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JOINT GENERAL COMMENT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR) AND THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC) ON ENDING CHILD MARRIAGE

2017

JOINT GENERAL COMMENT OF THE AFRICAN
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(ACERWC) ON ENDING CHILD MARRIAGE

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I. OBJECTIVE AND SCOPE OF THIS JOINT GENERAL COMMENT

[1] The prevalence of child marriage and its impacts are a major concern on the African continent.¹ Child marriage has a serious impact on the enjoyment of human rights and fundamental freedoms, particularly for women and girls and in recent years has attracted high-level policy interest in continental forums. Among others, this interest has been expressed through the adoption of an African Common Position and the African Union campaign to End Child Marriage in Africa.² Child marriage is prohibited under regional African law. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005 (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter) both specify that the minimum age of marriage shall be 18 years of

1 The overall prevalence of child marriage in Africa is higher than the global average and if current trends continue, Africa will become the region with the largest number and global share of child marriages by 2050 (UNICEF, 2015. A Profile of Child Marriage in Africa available at [http://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single\(1\).pdf](http://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single(1).pdf)).

2 In May 2014, the African Union (AU) launched a campaign to end child marriage in Africa, by enhancing continental awareness of the harmful impact of child marriage and by requiring states to take appropriate legal, social and economic measures to address child marriage. Also in 2014, the AU appointed a Goodwill Ambassador for Ending Child Marriage and the African Committee of Experts on the Rights and Welfare of the Child (Committee) appointed an AU Special Rapporteur on Child Marriage. Following the launch of these initiatives, in 2015 the Heads of State and Government of the AU announced that they had formally adopted an African common position on the AU campaign to end child marriage in Africa (the AU Common Position).

age. In line with the overall purposes of the Maputo Protocol and the African Children’s Charter, States Parties to either or both treaties are required to take legislative, institutional and other measures to give effect to this prohibition.³

[2] The aim of this Joint General Comment is to elaborate on the nature of State Party obligations that arise from Article 6(b) of the Maputo Protocol and Article 21(2) the African Children’s Charter, both of which prohibit child marriage, this Joint General Comment describes legislative, institutional and other measures that should be taken by States Parties to give effect to the prohibition and to protect the rights of those at risk or affected by child marriage.

[3] The task of interpreting the scope and meaning of provisions in the Maputo Protocol and the African Children’s Charter lies, respectively, with the African Commission on Human and Peoples’ Rights (Commission) and the African Committee of Experts on the Rights and Welfare of the Child (Committee).⁴

3 Article 6 of the Maputo Protocol, envisages that women and men will enjoy equal rights and be regarded as equal partners in marriage. In line with this vision, Article 6(b) provides that the minimum age of marriage for women shall be 18 years. The African Children’s Charter in Article 21(2) provides that child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

4 Article 45(1)(b) of the African Charter, authorises the Commission to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African governments may base their legislation. Similarly, the competence of

[4] Acting on these respective interpretative mandates, the Commission and the Committee have decided to issue this interpretative guidance on child marriage as a Joint General Comment.⁵ This joint effort is premised on Article 42 (a) (iii) of the African Children’s Charter and Article 45 (1) (c) of the African Charter which mandate the two bodies respectively to cooperate with other African, international and regional institutions concerned. This collaboration is also motivated by the nature of the issue, which is one that equally affects the rights of women and the rights of children.

[5] The scope of this Joint General Comment includes children in child marriages, children at risk of child marriage and women who were married before the age of 18.⁶ Article 21(2) of the African

the Committee to issue interpretive guidance is derived from Article 42(a)(ii) of the African Children’s Charter, which authorises it to “formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa” and Article 42(c), which authorises it to interpret provisions of the African Children’s Charter..

5 This Joint General Comment was developed by members of the Commission and Committee in consultation with experts, academics, states and organisations working to end child marriage in Africa. Drafts of the general comment were reviewed at meetings held in Ethiopia in April 2015 and in Kenya in October 2015. A revised draft was presented to the Commission during its 59th Ordinary Session for comment and input to the Committee during its 27th Ordinary Session in May 2016 for comment and input. Comments were consolidated and presented together with a revised draft of the general comment at a joint session of the Committee and Commission in November 2016. The final draft of this Joint General Comment was finalised by a working group of representatives from the Commission and Committee and is based on the strategic direction and instruction recommended by the Commission and Committee at the November 2016 joint session.

6 The Maputo Protocol recognises this interlink of terms and provides that “women” means persons of female gender, including girls.” Article 1(k) of

Children’s Charter prohibits the betrothal and marriage of all children before the age of 18 and boys at risk of or affected by child marriage are also included in the scope of this Joint General Comment. However, noting that girls are disproportionately at risk of and affected by child marriage, this Joint General Comment specifically aims to address some of the factors that make girls more susceptible to child marriage and its impacts, including their reproductive capacities and persistent gender inequality and discrimination against women. The disproportionate impact of child marriage on children with disabilities, migrant children, children who are refugees and children in child headed households is similarly noted.

[6] In this Joint General Comment, “**marriage**” means formal and informal unions between men and women recognised under any system of law, custom, society or religion.

