

# **The International Legal ‘Regime’ Against Child Marriage: A Haphazard Patchwork**

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## INTRODUCTION

There are 650 million women across the globe who were married as children.<sup>1</sup> Although both boys and girls can be victims of child marriages—which the Office of the United Nations High Commissioner for Human Rights defines as marriages where at least one party is a child—girls are disproportionately affected.<sup>2</sup> Child marriage has been described as “perhaps the most universally and extensive prevalent form of exploitation and sexual abuse of girls.”<sup>3</sup> Child marriage is detrimental to women’s physical and psychological health, and hinders efforts to advance women’s rights and general economic development.<sup>4</sup> Despite this, none of the international or regional instruments that operate against child marriage tackle the practice exclusively.<sup>5</sup> In 2015, ending child marriage was deemed a Sustainable Development Goal (SDG) under the United Nation’s 2030 Agenda for Sustainable Development.<sup>6</sup> But in 2023, UNICEF reported that the number of child marriages was still falling too slowly.<sup>7</sup> If the current rate of reduction persists, it will take another 300 years to eliminate child marriage worldwide.<sup>8</sup> By 2030, there will likely be at least 150 million more girls who will marry before they turn eighteen.<sup>9</sup>

Considering the ongoing battle against child marriage, this Comment seeks to critically evaluate the adequacy of the current international legal regime against child marriage. The background section explains the causes of child marriage and the relationship between child marriage and religion, as well as the

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1. See GIRLS NOT BRIDES, *Despite Significant Progress, We Need To Go 20 Times Faster To End Child Marriage By 2030, Shows New Data* (May 11, 2023), <https://www.girlsnotbrides.org/articles/despite-significant-progress-we-need-to-go-20-times-faster-to-end-child-marriage-by-2030-shows-new-data/>.

2. See Ruth Gaffney-Rhys, *International Law and Child Marriage*, INTERNATIONAL HUMAN RIGHTS OF WOMEN 346 (Niamh Reilly ed. 2020).

3. Mumtaz Ali Khan et al., *Safeguarding the Best Interest of the Child in Global Context: International Law and the Child marriage*, 57 J.R.S.P. 475, 475-82 (2020) (discussing the harmful effects of child marriage).

4. See Gaffney-Rhys, *supra* note 2.

5. See *id.*

6. See GIRLS NOT BRIDES, *The Sustainable Development Goals and Child Marriage* (Sept. 18, 2023), <https://www.girlsnotbrides.org/learning-resources/resource-centre/sdgs-and-child-marriage/>.

7. See GIRLS NOT BRIDES, *supra* note 1.

8. See GIRLS NOT BRIDES, *About Child Marriage*, <https://www.girlsnotbrides.org/about-child-marriage/> (last visited Apr. 4, 2024).

9. See Khan et al., *supra* note 3.

global nature of this practice.<sup>10</sup> The subsequent sections examine the text and legislative history of international and regional instruments, both with explicit and indirect provisions concerning marriage, organized chronologically by their enactment. These sections argue that the so-called regime is a haphazard patchwork. The relevant instruments, both individually and collectively, fail to construct an enforceable norm because three essential elements are missing: theoretical coherence, linguistic precision, and effective implementation. Based on this analysis, the final section suggests potential strategies to mend these holes. Particularly, it suggests that an independent, self-enforcing anti-child marriage convention is necessary, and its rationale should emphasize the detrimental health effects of child marriage. Additionally, anti-child marriage dialogue should engage religious leaders—who exert considerable influence over communities. However, these leaders must be convinced using the peripheral route of persuasion, because religious beliefs are held with strong conviction.

## I. BACKGROUND INFORMATION ABOUT CHILD MARRIAGE

### A. CAUSES OF CHILD MARRIAGE

Across diverse cultural contexts, child marriage is mainly driven by sociocultural norms, religion, and poverty.<sup>11</sup> In patriarchal societies, girls are valued less than boys, leading to gender inequality.<sup>12</sup> Moreover, in cultures that practice child marriage, parents and elders play a large role in the selection of spouses, and there is little to no emphasis on what the child wants, especially if the child is female.<sup>13</sup> Many of these cultures also place a large emphasis on female virginity, to the point that a girl's chastity is tied to a family's honor.<sup>14</sup> As a result, parents prefer to marry their daughter at a young age to ensure that her virginity is intact and to prevent out-of-wedlock births.<sup>15</sup> Husbands also prefer younger brides, because it increases the likelihood that they

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10. See *GIRLS NOT BRIDES*, *supra* note 8.

11. See Brianna Lee, *Child Marriage*, COUNCIL ON FOREIGN RELATIONS (Dec. 18, 2013), <https://www.cfr.org/article/child-marriage/>.

12. See *id.*

13. See *id.*

14. See *GIRLS NOT BRIDES*, *supra* note 8.

15. See *id.*

are still virgins.<sup>16</sup> Across different religions, there are disputes over the age at which a girl is mature enough to be married<sup>17</sup> and whether the internationally recognized age of majority, eighteen, should be adopted.<sup>18</sup>

Poverty is one of the key determinants of early marriages. In many developing countries, particularly in sub-Saharan Africa, South Asia, or the Middle East, poverty can push parents to marry off their daughters to make or save money.<sup>19</sup> In recent years, the negative impacts of extreme weather due to climate change have worsened poverty, which in turn has led to a spike in the number of child marriages; a 2022 study conducted by the Ohio State University “connect[s] droughts, floods and other extreme weather events to increases in child, early and forced marriages in low-and middle-income countries.”<sup>20</sup> One of the researchers posited that although extreme weather conditions do not directly cause child marriage, such disasters worsen pre-existing issues of gender inequality and poverty. This, in turn, pushes families towards child marriage as a strategy to cope with these challenges.<sup>21</sup> Another observed that beyond economic considerations, there are “a variety of ripple effects from weather disasters that led to more child marriages.”<sup>22</sup> For instance, “[c]ommunities . . . displaced by floods, cyclones and other disasters often end up in camps where young girls [are] targeted for sexual harassment and violence” to protect their daughters, families would hurriedly marry them off.<sup>23</sup>

The negative effect of the COVID-19 pandemic on efforts to reduce child marriages should be explored. In 2021, UNICEF reported that the pandemic had detrimental effects on the daily lives of girls by deteriorating their physical and mental health, preventing them from obtaining an education, and worsening the financial situations of their families and communities.<sup>24</sup> Such

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16. *See id.*

17. *See Lee, supra* note 11.

18. *See id.*

19. *See* UNICEF Innocenti Research Centre, *Early Marriages: Child Spouses* (Mar. 2001) 6-7, <https://www.unicef-irc.org/publications/pdf/digest7e.pdf/>.

20. Fiona C. Doherty, Smitha Rao, and Angelise R. Radney, *Association between Child, Early, and Forced Marriage and Extreme Weather Events: A Mixed-methods Systematic Review*, *INT'L SOC. WORK* 233, 247 (2023), <https://doi.org/10.1177/00208728231186006>.

21. *See id.*

22. *Id.*

23. *Id.*

24. *See* UNICEF, *Covid-19: A Threat to Progress Against Child Marriage* (Mar. 7, 2021), <https://data.unicef.org/resources/covid-19-a-threat-to-progress-against-child-marriage/>.

changes are estimated to increase the likelihood of child marriage and “up to 10 million more girls will be at risk as a result.”<sup>25</sup> Likewise, because “[e]ducation is a protective factor against child marriage,” UNICEF found that pandemic school closures pressured girls into marriage.<sup>26</sup>

Because child marriage is a phenomenon that intersects culture, religion, and poverty, it must be approached in an interdisciplinary manner. The additional circumstances of climate change and global warming must also be considered in order to understand the present dynamics.

