

# **The Normative Complementarity of the African Children’s Charter and the African Women’s Protocol in the Context of Efforts to Combat Child Marriage**

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## **1 INTRODUCTION**

Despite the existence of an extensive array of international treaties<sup>1</sup> addressing it and the progress made in reducing it, the practice of child marriage remains a significant global

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<sup>1</sup> These include the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962 (which establishes minimum marital ages and requires the registration of marriages); Convention on Elimination of All Forms of Discrimination against Women, 1979 (which provides that “the betrothal and the marriage of a child shall have no legal effect” and requires that “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”); and Convention on the Rights of the Child, 1989 (arts 19(1) and (2)). Several African human rights instruments also express disapproval of child marriage and/or establish 18 as the minimum age of marriage; namely, the African Charter on the Rights and Welfare of the Child, 1990 (African Children’s Charter); the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the African Women’s Protocol or Maputo Protocol); the African Youth Charter, 2006; the Southern African Development Community (SADC) Protocol on Gender and Development, 2008 (art 8(1) and (2)); and the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage, 2016. It should be noted that a number of countries have adopted national initiatives to combat child marriage. For example: Burkina Faso (National Strategy on the Prevention and Elimination of Child Marriage, 2016-2025), Egypt (National Strategy to Prevent Child Marriage), Mozambique (National Strategy for the Prevention and Elimination of Child Marriage 2015-2019), Nepal (National Strategy to End Child Marriage, 2015-2030), Uganda (National Strategy on Ending Child Marriage and Teenage Pregnancy 2014/2015-2019/2020), and Zambia (National Strategy on Ending Child Marriage 2016-2021).

concern. This harmful practice<sup>2</sup> affects millions of children, in particular girls,<sup>3</sup> and has serious implications for the enjoyment of human rights and fundamental freedoms by all children affected. In 2014, the United Nations Children’s Fund (UNICEF) reported that, worldwide, more than 700 million women alive today worldwide, were married before the age of 18 years.<sup>4</sup>

This article offers some reflections on the normative complementarity of the African Children’s Charter (Children’s Charter) and the African Women’s Protocol (Women’s Protocol) in the context of efforts to combat child marriage, highlighting the similarities and differences in the rights and obligations contained in the two instruments. The article also briefly discusses the complementary nature of the two main mechanisms responsible for monitoring States’ compliance with their obligations under the two treaties – the African Commission on Human and Peoples’ Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Child Rights Committee), as well as the challenges to the effective implementation, by the States parties, of their obligations under each instrument.

Although the term “complementarity” is commonly employed in international law, particularly in international criminal law, there is no generally accepted meaning of the concept.<sup>5</sup> For this reason, this article does not attempt to define the concept. Rather, the term “complementarity” is used, in the present article, to refer to the mutually reinforcing relationship between the norms contained in the Children’s Charter and Women’s Protocol

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<sup>2</sup> The UN Committees on the Elimination of Discrimination against Women and on the Rights of the Child consider child marriage a “harmful practice”; that is, a persistent practice and form of behaviour that is based on “discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering”. According to the Committees, the harm that such practices cause to the victims is far greater than “the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children”. See CEDAW/C/GC/31-CRC/GC/C/GC/18 para.15.

<sup>3</sup> Although boys are also married as children, girls tend to be disproportionately affected: child marriage is about five times more common among girls than boys. See UNICEF “Achieving a future without child marriage: Focus on West and Central Africa” 2017 <https://data.unicef.org/wp-content/uploads/2017/10/Child-Marriage-WEB.pdf> (accessed 21-02-2018). See also United Nations Population Fund (UNFPA) “Marrying Too Young: End Child Marriage” 2012 <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> (accessed 29-03-2016). For a discussion of the impact of child marriage, see section 2.4 below.

<sup>4</sup> UNICEF “Ending Child Marriage: Progress and Prospects” 2014 [https://www.unicef.org/media/files/Child\\_Marriage\\_Report\\_7\\_17\\_LR.pdf](https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR.pdf) (accessed 20-01-2018).

<sup>5</sup> See, for example, Ebobrah “Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations” 2011 *European Journal of International Law* 663 666.

and, to some extent, the relationship between the African Commission and the African Children's Committee.

The article has five main sections. Following this introduction, section two defines child marriage and provides a brief overview of the causes and prevalence of child marriage in Africa. The section also highlights the impact of child marriage. Section three discusses the normative complementarity of the African Children's Charter and the African Women's Protocol. Section four briefly outlines the challenges to the effective implementation of the Children's Charter and the Women's Protocol. The last section is the conclusion.