“**Child**” means a human being aged below 18 years of age, even if majority is attained earlier under national law.⁷

“**Child marriage**” is a marriage in which either one of the parties, or both, is or was a child under the age of 18 at the time of union.⁸

“**Betrothal**” means an engagement or a promise to marry. It

the Maputo Protocol.

7 Article 2 of the African Children’s Charter.

8 In Article 16(1) of UDHR, the United Nations General Assembly proclaimed that only men and women of full age, without any limitation due to race, nationality or religion, have a right to marry and to found a family.

can also refer to the act of promising or offering a child or young person in marriage, whether by a parent, guardian or family elder.

“Free and full consent” in the context of marriage it entails a non-coercive agreement to the marriage with full understanding of the consequences of giving consent.⁹The Commission and Committee recognise that older children may have the capacity to make decisions about their lives and may have the capacity to consent to sex, medical treatment and other acts. However, despite such evolving capacities, the language of the Maputo Protocol and the African Children’s Charter clearly stipulates that children under the age of 18 are not capable of giving full and free consent to a marriage.¹⁰It is further noted that a child’s inability to consent to marriage cannot be supplemented or cured with the addition of parental consent given on behalf of a child, as the requirement of “full” requires total consent on the part of the person consenting.

“Harmful practices” means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.¹¹

9 The requirement of free and full consent is recognised in several international human rights instruments including article 16(2) of UDHR.

10 The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964) requires additionally such free and full consent to be expressed in the presence of the authority competent to solemnize the marriage and of witnesses, and as prescribed by law..

11 Article 1(g) of the Maputo Protocol.

II. UNDERLYING PRINCIPLES OF INTERPRETATION

[7] The Committee applies four general principles as the lens through which interpretation of all African Children’s Charter provisions and all issues relating to the protection of the rights and welfare of the child are addressed. These are: the best interest of the child, the child’s right to freedom from discrimination, the right to survival, development and protection, and children’s right to participate in matters that affect them. The Commission supports the application of these four principles in formulating the guidance in this Joint General Comment. In addition, this Joint General Comment is informed by the principles of equality and non-discrimination that underpin the overall objective and purpose of the Maputo Protocol, as expressed in the preamble and in Article 2.

A. Best interests of the child

[8] The African Children’s Charter provides in Article 4(1) that the best interests of the child shall be the primary consideration in all actions undertaken by any person or authority concerning the child. Child marriage gives rise to negative physical, psychological, economical and social consequences and curtails the enjoyment of children’s human rights and fundamental freedoms. Child marriage is therefore not in the best interests of the child. Article 4(1) is wide and applies to all actions by States Parties concerning the child as well as all the actions by other stakeholders, such as parents, traditional leaders and community

representatives who, in the best interests of the child, must not perpetrate, perpetuate or support child marriage.

[9] Applying the best interests of the child principle, States Parties must adopt and enforce legislation that sets the minimum age of marriage at 18 for both boys and girls. The principle also requires the adoption of effective prevention and redress measures to address those at risk and those already affected by child marriage.

[10] As a corollary, the best interests of the child principle cannot and should not be interpreted or used as a justification to permit child marriage in any circumstance. For example, statements that imply that a child would fare better economically or avoid dishonour if married should never be suggested or considered as supporting an argument that child marriage is in the best interests of the child.¹²

B. Freedom from discrimination

[11] The Maputo Protocol and the African Children's Charter provide, in Articles 2 and 3 respectively, for the right to freedom from discrimination based on sex or gender. This principle is

12 As per the Constitutional Court of Zimbabwe and opined by Malaba DCJ in Mudzuru and another v Minister of Justice, Legal & Parliamentary Affairs N.O and Others: "There is a difference between making a man take responsibility for the pregnancy of a girl and the maintenance of the baby once it is born and compelling a girl child to get married because she got pregnant. It would, in fact, be a form of abuse of a girl child to compel her to be married because she got pregnant. What is clear is that pregnancy can no longer be an excuse for child marriage."

central to the Maputo Protocol and grounds the interpretation of all its provisions, many of which recognise that gender inequality is an underlying driver of discrimination against women. Sex and gender based discrimination include any distinction, exclusion or restriction or any differential treatment which is based on sex or gender and which has the objective or effect of compromising or destroying the recognition, enjoyment or exercise of a human right or a fundamental freedom.¹³ Child marriage is a manifestation of gender inequality and constitutes discrimination based on sex and gender. This is reflected by the overwhelmingly disproportionate risk and impact it has on girls and women and its correspondingly disproportionate effect on the enjoyment of their human rights and fundamental freedoms. Child marriage reinforces harmful social constructions of gender, supports systems of patriarchy and entrenches patterns of discrimination. The commitment to non-discrimination against women and girls requires States Parties to recognise child marriage as a form of sex and gender based discrimination and take appropriate measures towards its elimination.

C. Right to survival, development and protection

[12] A child's right to survival, development and protection is enshrined in Article 5(2) of the African Children's Charter.

13 This definition is taken from Article 1(f) of the Maputo Protocol, which defines Discrimination against Women, as read with Article 1(k), which defines the term women to mean persons of the female gender.