## B. THE RELATIONSHIP BETWEEN CHILD MARRIAGE AND RELIGION

Religion is a complex cause of child marriage because the practice is not unique to one faith. Moreover, some religious doctrines have historically condoned child marriage and shaped the current societal norms that tolerate it. As such, religious leaders must be included in the dialogue concerning child marriage.

Religious leaders exert significant influence over society, which is one reason why politicians are wary of going against religious ideals or appearing to do so.<sup>27</sup> Religious leaders can play a significant role in abolishing child marriage, particularly considering that many marriages are solemnized through religious rituals.<sup>28</sup> Take Ethiopia, for example: Between 2005 and 2006, Pathfinder International collaborated with local clerics and government representatives to raise awareness of the dangers and repercussions of child marriage. During this initiative, leaders from Orthodox, Catholic, Protestant, and Muslim communities pledged to eradicate child marriage and other harmful customs. Pathfinder estimated that this campaign was instrumental in averting over 14,000 premature marriages in the Amhara and Tigray regions of Ethiopia.<sup>29</sup> Likewise, in Senegal, a local

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25. *Id.*

26. *Id.*

27. See ASSOCIATED PRESS, *Population Expert: Sahel Must Tackle Child Marriage for Peace*, VOA NEWS (Jun. 18, 2019), [https://www.voanews.com/a/africa\\_population-expert-sahel-must-tackle-child-marriage-peace/6170222.html](https://www.voanews.com/a/africa_population-expert-sahel-must-tackle-child-marriage-peace/6170222.html).

28. *See id.*

29. See Rachel B. Vogelstein, *Child Marriage and Religion*, COUNCIL ON FOREIGN RELATIONS (Jan. 2, 2014), <https://www.cfr.org/blog/child-marriage-and-religion-0/>.

organization, Tostan, involved community and religious leaders in programs aimed at empowering communities to confront detrimental traditions affecting children, such as genital mutilation and child marriage. By involving these influential leaders, more than 6,400 communities in Senegal have made a commitment to eliminate child marriage and other harmful customs.<sup>30</sup>

Although working with local religious leaders can be an effective technique to prevent child marriage, it requires extensive and meticulous coordination across the entirety of a nation. The engagement of religious leaders has been a strategy that many states have neglected or lacked the political willpower to pursue due to fear of losing support from religious leaders and communities.<sup>31</sup> However, according to the International Center for Research on Women, across nations with high rates of child marriage, the commonality lies not in the uniform observance of a religion but in circumstances such as economic hardship and limited educational prospects for girls.<sup>32</sup> Therefore, the challenge for politicians is two-fold. On one hand, they must counter existing sociocultural norms that accept child marriage by engaging with religious leaders, and on the other, they must formulate economic strategies to address poverty.

### C. CHILD MARRIAGE AS A GLOBAL PHENOMENON

Child marriage is a complex global phenomenon, occurring in both developed and developing countries. In the United States, for example, child marriage was legal in all fifty states until 2018, and as of June 2023, has only been banned in eleven states.<sup>33</sup> West Virginia has the highest rate of child marriages in the U.S.—approximately seven marriages for every 1,000 children ages fifteen to seventeen, compared to 4.6 marriages per 1,000 for the same age group across the nation.<sup>34</sup> In March 2023, a bill to ban minors from getting married in West Virginia was rejected by the

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30. *See id.*

31. *See* ASSOCIATED PRESS, *supra* note 27.

32. *See* Vogelstein, *supra* note 29.

33. The states are Minnesota, Michigan, Pennsylvania, New York, New Jersey, Vermont, New Hampshire, Massachusetts, Delaware, Rhode Island, and Connecticut. *See* John Raby, *Child Marriage Ban Bill Defeated in West Virginia House*, AP NEWS (Mar. 8, 2023), <https://apnews.com/article/child-marriage-west-virginia-bill-defeated/>.

34. *See id.* This is based on data collected from 2010 to 2014.

Republican-dominated Senate Judiciary Committee in a 9-8 vote.<sup>35</sup> Opponents cited various reasons for rejecting the bill: first, they claimed that the bill was overly restrictive; second, that it ignored social norms and the prevalence of child marriage in rural West Virginia; third, that teenagers below the age of eighteen are permitted to drive, work, and enlist themselves for military duty with parental approval, and so should be allowed to marry.<sup>36</sup>

## II. EXAMINING INTERNATIONAL AND REGIONAL INSTRUMENTS CONCERNING MARRIAGE

### A. AN OVERVIEW OF INTERNATIONAL LEGAL INSTRUMENTS THAT ADDRESS CHILD MARRIAGE

Despite the severity of the child marriage problem described in the previous section, there have been no attempts to address the issue as a standalone convention of international human rights.<sup>37</sup> There is a cluster of provisions scattered across various international and regional instruments that are relevant to child marriage. Combined, they can be broadly referred to as a legal regime against child marriage.<sup>38</sup> However, the provisions are limited in scope and thereby fail to constitute an enforceable norm against child marriage. Examining the underlying theory, the language of the conventions, and domestic implementation efforts around the world that have been made to date can explain this failure.

Evidently, through the various United Nations Resolutions that countries have adopted, there is a consensus that child marriage is an important issue, and there is collective desire to eliminate the practice.<sup>39</sup> However, there is no overarching vision regarding a precise framework to combat child marriage. Consequently, the so-called regime is a handful of uncoordinated provisions scattered across various international conventions and agreements. This

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35. *See id.*

36. *See* Nick Reynolds, *Republicans Make a Case for Child Marriage*, NEWSWEEK (Mar. 8, 2023), <https://www.newsweek.com/republicans-make-case-child-marriage-1786476>

37. *See* Marcy K. Robles, *Child Marriage and the Failure of International Law: a Comparison of American, Indian, and Canadian Domestic Policies*, 18 I.C.L.R. 105, 110 (2018), DOI:10.2478/iclr-2018-0028 (discussing international laws that pertain to child marriage).

38. *See id.* at 111.

39. *See, e.g.*, G.A. Res. ¶ 2–6 (Dec. 15, 2022).

matter is further complicated by the need to respect parental rights, as well as customary and common law marriages, through which children can bypass statutory age requirements.<sup>40</sup> In customary marriages, a union is valid if it is carried out in adherence to a particular culture or tradition of the spouses.<sup>41</sup> In jurisdictions that accept common law marriages, even child marriages can acquire legal status after fulfilling certain criteria (such as cohabitation), although the precise criteria differ depending on jurisdiction.<sup>42</sup>

Furthermore, relevant provisions within these instruments have often been too broad and aspirational. Key terms, such as the age of "majority," the age at which individuals are legally permitted to marry, are left undefined.<sup>43</sup> The need to accommodate religious exceptions may contribute to the imprecision of the provisions.<sup>44</sup> Because none of the instruments are self-executing, their effectiveness largely depends on whether, how, and the extent to which domestic legislation follows through with implementation. In sum, most of these conventions contain promises made by adopting parties to enact domestic legislation and measures to combat child marriage. However, these promises and even legal obligations under these conventions are "often stated in language too general and aspirational to constitute enforceable norms in and of themselves."<sup>45</sup> Accordingly, due to this ambiguity, there is also a lack of guidance as to how to achieve these objectives.

Combined, these deficiencies create many loopholes in the regime which allow child marriage to persist. Deference to parental rights, customs, and religious beliefs has often diminished the impact of initiatives against child marriage, casting doubt on the illegality of the practice itself. There is also

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40. See *id.* at ¶ 27.

