

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

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At the time of ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, South Africa made reservations and interpretative declarations. This article discusses the meaning and legal implications of those reservations and interpretative declarations.

1 INTRODUCTION

South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) on 17 December 2004 and deposited its Instrument of Ratification with the Chairperson of the Commission of the African Union on 14 January 2005¹ as required by Article 28 of the Protocol. At the time of ratification South Africa made three reservations and two interpretative declarations to the Protocol. It made a reservation to Article 4(2)(j) which deals with the imposition of the death penalty on pregnant and nursing mothers; Article 6(d) which deals with the registration of customary marriages; and Article 6(h) on the nationality or citizenship of children born of alien parents. South Africa made interpretative declarations to Article 1(f) which defines 'discrimination against women' and Article 31 that deals with the question of whether the South African Constitution (the Constitution) offers more favourable human rights protection than the Protocol. The purpose of this article is to discuss the meaning and legal implications of those reservations and interpretative declarations. The discussion is structured in the following order: the status of international law in South Africa is appraised; the drafting history of the Protocol follows; an outline of the articles in the Protocol is done (however, a detailed discussion of these rights falls outside the scope of this article but references are given on each provision for further reading by those interested in in-depth discussions of individual provisions); this is followed by a detailed discussion of the meaning of reservations and interpretative declarations under international law; South Africa's reservations and interpretative declarations to the

¹ See <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> [accessed 18 August 2007].

Protocol and their legal implications are analysed; lastly, conclusions and recommendations are made.

2 INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES: A SOUTH AFRICAN VIEW

The fact that the apartheid government was in a class of its own in violating human rights has been documented sufficiently in law reports, human rights reports, journal and newspaper articles, textbooks, Organisation of African Unity resolutions,² and United Nations resolutions.³ With the demise of apartheid the democratic government adopted various measures to transform South Africa. Notable among these measures is the extent to which South Africa has signed, acceded to or ratified various regional and international human rights treaties. Dugard notes that “[b]efore 1994...South Africa was a party to only one instrument with human rights clauses – the Charter of the United Nations – and that was not incorporated into municipal law”.⁴ The result was that “no direct effect could be given to articles 55 and 56 of the Charter”⁵ which relate to human rights. However, since 1994 South Africa has signed or ratified various international and regional human rights instruments.⁶

What is the impact of international or regional human rights instruments on South Africa’s human rights jurisprudence? To answer this question one has to look at the Constitution and courts, and how they have treated the question of the status of international human rights treaties.

Another notable feature of the post-1994 era in South Africa was the enactment of a new Constitution which has been described as: “one of the most advanced constitutions in history”,⁷ and also as “one of the best constitutions in the world” with a Bill of Rights “which is considered among the most comprehensive of all Bills of Rights to date”.⁸ The Constitution unambiguously provides in section 39(1)(b) that “when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law”. Under section 233, when interpreting any legislation, a court must ensure that it adopts an interpretation that is in line with South Africa’s international law obligations. Sections 231 and 232 are to the effect that customary international law and treaties are sources of law in South Africa. Dugard summarises the impact the new Constitution has had on the status of international law in South Africa:

“As a result of the new Constitution, it has now become common place for the Constitutional Court and other courts to invoke human rights norms and decisions by international

2 Dugard (2007) *International Law: A South African Perspective* 546-547.

3 Dugard rightly writes that “South Africa’s racial policies featured on the agenda of the General Assembly from 1946 to 1994.” See Dugard (fn 2 above) 311.

4 Dugard (fn 2 above) 336.

5 Dugard (fn 2 above) 336.

6 For the list of international treaties that South Africa had ratified or signed by 2007 see Dugard (fn 2 above) 316-328; and for a list of regional human rights treaties South Africa had signed or ratified by 2007 see Dugard (fn 2 above) 556-568.

7 Dugger (2007) 197.

8 Goodsell (2007) 109.

human rights tribunals and supervisory bodies to interpret the Bill of Rights and to set aside laws and administrative practices that violate human rights. It is impossible to examine all the judicial decisions that have invoked international human rights law. The *Annual Survey of South African Law* and academic writings give some indication of the extent of this judicial practice.”⁹

Dugard reviews various judgments in which South African courts have referred to international treaties and to decisions of international and regional human rights bodies or tribunals. Courts have referred to treaties, such as the Convention against Torture, Convention on the Rights of the Child, Convention on Economic, Social and Cultural Rights, and the jurisprudence developed by the relevant committees established to oversee the implementation of, and compliance with, the above treaties.¹⁰ Courts have also relied heavily on the jurisprudence of the European Court of Human Rights.¹¹ Some pieces of legislation, like the Labour Relations Act of 1995 and Refugees Act of 1998, also require that their interpretation should reflect South Africa’s commitment to its international human rights obligations in the sense that they should be interpreted with due regard to, or in compliance with, the relevant international law instruments.¹² De Wet succinctly captures the ways through which international instruments are incorporated in the domestic legal system of South Africa in the following words: “[Non self-executing] treaties ...only become part of South African law once they are ratified and incorporated by means of legislation. Self-executing treaties pose an exception in this regard, as they become automatically operational once ratified.”¹³ In addition, de Wet rightly reminds us, “[c]ustomary international law is automatically part of South African law, unless it is incompatible with the Constitution or national legislation”.¹⁴

3 THE PROTOCOL

The Protocol,¹⁵ which at the time of writing had been ratified or acceded to by 21 African countries,¹⁶ is the main instrument in which the African Commission on Human and Peoples’ Rights (the African Commission) could be said to have formulated and laid down principles and rules aimed at solving legal problems relating to women’s rights and freedoms, and upon which African governments may base their legislation that may in one way or another affect the rights of women, hence fulfilling its mandate under