Similarly, the preamble of the Maputo Protocol condemns practices that hinder or endanger the normal growth or affect the physical and psychological development of women and girls. Child marriage poses a considerable threat to the survival and development of women and children, especially girls, children with disabilities, migrant children, children who are refugees and children in child headed households. Child marriage is correlated with early and frequent pregnancy, which in turn is associated with significantly higher rates of maternal morbidity, maternal mortality and infant mortality. Child marriage also curtails the right to development, as those who marry young are often forced to drop out of school or are precluded from participating in economic, political, social and other activities. Child marriage is also connected with increased exposure to the risk of domestic violence and because child marriage frequently results in social isolation, the protection needs of children and women in a child marriage often are not readily detected or met.

D. Participation

[13] Pursuant to Article 4(2) of the African Children's Charter, a child has the right to communicate and express their views and opinions, subject to such restrictions as prescribed by law. These views must, in terms of Article 7 of the African Children's Charter, be heard and taken into consideration in all judicial and administrative proceedings affecting the child. Articles 4(2) and (7) are violated when children are betrothed or married

without giving their personal, free and full consent. This includes instances where laws (whether statutory, customary or religious) regard the consent of legal guardians to be determinative. The participation rights of children are also violated when those convicted of rape are given the option to marry the victim in order to avoid criminal sanctions. Similarly, in circumstances where a child is not permitted to refuse or leave a union or marriage, his or her rights to participation, freedom of expression and freedom of movement (article 9 of the African Children’s Charter) are rendered nugatory.

[14] Having regard to the overall purpose of the African Children’s Charter and to the primacy of the principle of the best interests of the child, a child’s right to participate in decisions and matters affecting them shall not be used to justify any exception to the minimum marriageable age of 18 years. For a number of reasons, a child might express an interest in forming a union or entering into a marriage before the age of 18. Although a child has the right to express these views, pursuant to Article 7 of the African Children’s Charter, and should be afforded an opportunity to communicate such views in matters affecting them, the best interests of the child require that no exceptions to the minimum marriageable age of 18 can be tolerated.

E. Interrelatedness of children’s and women’s rights

[15] In addition to the principles outlined above, the authoritative guidance offered in this Joint General Comment is grounded in

the principle that rights are interrelated. This principle requires that a determination as to the meaning, content or ambit of the prohibition of child marriage in the Maputo Protocol and the African Children's Charter requires a simultaneous consideration of the overall purpose and objective of these two instruments and the totality of rights, freedoms and provisions they enshrine. Any determination must then be one that is consistent with the overall objectives and purposes of the instruments and must prefer an interpretation that results in maximal realisation and enjoyment of the totality of rights. The prohibition against child marriage in Article 6 of the Maputo Protocol and Article 21(2) of the African Children's Charter is interdependent and interlinked with a number of other rights recognised under the two instruments.¹⁴

III. NORMATIVE FRAMEWORK

[16] The state obligations set out in this Joint General Comment have been informed by the following normative framework:

- Article 21(1) of the African Children's Charter, which directs States Parties to take all appropriate measures to

¹⁴ These include right to education, the right to health, the right to rest, play, leisure and recreation, the prohibition against child labour , the right to security and protection against child abuse, torture, exploitation and cruel, inhuman or degrading punishment and treatment, the right of the child to parental care and protection, provisions requiring the joint contribution by parents in safeguarding the interests of the family, protecting and educating their children, the prohibition of all forms of sexual exploitation and sexual abuse of children, and the obligation to enact and enforce laws to prohibit unwanted or forced sex and all forms of violence against women.

eliminate harmful social and cultural practices affecting the welfare, dignity and normal growth of the child and in particular, those practices which are prejudicial to the health or life of the child and those practices which are discriminatory to the child on the grounds of sex or other status.

- Article 21(2) of the African Children's Charter, which provides that "child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory." Read with Article 2 of the African Children's Charter which defines a child as every human being below the age of 18 years, this prohibition precludes any exceptions to the minimum age of 18 for betrothal and marriage. The Commission and Committee further note that Article 21(2) makes no distinction as to forms of law (civil, customary or religious law). This means that the prohibition is a wide one, covering all forms of betrothal and marriage under all forms of law.
- Article 1(3) of the African Children's Charter, which requires States Parties to discourage any custom, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the African Children's Charter to the extent of such inconsistency.

- Articles 6(a) and 6(b) of the Maputo Protocol, which require that States Parties ensure that legislative measures are in place to guarantee that no marriage shall take place without the free and full consent of both parties and that the minimum age of marriage for women shall be 18 years without exception.
- Article 6 of the Maputo Protocol, which requires that States Parties ensure that men and women enjoy equal rights and are regarded as equal partners in marriage.¹⁵
- Article 1(b) of the Maputo Protocol, which enjoins States Parties to combat all forms of discrimination against women.¹⁶ Noting the disproportionate effect and impact of child marriage on women and girls, child marriage is a form of discrimination against women.

[17] This normative framework is further informed by the following general normative provisions related to implementation:

15 Article 6 of the Maputo Protocol.

16 Article 1(b) of the Maputo Protocol requires that States Parties : a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.” Articles 1(d) and (e) of the Maputo Protocol require State Parties to “take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist” and “support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.”

- Article 1 of the African Children’s Charter which requires States Parties to adopt legislative or other measures to give effect to the provisions contained in the African Children’s Charter.¹⁷
- Article 1(b) of the Maputo Protocol, which requires States Parties to take appropriate legislative, institutional and other measures to combat discrimination and to take corrective and positive action in those areas where discrimination continues to exist.¹⁸
- Article 26 of the Maputo Protocol, which requires that States Parties adopt measures and provide budgetary and other resources towards full and effective implementation.

