not permitted.

In light of the foregoing, the following reservations to the Maputo Protocol provisions are incompatible with its object and purpose, and thus are not permissible:

- ❖ Any reservation to the entire sub-provisions or a portion of article 2 of the Maputo Protocol, which is its core provisions aimed at eliminating gender discrimination;
- ❖ Any reservation made to any other provision or clause that is essential to the achievement of the Maputo Protocol's object or purpose, namely, fighting discrimination, even if that specific provision or clause is not itself part of the object or purpose;
- ❖ Reservation to any Maputo Protocol's provision or clause that undermines existing women's protection in a state's domestic legislation or other global or regional treaties in force for that state party, even if that specific provision or clause has nothing to do with article 2, which prohibits discrimination against women, because the Maputo Protocol seeks to improve, not undermine, existing protection.

### **3.4 Conclusion**

The Maputo Protocol, adopted by the AU as a supplement to the African Charter to address the long-standing issue of gender-based discrimination, marginalisation, and abuse on the African continent, includes provisions that strengthen and expand the protection of women's rights provided by existing HRTs such as the CEDAW while taking into account the unique aspects of African women and girls, earning it the moniker 'bill of rights for African Women.' And, because the Maputo Protocol's object and purpose is to eliminate all forms of discrimination against women by strengthening and supplementing existing women's rights standards, a reservation that seeks to undermine this would be contrary to its object and purpose, and thus is not permissible. This

includes reservations to article 2 of the Maputo Protocol, which is its core provision aimed at eliminating gender discrimination, reservations to other provisions that give specific application to the Maputo Protocol's object and purpose of fighting discrimination, and any other reservation under the document, even if it has nothing to do with article 2, when it has not previously been made in respect of the same rights under other HRTs applicable to the state concerned.

## Chapter 4: Unpacking the justification behind Ethiopia's reservation and 'interpretative declaration' to the Maputo Protocol

### 4.1 Introduction

The purpose of this Chapter is to explain why Ethiopia ratified the Maputo Protocol and to unpack the reasons that underpin its unilateral statements (reservations and 'interpretive declarations') to articles 4(2)(a), 6(b) and 6(d) of the Maputo Protocol. The Maputo Protocol Ratification Proclamation, the minutes of the Parliamentary Standing Committees, the minutes of the Women Parliamentarians Caucus, the MoFA explanatory note, and other relevant documents are examined to that end. Before delving into these issues, it's worth noting that Ethiopia's so-called 'interpretative declarations' on articles 4(2)(a) and 6(b) are reservations, not interpretative declarations. An interpretative declaration, as defined in Chapter 2, is a statement that seeks to elaborate or clarify the meaning or scope of specific treaty provisions without excluding or modifying them.<sup>163</sup> However, Ethiopia's so-called 'interpretative declarations' on articles 4(2)(a) and 6(b) have the effect of modifying the scope of Ethiopia's Maputo Protocol obligations. The 'interpretative declaration' on article 4(2) (a) (the prohibition of violence) goes beyond simply clarifying the provision and instead limits its legal effect to the public sphere.<sup>164</sup> This excludes the Maputo Protocol from addressing rape committed within marriage. Likewise, the 'interpretative declaration' concerning the provision that sets 18 as the legal marriageable age<sup>165</sup> indicates that Ethiopia applies the provision in accordance with its national law, which allows dispensation from the legal marriageable age. This 'interpretative declaration' unequivocally modifies the provisions of the Maputo Protocol which deliberately omit any exception to the minimum age of marriage. In light of this, Ethiopia's 'interpretative declarations' regarding articles 4(2)(a) and 6(b) of the Maputo Protocol purport to exclude and modify the legal effect of the provisions, and must therefore be regarded as reservations.

The chapter is organized into four sections, one of which is this one. The second section examines the factors that influenced Ethiopia's decision to ratify the Maputo Protocol. The justifications provided for making the unilateral statements, will be examined in section three. The conclusion is the final section.

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<sup>163</sup> Cheema & Ismail (n 40) 141.

<sup>164</sup> Maputo Protocol Ratification Proclamation art 3(2)(a).

<sup>165</sup> Maputo Protocol Ratification Proclamation art 3(2)(b).

## 4.2 The ratification of the Maputo Protocol by the government of Ethiopia

Whilst the Maputo Protocol Ratification Proclamation does not specify the reasons for the ratification of the Maputo Protocol, the discussions preceding its ratification provide some insight into why it was ratified. The explanatory note of the Ministry of Foreign Affairs (MoFA) and the minutes of the Women's, Children's, and Youth's Affairs Standing Committee and the Legal, Justice, and Democracy Affairs Standing Committee (Standing Committees), for instance, inform the following reasons as to why Ethiopia should ratify the Maputo Protocol. First, the ratification of the Maputo Protocol assists the state in achieving the objectives of the second National Human Rights Action Plan of Ethiopia.<sup>166</sup> Second, the ratification will serve as an act of compliance with the recommendation of the African Commission, which urges Ethiopia to ratify the Maputo Protocol.<sup>167</sup> Third, it serves as a guideline to protect women and girls from various forms of violence while stimulating the country's commitment to achieve gender equality.<sup>168</sup> Fourth, the Maputo Protocol is in compliance with national legislations, meaning that no additional obligations, budgets, or institutional structures are required.<sup>169</sup> Fifth, the ratification of the Maputo Protocol will not undermine the country's traditions and cultural beliefs, as the HoPR proposed reservations and 'interpretative declarations'.<sup>170</sup> Sixth, it supports the achievements of the state in implementing the United Nations (UN) and AU campaigns aimed at promoting girls' education and eradicating child marriage and FGM.<sup>171</sup> As a seventh reason, since the periodic report will be similar to the one that will be submitted to the CEDAW Committee and the African Commission, preparing the periodic report will not be an additional burden.<sup>172</sup> Finally, since the country is the host of the headquarters of the AU, and being under international pressure to ratify core HRTs, the ministry states that the ratification will contribute to the reputation and image of the country.

It is reflected from the above justifications that the country is not willing to ratify HRTs that contradict with the national laws, and traditional beliefs. The justifications given by the MoFA and the Standing Committees also indicate a hesitancy to accept HRTs that impose additional and costly obligations. Moreover, it is apparent from the documents that ratification of HRTs is more

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<sup>166</sup> Ministry of Foreign Affairs 'Explanatory note to the Draft Proclamation to Ratify the Maputo Protocol' (2017) 9.

