

## FEATURE

# The ACHPR and ACERWC on Ending Child Marriage: Revisiting the Prohibition as a Legislative Measure

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*The Joint General Comment of the African Commission on Human and People's Rights (ACHPR) and African Committee on the Rights and Welfare of Children (ACERWC) on Ending Child Marriages (hereafter Joint General Comment) (ACERWC 2017) raises both a topical matter – ending child marriages in Africa – as well as a technical legal issue. As has been widely observed, at the core of every General Comment is the question of whether it is an authoritative interpretation of treaty norms, or merely an unsystematic statement without legal weight (Mechlem 2009; Keller and Ulfstein 2012).*

*Answering the question in full is a daunting task and beyond the scope of this article: further insights in this regard can be gleaned from scholarly work on the International Covenant of Civil and Political Rights (Harland 2000; Blake 2008). That being noted, it is prudent to deal with each General Comment in the light of the perspectives of the drafters and the goodwill of the state parties bound by its guidance.*

*As such, the more workable question is whether the Joint General Comment offers an authoritative interpretation of the relevant treaty provisions that helps in developing jurisprudence towards the desired prohibition of child marriages in Africa. This article examines the context surrounding the prohibition on child marriage since its adoption in 2017, in addition to which it considers the prohibition's future prospects as a legislative measure.*

*The article begins with an explanation of what General Comments are, after which it evaluates the Joint General Comment and the obligations it creates and goes on to propose ways in which it could be made more effective.*

## **What are General Comments?**

General Comments are texts or materials prepared by international treaty bodies to address pertinent issues and guide state parties on how to meet their obligations under the treaties more effectively than they have been (UNHCHR 2005). Alston (2001: 775) describes a General Comment as

a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the "jurisprudence" emerging from its work.

Over time, this practice has also been adopted by non-UN human rights bodies. For instance, the ACPHR (African Commission) spearheaded the adoption of General Comment 3 of 2014 on the right to life as recognised in article 4 of the African Charter of Human and Peoples' Rights (African Commission 2014).

As noted, every General Comment raises the basic question: Is it an authoritative interpretation of treaty norms, or an unsystematic statement that lacks adequate grounding with no attachment of legal weight (Alston 2001; Keller and Ulfstein 2012). While various answers have been given, dealing with the question here would be an insurmountable task. For the purposes of this article, the question is if the Joint General comment provides an authoritative interpretation that is instructive in directing the development of jurisprudence towards the desired prohibition of child marriages in Africa.

## Background to the Joint General Comment

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Prior to the adoption in May 2014 of the Joint General Comment, the African Union (AU) launched a campaign to end child marriage by raising awareness of its harmful impact. In the same year, a Goodwill Ambassador for Ending Child Marriage was appointed, with the African Committee appointing an AU Special Rapporteur on Child Marriage. A subsequent meeting of AU heads of state and government formally adopted the position on the AU campaign to end child marriage (ACERWC 2017).

Members of the African Commission and ACERWC, in consultation with experts, academics, states and organisations working to end child marriage in Africa, reviewed the drafts of the General Comment at meetings held in Ethiopia in April 2015 and in Kenya in October 2015 (ACERWC 2017). Following the presentation of the first drafts at the 59<sup>th</sup> Ordinary Session of the ACEWRC and the 27<sup>th</sup> Ordinary Session of the African Commission, the comments were consolidated and presented as a revised draft of the General Comment at a joint session of the African Committee and African Commission in November 2016 (ACERWC, 2017). The final draft was then adopted as Joint General Comment of the African Commission on

Human and Peoples' Rights and the African Committee of Experts on the Right and Welfare of the Child on Ending Child Marriage (2017).

It is worth noting that a recent decision by the African Court on Human and People's Rights (African Court) deals with some of the contextual problems that the General Comment addresses. In *Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali* (2016) (the APDF case), the African Court evaluates the human rights implications of various sections of Mali's Family Code Law.

These sections hinge on the Family Code's minimum age of marriage, right to consent to marriage, right to inheritance and the state's obligation to eliminate traditional practices (para 6). The findings of this case are instrumental in the growing jurisprudence of the African human rights system, and, as such, will be brought to bear in the evaluation of the General Comment.

## Contextualising the prohibition on child marriage

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The Joint General Comment is divided into five thematic areas: its objective and scope; its underlying principles of interpretation; the normative framework; state obligations; and dissemination and monitoring. This section of the article evaluates its normative content and the nature of its obligations in the context of the prohibition as a legislative measure

## Normative content of the Joint General Comment

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Unlike other General Comments, which are based on a single article in a treaty, this one draws on provisions from various treaties. To this end, the first batch of articles to be evaluated are from the ACRWC. The Joint General Comment is informed by article 21(1) of the ACRWC, which requires state parties to take all appropriate measures to eliminate harmful social and

cultural practices affecting the welfare, dignity and normal growth of children.