9 Dugard (fn 2 above) 338. Emphasis in the original. Footnotes omitted.

10 Dugard (fn 2 above) 339-340.

11 Dugard (fn 2 above) 339-340.

12 Dugard (fn 2 above) 340.

13 De Wet (2004 – 2005) 1532 – 1533.

14 De Wet (fn 13 above) 1533.

15 Adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005.

16 The 21 African countries that had ratified this Protocol at the time of writing were: Benin; Burkina Faso; Cape Verde; Comoros; Djibouti; the Gambia; Libya; Lesotho; Mali; Malawi; Mozambique; Mauritania; Namibia; Nigeria; Rwanda; South Africa; Senegal; Seychelles; Tanzania; Togo; and Zambia. See <<http://www.africaunion.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>> [accessed 12 March 2008].

article 45(1)(b) of the African Charter on Human and Peoples' Rights.¹⁷ The African Commission, especially the office of the Special Rapporteur on the Rights of Women in Africa (SRRWA), was very instrumental during the drafting, adoption and process of ratification of this Protocol, and it continues to call upon African countries that have not ratified this Protocol to do so urgently. I now turn to a brief discussion of the historical adoption process of the Protocol.

The process leading to the drafting of the Protocol began in the 1990s when, during several meetings and seminars, human rights activists pointed out that, to a large extent, the African Charter was lacking in its protection of the rights of women in Africa.¹⁸ At the insistence of various partners, the African Commission in 1998 appointed the SRRWA whose mandate included, amongst other things, to make a follow-up on the drafting of the Protocol until its adoption by the African Union.¹⁹ With the assistance of NGOs and a Working Group which was established for that purpose, a draft of the Protocol was presented to the 26th Ordinary Session of the African Commission in November 1998 for adoption.²⁰ In effect, it took the Working Group less than two years to come up with the draft of the Protocol. The African Commission adopted the Draft Protocol at its 26th Session and thereafter transmitted it to the OAU General Secretariat for the requisite process.²¹

As a result, the OAU General Secretariat convened two Meetings of Experts both in Addis Ababa, Ethiopia, to discuss the Draft Protocol – the first was held from 12 – 16 November 2001 and the second from 24 -26 March 2003. The Draft Protocol was discussed and adopted at the Ministerial meeting which was held from 27-28 March 2003, also in Addis Ababa.²² It was submitted for adoption and was adopted at the Second Ordinary Session of the Assembly of Heads of State and Government of the African Union at its Summit which took place from 10-12 July 2003 in Maputo, Mozambique.²³

17 In the Inter-American system of human rights, unlike in the African, the major instrument on women's rights is dedicated to the eradication of violence against women. See the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belem do Para" adopted in Belém do Pará, Brazil, on 9 June 1994 at the 24th Regular Session of the General Assembly.

18 See 16th Annual Activity Report of the African Commission on Human and Peoples' Rights (ARAC) (2002-2003), para 55. For further discussion of the history of the Protocol see, Baderin MA, 'Recent Developments in the African Regional Human Rights System' (2005) 5 *Human Rights Law Review* 117 at 118-124; and Nsibirwa MS 'A Brief Analysis of the Draft Protocol to the African on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40 at 41-43.

19 16th ARAC, para 56.

20 16th ARAC, para 57.

21 16th ARAC, para 57.

22 16th ARAC, para 58.

23 16th ARAC, para 58. See also <<http://www.africa-union.org/root/au/Conferences/Summits/summit.htm>> [accessed 12 October 2006].

3.2 An outline of the rights in the Protocol

The Protocol provides various rights to women and these are: the right to freedom from discrimination;²⁴ the right to dignity;²⁵ the rights to life, integrity and security of the person;²⁶ the right not to be subjected to harmful practices;²⁷ rights relating to marriage, separation, divorce and annulment of marriage;²⁸ access to justice and equal protection before the law;²⁹ right to participation in the political and decision-making process;³⁰ right to peace;³¹ rights of women in armed conflicts;³² right to education and training;³³

24 Article 2.

25 Article 3.

26 Article 4. For a discussion of the rights to human dignity and physical security, see Nsibirwa (fn 18 above) 44. It has been rightly observed that '...the state is made responsible for violence including forced sex in the private sphere raising the possibility that those African states which have not already done so, may have to legislate to make rape within marriage illegal.' See Banda (2006) 79.

27 Article 5. It has been observed that '[t]he most important contribution by the Draft OAU Convention to the Draft Women's Protocol is to be found in article 6 which deals entirely with harmful practices. For practices to be harmful they must not only affect the fundamental human rights of women and girls but they must also be contrary to recognised international standards. This could be interpreted to mean that these standards are flexible, classifying certain activities as harmful.' Nsibirwa (fn 18 above) 45. Female genital mutilation or cutting is one of the harmful practices that the Protocol calls upon states to put to an end. For a discussion of the problem of female genital mutilation in Africa see: Friedenthal NJ 'It's Not All Mutilation: Distinguishing between Female Genital Mutilation and Female Circumcision' (2006) 19 *New York International Law Review* 111 at 111-154; Wu EY 'Global Burqas' (2005) 14 *Texas Journal of Women and the Law* 179 at 179-199; For a detailed examination of how the community can be involved in eradicating female genital mutilation, see Ouoba D *et al*, *Experience from a Community Based Education Program in Burkina Faso: The Tostan Program* (2004) available at <http://www.popcouncil.org/pdfs/frontiers/FR_FinalReports/BurkinaFaso_FGC.pdf> accessed 11 March 2008. It has been observed that '[t]he strength of the African Protocol is in its recognition that...the elimination of harmful practices, requires an holistic approach which goes beyond law and punishment to embrace the totality of the person whose rights have been violated.' See Banda (fn 26 above) 80-81. In Kenya, for instance, an alternative rites approach which involves community members in addressing the problem of female genital mutilation instead of penal sanctions has registered some achievements. See J Chege *et al*, *An Assessment of an Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya* (2001) available at <http://www.popcouncil.org/pdfs/frontiers/FR_FinalReports/Kenya_FGC.pdf> [accessed 12 March 2008].