IV. STATE OBLIGATIONS

A. Legislative Measures

Ensure that the betrothal and marriage of boys and girls under the age of 18 is prohibited, without exception

[18] The binding obligations set out in Article 6(b) of the Maputo Protocol and Article 21(2) of the African Children’s Charter require States Parties to take legislative measures to prohibit

17 Article 1 of the African Children’s Charter.

18 Ibid.

child marriage and to specify that the minimum age of marriage shall be 18 years. States Parties should enact, amend, repeal or supplement legislation as appropriate to ensure that the betrothal and marriage of children under the age of 18 years is prohibited. This prohibition should be without exception and should apply to all forms of marriage. Legislative measures should also ensure that practices of abduction and kidnapping for purposes of marriage are prohibited.¹⁹

[19] Legislative measures that prohibit child marriage must take precedence over customary, religious, traditional or sub-national laws and States Parties with plural legal systems must take care to ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.

[20] The Commission and Committee encourage States Parties to engage with children, young people, communities, traditional leaders and other stakeholders in the development of laws prohibiting child marriage. Stakeholders may include, as appropriate, teachers, health care workers, members of the legislature and executive, law enforcement and judicial officers,

19 Practices that involve abduction of a child for purposes of marriage include *ukuthwala* as it is known in South Africa, *ttshobediso* as it is known among the Basotho people, *unwendisa* as it is known in Swaziland, *telefa* as it is known in Ethiopia, and similar practices that involve the carrying off, kidnapping, offering as atonement or abduction of children for purposes of marriage among the Himba people in Namibia, the Umutara in Rwanda, the Nyanza people in Kenya, the Ganda/Bantu tribes of Uganda and the Latuka people of Sudan and others.

immigration officials, social and community development workers, non-governmental organisations, parents and the general public in circumstances where public attitudes support child marriage.

Ensure personal, full and free consent to marry

[21] Legislation must require that both parties to a marriage give full and free consent. Persons below the age of 18 are not able to give full and free consent to a marriage or similar union.

[22] The requirement of full and free consent must extend to all forms of marriage. Although parental consent may be required in certain instances, the personal, full and free consent of both parties to a marriage cannot be replaced by the consent of a parent, legal guardian or any other person.

[23] Marriage officers must verify the fact of consent. The absence of personal, full and free consent should be clearly established as a legal ground for the annulment of a presumed marriage.

Undertake constitutional reforms

[24] It is highly desirable that where constitutional reforms are undertaken, non-derogable clauses that enshrine equality within marriage and specify a constitutional minimum age of 18 years for marriage are contemplated. Limitations, exceptions and derogations from these clauses, whether based on tradition, religion or any other ground, should not be permissible.

B. Institutional Measures

[25] Full and effective compliance with the prohibition against child marriage requires that States Parties undertake institutional measures to ensure implementation of laws and policies alongside robust due diligence and accountability mechanisms to prevent child marriage. The following institutional measures are recommended as mechanisms which will help States Parties to identify and prevent child marriages, protect children from the risk of child marriage and reduce the impacts of child marriage, including for those already married.

Implement verification procedures: birth registration, age verification and marriage registration

[26] Birth registration is an essential component of the effort to end child marriage, as birth certificates produced on marriage are the most effective means to ensure that children under the age of 18 do not enter into marriage. Birth registration should be compulsory, accessible and free. Marriage officers should be responsible for verifying that both parties to a marriage meet the minimum age requirement of 18 years of age and birth certificates should constitute the preferred means for verification. In the absence of official documentation, marriage officers may rely on objective evidence, such as school or hospital records, to substantiate a child's date of birth or determine a party's approximate age. Marriage officers may also rely on community knowledge and interviews but wherever possible, this must be substantiated by objective, documentary evidence and verification procedures should not rely solely on the statements of parents or legal

guardians. In the event of a dispute or inconclusive evidence as to a person's age, the presumption should be that the person is under the age of 18.

[27] States Parties must accord priority to the establishment and improvement of official systems of registration, including in particular their Civil Registration and Vital Statistics (CRVS) systems to ensure universal coverage within their borders. States Parties are further encouraged to have regard to General Comment Number 2 issued by the Committee relating to Article 6 of the African Children's Charter for further guidance on implementation of the right to birth registration.

[28] States Parties are obligated to make the registration of all marriages in an official registry compulsory.²⁰ Compliance with this obligation requires the official registration of all forms of union, whether civil, customary or religious. Compliance also requires that marriage registration systems are accessible and cost effective for the parties to a marriage.

Ensure full enforcement of laws, penalties and sanctions

[29] To enforce the prohibition against child marriage, penalties and sanctions should be imposed where marriages are performed without the necessary checks to ensure that the age and consent requirements are met. However, penalties and sanctions should

²⁰ See Article 6(d) of the Maputo Protocol and Article 21(2) of the African Children's Charter.

not be imposed on children involved in a child marriage and where penalties or sanctions are imposed, States Parties must be careful to avoid any risk of retaliation against a child. Typically, sanction for non-compliance with marriage requirements will be imposed on marriage officers and they may also be imposed on persons who, although not authorised to perform a marriage, nevertheless purport to do so. If a person employed in the public service of a States Party is involved or complicit in a child marriage, their status as a civil servant should be regarded as an aggravating factor in the determination of a sanction or penalty and in addition to criminal sanction; administrative sanctions such as the loss of a marriage license may be imposed. Penalties and sanctions may also be imposed on any other person who actively encourages or facilitates the practice of child marriage. However, noting that imposing penalties and sanctions on parents may drive child marriage underground, subjecting parents to sanction or penalty is not recommended.