<sup>167</sup> As above.

<sup>168</sup> MoFA Explanatory Note (n 166) 10.

<sup>169</sup> The Women's and Children's Affairs Standing Committee & the Legal, Justice, and Democracy Affairs Standing Committee to the HoPR (Standing Committees) 'Conclusions and recommendations of the joint committee on the draft proclamation to ratify the Maputo Protocol' (2018) 2; MoFA Explanatory Note (n 166) 10.

<sup>170</sup> As above.

<sup>171</sup> MoFA Explanatory Note (n 166) 10.

<sup>172</sup> MoFA Explanatory Note (n 166) 10.

closely linked to the reputation of the country than to the situation of human rights. In the following section, the study explores the justifications that prompted Ethiopia to enter reservations to the Maputo Protocol.

### **4.3 Rationale behind Ethiopia's reservations to the Maputo Protocol**

With its extensive reservations to the provisions of the Maputo Protocol, Ethiopia depicts both its desire to become party to the treaty while at the same time seeking to exclude certain provisions perceived as being antithetical to its traditions and national laws. The purpose of this section is to provide an overview of the justifications that Ethiopia raised in entering reservations to the novel provisions of the Maputo Protocol.

#### **4.3.1 Mandatory registration of marriage**

Ethiopia has placed reservation on article 6(d) of the Maputo Protocol, which states that for a marriage to be legally recognised, it must be recorded and registered in line with national laws.<sup>173</sup> Article 28 of the Family Code and Registration of Vital Events and National Identity Card Proclamation No. 760/2012 requires every marriage, including a customary and religious marriage to be registered before the Officer of Civil Status. Moreover, article 94 of the Family Code requires marriage to be proved by presenting a legally valid certificate of marriage drawn up at or after the marriage ceremony.<sup>174</sup> The above requirements for marriage registration appear to be the same as article 6(d) of the Maputo Protocol. Nevertheless, the MoFA explanatory note stated that despite the provisions of the Proclamation and the Family Code, failure to register a marriage does not affect its validity. Therefore, the reservation over this particular provision is justified by the fact that every marriage that fulfils the essential conditions stipulated in the Family Code is valid regardless of registration.<sup>175</sup>

In support of this reservation, some scholars contend that compulsory marriage registration may negatively affect women who are legally married under customary or religious laws without any registration.<sup>176</sup> They therefore assert that this particular reservation prevents the dissolution of unregistered marriages, which most Ethiopian women are involved in. On the contrary, others argued that the mandatory registration of marriage is a vital step in eradicating early marriages, which are usually formed under customary and religious law.<sup>177</sup>

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<sup>173</sup> Maputo Protocol Ratification Proclamation 3(1)(b).

<sup>174</sup> The Revised Family Code of Ethiopia (the Family Code) art 94.

<sup>175</sup> MoFA Explanatory Note (n 166) 4.

<sup>176</sup> Birhanu (n 20) 139.

<sup>177</sup> Ashine (n 21) 200.

In this respect, it is pertinent to emphasise that as an instrument adopted to address the plight of African women, its provision on mandatory marriage registration was not incorporated to handicap those married under religious or customary laws. The provision instead envisaged to eradicate child marriages and ensure that the consent of the intending spouse is free and informed. Accordingly, the researcher echoed the second point of view that the reservation to article 6(d) of the Maputo Protocol contributes to the prevalence of child brides in Ethiopia.

#### **4.3.2 Prohibition of violence against women in the private sphere**

Among other things, the Maputo Protocol brings about progress by eradicating all forms of VAW, both in the public and private sphere. VAW is defined in article 4(a) of the Maputo Protocol in a comprehensive manner, which includes acts or threats of violence in both public and private realm.<sup>178</sup> Despite the provision not explicitly mentioning marital rape, the prohibition of forced and unwanted sex in the private sphere can be considered as a direct reference to marital rape.<sup>179</sup> Moreover, the African Commission in its Guidelines for Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines) affirmed that the definition of sexual violence applied regardless of the victim's relationship with the perpetrator.<sup>180</sup>

Despite the prevalence of marital rape in Ethiopia, article 620 of the Criminal Code criminalises rape committed outside wedlock, clearly excluding rape perpetrated by a marriage partner. Against this backdrop, Ethiopia placed a reservation on article 4(2)(a) of the Maputo Protocol stating that:<sup>181</sup>

article 4(2)(a) shall be applicable in accordance with article 620 of the Criminal Code of Ethiopia that defines rape to be a forced sexual intercourse that occurs out of wedlock.

During the discussion preceding the ratification of the Maputo Protocol, two pertinent questions were posed in relation to this particular reservation. The first is, according to articles 9(4) and 13(2) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), international agreements ratified by Ethiopia are part and parcel of the laws of the land, and Chapter three of the Constitution shall be interpreted in conformity with international HRTs adopted by Ethiopia, which places the Maputo Protocol on an equal footing with national legislations including the Criminal and Family Code. So what legal basis is used to interpret the provisions of the Maputo Protocol in conformity with the Criminal Code? was the first question.<sup>182</sup>

<sup>178</sup> Maputo Protocol art 4(2)(a).

<sup>179</sup> K Stefiszyn & A Prezanti 'The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: Advocacy toll' *ABC Press* (2009) 28.

<sup>180</sup> The Guidelines on Combating Sexual Violence and its Consequences in Africa (2017) 15.

<sup>181</sup> Maputo Protocol Ratification Proclamation art 3(2)(a).

<sup>182</sup> Minutes of the Women Parliamentarians caucus 2018 12.

Further, given the significance that criminalising sexual violence in the private sphere has on the realisation of gender equality and women's empowerment, why should the government of Ethiopia amend its national law to better protect and promote women's rights instead of entering a reservation? Was the second question.<sup>183</sup>

In response to the questions and entering the reservation, it was argued that even though the Criminal Code neither encourages nor reinforces marital rape, there is no applicable law that applies to rapes committed inside of marriage, preventing the provision from being implemented in Ethiopia.<sup>184</sup> However, it is argued that the reservation will likely be withdrawn if a law that criminalises marital rape is adopted.<sup>185</sup> There was also an argument that marital rape is a foreign concept that cannot be implemented in Ethiopia, as more than a million of women live in the rural areas and rely on their husbands for survival. In addition, since sexual intercourse is one effect of marriage, as stated in article 53 of the Family Code, criminalising marital rape has a negative effect on respect and discussion within the family, undermines the sanctity of marriage, and promotes divorce.<sup>186</sup> The reservation was thus entered to maintain the definition of rape enshrined in the Criminal Code.