28 Articles 6 and 7.

29 Article 8.

30 Article 9.

31 Article 10.

32 Article 11. It was argued with reference to Article 11 in its draft form, that 'article 4(d) of the Draft Protocol has brought about a more positive and welcome approach to the issue of treating rape and sexual abuse during conflict as war crimes. Such acts are to be considered war crimes without the prosecution having to prove that they were carried out with a political motive.' See Nsibirwa (fn 18 above) 45. For a detailed discussion of the obligation of the states parties to the Protocol to protect women from sexual violence, see Dyani (2006) 166-187. Apart from the Protocol, women in armed conflicts in Africa are also protected under the Four Geneva Conventions and the Two Additional Protocols, some of the provisions of which are believed to have acquired the status of customary international law. See generally, Henckaerts & Doswald-Beck (2005); Jinks & Sloss (2004), 97, where it is argued that the Geneva Conventions have become part of customary international law (168). It has to be noted that almost all African countries are states parties to the Four Geneva Conventions and the Two Additional Protocols. See <[http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)> [accessed 11 March 2008].

33 Article 12.

economic and social welfare rights;³⁴ health and reproductive health care rights;³⁵ right to food security;³⁶ right to adequate housing;³⁷ right to positive cultural context;³⁸ right to healthy and sustainable environment;³⁹ right to sustainable development;⁴⁰ widow's rights;⁴¹ right to inheritance;⁴² the special protection of elderly women;⁴³ special protection of women with disabilities;⁴⁴ and special protection of women in distress.⁴⁵ The Protocol also requires states parties to provide remedies to women whose rights have been violated.⁴⁶

4 RESERVATIONS AND INTERPRETATIVE DECLARATIONS: LEGAL IMPLICATIONS

4.1 Reservations

Unlike other treaties that specifically allow states to make reservations to some of their provisions at the time of ratification,⁴⁷ the Protocol is silent on reservations. However, that does not mean that reservations cannot be made to it. Baderin has argued that the fact that the Protocol is silent on reservations "in essence means that reservations are possible subject to the relevant international law rules in that regard".⁴⁸ He adds that, by allowing reservations, a treaty may get as many State Parties as possible but that at the

34 Article 13. It has been argued that the inclusion of pornography as a form of exploitation and abuse of women indicates the unique character of the Protocol on the ground that it moves away from the Western debates '...about whether pornography constitutes a violation of women's rights or is covered under the right to free speech...' See Banda (fn 26 above) 80.

35 Article 14. While analyzing article 14, Banda poses a question that needs an objective approach: "...one must ask how many women would dare ask a husband or partner about his HIV status?" She goes on to observe objectively that "[f]ear of rejection or violence for daring to challenge the breadwinner and head of the household means that this provision will have to be read with Article 2(2) on the changing attitudes and challenging stereotypes". See Banda (fn 26 above) 81-82. It has been observed that "[m]any of Africa's problems may be attributed to its high rate of population growth. Giving women greater control over reproduction will not only ensure women better health but also help the continent to tackle the problem of rapid population growth". See Nsibirwa (fn 18 above) 48-49. It has been rightly observed that Article 14(2)(c) is controversial and, that its prospects of enforcement remain debatable, but that, that notwithstanding, "...it is worth noting that this provision constitutes the first time in international human rights law that a right to abortion has been enshrined in law". See Banda (fn 26 above) 82.

36 Article 15.

37 Article 16.

38 Article 17.

39 Article 18.

40 Article 19.

41 Article 20. It has been rightly observed that '[I]f likened to widow disinheritance is widow abuse which can include being made to sleep with a stranger to be "cleansed" or indeed being forced to marry one of the deceased's relatives. The Protocol makes it clear that the widow is not to be subject to degrading and inhuman treatment...a widow shall have the right to remarry if she so wishes (and whom she wishes to marry)...'. See Banda (fn 26 above) 78.

42 Article 21.

43 Article 22.

44 Article 23.

45 Article 24.

46 Article 25.

47 For example Article 28 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 51 of the Convention on the Rights of the Child; and Article 30 of the Convention against Torture.

48 Baderin (fn 18 above) 123.

same time many reservations may weaken the “universal normative force of a treaty”.⁴⁹ At the time of writing three countries had made reservations to the Protocol – South Africa, The Gambia and Namibia.⁵⁰ There are some treaties that prohibit reservations.⁵¹ The Protocol is not one of them. It has been suggested that the absence of a provision in the Protocol prohibiting reservations “is probably a double-edged sword designed to both encourage participation and accommodate, among State Parties, possible cultural-legal differences that do not destroy the object and purpose of the treaty”.⁵² We now turn to a discussion of the law relating to reservations.

According to Article 1(d) of the 1969 Vienna Convention on the Law of Treaties (VCLT), a reservation “means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. Article 23 of the VCLT requires that a reservation “must be formulated in writing”. States do not have unlimited discretion when they opt to make reservations to certain provisions of the treaty. In terms of Article 19 of the VCLT, States are not allowed to enter reservations that are prohibited by the treaty; and reservations should not be incompatible with the object and purpose of the treaty. When states make reservations that are considered by other states to be incompatible with the object and purpose of the treaty, the latter are allowed by Article 20 of the VCLT to, and usually do, object to such reservations. For example, while acceding to CEDAW, Libya made a reservation to Article 2⁵³ to the effect that “Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Shariah* relating to determination of the inheritance portions of the estate of a deceased person,

49 Baderin (fn 18 above) 123.

50 See http://www.chr.up.ac.za/hr_docs/themes/theme39.html accessed 11 March 2008.

51 See Article 2(1) of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.

52 Baderin (fn 18 above) 124.

53 Article 2 of CEDAW states: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality between men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women”.

whether female or male”.⁵⁴ On 8 June 1990 Finland objected to that reservation in the following terms:

“The Government of Finland has examined the contents of the reservation made by the Libyan Arab Jamahiriya and considers the said reservation as being incompatible with the object and purpose of the Convention. The Government of Finland therefore enters its formal objection to this reservation.”⁵⁵