## 2 CHILD MARRIAGE: DEFINITION, CAUSES, PREVALENCE AND IMPACT

### 2.1 Definition

Child marriage refers to either a formal marriage or informal union where one party (usually a girl) or both parties are under the age of 18 years.<sup>6</sup> The Universal Declaration of Human Rights (UDHR) and several human rights treaties enshrine the right to "free and full" consent to a marriage, recognising that consent cannot be "free and full" in circumstances where one or both of the individuals involved lacks or lack the maturity to make an informed decision

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<sup>6</sup> The term "informal union" refers to a situation where the parties live together as if they were married. See UNICEF "Early Marriage a Harmful Traditional Practice: A Statistical Exploration" 2005 4 [www.unicef.org/publications/files/Early\\_Marriage\\_12.lo.pdf](http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf) (accessed 17-01-2018). In Africa, child marriage takes various forms in different cultures. For example, in rural northeast Ethiopia, *telefa* is a practice by which a man abducts, hides and rapes a girl and then, as the father of her unborn child, can claim marriage. See Getahun "Marriage through abduction ('Telefa') in rural north west Ethiopia" 2001 *Ethiopian Medical Journal* 105-112; in South Africa, *ukuthwala* is a practice that involves the kidnapping of a girl or young woman by a man and his friends or peers with the intention of constraining her family to endorse marriage negotiations. In recent times, this has increasingly involved the kidnapping, rape and forced marriage of minor girls as young as twelve years particularly in the Eastern Cape Province. See Department of Justice and Constitutional Development Gender Directorate "Ukuthwala" [www.justice.gov.za/brochure/ukuthwala/2011ukuthwala.pdf](http://www.justice.gov.za/brochure/ukuthwala/2011ukuthwala.pdf) (accessed 21-08-2017); and in Ghana, Benin, Nigeria and Togo, *trokosi* (literally "wife of the gods" in the Ewe language) is a practice by which a young virgin girl is offered in ritual servitude (involving the provision of labour and sexual services) to a local fetish priest as a form of atonement when the girl's relative (often a man) commits a serious crime. See Ben-Ari "Liberating girls from 'trokosi': Campaign against ritual servitude in Ghana" [www.un.org/en/africarenewal/vol115no4/154troko.htm](http://www.un.org/en/africarenewal/vol115no4/154troko.htm) (accessed 21-08-2017). See also UNICEF "Ending Child Marriage: Progress and Prospects" 2014. In exceptional circumstances, a marriage below the age of 18 may be allowed when the child is at least 16 years old. However, approval has to be given by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to culture or tradition.

concerning when and whom to marry.<sup>7</sup> Nevertheless, in most child marriages, there is usually an element of coercion involved, with parents, guardians or families pressurizing, colluding or forcing children into marriage.<sup>8</sup>

Although the term “child marriage” is often used interchangeably with “early marriage” or “forced marriage”, they do not necessarily refer to the same phenomenon.<sup>9</sup> Early marriage refers to marriages in which one or both spouses are 18 or older, but with a compromised ability to give consent to the union. It should be noted that in this context the phrase “early” does not directly emphasise the age of the parties,<sup>10</sup> nor does it directly reflect the negative effect of the practice. Thus, for example, the marriage of a 20 year-old who is not physically or emotionally mature may be considered an early marriage.

A “forced marriage” is one in which one or both parties have not given their full and free consent to the marriage.<sup>11</sup> Unlike in the case of child marriage, the age of the parties is not a factor. The term “forced marriage” is also used to refer to a union in which one or both parties is or are “not allowed to end or leave it”.<sup>12</sup> Forced marriages may be manifested in a number of forms, including child marriage, exchange or trade-off marriages, servile marriages and levirate marriages.<sup>13</sup> A child marriage is considered a form of forced marriage because one or both parties have not expressed their full and free consent to the marriage.<sup>14</sup>

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<sup>7</sup> The CEDAW General Recommendation No. 21 underscores that 18 years is the minimum age when young people attain “full maturity and capacity to act”.

<sup>8</sup> International Planned Parenthood Association (IPPF) and the Forum on Marriage and the Rights of Women and Girls “Ending Child Marriage: A Guide for Global Policy Action” 2006 <http://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf> (accessed 20-01-2018).

<sup>9</sup> UNFPA “Marrying Too Young: End Child Marriage” 2012 11.

<sup>10</sup> Nour “Child Marriage: A Silent Health and Human Rights Issue” 2009 *Reviews in Obstetrics and Gynaecology* 51-52.

<sup>11</sup> Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc CEDAW/C/GC31-CRC/C/GC/18 (4 November 2014) para 23. See also *Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Special Court for Sierra Leone Case No. SCSL-2004-16-A, Judgment, 22 February 2008 para 196, where the Appeals Chamber found that “[i]n the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim”.