It is clear from the above argument that the dignity and integrity of women are sacrificed in order to safeguard the sanctity of marriage and the private nature of marital interactions. In this respect, the exclusion of marital rape from the Criminal Code and this particular reservation reveal patriarchal overtones that are firmly ingrained in the legal system, which has the effect of accepting the violation of women's rights as an unattainable subject.

### **4.3.3 Minimum age of marriage**

The Maputo Protocol under article 6(b) urges states to enact appropriate legislative measures that set the minimum age of marriage at 18. The provision condemns early marriage and prohibits any exception that lowers the minimum marriageable age with the aim of protecting children. Following the same logic, the Family Code of Ethiopia under article 7 provided that 'neither a man nor a woman who has not attained the full age of 18 shall conclude marriage.'<sup>187</sup> Despite this, the same provision granted the Ministry of Justice the power to grant a dispensation for no more than two years upon the application of the future spouses, parents, or guardians.<sup>188</sup> However, there is no definition of what constitutes a serious cause, rather it is left to the discretion of the Ministry of

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<sup>183</sup> Minutes of the Women Parliamentarians caucus (n 182) 12.

<sup>184</sup> MoFA explanatory note (n 168) 7.

<sup>185</sup> MoFA explanatory note (n 168) 7.

<sup>186</sup> MoFA explanatory note (n 168) 3, minutes of the Women Parliamentarians Caucus (182) 11.

<sup>187</sup> The Family Code art 7(1).

<sup>188</sup> The Family Code art 7(2).

Justice. Against this background, Ethiopia has made a reservation to this particular provision to maintain its Family Code that allows marriage to be performed at the age of 16 in exceptional cases.<sup>189</sup>

This African-driven provision was specific about the absolute prohibition of child marriage and adequately captures the challenges that African girls face on a daily basis.<sup>190</sup> In *Association Pour le Progrès et la Defense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* case, the African Court noted that the Malian Family Code, which allows the administrative authority to grant permission for girls to get married at the age of 15, is discriminatory, and violates article 6(b) of the Maputo Protocol and articles 2, 4(1), and 21 of the African Children' Charter.<sup>191</sup> Although the provision in the Family Code of Ethiopia is gender neutral, due to the fact that early marriage disproportionately affects girls, it accelerates women to be child brides as early as 16, significantly diluting the importance of the provision in eradicating child marriage on the continent. Moreover, since children are not always capable of giving informed consent, the dispensation of marriageable age also leads to marriages that do not meet the requirement of free and informed consent.

#### 4.4 Conclusion

A discussion on Ethiopia's justifications for ratifying the Maputo Protocol and entering reservations to selected provisions is presented in this chapter. Examining the justifications mentioned by the Ethiopian government, it can be argued that HRTs cannot override tradition and domestic laws where reservation is consistently being used as a tool. Irrespective of the relevance of the provisions of the Maputo Protocol, the tradition and domestic laws of Ethiopia have been cited as grounds to exclude the domestic legal effect of the reserved provisions, frustrating the basic essence of the document. It has been highlighted that the provisions of the Family Code and the Criminal Code served as a barrier to the transition from the patriarchal and stereotyped to the progressive protection of women's rights. This can be noted from the fact that almost all the covered reservations are justified by the necessity of retaining the provisions of the Family and Criminal Code. In fact, a close examination of the provisions mentioned as justifications revealed the inadequacy of the national laws to effectively protect and promote women's rights. In this

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<sup>189</sup> Maputo Protocol Ratification Proclamation art 3(2)(b).

<sup>190</sup> K Makau 'The Maputo Protocol 10 years on: How can it be used to help end child marriage? 2013 <https://www.girlsnotbrides.org/articles/the-maputo-protocol-10-years-on-how-can-it-be-used-to-end-child-marriage/> (accessed 4 October 2022).

<sup>191</sup> *Association Pour le Progrès et la Defense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, Application No. 046/2016, Judgment on merits (10 May 2018) para 77 & 78.



respect, Ethiopia's reservations to the Maputo Protocol appear to be a refusal to address the most relevant areas of women's lives which the state has an international obligation to uphold.

## **Chapter 5: Assessing the compatibility of Ethiopia's reservations and 'interpretative declarations' with the Maputo Protocol's object and purpose**

### **5.1 Introduction**

Building on the preceding discussions on reservations to HRTs and the compatibility test in Chapter 2, the object and purpose of the Maputo Protocol in Chapter 3, and Ethiopia's reservations to the Maputo Protocol in Chapter 4, this chapter seeks to answer the research's main question, which is whether Ethiopia's reservations to articles 4(2)(a), 6(b) and 6(d) of the Maputo Protocol are compatible with its object and purpose. In Chapter 3, it has been argued that reservations may jeopardise the object and purpose of the Maputo Protocol in at least three ways. First, if the reservation seeks to exclude or modify the protections provided by article 2, which aims to eliminate gender discrimination; second, if the reservation seeks to exclude or modify other provisions of the Maputo Protocol that give specific application to article 2; and third, if the reservation excludes or modifies any other protection under the Maputo Protocol when it was not previously made regarding the same rights under another HRTs applicable to the state, even if it does not directly affect article 2.

### **5.2 Assessing the compatibility of Ethiopia's reservation to the criminalisation of marital rape**

Ethiopia's reservation to article 4(2)(a) concerns the scope of the duty to prohibit and eradicate all forms of VAW. As discussed in the preceding chapter, the prohibition under article 4(2)(a) expressly includes unwanted or forced sex in both the private and public spheres, implying that marital rape is also prohibited. However, Ethiopia expressed its reservation, noting that 'article 4(2)(a) shall be applicable in accordance with article 620 of the Criminal Code. which, in effect, exempt a husband from prosecution for raping his wife. The researcher now turns to analysing whether Ethiopia's unilateral statement that attaches the marital rape exemption to article 4(2)(a) goes against the Maputo Protocol's dual interrelated objectives laid out in Chapter three, namely fighting discrimination against women (compatibility test one) and strengthening existing women's rights protections applicable to the state (compatibility test two).