On 16 October 1996 Finland gave its detailed explanation why it thought the reservation by Libya to Article 2 of CEDAW was incompatible with the object and purpose of the Convention:

“A reservation which consists of a general reference to religious law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of the observance of treaties according to which a Party may not invoke the provisions of its internal law as justification for failure to perform a treaty”.⁵⁶

When a State Party objects to a reservation by another State Party, it usually also states the legal implications of such objection on the implementation of the treaty between the reserving and the objecting state.⁵⁷ For example, after making the above objection to Libya’s reservations, Finland expressly put it that “[t]his objection is not an obstacle to the entry into force of the said Convention between Finland and the Libyan Arab Jamahiriya”. It is common practice that, when states object to reservations by other states, they add that they do not object to the entry into force of the relevant treaty in its entirety between the reserving and objecting states, with the understanding, however, that the reserving states shall not benefit from the reservations. There are instances where objecting states recommend to the reserving states what to do in cases of what the former consider to be reservations incompatible with the object and purpose of the treaty. For example, when ratifying CEDAW Niger made many reservations that Denmark considered to be incompatible with the Convention. In its objections Denmark, while observing that CEDAW remained “in force in its entirety between Niger and Denmark”, recommended to “the Government of Niger to reconsider its reservations...”⁵⁸

Article 22 of the VCLT allows states to withdraw reservations “at any time”. The government of Malawi, for example, when acceding to CEDAW, made two reservations which it withdrew later. The following Statement from the UN Secretary General’s Office regarding that development is noted:

“On 24 October 1991, the Government of Malawi notified the Secretary-General of its decision to withdraw the following reservations made upon accession:

‘Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.

54 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

55 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

56 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

57 For the legal effects of reservations and objections to reservations, see Article 21 of the VCLT.

58 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

While the Government of the Republic of Malawi accepts the principles of article 29, paragraph 2 of the Convention this acceptance should nonetheless be read in conjunction with [its] declaration of 12th December 1966, concerning the recognition, by the Government of the Republic of Malawi, as compulsory the jurisdiction of the International Justice [sic] under article 36, paragraph 2 of the Statute of the Court'.⁵⁹

As at March 2008, the following countries had withdrawn all or some of the reservations that they had made to CEDAW: Czechoslovakia, Australia, Austria, Bangladesh, USSR (Russia), Belgium, Brazil, Bulgaria, Canada, Cyprus, Fiji, France, Germany, Hungary, Ireland, Jamaica, Liechtenstein, Malawi, Mauritius, Mongolia, New Zealand, Poland, Romania, Thailand, and the United Kingdom.⁶⁰ The VCLT, while allowing States Parties to a treaty to modify a treaty⁶¹ does not expressly allow or prohibit states to modify reservations. Instances have arisen where a state's reservations have been objected to by many State Parties to the treaty, but at the same time such state does not want to withdraw its reservations. What some states do, is to modify their reservations. States have reacted to such modifications in at least two ways: either by objecting to the content of the modified reservations or by rejecting the modified reservations in their entirety, and calling upon the modifying state to withdraw the reservations and not just to modify them. For example, when on 6 February 1998 Malaysia notified the UN Secretary General that it had modified its reservation to CEDAW, France (on 20 July 1998) objected to the modified reservation on the ground that it was incompatible with the object and purpose of CEDAW. But the Netherlands (on 21 July 1998), after examining Malaysia's modification, urged Malaysia to strive to respect the rights implicated in its modified reservation and also change its relevant laws in conformity with CEDAW.⁶²

When Maldives modified its reservation to CEDAW, Finland "examined the contents of the modified reservation" and welcomed the modifications "with satisfaction"; although some elements of the modified reservation remained "objectionable", and assumed that Maldives would "do its utmost to bring its national legislation into compliance with obligations under the Convention with a view to withdrawing the reservation". However, Germany categorically objected to the modification on the ground that it was a violation of Article 19 of the VCLT:

"The Government of the Federal Republic of Germany notes that reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification. The Government of the Federal Republic of Germany objects to the modification of the reservations."⁶³

59 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

60 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

61 Article 41.

62 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

63 See <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

The above discussion is relevant to South Africa in relation to its reservations to the Protocol and to other treaties in at least four respects: one is that every reservation South Africa intends to enter on a treaty provision should be as clear as possible; two, such a reservation should not defeat the object and purport of the treaty otherwise it will be invalid and will attract an avalanche of objections; three, South African is free to withdraw any reservation to any treaty provision at any time; and four, should any state party to the Protocol object to any of South Africa's reservation, South Africa could choose to either retain the reservation, modify it or withdraw it competently. However, it is recommended that it would be better for South Africa to withdraw a reservation instead of modifying it because, as the above objection by Germany to Maldives' modification illustrates, the VCLT only allows a reservation at the time when the state is becoming party to the treaty and not when it has already become party to the treaty. Modifying a reservation is tantamount to entering a new reservation after becoming party to the treaty, a situation not contemplated under the VCLT.