41. See Legal Information Institute, *Equal Rights of the Customary Marriage Law of 1998*, CORNELL L. SCHOOL, [https://www.law.cornell.edu/women-and-justice/resource/equal\\_rights\\_of\\_the\\_customary\\_marriage\\_law\\_of\\_1998](https://www.law.cornell.edu/women-and-justice/resource/equal_rights_of_the_customary_marriage_law_of_1998) (last visited Apr. 1, 2024).

42. See *id.* at ¶ 27.

43. See Convention on the Rights of the Child, Art. 1 (Nov. 20, 1989) 1577 U.N.T.S. 3 (hereinafter CRC).

44. See Robles, *supra* note 37 at 114.

45. Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 J. GENDER, SOC. POL'Y & L. 233, 247 (2011) (discussing problems with the international law regime against child marriage).

insufficient guidance for states to prevent and outlaw child marriage at a domestic level.<sup>46</sup>

## B. UNITED NATIONS RESOLUTIONS

As mentioned above, various United Nations resolutions have been adopted to combat child marriage. The most recent one, the sixth resolution on child, early, and forced marriage, was adopted on July 13, 2023, by the Human Rights Council (HRC).<sup>47</sup> It reaffirmed several previous HRC resolutions as well as General Assembly (GA) resolutions.<sup>48</sup> The resolutions identify key causes of child marriage: religion and cultural customs, poverty, and gender inequality.<sup>49</sup> Crucially, they acknowledge child marriage as “a violation, abuse and impairment of human rights,” adversely affecting the “right to education, and the highest attainable standard of health, including sexual and reproductive health.”<sup>50</sup> There is an asymmetry as to the extent to which states implement the resolutions. Despite their moral authority, they are not legally binding and there are no consequences for states that fail to act or only take minimal action. States are repeatedly called to ratify applicable conventions concerning marriage and children.<sup>51</sup> But due to the conventions’ theoretical and linguistic deficiencies and the dearth of self-enforcing mechanisms, their impact on eradicating child marriage has been and continues to be questionable. This is particularly evident in the persistence of child marriage around the world; even where states have adjusted the legal minimum age of marriage to eighteen, child marriage continues due to legal exceptions and customary marriages.

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46. *See id.* at 243–47.

47. Human Rights Council Res. 53/23, at 1 (July 13, 2023).

48. *See id.* at 2–5. The reaffirmed resolutions were: H.R.C. Resolution 24/23 of 27 September 2013, G.A. resolution 69/156 of 18 December 2014; H.R.C. Resolution 29/8 of 2 July 2015, G.A. resolution 71/175 of 19 December 2016; H.R.C. Resolution 5/16 of 22 June 2017, G.A. resolution 73/153 of 17 December 2018; H.R.C. Resolution 41/8 of 11 July 2019, G.A. resolution of 75/167 of 16 December 2021; H.R.C. Resolution 48/6 of 8 October 2021, G.A. resolution of 77/202 of 15 December 2022

49. *See id.* at 2.

50. *Id.*

51. *See id.* at 2–5.

### C. A CLOSER LOOK AT RELEVANT INTERNATIONAL INSTRUMENTS

Time and time again, international legal agreements have been used as a “substitute for action” for issues where consensus is difficult or unrealistic.<sup>52</sup> For instance, human rights treaties may include general provisions to encourage “State Parties to implement the treaties to the fullest possible extent[, or a] . . . vaguely worded catch-all treaty clause can often be slotted in when there is no possibility of reaching agreement on whatever it might mean.”<sup>53</sup> In the context of child marriage, relevant marriage provisions are formulated with ambiguous language, and agreements lack self-enforcing mechanisms.

The sociocultural elements of child marriage make each state’s situation unique. It is therefore incredibly difficult to establish consensus amongst states, let alone a workable framework. Because of the link between child marriage and religion, the international legal regime continues to have an added challenge of needing to address cultural relativism. Hence, international discussions concerning child marriage have also had to be conducted carefully to avoid seeming insensitive to these norms or paternalistic.

This section will analyze eight international conventions, organized in chronological order by their enactment, with three distinct objectives. First, this section will show that relevant provisions regarding marriage are inspired by or refer to the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 1964 (“Marriage Convention”). Second, it will demonstrate that because the Marriage Convention is inherently vague and lacks any practical enforcement mechanisms, it impacts the functionality and effectiveness of all subsequent provisions that use it as a foundation. Third, it will illustrate that because all provisions are imprecise; therefore, when analyzed together, there is no overarching vision concerning child marriage, nor is there an enforceable international norm.

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52. VAUGHN LOWE, INTERNATIONAL LAW: A VERY SHORT INTRODUCTION 29 (2015).

53. *Id.*

### 1. *Marriage Convention, 1964*

The preamble of the Marriage Convention states that it seeks to “eliminat[e] child marriages and the betrothal of young girls before the age of puberty.”<sup>54</sup> Article 1.1 of the Marriage Convention states that “[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”<sup>55</sup> However, “a young girl cannot be expected to fully understand the implications of consenting to be married and is vulnerable to undue pressure from her family and powerful cultural demands,”<sup>56</sup> all of which may not be the best for her wellbeing.<sup>57</sup> Furthermore, it is unclear what constitutes “full and free consent,” which makes the provision vulnerable to domestic loopholes. For instance, domestic law can treat wedding vows as conclusive evidence of “full and free consent,” despite later displays of coercion or duress.<sup>58</sup> Without a working definition of consent, it is impossible to ascertain when consent has been given or contend when it has not.

Perplexingly, under Article 1.2, a party can be absent from the wedding ceremony where “the competent authority is satisfied that the circumstances are exceptional and that a party has . . . consented to the marriage.”<sup>59</sup> Although “competent authority” is not defined, it seems to include religious and partisan authorities.<sup>60</sup> Considering the uncertain definition of consent, Article 1.2 furthers the potential to abuse the consent requirement. For instance, a father can verbally reassure a religious authority of his religiously devout daughter’s consent to a marriage. Based on this assurance, the religious authority can then proceed to perform a binding religious ritual.

Although Article 2 requires State Parties to specify a minimum age for marriage in domestic legislation, this requirement falls short because there is no authoritative guidance regarding a

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54. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Nov. 7, 1962), 521 U.N.T.S. 231 (hereinafter Marriage Convention).

55. *Id.*

56. Warner, *supra* note 45 at 249.

57. *See id.*

58. *See id.*

59. Marriage Convention, *supra* note 54.

60. *See id.* at Art. 1, ¶ 2.

precise minimum age, though the Preamble encourages states to eliminate pre-puberty marriages.<sup>61</sup> Beyond the vagueness of the contents of the Marriage Convention, it is also difficult to evaluate its effectiveness because there are no monitoring or reporting requirements. With key terms left undefined and enforcement left largely to domestic legislation where states can easily utilize loopholes, the Marriage Convention fails to be helpful in reducing child marriage.

2. *Universal Declaration of Human Rights, 1948 (UDHR), International Covenant on Civil and Political Rights, 1976 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights, 1976 (ICESCR)*

Despite being non-binding, the UDHR is highly influential and often hailed as one of the most renowned international instruments regarding marriage.<sup>62</sup> The International Covenant on ICCPR and the ICESCR are subsequent conventions that draw inspiration from the UDHR<sup>63</sup> and, as a result, should be read in conjunction. A close reading of the marriage-related provisions within these three conventions reveals that the UDHR was unlikely formulated with combating child marriage in mind, rendering it an ineffective tool in this regard. Consequently, as successors to the UDHR that contain virtually identical provisions concerning marriage, the ICCPR and ICESCR are equally ineffective in protecting children from marriage.