#### **5.2.1 Compatibility test one: Fighting discrimination against women**

To determine whether marital rape perpetuates discrimination against women and thereby undermining the Maputo Protocol's goal of eliminating discrimination, one first needs to understand the concept of discrimination, as well as how marital rape affects victims and plays a

role in perpetuating discrimination. The Maputo Protocol defines discrimination against women as:<sup>192</sup>

any distinction, exclusion, restriction or any differential treatment on the basis of sex' that has the objectives or effect of undermining or reversing the recognition, enjoyment, and exercise by women, regardless of their marital status, of 'human rights and freedoms in all spheres of life.

Three important observations are crucial here. First, the definition encompasses direct discrimination, when women's rights are eroded or negated because of differential treatment, and indirect discrimination, which occurs when a general policy or measure, though framed neutrally, has disproportionately prejudicial effects on women, thereby affecting or nullifying women's rights in a particularly discriminatory manner. Second, to constitute discrimination, the difference in treatment or the distinction, exclusion or restriction must impair or nullify a woman's rights. Finally, the Maputo Protocol expressly states that a woman's marital status has no bearing on the definition of discrimination against her.

When viewed against this backdrop, there is no doubt that rape, whether within marriage or outside, is well within the ambit of discrimination against women. First, the marital rape exemption formulated by Ethiopia constitutes 'distinction, exclusion, restriction or differential treatment on the basis of sex.' As it is clear from the Maputo Protocol Ratification Proclamation, Ethiopia is willing to comply with the content of article 4(2)(a), provided that such compliance does not run counter to article 620 of the Criminal Code. This provision of the Criminal Code states:<sup>193</sup>

Whoever compels a woman to submit to sexual intercourse *outside wedlock* [emphasis added], whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable with rigorous imprisonment from five years to fifteen years.

This provision exempts a man from prosecution for raping his wife, denying married women legal protection. Turning to the provision that deals about rape committed by woman, it provides that a 'woman who compels a man to sexual intercourse with herself, is punishable with rigorous imprisonment not exceeding five years.'<sup>194</sup> This provision, unlike the provision dealing with rape committed by men, does not establish the marital rape exemption. This begs the question of why the exemption is available only to men who rape their wives and not to women who rape their husbands. The text of the Criminal Code does not explain why this disparity in treatment exists,

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<sup>192</sup> Maputo Protocol art 1(f).

<sup>193</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia 2004 (the Criminal Code) art 620(1).

<sup>194</sup> The Criminal Code art 621.

nor are secondary sources available to explain it. However, various explanations are possible. First, one could argue that the lack of a marital rape exemption in the provision dealing with rape committed by woman is a typo, and that in practice, both the wife and husband who commit rape against their partner can use the defense. If this argument is correct, and the marital rape exception is also available to women who rape their husbands, the exemption could be considered gender-neutral. Although considering the exemption to be gender-neutral may prevent it from constituting direct discrimination, it may still constitute indirect discrimination because it affects women in marriage disproportionately when compared to men. Second, it is possible to argue that the marital rape exemption is not included in the provision dealing with rape committed by women in order to avoid false neutrality toward an institution that almost always negatively affects the security and well-being of women in patriarchy. This, however, is a ridiculous argument to say the least. Recognising the hierarchical nature of a heterosexual marriage in which women are subjected to sexual assault, including marital rape, but allowing the practice to continue is irrational. If the premise is that women are particularly vulnerable to abuse in marriage, including marital rape, then the law should have devised a solution rather than including a marital rape exemption that legalises the practice. If this is the real reason for not including the marital exception to the provision on rape committed by women, the only reasonable point it has is acknowledging the suffering women undergo in marriage. As a last possible explanation, it is also possible to argue, although unlikely to be true given the Ethiopian Women Lawyers Association's active engagement during the Criminal Code drafting process, that it is an intentional treatment of sexual offenders differently based on their gender, punishing women for raping their husbands while allowing husbands to go unpunished for raping their wives. The researcher believes that the legislature did not intend to make this distinction, but if true, the marriage rape exemption would amount to direct discrimination. In sum, no matter why this exemption is only applicable to men who rape their wives, not to women who rape their husbands, it will not change the fact that married women face 'distinction, exclusion, restriction, or differential treatment on the basis of sex' due to the marital rape exemption.

Having established the existence of 'distinction, exclusion, restrictions, or differential treatment based on sex,' the next question is whether this exclusion and differential treatment impair or nullify a woman's rights. This necessitates an examination of the impact of marital rape on women's human rights. Researches indicate that marital rape has a variety of physical and psychological impact on victims ranging from depression to suicide.<sup>195</sup> Although historical myths

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<sup>195</sup> KM Devries and others 'Intimate partner violence and incident depressive symptoms and suicide attempts: a systematic review of longitudinal studies' (2013) 10 *PLOS Medicine* 12.

persist, it was established that marital rape victims suffer long-lasting psychological or physical injuries that are as severe as or greater than those suffered by stranger rape victims, including humiliation, fear, torn muscles, fatigue, and injuries to private organs.<sup>196</sup> Furthermore, miscarriages, stillbirths, infertility, and HIV infections are some of the gynaecological consequences of marital rape.<sup>197</sup> The marital rape exemption, which in effect allows the man to use force until the wife becomes submissive, thus restricts not only article 4(2)(a) of the Maputo Protocol, but also several of its provisions, regardless of whether they expressly mention violence. It jeopardises the right to dignity, the right to life, the integrity and security of the person, the right to equality in the family, the right to liberty, equal protection under the law, and non-discrimination, health and reproductive rights, the right to privacy, and freedom from cruel, inhuman, and degrading treatment, among other things.<sup>198</sup> Permitting men to rape their wives, for example, renders women's rights to control one's fertility, to decide whether to have children, the number of children, and their spacing, to choose any method of contraception, and to self-protection and protection against sexually transmitted infections, including HIV/AIDS, illusory.<sup>199</sup> It also makes the woman's freedom from cruel, inhuman, and degrading treatment as provided under article 4(1) of the Maputo Protocol a chimaera rather than a reality. First, marital rape inflicts severe pain and suffering on the victim by causing long-lasting psychological or physical injuries. Second, the pain and suffering are inflicted for a prohibited purpose that includes coercion, intimidation, or discrimination.<sup>200</sup> Finally, because marital rape is not punishable, the pain and suffering inflicted on a wife in order to make her submissive for sex against her will is agreed to or condoned in advance by State authorities.