4.2 Interpretative declarations

Unlike reservations, the VCLT does not expressly provide for, or define, interpretative declarations. In 1957 Fitzmaurice made the following observation in relation to interpretative declarations and reservations that is still of relevance today:

"[G]overnments not infrequently [make] declarations in which they do not say that they will not carry out, or will only partly carry out, a certain provision – but make statements of intention, or say how they understand or propose to interpret or apply the provision, either generally or in certain events. Whether this will amount strictly to an actual reservation or not, will depend on whether, by way of special interpretation, the party concerned is really purporting, so far as its own obligations are concerned, to alter the substantive content or application of the provision affected; or whether the statement is truly interpretational, and merely clarifies some obscurity, or makes explicit something that in the clause is only implicit."⁶⁴

According to Fitzmaurice, if the statement made by the state, in so far as its obligations are concerned with regard to the treaty it has ratified or acceded to, alters, or purports to alter, 'the substantive content or application of the provision affected' then that statement is a reservation. On the other hand, however, if, when ratifying or acceding to a treaty, a state makes a statement which is 'truly interpretational, and merely clarifies some obscurity, or makes explicit something that in the clause is only implicit', that statement is an interpretative declaration.⁶⁵ However, recently we have witnessed that the distinction drawn by Fitzmaurice is being blurred, and that it is becoming increasingly difficult to determine whether some statements are reservations or interpretative declarations. It has been rightly observed that "[o]ne of the

64 Fitzmaurice (1957) 203-93, as quoted in Nelson (2001) 771.

65 The United Nations Office of Legal Affairs (Treaty Handbook) defines a declarative interpretation in the following terms: 'interpretative declarations...unlike reservations, do not purport to exclude or modify the legal effects of a treaty. The purpose of an interpretative declaration is to clarify the meaning of certain provisions or of the entire treaty.' See para 3.6.1 at <<http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm>> [accessed 8 March 2008].

most daunting problems in the law of treaties is the distinction between reservations and interpretative declarations".⁶⁶ As Nelson rightly writes:

"As is generally agreed, it is at times extremely difficult to make any distinction between an interpretative declaration and a reservation as there is in truth no objective test. 'An interpretative declaration might be regarded by one State as rendering the true meaning of a treaty and by another as distorting that meaning' – hence modifying or excluding the legal effect of the relevant provision in its application."⁶⁷

Contemporary treaty ratification practice attests to the fact that, like reservations, many interpretative declarations modify "the extent of the obligations" the State undertakes when it ratifies or accedes to a particular treaty.⁶⁸ This has led to the categorisation of interpretative declarations into two categories: "mere interpretative declarations" and "qualified interpretative declarations". In the former case the state makes, what one would call, a genuine interpretative declaration, while in the latter case "a State makes a condition of its participation in a treaty subject to a particular interpretation of a treaty".⁶⁹ Fitzmaurice has thus observed:

"The latter type of declarations should be viewed as a reservation, since "the declaring State is purporting to exclude or to modify the terms of the treaty. Thus the consequences attached to the making of reservations should apply to such (a) declaration". Therefore, rules of the Vienna Convention on reservations should apply to qualified interpretative declarations."⁷⁰

As mentioned earlier, in practice some states make interpretative declarations that are interpretative declarations only in name, but reservations in effect.⁷¹ This prompts other states to regard them not as interpretative declarations but as reservations and to object to them if they are against the object and purpose of the treaty. Thus Kohona observed that an interpretative "declaration attracts an objection because the statement concerned is actually a reservation not provided for by the treaty or is inconsistent with its object or purpose".⁷² Boyle suggests that, where it is difficult to determine whether the statement in question amounts to a reservation or an interpretative declaration, it is important to look at the intention "underlying the making of that statement".⁷³

There are instances where some states have made statements which are purely political in nature and which one cannot categorise either as reservations or interpretative declarations. For example, when Iraq ratified CEDAW, one of its "reservations" was to the effect that being a State Party to the same

66 Fitzmaurice (2006) 160.

67 Nelson (fn 64 above) 777.

68 Gardner (1997) 644.

69 Fitzmaurice (fn 66 above) 160.

70 Fitzmaurice (fn 66 above) 161. Footnotes omitted.

71 It has been illustrated that "[i]n the 1988 *Belilos* case...the [European Court of Human Rights] struck down an interpretative declaration concerning Article 6(1) on fair trial that the Swiss government had made when depositing its ratification instrument. The Court first interpreted the declaration as in fact a reservation and then went on to discard its validity as it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning or scope". See Koskeniemi and Leino (2002) 567.

72 Kohona (2005) 449.

73 Boyle (1980) 504.

instrument as Israel did “in no way imply recognition of or entry into any relations with Israel”. As expected Israel did not take that “declaration” or “reservation” lightly and objected to it by saying that:

“In the view of the Government of the State of Israel, such declaration which is explicitly of a political character is incompatible with the purposes and objectives of the Convention and cannot in any way affect whatever obligations are binding upon Iraq under general international law or under particular conventions. The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards Iraq an attitude of complete reciprocity.”⁷⁴

The foregoing discussion is relevant to South Africa in the following three ways: an interpretative declaration should only and only clarify the meaning South Africa attributes to an obscure word in the treaty provision or the treaty provision itself. In other words, should South Africa attempt to couch a reservation as an interpretative declaration, other states parties to the treaty will treat it as a reservation and object to it. Two, like a reservation, an interpretative declaration should not defeat the object and purport of the treaty. And lastly, South African should not enter “political” interpretative declarations.

5 SOUTH AFRICA RATIFYING THE PROTOCOL

The Instrument of Ratification of the Protocol which was signed by the South African Minister of Foreign Affairs, Nkosazana Clarice Dlamini Zuma, on 17 December 2004 and deposited with the Secretariat of the African Union on 14 January 2005 provides in the preamble that “...ratification of the Protocol was approved by the South African Parliament in accordance with the requirements of South African law, subject to...reservations and declarative interpretations”. We now turn to a discussion of those reservations and declarative interpretations.

5.1 Reservations

South Africa reserved to Article 4(2)(j) of the Protocol which obliges States parties that still impose the death penalty to take appropriate and effective measures to ensure that the death penalty is not carried out on pregnant or nursing women. South Africa entered the following reservation:

“Article 4[2](j)⁷⁵ of the Protocol does not find application in the Republic of South Africa as the death penalty has been abolished. Inasmuch as the existence of Article 4[2](j) may be construed to be an inadvertent sanctioning of the death penalty in other States Parties, this may conflict with section 2 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996). South Africa is in principle opposed to the application of the death penalty and no adverse legal consequences, including any conflict with section 2 of the Constitution of the Republic of South Africa, may be visited upon the Parliament and the Government of the Republic of South Africa pertaining to the ratification of the Protocol.”