The most relevant UDHR provision within the context of child marriage is Article 16. It crucially established the requirement of free and full consent:

1. Men and women of *full age*, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

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61. *See id.*

62. *See Robles, supra* note 37 at 111.

63. *See id.*

2. Marriage shall be entered into only with the *free and full consent* of the intending spouses.<sup>64</sup>

While the codification of the “free and full consent” requirement was a significant development, Article 16 is flawed in two crucial ways. First, it is construed in a highly general manner. Important terms, like “full age” and “full and free consent,” are left undefined.<sup>65</sup> Second, *child* marriage is not formally identified or addressed. The distinct circumstances that lead to child marriage and the characteristics of these arrangements require separate treatment; a general provision on marriage between adults “of full age” cannot capture the reality of child marriage.

Article 23(2) of the ICCPR, which incorporates Article 16 of the UDHR grants the right to marry to “men and women of marriageable age.”<sup>66</sup> The usage of the terms “men and women” rather than “males and females” suggests that the authors of the text intended to prohibit child marriages.<sup>67</sup> Though subsequent resolutions have evinced “an aim to prohibit child marriage,”<sup>68</sup> it is unlikely that UDHR was formulated with combating child marriage as one of its aims; even if limiting child marriage was in mind, the scope of the provisions and undefined key terms severely undermine its capacity to do so.

Since the ICCPR and ICESCR “contain virtually identical provisions” on child marriage as the UDHR, they similarly fail to adequately address child marriage.<sup>69</sup> The UDHR, ICCPR, and

64. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (emphasis added).

65. *See id.*

66. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), New York, Dec. 16, 1966, in force March 23, 1976, 999 U.N.T.S. 171, art. 23(2); *see also* Gaffney-Rhys, *supra* note 2 at 350.

67. *See* Gaffney-Rhys, *supra* note 2 at 350. However, in the legislative history of the UDHR, no special attention was given to children. Even marriage was seldom discussed; the topic was only raised by the representative of Egypt in objection to “the freedom to contract marriage without any restrictions as to race, nationality or religion” because “in almost all [Muslim] countries, certain restrictions and limitations existed regarding the marriage of [Muslim] women with persons belonging to another faith” *Yearbook of the United Nations 1948-49*, 1950 U.N.Y.B 532, U.N. Sales No. 1950.I.II.

68. Gaffney-Rhys, *supra* note 2 at 350. For example, the UN General Assembly Resolution on International Day of the Girl Child (20212); UN Human Rights Council Resolution on Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage (2015); UN General Assembly Resolution on Child, Early and Forced marriage (2016); and the Council of Europe Parliamentary Assembly Resolution on Forced Marriages and Child Marriages (2005).

69. Warner, *supra* note 45 at 254.

ICESCR, like the Marriage Convention, problematically include provisions upholding the freedom to practice religion, which can be interpreted as safeguarding a father's right to arrange his daughter's marriage if his religious beliefs allow it.<sup>70</sup> As such, the UDHR and its progeny are ineffective because the terms contained in the relevant marriage provisions are inapplicable to child marriage arrangements.

3. *Convention on the Elimination of All Forms of Discrimination Against Women, 1981 (CEDAW)*

Similar to the Marriage Convention, CEDAW contains provisions that specifically deal with marriage and attempt to address child marriage. Article 16(2) states that

[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.<sup>71</sup>

While Article 16 acknowledges and specifically addresses child marriage, the provision is ineffective in practice. Article 16 is silent on the age range of "child." Therefore, the most favorable interpretation here is that the definition of "child" is contingent upon other existing laws.<sup>72</sup> As such, despite the categorical prohibition of child marriage, the progress that has been made is minimal to none.<sup>73</sup> Indeed, Article 16.2 is applied in jurisdictions that defer to religious and local traditions, have domestic legislation stipulating eighteen as the age of adulthood, or accept parental, guardian, and public official consent as sufficient to marry a child.

Notably, in 1994, the Committee on the Elimination of Discrimination against Women published General Recommendation 21, which states that "the minimum age for marriage should be 18 years old for both man and woman."<sup>74</sup> It

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70. *See id.*

71. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (hereinafter CEDAW).

72. *See Warner, supra* note 45 at 254.

73. *See id.*

74. CEDAW, General Recommendation 21: Equality in Marriage and Family Relations, 1994, <https://www.refworld.org/docid/48abd52c0.html/>.

also acknowledges that “when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded[, restricting] their economic autonomy.”<sup>75</sup> Indeed, Recommendation 21 demonstrates an understanding that the minimum age for marriage should be eighteen, but because recommendations are not legally binding, any effect has been minimal. At least 117 nations permit children under eighteen years old to marry.<sup>76</sup>

#### 4. *Convention on the Rights of the Child, 1990 (CRC)*

The CRC was envisioned as a comprehensive treaty on children’s rights. Yet the drafters neglected to include any provision directly addressing marriage, a fact that researchers have described as “strange and miserable.”<sup>77</sup> The CRC stops applying once a child reaches eighteen years old or whenever domestic law stipulates that they have reached adulthood: in other words, the age of majority.<sup>78</sup> Since local law determines the age of majority, which is not always eighteen, many girls are left beyond the protection of the CRC. Furthermore, if a girl is married, even if she is below eighteen or the domestic age of majority, she may fall beyond the scope of the CRC; married girls are often socially and legally deemed to be adults because of their marital status, and even more so upon giving birth, regardless of their actual age.<sup>79</sup> Hence, being married can preclude these girls from the CRC’s protection, which defeats the purpose of the Convention.<sup>80</sup> As such, there is tension between human rights and the need to respect family life.

Even if the CRC applies to married girls, the provisions which can be used to condone child marriage nullify the ones that can be invoked to protect children.<sup>81</sup> For instance, Article 14.2 asks State Parties to “respect the rights and duties of parents . . . to provide direction to the child in the exercise of his or her right [to freedom

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75. *Id.*

76. See Aleksandra Sanstrom & Angelina E. Theodorou, *Many Countries Allow Child Marriage*, PEW RESEARCH CTR. (Sept. 12, 2016), <https://www.pewresearch.org/short-reads/2016/09/12/many-countries-allow-child-marriage/>.

77. CRC, *supra* note 43; Khan et al., *supra* note 3 at 481.

78. See CRC, *supra* note 43.

79. See Warner, *supra* note 45 at 251.

80. See *id.*

81. See *id.* at 251-252.

of religion] in a manner consistent with the evolving capacities of the child.”<sup>82</sup> In practice, Warner writes, this “grants deference to the rights of parents to control aspects of their children’s lives, particularly in the case of religion, education, and cultural heritage.”<sup>83</sup> Under the guise of religion, parents are often able to make decisions that enable child marriage. Since those children have reached the age of majority by grace of their “marriage,” they will no longer qualify for protection under the CRC.<sup>84</sup> Provisions such as Article 24.3, which require states to eliminate “traditional practices prejudicial to the health of children,” are undermined because they are unable to have an actual effect on child marriages.<sup>85</sup> The decision-making authority granted to parents is so broad that it undermines articles that stipulate:

that all children shall have the right to protection from all forms of physical or mental violence, injury, abuse, maltreatment or exploitation; the right to health; the right to education; the right to protection from abduction, sale or trafficking; the right to rest and leisure, the right to protection from economic exploitation and the right to protection from all forms of exploitation prejudicial to the child’s welfare.<sup>86</sup>

Article 14.2 contradicts Article 3, which declares that in all matters “concerning children . . . the best interests of the child shall be a primary consideration” and that state parties must “undertake to ensure the child such protection and care as is necessary for his or her well-being.”<sup>87</sup> In theory, a parent could argue that they have an explicit CRC right to marry their daughter off for religious reasons in her “best interests.”