Furthermore, article 21(2) prohibits the betrothal and of girls and boys, and requires that effective action be taken to ensure the effectiveness of the prohibition. First, it requires that the minimum age of marriage be 18 years and that it be compulsory for all marriages to be registered. Another normative provision that reiterates the need for the prohibition is found in article 1(3) of the ACRWC, which requires state parties to discourage any custom, cultural or religious practice that is inconsistent with the rights, duties and obligations in the Charter to the extent of the inconsistency.

One may argue that the prohibition in article 21(2) that precludes all exceptions to the age of 18 years as the minimum age of betrothal and marriage, fails to protect a child whose age is not ascertained in that it does not stipulate the bureaucratic procedures that state parties should follow to prove that an affected person is below 18 years. There is no normative provision in the Joint General Comment that protects an individual (who is about to be a victim of a child marriage) where his or her age has not been ascertained. This potentially dangerous predicament is resolved in paragraph 26, where there is an obligation on state parties to presume that the person is under the age of 18 (ACERWC 2017).

The position is reiterated by the African Court in the APDF case where it requires that states should not condone any discrimination against the girl child through the use of an age that is lower than 18 for marriage (APDF, paras 75-78).

The second batch of normative provisions are from the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter the Maputo Protocol). The major provisions include articles 6, 6(a) and (b), and 1(b). On the basis of article 6(a) and (b), the Joint General Comment reiterates the requirement that state parties have to ensure that legislative measures are in place to guarantee that no marriage takes place without the free and full consent of both parties, with the age of marriage for women having to be 18 years. Article 6 of the Maputo Protocol requires that state parties ensure that men and women enjoy equal rights and are regarded as equal partners in marriage, while article 1(b) enjoins state parties to combat all forms discrimination against women.

These provisions are instrumental in ensuring that the rights of girls are protected from the practice of child marriage. However, they portray the girl child as the main victim of child marriage, a position exacerbated by some of the definitions. For instance, the Joint General Comment adopts the definition of harmful practices from the Maputo Protocol as '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' (article 1(e)).

The jurisprudence of the African Court indicates that where a state maintains legislation that does not protect children from harmful practices, it maintains discriminatory practices which undermine the rights of women and children and that are tantamount to a violation of its international commitments (APDF, para 124).

This provision does not envision any harmful practices to the boy child in the context of child marriages, yet a study by UNICEF (2019) finds that Africa has the highest number of child grooms in the world. According to this study of 82 countries, the Central African Republic had the highest rate globally, at 22 per cent, followed by Nicaragua at 19 per cent; it also found that some 115 million boys and men around the world were married as children, with about 20 per cent of them married before age 15 (UNICEF 2019). Such studies clearly indicate that boys are as much affected by child marriage as girls.

Another notable feature of the Joint General Comment is its lack of reference to any provision of the ACHPR in either its principles of interpretation or its normative provisions (ACERWC 2017). This is not a limitation on the ACPHR's relevance, however.

First, a reading of the Joint General Comment indicates that the mandates of the African Commission and ACERWC informed its adoption. Secondly, although the mandates of these two organs are to protect and promote rights, the African Commission's generalised approach complements the child-focused one of the ACRWC. Thirdly, the African Commission engages its article 17(2) to provide for the retention of the girl child in school to prevent child marriage and mitigate its effects.

Fourth, both the African Commission and the ACERWC

are mandated to use instructive jurisprudence that develops their mandate. The APDF case is instructive in this regard as it lays down the normative provisions from the ACHPR, the ACRWC, the Maputo Protocol and the CEDAW Committee with regard to the minimum age of marriage, the right to consent to marriage, and the state's obligation to eliminate harmful traditional practices (APDF, 2016, paras 59-131).

Fifth, with regard to dissemination, monitoring and reporting on compliance with recommendations in the Joint General Comment, the African Commission, along with the Maputo Protocol and the ACRWC, requires states parties to submit periodic reports on the implementation of the obligations to end child marriages.

It should also be recalled that while the ACRWC provides for frameworks for the promotion and protection of the rights of a child (such as the best interests principle), it does not provide an extensive list of rights of the child. The ACHPR, on the other hand, provides for the rights of a person (such as the rights to dignity, health, education and life).