The Constitution protects the right to life under section 11 by providing that “everyone has the right to life.” Unlike in some African countries where the

74 See <http://www.unhcr.ch/html/menu3/b/treaty9_asp.htm> [accessed 11 March 2008].

75 The Instrument of Ratification omits subsection 2, and only refers to Article 4(j). This was a mistake, as the reference should have been Article 4(2)(j).

right to life is qualified,⁷⁶ the right to life under the South African Constitution is not qualified. The Constitutional Court in *S v Makwanyane*⁷⁷ held that the death penalty was unconstitutional because it, amongst other things, violated the right to life, and was a cruel and inhumane punishment. It is upon that basis that the ratification instrument clearly points out that Article 4(2)(j) of the Protocol does not have application in South Africa because the death penalty has been abolished there. One has to recall that the reservation refers to section 2 of the Constitution. Section 2 provides: “the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

Section 2 should be viewed in the light of the above reservation, where the instrument of ratification states that “inasmuch as the existence of Article 4[2] (j) may be construed to be an inadvertent sanctioning of the death penalty in other States Parties, this may conflict with section 2 of the Constitution...” This reservation at least has two implications: the first implication is that South Africa cannot enact a law that sanctions the imposition of a death penalty even if the Protocol allows the imposition of such a penalty, because such law would be in conflict with section 2 of the Constitution; the second and most important implication is, that South Africa cannot conduct itself in a manner that would allow or facilitate the imposition of a death penalty on any person, because such conduct would be in violation of the Constitution. For example, South Africa cannot extradite or deport a person to a country where there is the likelihood that such person may be sentenced to death when convicted of the offence for which he has been deported or extradited.⁷⁸ The reservation to Article 4(2)(j) makes it clear that “South Africa is in principle opposed to the death penalty...”

South Africa also made a reservation to Article 6(d). This Article states: “States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised”.

“The Republic of South Africa makes a reservation and will consequently not consider itself bound to the requirements contained in article 6(d) that a marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognised. This reservation is made in view of the provision of section 4(9) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), which stipulates that failure to register a customary marriage does not affect the validity of that marriage, and is considered to be a protection for women married under customary law.”

76 For example, the Constitution of Uganda (1995) provides that ‘no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial...’ (article 22(1)); see also article 12(1) of the Constitution of Zimbabwe (as amended in 2005); article 12(1) of the Constitution of Zambia (as amended in 1996); and article 14(1) of the Constitution of Mauritius.

77 1995 (3) SA 391 (CC).

78 For a detailed discussion of South Africa’s jurisprudence relating to deportation where a deportee may be sentenced to death, see De Wet (above) 1529 -1559.

Unlike the reservation to the death penalty (Article 4(2)(j)) which is based on the Constitution which is the supreme law of the land, the reservation to Article 6(d) is based on the Recognition of Customary Marriages Act (RCMA). However, both reservations have the same force under international law notwithstanding the fact that one is based on the Constitution and the other on a piece of legislation subordinate to the Constitution. When commenting on section 4(9) of the RCMA, Jansen rightly observes that “[a]lthough the Act provides for registration this is not a requirement for a valid customary marriage”.⁷⁹ It is vital to note that South Africa does not merely say that it is making a reservation to Article 6(d) in the light of its domestic legislation. It also explains why such reservation is important, viz, it “is considered to be a protection for women married under customary law”. Such justification is important because if any other State Party wanted to object to South Africa’s reservation in this regard, it may find it a challenge to make a convincing objection. For example, any objection to South Africa’s reservation would have to show that the reservation perpetuates the subordination of women. South Africa’s reservation also shows that it did not reserve on article 6(h) just for the sake of reserving but to genuinely protect the rights and interests of women married under customary law.

However, it could be argued that the above justifications South Africa gave in reserving to Article 6(d) are indefensible in the light of the following two reasons. In the first place, Article 27 of the VCLT prohibits a state from invoking its domestic law to defeat its international obligation. One could argue that South Africa by invoking its domestic law, section 4(9) of the RCMA, is defeating its international obligation under Article 6(d) of the Protocol.

Secondly and most importantly, Viljoen argues that “the non –registration of marriages facilitates the marriage of girl-children, and therefore strikes at a core provision of the Protocol”.⁸⁰ It is argued that this is true when one only looks at section 3(1)(a)(i-ii) of the RCMA which requires that for any customary marriage entered into after the coming into force of the Act to be valid, “the prospective spouses must both be above the age of 18 years; and must both consent to be married to each other under customary law”. However, it is submitted that the registration of customary marriages in itself does not prevent the marriage of girl-children. This is because the RCMA provides in 3(3)(1)(a) that “for a customary marriage entered into after the commencement of this Act to be valid, if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or legal guardian must consent to the marriage”.

Section 4(a) buttresses my argument by providing that “[d]espite [section 3](1)(a)(i)], the Minister or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question”. Under section 4, every customary marriage, including

79 Bekker, Rautenbach and Goolam (2006) *Introduction to Legal Pluralism in South Africa* 41. Footnotes omitted.

80 Viljoen (2007) 273.

those where the wife is below the age of 18 provided the legal requirements were met, has to be registered even though failure to register it does not affect its validity. One also has to recall that the Children's Act⁸¹ which came into force in July 2007, though under section 1 defines a child to mean a person under the age of 18 years and sets 18 years as the age of majority (section 17), provides under section 12(2) that "[a] child below the minimum age set by law for a valid marriage may not be given out in a marriage or engagement". However, sections 31 read together with section 18(3)(c) provide that any parent or guardian of the child may give or refuse any consent required by law in respect of the child in including consent to the child's marriage. Thus the registration of customary marriages in itself does not prevent the marriage of girl-children. However, it could be argued that such laws are in violation of South Africa's international obligations because under the Protocol and CEDAW, girls should only get married when they reach the age of 18 years.⁸² The African Charter on the Rights and Welfare of the Child⁸³ also requires states to take "effective action" including enacting appropriate legislation specifying "the minimum age of marriage to be 18 years..."⁸⁴