Furthermore, the marital rape exception, which views marriage as a license to rape one's wife and thus treats women as a form of sexual property of the husband, inhibits women's ability to enjoy equality in marriage and family relations as provided under article 6 of the Maputo Protocol.<sup>201</sup> After all, it is impossible to have equal rights in a marriage where one is being subjugated through forced sex disguised as conjugal right.<sup>202</sup> Further still, the marital rape exception denies women from exercising their right to get equal protection and benefit of the law as recognised under article

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<sup>196</sup> JN Robinson 'Marital rape perception and impact of force' MA thesis, City University of New York, 2017 12 [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1014&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1014&context=jj_etds) (accessed 22 September 2022).

<sup>197</sup> As above.

<sup>198</sup> CEDAW General Recommendation 19 on Violence against women para 7.

<sup>199</sup> Maputo Protocol art 14.

<sup>200</sup> M Randall & V Venkatesh 'The right to no: The crime of marital rape, women's human rights, and international law' (2015) 41 *Brooklyn Journal of International Law* 192.

<sup>201</sup> Randall & Venkatesh (n 200) 191.

<sup>202</sup> L Segal 'Explaining male violence' in J Muncie *et al* (eds) *Criminological perspectives: A reader* (1996) 189.

8 of the Maputo Protocol. Indeed, there is nothing less rational than denying people protection from violent crime based solely on their gender and marital status.<sup>203</sup> In light of the above discussion, one can understand that the exclusion of married women from the protection of the law nullifies almost all rights recognised by the Maputo Protocol.

Marital rape, which impairs or nullifies the enjoyment by women of all the rights specified above, is thus discrimination within the meaning of article 1(f) of the Maputo Protocol. Accordingly, the exemption of marital rape by Ethiopia implies discriminatory treatment in several ways. First, it legitimises a type of violence that disproportionately affects women. It condones men's illegitimate control over women, even allowing routine sexual assaults on them in order to maintain this control.<sup>204</sup> It thus preserves women's inferiority in the country, fortifying the inequality between men and women. Second, it discriminates between violence experienced by women and other types of violence.<sup>205</sup> Third, it discriminates between violence experienced in the private sphere and violence experienced in the public sphere.<sup>206</sup> It transgresses the right to equality and equal protection of law by discriminating between married and unmarried women. What could be more irrational than a law that prosecutes and punishes sexual assault, unless the victim and assaulter are married? After all, how the dignity of a married woman is different from that of an unmarried woman? By insulating and protecting a separate political system of subordination and violence against a separate class of women who are married, and thereby denies them protection of the laws available to others, the exemption reflects and perpetuates women's social subordination and discrimination. Taking a closer look at Ethiopia's justification for continuing to exempt marital rape from prosecution also exposes a very archaic understanding hidden behind the iron curtain of marriage: wives belong to their husbands, and marriage contracts provide an entitlement to sex. Ethiopia argues that criminalising marital rape would violate Ethiopian tradition and the sanctity of the family, and it would also be hard to prove.<sup>207</sup> These arguments are not only against the very objective of the Maputo Protocol but also, they are fallacious. The first argument, which concerns the desire to maintain the integrity of Ethiopian tradition, is at odds with the Maputo Protocol, which sets clear criteria to distinguish cultural values that should be preserved from those that should be changed or eliminated. The Maputo Protocol defines 'positive African cultural values'

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<sup>203</sup> R West 'Equality theory, marital rape, and the Promise of the Fourteenth Amendment' (1990) 42 *Florida Law Review* 46.

<sup>204</sup> GS Bajpai 'Time to criminalise marital rape' (2022) <https://www.newsclick.in/time-criminalise-marital-rape> (accessed 21 September 2022).

<sup>205</sup> Randall & Venkatesh (n 200)189.

<sup>206</sup> As above.

<sup>207</sup> UN statement 'CEDAW Committee Considers report of Ethiopia' (21 February 2019) <https://www.ohchr.org/en/statements/2019/02/committee-elimination-discrimination-against-women-considers-report-ethiopia> (accessed 21 October 2022).

as ‘those founded on the principles of equality, peace, freedom, dignity, justice, solidarity, and democracy.’<sup>208</sup> It then calls ‘any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls’ to be eliminated.<sup>209</sup> Specifically, article 2, which is the core provision of the Maputo Protocol, reiterates the prohibition of HTPs that endanger women's health and general well-being, as well as all other practices that emphasise the inferiority or superiority of one sex over the other, including, wife abuse and child marriages.<sup>210</sup>

Article 5, another provision that gives effect to the principle of non-discrimination, also prohibit and condemn all forms of harmful practices which negatively affect the human rights of women. Thus, Ethiopia’s argument not to criminalise marital rape, which is rooted in patriarchal values and gender norms, cannot stand in light of the Maputo Protocol purpose of eliminating all forms of discrimination and harmful practices against women. Turning to the second justification provided by the Ethiopian government to exempt marital rape, it claims to maintain the sanctity of marriage i.e., the emotional and psychological unity between the spouses. However, the reality is far from this. The EDHS states that close to 34 per cent married women in Ethiopia experience emotional, physical, and sexual violence from their partners, of which 10% reported experiencing sexual violence.<sup>211</sup> Likewise, a survey conducted by WHO found that 59% of Ethiopian women are the victims of sexual violence committed by their partners.<sup>212</sup> This shows that majority of marriages in the country are nothing, but structures of violence for women. As to the third argument, it claims that marital rapes are difficult to prove. However, this argument does not hold water for two reasons. First, a crime cannot be condoned simply because it is difficult to prove. Second, leaving the implementation issue aside, criminalisation of marital rape would have a deterrent effect on prospective rapist husbands.

In light of the preceding discussion, the researcher contends that Ethiopia, by making an exception for sexual assault within marriage, shackles the very foundation of the Maputo Protocol, which is

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<sup>208</sup> Maputo Protocol preamble para 10.

<sup>209</sup> Maputo Protocol preamble para 13.

<sup>210</sup> Maputo Protocol art 2(1)(b) & 2(2).

<sup>211</sup> Central Statistical Agency ‘Demographic and Health Survey’ Ethiopia, (2016) 289 <https://dhsprogram.com/pubs/pdf/FR328/FR328.pdf> (accessed 14 September 2022).