The criterion of best interests of the child has remained elusive, even in the International Law Commission’s Draft Resolution on Human Rights and Private International Law (“ILC Draft Resolution 2021”). Under General Considerations in paragraph 20, it states “where appropriate, the principle of the best interests

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82. CRC, *supra* note 43.

83. Warner, *supra* note 45 at 252.

84. *See id.*

85. CRC, *supra* note 43.

86. Warner, *supra* note 45 at 252.

87. CRC, *supra* note 43.

of the child has been taken into account.”<sup>88</sup> Like the CRC, no additional explanation is provided; it is unclear how the criterion has been interpreted by the Committee.<sup>89</sup> It also does not explain how states should prioritize conflicting choices made for a child that are both based on best-interest arguments. For instance, what takes precedence when the best interests of the child based on religion are at odds with the best interests of the child based on health? To what extent would child marriage be against or satisfy the best interest of the child principle? The lack of guidance on such essential dilemmas hinders the entire regime against child marriage.

It should be emphasized that Article 13 is specifically about child marriage; it declares that “[c]hild marriage and marriage agreed upon in the absence of the free and full consent of the two spouses infringe upon human rights and shall not be recognized.”<sup>90</sup> However, the provision is merely a regurgitation of the Marriage Convention, and thus inherits its dubious imprecision.<sup>91</sup>

5. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956 (“Anti-Slavery Convention”) and Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, 1999 (“Child Labor Convention”)*

Article 1 of the Anti-Slavery Convention instructs state parties to use all necessary means to eliminate institutions and practices that allow women to be given away or transferred in exchange for payment.<sup>92</sup> However, like the UDHR, the Anti-Slavery Convention does not acknowledge or address “the special circumstances and vulnerabilities of children.”<sup>93</sup> For a female child to derive protection under the Anti-Slavery Convention, one would have to assume that even a minor can be considered a “woman.” In

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88. POCAR FAUSTO, 4<sup>TH</sup> COMMISSION ON HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW, 2021.

89. *See id.*

90. *Id.*

91. *See id.*

92. *See* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3, art. 1 (hereinafter Anti-Slavery Convention).

93. Warner, *supra* note 45 at 255.

practice, it is also ambiguous and difficult to ascertain “whether the girl has been given the right to refuse the marriage.”<sup>94</sup> Because many child marriages and forced marriages involve the sale and purchase of a human being, it is significant and important that the Anti-Slavery Convention condemns this practice.

The Child Labor Convention enhances the Anti-Slavery Convention by explicitly defining a child as anyone below the age of eighteen, as well as adding that “[e]ach Member which ratifies [the] Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.”<sup>95</sup> In Article 3, “all forms of slavery or practices similar to slavery” are named as one of the “worst forms of child labor,” which establishes the link to the Anti-Slavery Convention.<sup>96</sup> Building on this idea, since the Anti-Slavery Convention recognizes forced marriage as a form of slavery, it heightens the status of forced marriage as a significant issue. Most strikingly, unlike the Conventions discussed earlier, Article 7 attempts to tackle the question of implementation. It focuses on the use of sanctions, the importance of education, and stipulates the “designat[ion of a] competent authority responsible for the implementation of the provisions giving effect to this Convention.”<sup>97</sup> If a state ratifies both the Anti-Slavery and Child Labor Conventions in conjunction, girls will also qualify for the protection afforded by Article 1 of the Anti-Slavery Convention.<sup>98</sup>

Given the severity and prevalence of child marriage, it is inadequate for the legal regime to merely condemn this practice indirectly. Moreover, these provisions are not only scattered, but it is not even clear that they should or must be read together. Despite their flaws, these Conventions as a pair do offer some protection for girls. However, this effort is largely reduced by the consent exception, and in practice, determining whether a child's consent to marriage has been given is challenging.

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94. *Id.*

95. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Jun. 17, 1999, 2133 U.N.T.S. 161 (hereinafter Child Labor Convention).

96. *Id.*

97. *Id.*

98. See Warner, *supra* note 45 at 256.

#### D. REGIONAL INSTRUMENTS RELEVANT TO CHILD MARRIAGE

Besides international instruments, there are also agreements that pertain to specific regions concerning marriage rights and requirements. Many regional instruments bear a strong resemblance to the ICCPR. For example, Article 17(2) of the American Convention on Human Rights, 1969 (ACHR), and Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR) confer a right for “men and women of marriageable age” to marry.<sup>99</sup> Article 33 of the Arab Charter on Human Rights, 2004 (“Arab Charter”) also stipulates that “men and women of marrying age have the right to marry.” Still, all these conventions fail to define the numerical ages of “men and women.”<sup>100</sup> Hence, children under the age of eighteen can still be married if domestic legislation deems a fifteen-year-old child, for instance, to be a “woman.”

Article 9 of the Charter of Fundamental Rights of the European Union, 2009 (“EU Charter”) also merits discussion.<sup>101</sup> It does not make any reference to men and women, but rather broadly states that “[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”<sup>102</sup> In fact, according to one scholar, this provision was “designed to avoid the assertion that marriage must be heterosexual and should not be construed as permitting child marriage.”<sup>103</sup> Although Article 9 does not condone child marriage, it is not explicitly against the practice, nor does it offer any protection for minors. In seven member states,<sup>104</sup> national legislation does not mandate a minimum age for marriage.<sup>105</sup> And

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99. American Convention on Human Rights “Pact of San Jose, Costa Rica,” Nov. 22, 1969, S. Treaty Doc. No. 95-21 (hereinafter ACHR); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5 (hereinafter ECHR).

100. Arab Charter on Human Rights, May 22, 2004, 24 B.U. Int’l L.J. 147 (hereinafter Arab Charter).

101. Charter of Fundamental Rights of the European Union: 2010 O.J. (C83) 389. Proclaimed by the Commission, 7 December 2000. Proclamation and text at 2000 O.J. (C364) 1 (hereinafter EU Charter).

102. *Id.*

103. Gaffney-Rhys, *supra* note 2 at 351.

104. Belgium, Finland, France, Greece, Ireland, Luxembourg, and Slovenia. See FRA, *Marriage with consent of a public authority and/or public figure* (Apr. 28, 2018), <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/marriage-consent-public-authority-andor-public-figure>.

105. See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *MARRIAGE WITH CONSENT OF A PUBLIC AUTHORITY AND/OR PUBLIC FIGURE* (Apr. 18, 2018),

while the EU is committed to child protection, as seen in Article 24 on children's rights of the EU Charter and Directive 2011/92/EU on sexual abuse and exploitation of children, neither instrument addresses child marriages.<sup>106</sup> In contrast, African regional instruments contain language more precise than their international counterparts, but the region continues to struggle with persistent rates of child marriage. This indicates that beyond precise laws, there are other obstacles preventing the elimination of child marriage.

### 1. *Africa*

The African continent, estimated to account for 20% of child brides, has four additional instruments specific to its nations.<sup>107</sup> The examination of these instruments, akin to the section on international instruments, will be conducted chronologically by their enactment to showcase their evolution in precision and consideration of enforcement. Unlike international instruments, these regional instruments typically demonstrate a clear goal to eliminate child marriage, with more specific language and defined key terms. However, the challenges of securing signatories and ensuring effective enforcement continue to hinder anti-child marriage efforts in Africa.