[30] In all instances where a penalty or sanction is imposed in the context of a child marriage, the emphasis should be on prevention and deterrence. In addition, States Parties shall ensure that in enforcing laws and/or imposing penalties and sanctions, whistle blowers who report or disclose child marriage or the suspicion or possibility of a child marriage are fully protected. In addition to any person who is required by law to report child marriage or the suspicion of a child marriage, including teachers, health providers, marriage officers and other employees in the public service, States

Parties should extend a wide protection to any other person who in good faith reports suspicion or possibility of a child marriage.

Institutional measures around education

[31] The retention of children in school is essential to preventing child marriage and mitigating its effects. States Parties must put in place measures to retain all children but especially girls in school and to raise awareness about the importance of their education.²¹ States Parties should pursue policies and plans designed to achieve equal access by girls and boys to education. These policies should include measures to encourage pregnant girls to keep attending or returning to school.²² It is compulsory for States Parties to facilitate the retention and re-entry of pregnant or married girls in schools and to develop alternative education programmes such as skills acquisition and vocational training in circumstances where women are unable or unwilling to return to school following pregnancy or marriage.²³

[32] Policies for equal access might also include giving incentives to parents to send their girls to school, ensuring that sanitary facilities are available to girls at school or reducing the exposure of girls to violence at or whilst making their way to school. Other

21 As required by Article 17(1) of the African Charter, Article 12(c) of the Maputo Protocol and Article 11 of the African Children's Charter.

22 As required in terms of Article 11(3)(d) and Article 11(6) of the African Children's Charter.

23 Article 11(3)(d) and (e) of the African Children's Charter and Article 12(2)(c) of the Maputo Protocol.

best practice measures that have shown to be successful in keeping girls in school include bursary programmes targeting teenage girls in high-risk areas and the establishment of new educational facilities in rural areas.

[33] States Parties should ensure that school policies and regulations allow or require for teachers to intervene if they become aware or suspicious that a girl is at risk of being withdrawn from school, whether for purposes related to an intended marriage or otherwise.

Institutional measures to ensure access to and uptake of health services

[34] In line with the African Children’s Charter and the Maputo Protocol, girls have the right to enjoy their best attainable state of physical and mental health²⁴ and must be afforded access to a comprehensive range of sexual and reproductive health rights.²⁵ Child marriage deprives children the full complement of their right to health and increases their risk of exposure to sexually transmitted infections, including HIV and AIDS. As explained in General Comment Number 1 on Article 14(1)(d) and (e) of the Maputo Protocol, women have the right to be protected from HIV and do not enjoy this right in circumstances where they face significant risk of HIV exposure or transmission.²⁶

24 Article 14(1) of the African Children’s Charter.

25 Article 14 of the Maputo Protocol and Article 14 of the African Children’s Charter. See also the African Commission’s General Comments on Article 14(1), (d) and (e) and on Article 14(2)(a) and (c) of the Maputo Protocol.

26 Paragraph 5 of the African Commission General Comment on Article

[35] States Parties are under an obligation to ensure access to comprehensive sexual and reproductive health services.²⁷ Third party permission for accessing these services should not be required and services should be integrated, rights-based, women-centered and/or youth-friendly and free of coercion, discrimination and violence.²⁸ In the case of contraception, States Parties should strive to ensure that user fees are not charged.

[36] To encourage the uptake of sexual and reproductive health services, States Parties should develop and implement comprehensive sexuality education and information programmes. Age appropriate information about sex, sexuality, sexual and reproductive health rights and sexually transmitted infections, including HIV and AIDS, should form part of the formal school curriculum and should also be disseminated widely among the general public, including in non-school settings and in media which reaches rural and remote settings.²⁹ Comprehensive sexuality education should also include age appropriate information about what constitutes consent to sex, as distinct from consent to marriage, and information

14(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

27 Article 14 of the Maputo Protocol and Article 14 of the African Children's Charter. See also the African Commission's General Comments on Article 14(1), (d) and (e) and on Article 14(2)(a) and (c) of the Maputo Protocol.

28 African Commission General Comment no 1 on article 14 of the Maputo Protocol, paragraph 29.

29 African Commission General Comment no 1 on article 14 of the Maputo Protocol, paragraph 26.

about gender, sexuality and social norms and stereotypes that perpetuate gender inequality and its manifestations, including child marriage.

[37] In line with the obligation in Article 14(2)(c) of the Maputo Protocol and as further explained in General Comment Number 2 issued by the Commission, States Parties must protect the reproductive rights of women and girls by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother. Because girls in child marriages are at such high risk of pregnancy related health complications, medical abortion in the instances contemplated by Article 14(2)(c) is of great consequence and must be provided.