Finally, from an interpretative perspective, the two bodies have recourse to draw inspiration from international law on human and peoples' rights with regard to the provisions of various African and international instruments on human rights. This provides for the organic interpretation of the General Comment in the context of various developments stemming from organs such as the African Court. This is provided for in article 60 of the ACHPR and article 46 of the ACRWC. As such, the lack of direct reference to the African Charter with regard to underlying principles is not a limitation to its relevance under the Joint General Comment.

## **An issue of equityNature of the obligations**

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The Joint General Comment classifies obligations as legislative, institutional and other measures. As for the legislative measures, they deal with three main issues: the prohibition on child marriages, the question of consent, and the need for constitutional

reforms (ACERWC 2017). With regard to the prohibition, the Joint General Comment reiterates the prohibition, urging state parties to adopt legislative measures that take precedence over all customary, religious, traditional and subnational laws. Furthermore, it requires that the dissemination of these laws involve various stakeholders, such as teachers, health workers, immigration officers, civil society and the general public.

While the obligation to prohibit child marriages is an important step forward, the scope of the prohibition is such that it gives limited attention to the boy child while tending to portray the girl child as the only child burdened with harmful practices. In addition, the General Comment falls short of offering extensive guidance on the roles of national human rights institutions (NHRIs), regional economic communities (RECs), the media, and the private sector. These stakeholders play a key role in the effectiveness of a General Comment. For instance, NHRIs have a role in ensuring accountability by state parties, while the media have to ensure that the child's development is not impaired by their reporting.

## **How can the General Comment be used effectively?**

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The Joint General Comment would be more effective if it contained stronger recognition of the different stakeholders and the role they play. Stakeholders such as NHRIs, RECs, the media and the private sector need to be heavily engaged. NHRIs should have the mandate to attend sessions and give shadow reports as a means of ensuring accountability. The media have to be encouraged to embrace professional and ethical standards to ensure the all-inclusive welfare of children affected by child marriage.

The African Commission and ACERWC need to strengthen the Joint General Comment's ability to embrace the emerging challenges of child grooms. This calls for revisiting some of the phrasing and definitions that characterise the prohibition as a preserve of the girl child so as to take account of

the fact that child marriage is a problem that affects boys as well as girls. State parties' stakeholders in the justice and law and order sectors should work together to promote accountability and engage in constructive dialogue to bring child marriage to an end.

## Conclusion

This article set out to establish whether the prohibition and legislative measures in the Joint General Comment offer an authoritative interpretation of the relevant treaty provisions on child marriages. It was established that the Joint General Comment does not offer detailed guidance to key stakeholders about their role in dealing with the prohibition. Secondly, the prohibition focuses on the girl child to the exclusion of the boy child. In the light of emerging research on child grooms, there is a need to develop jurisprudence that deals equally with girls and boys. The African Committee has made it its practice to conduct country studies – it is proposed that similar studies be commissioned on the prohibition of child marriages and the situation among state parties. Decisions by other African Union organs such as the African Court highlight issues that the Joint General Comment should engage with to ensure non-discrimination against children in respect of their protection against child marriage.

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## References

ACERWC (2017) Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child on Ending Child Marriages

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

African Commission on Human and Peoples' Rights (2014) General Comment 3 of 2014 on the Right to Life

*Association Pour le Progrès et la Defense Des Droits Des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali* Application 46 of 2016

Alston P (2001) 'The historical origins of the concept of "general comments" in human rights law.' In Boisson de Chazournes L and Gowland DV (eds) *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*. Springer

Blake C (2008) *Normative Instruments in International Human Rights Law: Locating the General Comment*. New York: New York University School of Law

Harland C (2000) 'The status of the International Covenant on Civil and Political Rights (ICCPR) in the domestic law of state parties: An initial global survey through UN Human Rights Committee documents.' *Human Rights Quarterly* 22(1)

Keller H and Ulfstein G (eds) (2012) *UN Human Rights Treaty Bodies: Law and Legitimacy* Cambridge: Cambridge University Press

Mechlem K (2009) 'Treaty bodies and the interpretation of human rights.' *Vanderbilt Journal of Transnational Law*, 42(3)

Omurray Gastón CM, Misunas C and Cappa C (2019) 'Child marriage among boys: A global overview of available data.' *Vulnerable Children and Youth Studies: An International Interdisciplinary Journal for Research, Policy and Care*, 14(3)

African Charter on Human and OAU (1990) African Charter Peoples' Rights on the Rights of Women in Africa

UNHCHR (2005) Factsheet 15 on the Human Rights Committee. Available at <https://bit.ly/2rortTg>

Universal Declaration of Human Rights