#### a. *African (Banjul) Charter on Human and People's Rights, 1981 ("Banjul Charter")*

Under the Banjul Charter, signatories are also required to follow international declarations and conventions. Article 18(3) specifies:

The State shall ensure the elimination of every discrimination against women and also ensure the protection

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<https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/marriage-consent-public-authority-andor-public-figure/>.

106. See Gaffney-Rhys, *supra* note 2 at 351.

107. See UNICEF, IS AN END TO CHILD MARRIAGE WITHIN REACH? (May 2, 2023), <https://data.unicef.org/resources/is-an-end-to-child-marriage-within-reach/>.

of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>108</sup>

Although this helps to promote coherence in international law, the international declarations and conventions stipulated, as discussed above, are theoretically incoherent, linguistically ambiguous, and lack self-enforcing mechanisms. Hence, even though the Banjul Charter has been ratified by fifty-four out of fifty-five African Union Member States, the practical and actual impact of Article 18 towards African continental efforts against child marriage is questionable.<sup>109</sup>

b. *African Charter on the Rights and Welfare of the Child, 1990 (ARWCC)*

The ARWCC is an instrument that focuses specifically on children, and unlike the CRC, it targets harmful social and cultural practices “affecting the welfare, dignity, normal growth and development of the child,” including child marriage. In Article 21(2),

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.<sup>110</sup>

This provision is one of the few within international and regional law against child marriage that not only identifies child marriage specifically, but also explicitly calls for legislation to set the minimum age of marriage at eighteen years and mandate marriage registration. Although fifty African Union Member States have ratified the ARWCC, eleven of these states continue to

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108. African Charter on Human and Peoples' Rights, Jun. 27, 1981, 1520 U.N.T.S. 217 (hereinafter, Banjul Charter).

109. See ACHPR, *State Parties to the African Charter*, <https://achpr.au.int/en/states/> (last visited Apr. 4, 2024).

110. African Charter on the Rights and Welfare of the Child, Jun. 1, 1990, OAU Doc. CAB/LEG/24.9/49 (hereinafter ARWCC).

set the minimum age of marriage below eighteen years old or allow exceptions to be made.<sup>111</sup>

c. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 ("Maputo Protocol")*

Unlike the Marriage Convention, the Maputo Protocol to the African Charter stipulates eighteen to be the minimum marriage age for women. Article 6 declares that:

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate legislative measures to guarantee that:

(a) no marriage shall take place without the free and full consent of both parties;

(b) the minimum age of marriage for women shall be 18 years.<sup>112</sup>

However, it has only been ratified by forty-four out of fifty-five African Union Member States. Within the forty-four states that have ratified the protocol, nine of them have yet to set the minimum age of marriage at eighteen years old or have allowed exceptions.<sup>113</sup>

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111. Angola, Burkina Faso, Democratic Republic of Congo, Gabon, Guinea-Bissau, Mali, Niger, Senegal, Sudan, Tanzania, and Zambia. See ACPF, *Minimum Age of Marriage in Africa*, GIRLS NOT BRIDES (June 2013), <https://www.girlsnotbrides.org/documents/1197/Minimum-age-of-marriage-in-Africa-June-2013.pdf/>.

112. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Jul. 1, 2003, CAB/LEG/66.6 (hereinafter Maputo Protocol).

113. Angola, Burkina Faso, Democratic Republic of Congo, Gabon, Guinea-Bissau, Mali, Senegal, Tanzania, and Zambia. See African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Status List (Feb. 14, 2023), [https://au.int/sites/default/files/treaties/37077-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/37077-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf).

d. *Southern African Development Community Protocol on Gender and Development, 2008* (“SADC Protocol”)

Similar to the ARWCC, the SADC Protocol also asks states to “enact and adopt” legislation that specifies eighteen as the minimum marriage age.<sup>114</sup> Notably, Article 8 goes a step further and highlights the need to “account [for] the best interests and welfare of the child.”<sup>115</sup>

Article 8(2): Legislation on marriage shall ensure that: a) no person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child; (b) every marriage takes places with the free and full consent of both parties; (c) every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws; and (d) during the subsistence of their marriage the parties shall have reciprocal rights and duties towards their children with the best interests of the children always being paramount.<sup>116</sup>

The “unless otherwise specified by law” exception creates a loophole that continues to permit child marriage in states that have a minimum marriage age below eighteen or where parents make best interest arguments in the name of religion or poverty.

Protocols within the Southern African Development Community become effective, or “enter into force,” once they have been ratified by two-thirds of the member states.<sup>117</sup> This process transitions the regional law from a mere stated intention to its practical application.<sup>118</sup> Moreover, member states that join a protocol after it has entered into force are considered to have “acceded” to the protocol.<sup>119</sup> There are currently sixteen SADC

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114. Southern African Development Community Protocol on Gender and Development, Aug. 17, 2008, [http://www.cladem.org/english/news/Protocol%20on%20Gender/o20August%202008%20-%20English0001\(4\).pdf](http://www.cladem.org/english/news/Protocol%20on%20Gender/o20August%202008%20-%20English0001(4).pdf) (hereinafter SADC Protocol).

115. *Id.*

116. *Id.*

117. See Nyarai Kampilipili, *Revised SADC Gender Protocol Enters into Force*, TRALAC (Aug. 20, 2018), <https://www.tralac.org/news/article/13380-revised-sadc-gender-protocol-enters-into-force.html/>.

118. *See id.*

119. *See id.*

member states.<sup>120</sup> The SADC Protocol came into force in 2013 after it was ratified by eleven SADC states.<sup>121</sup> In 2016, the SADC Protocol was revised in an Agreement Amending the SADC Protocol and Development (“Amendment Agreement”), which met the two-thirds ratification requirement.<sup>122</sup> The revision was due to SADC’s desire to better align itself with global targets to eliminate child marriage.<sup>123</sup> Article 6 of the Amendment Agreement now says “no person under the age of 18 shall marry,” which effectively removed the “unless otherwise specified by law” exception.<sup>124</sup> Despite the amendment, six SADC states continue to have exceptions to the minimum age of eighteen requirement.<sup>125</sup> These exceptions typically exempt “customary or religious unions” and allow for child marriage “where it is in the interest of the minors involved.”<sup>126</sup>

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120. Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic Tanzania, Zambia and Zimbabwe. *See* SADC Protocol.

121. Angola, Lesotho, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. *See* SADC Protocol.

122. *See* Kampilipili, *supra* note 117.

123. *See id.*

124. *See id.*

125. Angola, Botswana, Democratic Republic of Congo, Eswatini, Madagascar, Tanzania, Zambia and Namibia. *See* SADC Protocol.

126. GIRLS NOT BRIDES, ANGOLA, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/angola/> (last visited Apr. 4, 2024); GIRLS NOT BRIDES, BOTSWANA, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/botswana/> (last visited Apr. 4, 2024); GIRLS NOT BRIDES, DEMOCRATIC REPUBLIC OF THE CONGO, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/democratic-republic-of-the-congo/> (last visited Apr. 4, 2024); U.S. DEPARTMENT OF STATE, 2018 INVESTMENT CLIMATE STATEMENTS: ESWATINI, <https://www.state.gov/reports/2018-investment-climate-statements/eswatini/>; GIRLS NOT BRIDES, MADAGASCAR, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/madagascar/> (last visited Apr. 4, 2024); GIRLS NOT BRIDES, TANZANIA, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/tanzania/> (last visited Apr. 4, 2024); GIRLS NOT BRIDES, ZAMBIA,, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/zambia/> (last visited Apr. 4, 2024); GIRLS NOT BRIDES, NAMIBIA,, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/namibia/> (last visited Apr. 4, 2024).