<sup>212</sup> World Health Organisation ‘Preventing intimate partner and sexual violence against women: taking action and generating evidence’ (2010) 13 [http://apps.who.int/iris/bitstream/handle/10665/44350/9789241564007\\_eng.pdf;jsessionid=5B4422143D4F85D05800B6D5CE1086C8?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/44350/9789241564007_eng.pdf;jsessionid=5B4422143D4F85D05800B6D5CE1086C8?sequence=1) (accessed 14 September 2022)

to eliminate all forms of discrimination and harmful practices against women, and thus the reservation to article 4(1)(a) is severable.

### **5.2.2 Compatibility test two: The prohibition not to take regressive measure**

The Maputo Protocol seeks to strengthen the protection of women's rights already provided by existing instruments like CEDAW and the African Children's Charter, as is evident from its preamble. Meaning, it forbids any action of states, including ratification and reservations, from having the impact of rolling back or limiting the rights that women already enjoy in the relevant state. Therefore, using the Maputo Protocol as a vehicle, Ethiopia cannot compromise its current obligations under any other applicable global or regional treaties, as this would go against the Maputo Protocol's object of strengthening existing protection. Evaluating Ethiopia's reservation to the criminalisation of marital rape against this purpose of the Maputo Protocol, it is evident that the reservation is actually backwards-looking. Without making explicit reference to marital rape, various HRTs to which Ethiopia is a party including the ICCPR, CEDAW and African Charter provide protection for women against VAW including marital rape.<sup>213</sup> For instance, as interpreted by the CEDAW Committee, gender-based violence, including rape within the family, is regarded as a form of discrimination.<sup>214</sup> Accordingly, the Committee expressed its concern about Ethiopia's failure to criminalise marital rape.<sup>215</sup> Likewise, the HRC has repeatedly stated that VAW, including intimate partner sexual assault, is a form of discrimination that requires appropriate criminal remedies.<sup>216</sup> Similarly the Committee against Torture noted that states bear responsibility' to prevent and protect victims from gender-based violence, such as rape, domestic violence, FGM, and trafficking.<sup>217</sup> In addition to this, several soft law instruments including the Declaration on the Elimination of Violence against Women (DEVAW) provides protection for women against violent act that occurs either in public or private life. Pursuant to the DEVAW, marital rape is a kind of VAW that forces women into a subordinate position to men.<sup>218</sup>

From the above discussion, it is clear that Ethiopia was already under obligation to provide protection for woman against violence committed both in the public and private sphere. Thus, by formulating a marital rape exception to the Maputo Protocol, Ethiopia takes a regressive measure that is clearly against the Maputo Protocol's object of strengthening existing protection.

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<sup>213</sup> Randall & Venkatesh (n 200)189.

<sup>214</sup> CEDAW GC 19 (n 198) 1.

<sup>215</sup> Concluding observations on the combined sixth to seventh periodic report of Ethiopia, CEDAW Committee (27 July 2011), UN Doc CEDAW/C/ETH/CO/6-7 (2011) para 20.

<sup>216</sup> Randall & Venkatesh (n 200)189.

<sup>217</sup> Committee against Torture General Comment 2 on Implementation of article 2 by States parties' para 18.

<sup>218</sup> DEVAW preamble para 6.



To recap, Ethiopia's reservation to the criminalisation of marital rape is not permissible as it undermines the two interconnected goals of the Maputo Protocol, i.e. strengthening existing women's rights standards and combating discrimination against women in Africa.

### **5.3 Assessing the compatibility of Ethiopia's reservation to the mandatory registration and minimum age of marriage**

The Maputo Protocol's tough stance on eradicating child marriage on the continent is reflected in its provisions, which explicitly prohibit marriage under the age of 18<sup>219</sup> and require every marriage to be recorded in writing and registered in accordance with domestic law.<sup>220</sup> These provisions have the triple benefit of preventing early marriage, ensuring the free and full consent of the prospective spouse, and providing legal certainty about the existence of marriage that fulfils all the essential conditions.<sup>221</sup> As mentioned in the preceding chapter, Ethiopia has placed reservations on both provisions of the Maputo Protocol, which poses the question of whether the document's object and purpose have a chance of being realised upon Ethiopia's ratification or has risked being achieved through the reservations. The researcher attempts to address this question through the lens of the compatibility tests.

#### **5.3.1 Compatibility test one: Fighting discrimination against women**

The absence of marriage registration and exceptions to the minimum marriageable age create loopholes that disproportionately expose girls to child marriage which results in the violation of their fundamental rights.<sup>222</sup> Despite this, Ethiopia placed reservations on the provisions of the Maputo Protocol that appear to excuse child marriage, which can both result in and be a cause of discrimination, which is the major issue that the Maputo Protocol eager to address.<sup>223</sup> To underscore the Maputo Protocol's objective of protecting women from discrimination through article 6(b) and (d), it is essential to address child marriage as both a by-product of and a driver of discrimination.

To begin with child marriage as a direct result of discrimination, it is imperative to examine why an exception to the legal age of marriage has been incorporated into the Family Code. A public consultation conducted during the revision of the Family Code informed that there were oppositions to the lifting of the legal age of marriage for women from 15 to 18.<sup>224</sup> The public

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<sup>219</sup> Maputo Protocol art 6(b).

<sup>220</sup> Maputo Protocol 6(d).

<sup>221</sup> Banda (n 147) 50.

<sup>222</sup> S Lee-Rife *et al* 'What Works to Prevent Child Marriage: A Review of the Evidence' (2012) 43 *Studies in Family Planning* 287.

<sup>223</sup> Maputo Protocol Ratification Proclamation art 3.

<sup>224</sup> M Belay 'Public consultation toward Ethiopia's Family Law reform and the Revised Code's Response' (2016) 10 *Mizan Law Review* 252.

opinion to maintain 15 as a legal marriageable age was justified by a prejudiced fear that, because a large number of Ethiopian women live in rural areas without access to education, prohibiting them from getting married until they turn 18 would negatively affect them and their families.<sup>225</sup> This indicates that marriage was considered as a tool for parents to delegate the responsibility of raising their daughter to a man who had the means to do so. Although the legal marriageable age has been raised to 18, the Ministry of Justice has given the authority to excuse two years with the production of serious causes.<sup>226</sup> Despite the dispensation appears to be gender-neutral, given the negative public reaction and the reality in the country, the exception in the Family Code disproportionately targets girls and is strongly influenced by discriminatory norms that place women in inferior roles to men. The impact of allowing dispensation is further exacerbated by non-registration of marriages, which leads to marriages being consummated despite not meeting the prerequisites.