One positive and undeniable aspect of South Africa's reservation to article 6(d) is that when one looks at the various provisions of the RCMA in the light of the status of women in customary marriages in South Africa in the past, the RCMA is indeed meant to protect women in such marriages. As Samuel observes, before the enactment of the RCMA, women in customary marriages were "in a position of perpetual minors, passing from the guardianship of their fathers to that of their husbands".⁸⁵ They had no *locus standi* and their contractual capacity was limited, men owned and controlled household property, and that it was "more difficult for women than men to obtain a divorce."⁸⁶ If a man was prepared to forfeit the bride wealth, he could "unilaterally repudiate his wife" but the wife could not unilaterally repudiate her husband and where grounds of divorce existed, she could not initiate the process.⁸⁷ A woman who sought a divorce had to "enlist the help of the bridewealth holder who [might] well be reluctant to co-operate for fear of having to return at least part of the bridewealth".⁸⁸

Samuels succinctly captures the "overriding object" of the Act as "to ameliorate the inconsistencies in South African family law which relegated women to second class citizens or even worse, women with no status at all".⁸⁹ As mentioned earlier, the Act provides under section 4(9) that the non-registration of a customary marriage does not affect its validity. This has various positive

81 Act 38 of 2005.

82 Viljoen (fn 80 above) at 273.

83 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990). Adopted in July 1990 and entered into force 29 November 1999. South Africa acceded to this treaty on 1 July 2000.

84 Article 21(2).

85 Samuel (1999) 25.

86 Samuel (fn 85 above) at 25.

87 Samuel (fn 85 above) at 25.

88 Samuel (fn 85 above) at 25.

89 Samuel (fn 85 above) at 25.

consequences. First, a wife in a customary marriage, whether registered or not, “has full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any other rights and powers that she might have at customary law”.⁹⁰ Secondly, section 7 makes a customary marriage contracted after the commencement of the Act a marriage in community of property and loss between the spouses unless the spouses in their antenuptial contracts excluded such consequences. And thirdly, under section 8 a customary marriage may only be dissolved by court on the ground that either party proves the existence of “irretrievable breakdown of the marriage”. The above provisions show that women in customary marriages, whether registered or not, are equal with men, can own property and can decide to seek a divorce if they think that a marriage has irretrievably broken down.

A reservation was also entered to Article 6(h) which provides: “States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests”.

“The Republic of South Africa makes reservation to Article 6(h), which subjugates the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children.”

Unlike the previous two reservations already considered, this reservation to Article 6(h) is expressly based neither on the Constitution nor on a piece of legislation. However, like the other two reservations, it also gives its rationale, that is, that it protects the inherent rights to citizenship and nationality of children. It has to be recalled that in countries like Egypt in the case of marriages between aliens and Egyptians, they must take the father’s nationality, always. It is considered to be prejudicial to the child’s future if he acquired the mother’s nationality. Authorities in that country hold the view that where the mother is, for example, an Egyptian and the father a South African, the child has to be a South African citizen “since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father’s nationality”.⁹¹ If South Africa enacted a law that denied South African nationality or citizenship to children born of South African fathers but alien mothers for security interests, as the Protocol provides in article 6(h), it would mean that children born of South African fathers but Egyptian mothers would become stateless as they would be neither South African nationals nor Egyptian nationals. The reservation to Article 6(h) should be viewed in that context.

5.2 Interpretative declarations

South Africa made an interpretative declaration to Article 1 (f) which defines discrimination against women to mean “any distinction, exclusion or restric-

⁹⁰ Section 6.

⁹¹ See Egypt’s reservation to Article 9 of CEDAW at <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> [accessed 10 March 2008].

tion or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life". The declaration reads:

"It is understood that the definition of "discrimination against women" in the Protocol has the same meaning and scope as is provided for in section 9 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), as interpreted by the Constitutional Court of South Africa from time to time."

This is probably one of the most unclear of interpretative declarations. It could be likened to the well known "Sharia declarations/reservations" by which Islamic countries vaguely state when ratifying treaties that a particular word or phrase in a treaty shall be given the meaning that is in line with the Sharia law.⁹² Unlike its reservations, where South Africa at least paraphrases the relevant national law upon which a reservation is based, in this case one has a double task interpreting it. In the first place, one has to read section 9 of the Constitution⁹³ and understand what it means by "discrimination against women". In addition, one is also required to read the judgments of the Constitutional Court that have interpreted section 9 with regard to discrimination against women. Judgments rendered by other courts, and in particular the High Court and the Supreme Court of Appeal, on their understanding of section 9 and how they relates to discrimination against women are irrelevant, unless they have been upheld by the Constitutional Court. Thus, Cameroonian, Egyptian, Malian or Ugandan researchers who want to understand what "discrimination against women" means in South Africa in relation to the Protocol are required to familiarise themselves with section 9 of the Constitution and the relevant jurisprudence of the Constitutional Court "from time to time".

Despite the fact that researchers who are not familiar with the South African Constitutional Court equality jurisprudence may find it a daunting task to establish what the Court has ruled on the meaning of discrimination against women in the context of the South African Constitution, it should be recalled that there are several ground-breaking judgments in which the Court has declared laws or customs to be unconstitutional for discriminating against women. Such judgments have indeed reflected that the Court has furthered not only the object and purport of section 9 of the Constitution, but also that of the Protocol. It is beyond the scope of this article to discuss in detail all or most of the cases in which the Court has upheld the unconstitutionality of laws that discriminated against women, however, two cases are highlighted. In *Bhe and Others v Magistrate, Khayelitsha and others*⁹⁴ the Constitutional Court held that the relevant sections of the Black Administration Act⁹⁵ and the Intestate

92 For example Saudi Arabia made the following reservation when ratifying CEDAW: "In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." See <http://www.unhcr.ch/html/menu3/b/treaty9_asp.htm> [accessed 10 March 2008].