### III. HOLES IN THE PATCHWORK REGIME

#### A. LEGAL AND ADMINISTRATIVE

Both HRC and GA Resolutions concerning child marriage have reiterated time and time again that it is essential for states to set their minimum legal marriage age to eighteen, maintain a marriage registry, and to make the registration of marriage mandatory, subject to fines or even criminal liability.<sup>127</sup> The persistent lack of legal attention paid to the regulation of customary and religious child marriages largely undermine these developments.

Admittedly, legal efforts to combat child marriage must balance both the protection of human rights and respect for privacy and parental rights. However, the current status quo seems to give too much deference to the latter. The right of parents to make decisions in the best interest of their children is often paramount. Furthermore, states may hesitate to deal with the concept of “marriage,” because while there is a legal component, the institution is largely socio-religious. Child marriage must be framed as a violation of human rights in every context—including customary and religious practices. The law must clarify and explicitly prioritize children’s right to health and education in the ranking of interests. Furthermore, one of the most effective methods to eliminate child marriage and to minimize the adverse health consequences of the practice, is to legally require girls to remain in school until they turn eighteen.<sup>128</sup> Educated girls are less likely to be married off at a young age, and when parents are educated, they are also less inclined to marry their adolescent daughters off.<sup>129</sup> Ultimately, history and practice have shown that due to religious and sociocultural influences, as well as economic considerations, parents and guardians cannot be assumed to place children’s right to health and education at the forefront when considering the best interests of their children.

Child marriage is a complex issue that lies at the intersection of both private law and human rights. Hence, public law provisions that make broad references to the best interests of children are insufficient. Children are particularly vulnerable

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127. See Human Rights Council Res. 53/23, *supra* note 47.

128. See Doherty, et al., *supra* note 20.

129. See *id.*

because of the degree of control exercised by parents and guardians over their liberty, and because it is near to impossible for a minor to leave a marriage.<sup>130</sup>

Given the disparity between the current anti-child marriage legal regime and the HRC and GA Resolutions, there is a need for theoretical alignment. A standalone convention addressing child marriage with self-enforcing mechanisms would be able to achieve this. It would also send an international message regarding the severity of the issue and demonstrate a strengthened commitment to eliminating child marriage. Notably, such a convention would have to identify and explicitly address the tension between the private law right to family life and the public law right of children to enjoy human rights protection to be effective. The hypothetical convention should also have appropriate monitoring and reporting mechanisms at both national and international levels. Due to globalization, child marriage has evolved into a cross-border issue.<sup>131</sup> For example, in Australia, federal police data from 2019 revealed an “unknown numbers of children born in Australia who are taken overseas and forced into child marriage, [and] never to return.”<sup>132</sup> As a result, it is becoming increasingly crucial for states to concretely agree on a basic framework that includes core components concerning domestic implementation.

Ultimately, the hypothetical convention should include:

i. A Self-Enforcement Mechanism upon Ratification

Upon ratification, states should be given a two-year period to either enact new laws or to amend existing laws to comply with the new convention. Moreover, all states must confirm the age of majority as eighteen years old and declare that eighteen years old is the minimum age to enter a marriage, without exceptions. They should mandate that children remain in school until they reach the age of eighteen, or at least commit to invest in and develop the education sector to the point where this can be realized in the near future.

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130. *See id.*

131. *See* Nina Funnell, *Shocking reality for Australia's victims of forced marriage*, WORLDWIDE NEWS (Feb. 11, 2019), <https://www.news.com.au/lifestyle/real-life/news-life/shocking-reality-for-australias-victims-of-forced-marriage/news-story/>.

132. *Id.*

ii. A Working Group to Consult and Engage Religious Leaders

There should be a requirement for states to establish committees that operate on both national and local levels with NGOs to engage with religious leaders to formulate tailored, socially-conscious strategies to end child marriage.

iii. Mandatory Training for Schools to Identify Children at Risk of Being Forced into Marriage

Educators at schools should undergo mandatory training to understand the causes of child marriage and to identify students who may be at risk of being forced into a domestic marriage or trafficked. They should not be held legally accountable for failing to prevent their students from forced marriage. However, if the student themselves confides in an educator or they have discovered substantial evidence pointing to the fact that the student is at risk, educators should have a legal obligation to report it to a member of the school administration, who can then decide whether to involve the police.

iv. A Publicly Available Domestic Action Plan

Once domestic law has been amended or new laws have been enacted, states should be required to publish an action plan detailing the strategies they intend on employing, as well as how they will budget for these plans.

v. Educational Campaigns and Patrolling in Refugee Camps

In states that host refugee camps, they should establish education campaigns to educate parents about children's rights, as well as the health dangers associated with sexual intercourse and early pregnancy before a child's body is fully developed. There should also be active monitoring to prevent marriage ceremonies from taking place if one party is a minor, and the minors should be put under child protection services if they are found to be pushed into such an arrangement.

vi. Independent Committee Monitoring and Reporting Mechanisms

State parties should establish a committee, consisting of a representative from every state that oversees an annual conference where states share their progress in the form of a report, and learn from each other's data. The state reports and transcript of the conference should be made publicly available.

vii. Naming and Shaming of Non-Compliant States

States that fail to take action, only take insufficient action, or make half-hearted attempts should be named and shamed at the annual conference. The basis for this mechanism should come from observations and reports made by international and local NGOs sent to the independent committee to help to monitor and evaluate state action.

A dedicated anti-child marriage convention with robust enforcement would make a strong international statement. It would reinforce the minimum marriage age of eighteen and mandate collaboration among governments, NGOs, and religious leaders to create a solid domestic foundation against child marriage. The convention would push for teacher training to protect at-risk girls, with transparency amongst states concerning prevention strategies and progress. An independent committee would oversee compliance, with non-compliant states subject to international naming and shaming.

## B. ENFORCEMENT AND SUGGESTIONS

At its core, child marriage is a social phenomenon and one that occurs largely behind closed doors. As a result, the inherently intimate nature of child marriage largely limits the range of public actions a state may take. At best, states can only establish mechanisms for the registration of marriages and monitoring. The private nature of marriage makes patrolling nearly impossible and unrealistic. For instance, under Indian law, anyone who is found responsible for performing or arranging the marriage of a female

under eighteen years old will be subjected to criminal penalties.<sup>133</sup> Yet, proceedings will not be initiated unless a complaint is first filed, which seldom happens.<sup>134</sup> Compliance will largely rely on individuals to adjust their attitudes and conduct.

Changes in attitudes and culture can only be prompted by increased awareness and education over time. Legislation aimed at preventing child marriage will likely face obstacles in enforcement due to the belief that numerous traditional customs have persisted and may continue to, despite conflicting with new laws.<sup>135</sup> The cultural aspect of the practice suggests a need for both government and non-government entities to complement anti-child marriage policies with programs focused on community education, increasing awareness, engaging local and religious leaders, involving parents, and empowering young girls via education and employment opportunities.<sup>136</sup> For instance, a potential program could include offering financial incentives to families to keep their daughters in school, providing meals to students during school hours to alleviate the parental burden, and guaranteeing job opportunities for girls upon the completion of their education.<sup>137</sup>

Religious laws allowing child marriage must be revisited and reinterpreted within the context of modern human rights frameworks. When it comes to deeply entrenched religious beliefs, such as those justifying child marriage, responses to challenging messages can significantly differ. Religious leaders confronted with viewpoints opposing child marriage might engage in “value-protective processing,” defending their beliefs with counterarguments against conflicting evidence.<sup>138</sup> Thus, in matters like child marriage, where deeply held values are challenged, simply presenting stronger factual arguments may not lead to a shift in attitudes and could even solidify existing beliefs.<sup>139</sup> Instead, changing deeply held beliefs demands a subtler

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133. See The Child Marriage Restraint Act, 1929 §5 (India).