Meanwhile, child marriage is the toxic outcome of gender inequality and discrimination that disproportionately affects girls.<sup>227</sup> The tradition of dowry, which is often provided by the groom to the bride's family, for instance, is an impulse for many African parents to marry off their daughters instead of their sons.<sup>228</sup> Furthermore, African women's lives are insecure and predisposed to violence,<sup>229</sup> which forces parents to resort to child marriage in order to escape the embarrassment that results from their daughter losing her virginity or getting pregnant out of wedlock.<sup>230</sup> Likewise, the gender role assigned to women and the stereotype associated with the education of girls are proven to discriminately expose females to child marriage at a higher rate than their male counterparts.<sup>231</sup> These demonstrate child marriage to be the direct result of discrimination, which disproportionately affect women.

Child marriage, on the other hand, results in discrimination that robs girls of their childhood and future, making them prone to prejudice of different kinds.<sup>232</sup> From the inception of the marriage,

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<sup>225</sup> As above.

<sup>226</sup> The Family Code art 7(2).

<sup>227</sup> CA Packer 'Using human rights to change tradition; traditional practices harmful to women's reproductive health in sub-Saharan Africa' (2002) *Intersentia* 62.

<sup>228</sup> NM Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 53 *Reviews in Obstetrics & Gynecology* 53.

<sup>229</sup> As above.

<sup>230</sup> M Getu et al 'The prevalence and drivers of early marriage across three generations in three districts from Amhara, Oromia and Southern Nations, Nationalities and Peoples regions of Ethiopia' (2021) 17 *Ethiopian Journal of the Social Sciences and Humanities* 105.

<sup>231</sup> Human Trafficking Search 'Contributing factors to child marriage in developing countries' 2017 <https://humantraffickingsearch.org/2017530contributing-factors-to-child-marriage-in-developing-countries/> (accessed 20 October 2022)

<sup>232</sup> United Nation Human Rights office of the high Commission <https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings> (accessed 17 September 2022)

child brides are denied the right to choose when and with whom to be married.<sup>233</sup> And, due to a persistent practice of denying child brides the opportunity to pursue education and employment, girls who are married as minors are more likely to have a lower position in society.<sup>234</sup> Girls' capacity to negotiate safe sexual lives and assert autonomy over their bodies and their sexual and reproductive health is also hampered by power dynamics driven by age disparities.<sup>235</sup> This subjected young girls, among others, to marital rape, early and unwanted pregnancy, maternal mortality, school dropout and significantly heightened the likelihood of women contracting HIV compared to men.<sup>236</sup> It is evident from this that the practice of child marriage violates not only article 6 of the Maputo Protocol but is also restrict the application of all of its provisions, resulting in the violation of women's rights to education (article 12), economic and social welfare (article 13), dignity (article 3), reproductive health (article 14), and life, integrity, and security (article 4), among others.

It goes without saying that child marriage is the most noxious manifestation of asymmetrical relations between men and women, which leads to the violation of the principles of gender equality and non-discrimination that serve as the guiding principles for interpreting the provisions of the Maputo Protocol. Despite the extensive discrimination associated with it, Ethiopia's reservation to the provision specifying the minimum age for marriage and requiring mandatory marriage registration enables children as young as 16 to get married. This alleviate the protections provided by the Maputo Protocol for African girls by infringing upon article 2 of the Maputo Protocol, which calls on states to combat all forms of discrimination that endanger the lives of women and girls, mainstream gender in policies and legislations, take corrective and positive measures to eliminate *de facto* and *de jure* discrimination, modify traditional practices that manifest the superiority of one gender over the other, and encourage regional and global efforts aimed at eliminating discrimination.<sup>237</sup> In this light, Ethiopia's reservation to articles 6(b) and (d) of the Maputo Protocol impugns article 2 of the document, which is the core provision that gives effect to the overall object and purpose of eliminating discrimination against women and girls.

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<sup>233</sup> As above.

<sup>234</sup> P Kammerer 'The Unmarried Mother: A Study of Five Hundred Cases' (1918) 77 <https://www.jstor.org/stable/pdf/1144343.pdf> (accessed 20 October).

<sup>235</sup> Human Rights Watch 'No way out: Child marriage and human rights abuses in Tanzania' 2014 [https://www.hrw.org/report/2014/10/29/no-way-out/child-marriage-and-human-rights-abuses-tanzania#\\_ftn30](https://www.hrw.org/report/2014/10/29/no-way-out/child-marriage-and-human-rights-abuses-tanzania#_ftn30) (accessed 20 October 2022).

<sup>236</sup> As above.

<sup>237</sup> Maputo Protocol art 2.

### 5.3.2 Compatibility test two: The prohibition not to take regressive measure

Given the risks child marriage poses to the development and well-being of children, particularly for girls, several international HRTs place a high priority on its abolition.<sup>238</sup> For instance, article 16 of the CEDAW calls for state parties to prohibit betrothal, impose a minimum age for marriage, and make marriage registration mandatory. Although not explicitly addressing child marriage, the Convention on the Rights of the Child (CRC) exhorts states to take all necessary measures to eradicate all traditional practices detrimental to children.<sup>239</sup> Compared to the CRC and CEDAW, the African Children's Charter is a progressive regional instrument that explicitly proscribes the minimum age of marriage to be 18 and makes registration of marriage compulsory.<sup>240</sup>

Despite the recognition of women's rights in the above HRTs, the Maputo Protocol embraces the threshold set out in the African Children's Charter and reiterates marriage registration as a legal requirement.<sup>241</sup> This incorporation, as outlined in the preamble, seeks to strengthen the implementation of women's rights, which still continue to be violated despite the existing HRTs being ratified. Having said that, since one of the objectives of the Maputo Protocol is to advance and reinforce the protection of women's rights already provided in existing HRTs, using a reservation as a tactic to circumvent the existing obligations contradicts the Maputo Protocol's goal of strengthening existing standards.

Alongside, with a view of combating child marriage in Africa, the ACERWC and the African Commission, jointly asserted the interrelatedness and interdependence of children's and women's rights, requiring the complementarity of the African Children's Charter and Maputo Protocol in eradicating child marriage.<sup>242</sup> Furthermore, by explicitly defining 18 as the minimum marriageable age, the Maputo Protocol eliminates the loophole created by article 16(2) of the CEDAW, which fails to do so. Considering the above, it is valid to argue that the specification of the minimum age for marriage and the requirement for compulsory marriage registration in the Maputo Protocol are intended to strengthen the protection of women's rights in existing HRTs.