93 See also Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

94 2005 (1) SA 580.

95 Act 38 of 1927.

Succession Act⁹⁶ were unconstitutional because, inter alia, they furthered cultural practices which prohibited women from being heirs of the estates of their fathers who had died interstate. In *Shilubana and Others v Nwamitwa*⁹⁷ the Court held that tribal chiefs had the power to develop customary law to allow the appointment of a woman as a tribal chief on the ground that a customary practice which prohibited women from being chiefs was discriminatory and contrary to the Constitution. The Court also held that “[i]f women are to be Chiefs, the practice that a [Chief] always has to be fathered by the previous [Chief] must necessarily change”.⁹⁸ The above rulings are in consonant with the Protocol which requires South Africa to outlaw all customs and laws that perpetuate discrimination against women.⁹⁹ However, it is regrettable that in none of the above cases did the Court refer to the Protocol to buttress its findings that the principle of non-discrimination against women is also entrenched under international treaties to which South Africa is a party.

South Africa also made a declarative interpretation to Article 31. Article 31 provides that “none of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties”. The declaration reads:

“It is understood that the provisions contained in article 31 may result in an interpretation that the level of protection afforded by the South African Bill of Rights is less favourable than the level of protection offered by the Protocol, as the Protocol contains no express limitations to the rights contained therein, while the South African Bill of Rights does inherently provide for the potential limitations of rights under certain circumstances. The South African Bill of Rights should not be interpreted to offer less favourable protection of human rights than the Protocol, which does not expressly provide for such limitations.”

Article 31 contemplates that there may be situations where national legislation could contain more favourable provisions for the realisation and protection of women’s rights than the Protocol itself. In such cases, such national legislation should be encouraged. South Africa was concerned that because the Protocol does not contain express limitation clauses, it could be assumed that it offered more favourable protection than the Constitution which did contain such limitations. By making an interpretative declaration to Article 31, South Africa clarified that its Bill of Rights offered more favourable protection to South African women than the Protocol. One finds it more compelling to agree with the South African position for at least three reasons. First of all, it is easier for women in South Africa to petition the South African courts for the protection of their rights under the Bill of Rights than would be the case with the Protocol. Many of them may not even be aware that the Protocol exists, and even those who are aware of its existence are required to exhaust domestic remedies

96 Act 81 of 1987.

97 [2008] ZACC 9.

98 *Shilubana and others v Nwamitwa* [2008] ZACC 9, para 79.

99 See Article 2. In *Daniels v Campbell and others* 2004 (5) SA 331 (CC) the Constitutional Court found the relevant provisions of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 to be unconstitutional for discriminating against widows see above in monogamous Muslim marriages.

before approaching the Protocol's enforcement body. Secondly, South African courts and human rights activists are more likely to be better conversant with the South African Bill of Rights than with the Protocol, and thus, if there are violations of women's rights, their first source of reference will be the Constitution. Lastly, the enforcement mechanism of international judgments depends largely on the goodwill of the state concerned, and many states respect such judgments because they do not want to be named and shamed as ones that do not respect their treaty obligations. However, national courts' judgments are always easier to enforce as relevant government officials may be taken to court for contempt if they disrespected a court order without justification. It is thus easier to seek a local remedy by relying on the Bill of Rights, than an international remedy relying on the Protocol.¹⁰⁰

6 CONCLUSION

The article has dealt with the meaning of reservations and interpretative declarations in the light of the Protocol. The drafting history of the Protocol has been discussed. The article has also addressed the distinction between reservations and interpretative declarations. It has been shown that, while it may sometimes be difficult to draw this distinction, it is possible to do so. The status and importance of international law in South African jurisprudence has been dealt with, and it has been demonstrated that courts in South Africa resort to international law to interpret the Bill of Rights, as required by the Constitution. The legal implications of the reservations and interpretative declarations that South Africa made when ratifying the Protocol have been discussed. The author has illustrated that whereas all the reservations South Africa made to the Protocol are clear, this is not the case with one interpretative declaration to Article 1(f) of the Protocol that defines "discrimination against women". The interpretative declaration is to the effect that South Africa understands "discrimination against women" to mean the interpretation given to that term under section 9 of the Constitution and how it is interpreted by the Constitutional Court from time to time. The author accordingly argues that this is an ambiguous interpretative declaration.

It is submitted that much as South Africa's reservation to Article 6(d) of the Protocol is meant to protect women in customary marriages, South Africa, as the African Commission on Human and Peoples' Rights recommended in 2005,¹⁰¹ should in the not far distant future consider withdrawing that reservation because it clearly furthers a practice (of the marriage of minors) which is contrary

100 For circumstances under which a state or provincial official can be convicted of contempt of court see *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and another* [2003] 2 All SA 223 (SCA). On the same subject matter see also *Kate v MEC for Welfare, Eastern Cape* [2005] 1 All SA 745 (SE).

101 The African Commission on Human and Peoples' Rights recommended that South Africa should consider "lifting the reservation made on Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa." See Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa, made at the 38th Ordinary Session of the African Commission on Human and Peoples' Rights 21 November – 5 December 2005, Banjul, The Gambia at <http://www.chr.up.ac.za/hr_docs/countries/docs/concluding%20observations%20-%20south%20african%20periodic%20report%20-%20update%20and%20%20adopted.doc> [accessed 19 July 2008].

to its international obligations under the UN Convention on the Rights of the Child, the Protocol, the African Charter on the Rights and Welfare of the Child, and CEDAW. South Africa should also consider revising its domestic laws to expressly prohibit the marriage of minors. The reservations and interpretative declarations discussed above, apart from the one on Article 6(d) in some respects as highlighted above, are reflective of South Africa's commitment not only to protecting the rights under its Bill of Rights but also under the relevant international treaties it is party to. These rights include the right to life, the right to equality between men and women during marriage especially customary marriages, and the rights of children in relation to the nationality of both their parents.

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