[38] In line with obligations around birth registration, girls who deliver babies must be assisted to register a birth after delivery.³⁰

Institutional measures to promote access to justice

[39] Systematic inadequacies in the administration of justice, such as lack of infrastructure, resources, adequate laws, well-trained personnel and corruption violate States Parties obligations to ensure access to justice and impacts on the obligation of States Parties to protect girls from child marriage. Ensuring access to

30 Article 6 of the African Children's Charter and see also General Comment Number 2 of the African Commission available at <http://www.achpr.org/instruments/general-comment-two-rights-women/> (accessed 18 march 2016).

justice may require States Parties to conduct awareness raising activities about laws on child marriage and how people can enforce them. Toll free helplines are encouraged as an effective means of facilitating access to justice for vulnerable and remote groups. Where needed, free legal aid should be provided.

[40] States Parties should further consider establishing specialised women's and children's police units, programmes aimed at training prosecutors, magistrates and judges in gender and age sensitive approaches and interventions for supporting Civil Society Organisations, national human rights institutions and statutory bodies to ensure access to effective assistance in justice processes.

[41] States Parties must provide for appropriate remedies where rights or freedoms have been violated.³¹ Appropriate remedies means, among other things, that remedies are determined by a competent judicial, administrative or legislative authority or by any other competent authority as provided for by law.

31 Article 25 of the Maputo Protocol. In order for a remedy to meet these objectives and meet the standards required by international law, laws should accomplish at least three outcomes. First, laws should vest competence in an appropriate adjudicative mechanism to provide relief. In the context of child marriage, relief might include an injunction to prevent a child marriage, a declaration noting the invalidity of a child marriage, an order requiring that services be provided to a victim or compensation. Secondly, laws should give adjudicative authorities discretion to impose remedial measures that are special, and targeted at personal circumstances, or general, seeking to address the effects of the violation on similarly placed individuals. Thirdly, laws should contain generous provisions on locus standi in order to ensure that anyone acting in the best interests of a victim is entitled to an audience before adjudicative authorities.

Institutional measures to provide redress and support for those already married

[42] In addition to measures aimed at preventing child marriage, States Parties should also provide support to girls and boys already married. Children who have already been affected by child marriages should: (i) be provided with comprehensive social protection and health services, (ii) appraised of their legal rights and options for redress, (iii) assisted to continue with their education, (iv) encouraged to seek advice and assistance for the violation of any other rights, especially in circumstances of domestic violence, and (v) supported in fulfilling their parenting roles in respect of children born of the union.

Capacity building and training

[43] States Parties should conduct training and capacity building workshops for relevant government officials, particularly officials dealing with marriage and birth registration, to raise awareness about the prohibition against child marriage, the legal rights of children and women and the right to be protected from child marriage. Further stakeholders to be targeted include teachers, health providers, judicial officers, the police, religious, community and traditional leaders, national human rights institutions, bodies with a human rights mandate and Civil Society Organisations providing legal, health, psychosocial or other services to the victims of child marriage.

Data Collection

[44] States Parties should establish credible and effective data collection mechanisms to determine which efforts need to be intensified to combat child marriage and in which areas. Data on school enrolment, school attendance, school completion and drop out, the uptake of health and other social services and any other relevant data, should be collected. Where possible, it should be disaggregated by age, gender, region and other relevant characteristics and should support the development of targeted programmes and interventions. Data systems should be linked to the national CRVS system, including birth and marriage registration data. The information collected should also inform reports submitted to the Commission and Committee.

Resource allocation and budgeting

[45] To meet their obligations as outlined in this Joint General Comment, States Parties should allocate sufficient budgetary and other resources towards ending child marriage. These should include budgetary, human and other relevant resource allocations for programmes, awareness campaigns, CRVS systems, legislative reform, law and policy implementation and training.

C. Other measures

Take measures to address the root causes of child marriage, including:

Poverty

[46] The requirement that States Parties take all necessary measures to address poverty is well established and will contribute to ending child marriage.³² Measures to address poverty include increasing national budgets for social services such as education, health and adequate housing. Failure to provide basic social services results not only in the breach of legal obligations to address poverty but also in an enabling environment of child marriages.

[47] Child marriage is strongly associated with girls who have received little or no formal education, often due to family poverty and perceptions that girls do not require education. Thus, addressing the root causes of poverty and expanding access to education constitute the two most powerful counters to the phenomenon of child marriage. State Parties are advised to adopt policies to reduce poverty, particularly in child marriage hotspots, and expand assistance (including social protection

32 There is clear empirical evidence that shows that poverty is one of the leading root causes of child marriage, see Office of the High Commission for Human Rights, 2014 “Preventing and Eliminating Child, Early and Forced Marriage” available at <http://www.ohchr.org/EN/Issues/Children/ThematicReports/Pages/ThematicreportschildrenIndex.aspx> (accessed 18 March 2016). In many countries, including in Africa, marriage is perceived as a way to ensure the economic subsistence of girls and women who have no autonomous access to productive resources and who live in situations of extreme poverty. Articles 10, 13, 15 and 16 of the Maputo Protocol and Article 20(2) of the African Children’s Charter set out this obligation but it is also inferred from the guarantee of other rights and freedoms set out in the African Charter, Maputo Protocol and the African Children’s Charter.

schemes) to support families and children. Particular attention should be paid to the need to address poverty among vulnerable groups, including children in child headed households, children with disabilities and children affected by homelessness, internal displacement and conflict.