134. See Warner, *supra* note 45, at 245.

135. See Robles, *supra* note 37 at 114.

136. See Nawal M. Nour, *Child Marriage: A Silent Health and Human Rights Issue*, 2.1 REV. OBSTETRICS & GYNECOLOGY, 51, 55 (2009).

137. See *id.*

138. Kathryn Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 441-42, Temple University Legal Studies Research Paper No. 2006-18 (2006), <https://ssrn.com/abstract=927397>.

139. See *id.*

approach.<sup>140</sup> As such, politicians should employ strategies that blend persuasive arguments for ending child marriage with powerful narratives from affected individuals.

Consequently, although there's an urgent need to address child marriage, its eradication presents a paradox; it cannot be expedited. Changing societal attitudes and improving economic conditions are processes that inherently take time.

#### IV. ISSUES WITH COMPLIANCE

Although international instruments are largely linguistically imprecise, African instruments such as the ARWCC are specific enough to make a substantial impact towards the reduction of child marriages. While the ARWCC could have gone one step further to explicitly ban religious and customary marriages below the age of eighteen as well, it firmly declares that “[c]hild marriage and the betrothal of girls and boys shall be prohibited.”<sup>141</sup> Hence, while legal precision is a necessary foundation, its existence alone may be insufficient because of practical challenges posed by implementation. Legal developments can only be substantial to the extent they are implemented. In turn, implementation hinges on whether states are committed and have the financial means and institutional structures to enable them to comply with the law.

The interplay of sociocultural dynamics and cultural relativism within the framework of international human rights often renders initiatives against child marriage susceptible to criticism for paternalism and cultural imperialism.<sup>142</sup> To mitigate such accusations, it is essential to craft an anti-child marriage convention that reflects a broad spectrum of values. This can be achieved through inclusive drafting processes that involve consultations with all concerned nations, ensuring that the legislative history of the convention showcases substantive engagement and discourse.

On a technical level, the hypothetical convention should eschew broad, aspirational language in favor of precise, actionable commitments. A focused scope is preferable, capturing a consensus that reflects each nation's minimum agreed-upon actions against child marriage. Moreover, the hypothetical

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140. *See id.*

141. ARWCC, *supra* note 110 at art. 21.

142. *See Khan et al.*, *supra* note 3 at 482.

convention's foundation must be bolstered by empirical data, underlining that the protection of children's rights to health, education, safety, and participation is not only a moral imperative but also an inviolable obligation.

The empirical data should concretely demonstrate that sexual intercourse and early pregnancies adversely affect children's health: maternal mortality, in particular, "is the second leading cause of death among girls aged 15-19."<sup>143</sup> Other complications associated with carrying a child when the mother's body itself has not fully developed include inflammation, bleeding, uterine perforation, as well as thinning of the endometrium.<sup>144</sup> These complications can lead to repeated miscarriages, ectopic pregnancy, or even infertility in adulthood.<sup>145</sup>

Notably, educated women also tend to work for longer periods, and by doing so, have children later in life.<sup>146</sup> This means that when they do have children, they are more economically independent, which also benefits future generations.<sup>147</sup> Moreover, "if all adults received two more years of schooling or completed secondary school, it would lift nearly 60 million people out of poverty."<sup>148</sup> Therefore, by mandating that girls remain in school until age eighteen, states can reduce both the number of child brides and poverty writ large.

Although strategies to promote compliance are beyond the scope of this Comment, Omri Ben-Shahar and Anu Bradford's reversible rewards framework, which uses carrots instead of sticks, is suggested for further consideration. Applied to the context of child marriage, states with low rates of child marriage ("Enforcers") can establish a reversible reward fund to incentivize states with high rates of child marriage ("Violators") to act. The fund is "pre-committed and irrevocable"—serving as a reward for

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143. Yolaine Glèlè Ahanhanzo et al., *Factors Associated with Early Sexual Intercourse among Teenagers and Young Adults in Rural South of Benin*, 9(2) J. PUBLIC HEALTH AFR. 88, 88 (2018) (discussing health complications of early sexual intercourse and early pregnancies).

144. *See Are There Any Consequences To Having Early Sex At The Age Of 16 Or 17?*, VINMEC, <https://www.vinmec.com/en/news/health-news/obstetrics-gynecology-and-assisted-reproductive-technologies-art/are-there-any-consequences-to-having-early-sex-at-the-age-of-16-17/>.

145. *See id.*

146. *Ending Poverty Through Girl's Education*, THE BORGAN PROJECT (May 5, 2023), <https://www.borgenmagazine.com/girls-education-2/>.

147. *See id.*

148. *Id.*

the Violators if they change their conduct according to what the Enforcers encourage.<sup>149</sup> If a Violator opts not to change its conduct, the Enforcers may use the money in the fund for the sole purpose of reimbursing the costs incurred while sanctioning the Violator.<sup>150</sup>

A reversible child marriage fund may be more effective when combined with non-monetary measures. For states that lack willpower rather than capacity to combat child marriage, trade agreements or substantial loans that strengthen their economies might offer more incentive than mere financial aid. Conversely, for states lacking the necessary capacity and infrastructure to take effective action against child marriage, the provision of experts, such as medical professionals, in addition to financial support, can help establish essential institutions and programs. Furthermore, because the encouraged conduct was collectively determined, it mitigates accusations of paternalism or attempts at cultural imposition by any single state or region.

## CONCLUSION

The existing international legal architecture designed to address child marriage is markedly deficient, representing a haphazard patchwork of provisions with varying degrees of relevance strewn throughout numerous international and regional conventions. This framework fails to articulate a cohesive strategy for the eradication of child marriage; the language used is frequently ambiguous, resulting in standards that offer little specific or useful guidance for implementation, and lack enforcement mechanisms. These deficiencies have precluded the establishment of a robust and enforceable global norm against child marriage. Regional African instruments have demonstrated that linguistic precision in themselves does not guarantee compliance, as enforcement often falters due to exceptions carved out by the law for customary and religious unions, a lack of political will, or resources.

Combating child marriage requires a comprehensive and nuanced approach that extends beyond international agreements to include local collaboration. To avoid the pitfalls of paternalism and cultural imperialism, sufficient time and effort must be

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149. *See id.* at 157.

150. *See id.*

invested in identifying the appropriate standards to be enshrined in a hypothetical, dedicated anti-child marriage convention. Additionally, states must reconsider conventional approaches of imposing sanctions and dispensing incentives. This Comment advocates for a deeper exploration of reversible rewards as a novel strategy to enhance compliance with anti-child marriage measures.

Given its intersection with private law and human rights, child marriage presents an exceptionally intricate challenge. Efforts to eradicate the practice are further complicated by its widespread occurrence, the influences of globalization, sociocultural mores, religious beliefs, and economic conditions. Addressing the issue effectively calls for not just legal interventions, but also a commitment to education and cultural engagement that empowers children, families, and entire communities. Such transformational efforts are gradual and are part of broader societal movements that address gender equality and environmental sustainability. Consequently, while the elimination of child marriage is a global imperative, it is a goal that must be pursued with careful deliberation and respect for the complex tapestry of societal dynamics.