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<sup>238</sup> M Arthur 'Child marriage laws around the world: minimum marriage age, legal exceptions, and gender disparities' (2018) 39 *Journal of Women, Politics & Policy* 54.

<sup>239</sup> T Deane 'Marrying young: Limiting the impact of a crisis on the high prevalence of child marriages in Niger' (2021) 10 *laws* 6.

<sup>240</sup> African Children's Charter art 21.

<sup>241</sup> Maputo Protocol art 6(b) & (d); see also Viljoen (n 143) 24.

<sup>242</sup> Joint General Comment of the African Commission and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage para 15.

Against this background, Ethiopia's reservation to article 6(b) and (d) of the Maputo Protocol that contain analogous provisions of other HRTs, which the state has ratified without reservation, runs against the Maputo Protocol's goal of strengthening existing standards. In addition, Ethiopia's reservation, which compromises the existing obligation of the state, contradicts the non-regression principle of international law that is enshrined in article 31 of the Maputo Protocol.

#### **5.4 Conclusion**

This chapter assessed the compatibility of Ethiopia's reservations with the Maputo Protocol's object and purpose. Reservations unequivocally limit the effective implementation of rights. The effect will be significantly more evident if the reservations conflicts with the document's purpose and object. In order to assess the compatibility of Ethiopia's reservation and come to a conclusion, the researcher employed the two compatibility tests that have been shown to be the Maputo Protocol's object and purpose, namely the objective of eradicating discrimination against women and strengthening existing human rights standards. Therefore, the reservations concerning the prohibition of violence in the private sphere, the minimum marriage age, and compulsory marriage registration were found to be incompatible with the Maputo Protocol's object and purpose. This incompatibility proved to jeopardise the normative scheme of the Maputo Protocol, which also casts doubt on the effectiveness of having an African-specific treaty on women's rights.

## **Chapter 6: Conclusion and recommendations**

### **6.1 Conclusion and key findings**

The general objective of the study is to assess the compatibility of Ethiopia's reservations and 'interpretative declarations' with the Maputo Protocol's object and purpose and provide tenable recommendations regarding the reservations and 'interpretative declarations' in general and on their compatibility in particular. To provide a clear picture of Ethiopia's reasoning for entering reservations to the provisions of the Maputo Protocol, the study examined the arguments put forth by the Parliamentary Standing Committees, the Women Parliamentarians Caucus, and the Ministry of Foreign Affairs. In doing so, it has been established that the main justification for excluding the domestic application of the Maputo Protocol was the inconsistency of the reserved rights with the national laws, notably the Criminal and Family Codes. This suggests that the Ethiopian government opted against ratifying progressive provisions that improve the rights of women and girls and instead chose to preserve the discriminatory provisions embodied in the national laws. Indeed, this prevents women and girls from taking full advantage of the Maputo Protocol's novel features.

Moreover, the researcher has found that the 'interpretative declarations' pertaining to violence in the private sphere and the minimum age of marriage, appear to exclude and modify the domestic applications of the provisions, which is a trait of reservation but not of interpretative declaration. In this regard, it has been emphasised that, regardless of the nomenclature given to the statement, Ethiopia's 'interpretive declarations' that seek to limit or alter the legal effect of the Maputo Protocol's provisions should be regarded as a reservation. Additionally, it has come to light that Ethiopia has not entered reservations to analogous provisions in other HRTs including CEDAW and the African Children's Charter. This reveals the lax domestic implementation of international responsibilities and indicates that the government of Ethiopia is apathetic in respecting and promoting women's rights to the fullest.

Finally, it has been established that a state's reservation to the Maputo Protocol runs counter to its purposes in three ways. First, if the reservation targets the protection under article 2 of the Maputo Protocol; second, if the reservation directly or indirectly impacts the application of article 2; and lastly, if the reservation is entered to compromise an obligation existing in previously ratified HRTs. Through these compatibility criteria, the researcher found that Ethiopia's reservations concerning the prohibition of violence in the private sphere, the minimum age of marriage, and compulsory marriage registration are incompatible with the Maputo Protocol's objects and purposes.

## **6.2 Recommendations**

### **6.2.1 Recommendations to the government**

- I. In light of the fact that some provisions of the Ethiopian Criminal and Family Codes do not adequately protect women's rights as they should and have served as a basis for entering reservations to the most innovative provisions of the Maputo Protocol, amending the provisions that stymie the realisation of women's rights should be the top priority of the government.
- II. The government of Ethiopia should take precautions to avoid distorting the normative framework of women's rights treaties by making sure that those proposing reservations, as well as those commenting on the proposed reservations, are experts in women's rights and are well versed in the subject.
- III. Given that certain provisions of the Maputo Protocol have been understood fallaciously, it is essential that the relevant government body conduct a study prior to making reservations. This will enable them to grasp the real meanings of the treaty provisions and the rights that are intended to be safeguarded. In this regard, Ethiopia should carefully reconsider modifying or removing the reservations and 'interpretative declarations' that were made to the Maputo Protocol without a thorough understanding of its purpose and object.
- IV. Although ratifying the Maputo Protocol is a crucial step towards ensuring women's rights, the extensive and unreasonable reservations in relation to its core provisions render its ratification of little value. Accordingly, since all the assessed provisions are prominent areas where Ethiopian women face challenges, the government should consider withdrawing them.
- V. Since the VCLT explicitly prohibits entry of reservations that contradict the objects and purposes of a treaty, the researcher strongly advises the Ethiopian government to withdraw the reservations that were found to be incompatible with the Maputo's Protocol objects and purposes.

### **6.2.2 Recommendations to civil societies**

- I. Women's rights advocates should call on the government to amend discriminatory laws and ensure that the Maputo Protocol is accessible to all women and girls.

- II. Women's rights organisations should lobby the government to enable them to participate in parliamentary debates dealing with the entry or modification of reservations and interpretative declarations to women's rights instruments.
- III. Women's rights organisations should provide the government with research that demonstrates the purpose and object of the Maputo Protocol, enabling the government to reconsider its reservations.
- IV. Since the reserved provisions of the Maputo Protocol are notable in addressing the challenges faced by Ethiopian women, CSOs should lobby the government for an urgent withdrawal of the reservations.



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