All forms of harmful practices

[48] State Parties must prohibit and condemn all forms of harmful practices that perpetuate child marriage or negatively affect the human rights of women.³³ State Parties are further obliged to discourage any custom, tradition, cultural or religious practice that is inconsistent with the protected rights or welfare of the child.³⁴ The obligation to prohibit harmful practices must be balanced with the right of women and girls to live in a positive cultural context and the corresponding duty on States Parties to promote positive cultural contexts.³⁵

[49] Child marriage is itself a harmful practice³⁶ but there are other harmful practices that contribute to the prevalence and impact of child marriage. Often sustained in the name of tradition or religion, harmful practices perpetuate gender inequality because they violate girls' fundamental rights to life, health, dignity, education

33 Article 5 of the Maputo Protocol.

34 Article 1(3) of the African Children's Charter.

35 Article 17 of the Maputo Protocol.

36 Practices and customs are harmful where they infringe on human rights.

and physical integrity among others. Therefore, all forms of harmful practices, and particularly those that are interconnected with child marriage, should be condemned and prohibited by States Parties. These include but are not limited to abduction and kidnapping for purposes of marriage, female genital mutilation, virginity testing, breast ironing, forced feeding, forced marriages of persons over the age of 18 years and tourist marriages. In the context of child marriage, the payment of dowry increases girls' vulnerability and compromises the ability to give free consent.³⁷ States Parties must take measures to prohibit and condemn the payment of dowry in respect of children.

Gender inequality and discrimination

[50] Attitudes and beliefs that perpetuate the subordination of women and girls contribute to the prevalence and impact of child marriage. States Parties have a duty to eliminate discrimination against women in all its forms and whether in law or in fact. This obligation requires that States Parties take measures to eradicate systemic gender inequality and integrate a gender perspective across all policies, plans and programmes. States Parties should also take corrective actions to address discrimination and should commit to modifying social and cultural patterns in diverse ways.

37 Although practices vary, the payment of dowry may encourage parents to agree to their child's marriage in exchange for a financial gain or reward. Joint General Comment No. CEDAW/CRC Joint General Recommendation / General Comment, paragraph 24.

Develop and implement national action plans and early warning programmes

[51] States Parties should develop and implement national strategies and comprehensive action plans to combat child marriage. National action plans should be well resourced, coordinated at the highest levels of government and fully inclusive of Civil Society, women, children, all relevant state departments, the public, human rights organisations and other international bodies and donors. A multi-sectoral approach should be applied to the design, drafting and implementation of plans. The content of national action plans should include prevention, early warning programmes (hotlines and rescue-squads), provision of shelters, support to women and girls already married, peer and community monitoring mechanisms, provisions around monitoring and evaluation and the collection of gender-disaggregated data relevant to child marriage. An efficient communication strategy to publicise the national action plan should also be developed.

[52] States Parties are encouraged to support Civil Society initiatives and partnerships invested in empowering communities and girls at risk of child marriage. States Parties are further encouraged to facilitate dialogue and promote collaboration between all stakeholders, and particularly traditional, community and religious leaders, in the prevention of child marriage.

Promote the role of men and traditional and religious leaders

[53] Recognising the links between child marriage and gender inequality, States Parties are encouraged to promote the participation of parents, particularly fathers, religious leaders and community leaders in ending child marriage.³⁸

Develop and implement special measures to prevent child marriage among children at higher risk

[54] Special measures to prevent child marriage should be appropriately adapted to take account of the special vulnerabilities of certain categories of children. In particular, States Parties should design measures to protect children affected by conflict, children with disabilities, children in child headed households and children affected by homelessness or internal displacement as outlined below.

[55] Noting that situations of unrest and armed conflict exacerbate the potential for child marriage, States Parties should take all feasible measures to ensure the special protection and care of children affected by conflict and mitigate the effects of conflict

³⁸ See commitment 9 of the African Union Common Position and the 2015 Kigali Declaration which encourage dialogue and promote partnership and collaboration with local, traditional and religious leaders to prevent and eliminate child, early and forced marriage; and to encourage dialogue with men and boys to prevent and eliminate child, early and forced marriage. The Kigali Declaration is available at <http://thecommonwealth.org/sites/default/files/press-release/documents/Early%20and%20Forced%20Marriage%20-%20Kigali%20Declaration.pdf> (accessed 18 March 2016).

on children.³⁹ Children must be prevented from taking part in hostilities.⁴⁰ Maximum efforts should be made to ensure the return to safety of any children abducted or forced into a marriage.

[56] Noting that children with disabilities are at increased risk of child marriage, States Parties should take special measures to protect children with disabilities against child marriage. Reasonable accommodations should be made to ensure that children with disabilities can access and use educational, health and other social services and enjoy and exercise rights on an equal basis.

[57] Special measures should be taken to ensure that children in child headed households receive necessary social assistance and are protected from the risk of child marriage.

[58] States Parties have an obligation to protect children who are asylum seekers, refugees, migrants, returnees or internally displaced children against all forms of violence and must take measures to ensure their physical, psychological, social and legal protection.⁴¹ All children who have been displaced but especially girls who are disproportionately affected by displacement are entitled to protection and humanitarian assistance and special measures should be taken to protect them from child marriage.⁴²

39 Article 22(3) of the African Children's Charter.

40 Article 22(2) of the African Children's Charter.

41 Articles 10(2)(c) and 11(3) of the Maputo Protocol.

42 Article 32 of the African Children's Charter.

Reparation to victims

[59] States Parties are obliged to provide adequate, effective and comprehensive reparation to the victims of child marriage. Where acts and omissions are attributable to the State, States Parties should provide reparation that includes compensation, satisfaction and guarantees of non-repetition as those terms are endorsed in General Comment Number 4 issued by the Commission.⁴³ However, States Parties are obliged to provide all victims of child marriage reparation in at least the forms of restitution and rehabilitation.⁴⁴ Measures of restitution should be aimed at returning victims to the position they were in before and may include restoration of status or citizenship and rights to land or property. As part of their restitution efforts, States Parties must ensure that girls who are pregnant and girls who have had children are allowed and assisted to return to school and that

43 As pronounced by the Commission in General Comment Number 4, compensation should be awarded to compensate for economically assessable damage and includes reimbursement of medical expenses, compensation for disabilities and any other material, non-material or other harms suffered. Satisfaction and the right to truth involves the State acknowledging its responsibility for the impact and violations involved in child marriages and should be aimed at ending continued violation of the prohibition, verification of facts and full and public disclosure. Guarantees of non-repetition involve taking measures to combat impunity and can be linked to clearer instructions, guidelines and policies, training of law enforcement and other public officials, the establishment of independent investigative mechanisms and appropriate forms of accountability.

44 General Comment No. 4 of the African Commission on the Right to Regress for Victims of Torture and Other Cruel, inhuman or Degrading Punishment or Treatment (Article 5).

alternative vocational training programmes are offered to all victims of child marriage. Rehabilitation refers to the restoration of function or the acquisition of new skills required by the change of circumstances of victims of child marriage. Rehabilitation for victims of child marriage should aim to restore, as far as possible, their independence, physical, mental, cultural, spiritual and vocational ability and the full inclusion and participation in society. States Parties must provide specialised, appropriate and accessible rehabilitative service to the victims of child marriage which may include legal aid services, victim support and empowerment services, access to healthcare and medical services, psychosocial and protection services, re-integrative and social services and alternative vocational training.

[60] The primary responsibility for reparation, and particularly the provision of services to victims, resides with State Parties. However, an enabling environment which permits civil society, community based and grass roots organisations to arrange for or provide reparation services should be fostered. National laws and policies should make provision for the immediate temporary protection of child victims, such as at shelters. Similarly, national laws and policies should provide for clear mechanisms to report child marriage and the suspicion of child marriage. Reporting should trigger a response in the form of provision of services, victim support and empowerment and other forms of redress.

Awareness and public information campaigns

[61] To ensure full and effective prohibition of child marriage, States Parties should develop public awareness and information campaigns that reach all areas of the territory and all sectors of society. A powerful strategy, and one which seeks to ensure the participation of girls, is one in which once married, at risk or married women and girls in a child marriage themselves narrate the circumstances of their child marriage, detailing in their own language the impact of child marriage on their life chances, education, health and human rights. Messaging and information should try to link and situate child marriage within the broader context of gender inequality and discrimination against women, in order to transform beliefs and attitudes about both child marriage and women.

[62] States Parties are encouraged to support Civil Society initiatives and partnerships that promote the wellbeing and protection of children, particularly those invested in empowering communities and girls at risk of child marriage. States Parties are further encouraged to facilitate dialogue and promote collaboration between all stakeholders, and particularly traditional, community and religious leaders, in the prevention of child marriage.

V. DISSEMINATION, MONITORING AND REPORTING ON COMPLIANCE WITH RECOMMENDATIONS IN THE JOINT GENERAL COMMENT

[63] This Joint General Comment suggests a series of measures for implementing the prohibition of child marriage. These measures are co-dependent and include legal reforms, policy development, compliance and promotion. Alongside legislative reforms, implementing the prohibition on child marriage requires that States Parties undertake institutional measures, ensure the enforcement of criminal provisions and effective awareness raising plans and mechanisms. Enforcement and awareness will only be possible if all relevant stakeholders but especially government officials, the police and the judiciary are equipped to protect girls and boys from child marriage and its effects. States Parties are encouraged to distribute this Joint General Comment widely, including in local languages, and to make its contents known. As an important adjunct to the awareness building process, States Parties may wish to disseminate court judgments on child marriage.

State reporting

[64] The African Charter, Maputo Protocol and the African Children's Charter all require that States Parties submit periodic reports on the implementation of the rights and freedoms guaranteed under each convention. The State reporting process is a constructive one and the Commission and Committee strongly

encourage States Parties to use state reporting as an opportunity and platform to indicate progress and share best practices in the implementation and fulfilment of rights. States Parties must report on compliance with Article 6(b) of the Maputo Protocol and Article 21(2) of the African Children's Charter, in line with the recommendations in this Joint General Comment and in accordance with the Reporting Guidelines under the Maputo Protocol and under the African Children's Charter. In their reports, States Parties are invited to include statistics, offer descriptions of context, indicate challenges and barriers in realising the prohibition on child marriage, provide an assessment of measures taken and suggest best practices which may be helpful to other States Parties.



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