<sup>12</sup> CEDAW/C/GC/31-CRC/C/GC/18 para 23.

<sup>13</sup> CEDAW/C/GC/31-CRC/C/GC/18 para 23.

<sup>14</sup> CEDAW/C/GC/31-CRC/C/GC/18 para 20.

Despite the difference in the meaning of these terms, they form an integral part of the classification and understanding of the nature of child marriage.

## 2.2 Causes

Various factors commonly drive and/or perpetuate child marriage in Africa. These include poverty, cultural traditions and religious beliefs, gender inequalities, conflict situations, natural disasters and inadequate legislative frameworks.<sup>15</sup> In places where poverty is severe, parents often see young girls as financial burdens and marrying them off as a way of relieving that burden and securing their future by transferring the ‘burden’ to their husbands or their families. In some areas, particularly those affected by conflict or natural disasters, marrying off a girl as a child is perceived as a way to protect girls from sexual violence.

Pervasive gender inequalities play a critical role in perpetuating child marriage.<sup>16</sup> In many communities where child marriage is practised, social norms place a much higher value on boys than girls, with the latter often being considered to be a burden or commodity.<sup>17</sup>

## 2.3 Prevalence

Although child marriage is a worldwide phenomenon,<sup>18</sup> sub-Saharan Africa has the highest rates.<sup>19</sup> The Middle East and North Africa account for 17 percent; East Asia and the Pacific, 15 percent; and Eastern Europe and Central Asia, 11 percent.

All African countries are confronted with the problem of child marriage, although the prevalence varies between countries – from 76 percent in Niger to 2 percent in Algeria.<sup>20</sup>

<sup>15</sup> See, for example, UNFPA “Marrying Too Young: End Child Marriage” 2012 11-12; Girls Not Brides “Child Marriage in Sub-Saharan Africa” <https://www.girlsnotbrides.org/region/sub-saharan-africa/> (accessed 17-01-2018); Human Rights Watch (HRW) “Those Terrible Weeks in their Camp: Boko Haram Violence against Women and Girls in Northeast Nigeria” 2014 *Human Rights Watch Report* 13 <https://www.hrw.org/sites/default/files/reports/nigeria1014web.pdf> (accessed 24-03-2016).

<sup>16</sup> IPPF and the Forum on Marriage and the Rights of Women and Girls “Ending Child Marriage: A Guide for Global Policy Action” 2006 18.

<sup>17</sup> Girls Not Brides “Ending Child Marriage in Africa: A Brief” 2015 <https://www.girlsnotbrides.org/resource-centre/ending-child-marriage-africa-brief-girls-not-brides> (accessed 18-01-2018).

<sup>18</sup> See UNICEF “Ending Child Marriage: Progress and Prospects” 2014 1.

<sup>19</sup> See UNICEF “Child marriage is a violation of human rights, but is all too common”, January 2018 <https://data.unicef.org/topic/child-protection/child.marriage/#> (accessed 21-02-2018).

<sup>20</sup> UNICEF “The State of the World’s Children 2015: Reimagine the Future: Innovation for Every Child Digital Report” Table 9, Child Protection 84-89 [http://www.unicef.org/publications/files/SOWC\\_2015\\_Summary\\_and\\_Tables.pdf](http://www.unicef.org/publications/files/SOWC_2015_Summary_and_Tables.pdf) (accessed 01-03-2016); Girls Not Brides “Ending Child Marriage in Africa: A Brief” 2015.

Across sub-Saharan Africa, an estimated 4 in 10 girls were married before they turned 18, an estimated one in 8 were married or in a union before age 15.<sup>21</sup> The practice is reported to be widespread in West and Central Africa, where an estimated 42 percent of women are married before age 18, and in East and Southern Africa, where 37 percent of girls are affected.<sup>22</sup> Furthermore, among the 20 countries with the highest rates of child marriage in the world, 15 are African.<sup>23</sup>

It is important to note that while there has been a decline in the prevalence of child marriage in Africa, progress has been slow and uneven. Moreover, it remains higher than the global average.<sup>24</sup> It is projected that, due to a growing child population and in the context of slow progress in ending child marriage, sub-Saharan Africa will have the largest share of child marriages in the world by 2050.<sup>25</sup>

## 2.4 Impact

The consequences of child marriage, particularly for girls, are well-documented<sup>26</sup> and do not, in the context of this article, require a detailed discussion. Nevertheless, it is useful to briefly summarize them.

<sup>21</sup> *Ibid*; See also UNICEF “Ending Child Marriage: Progress and Prospects” 2014 1-8.

<sup>22</sup> UNICEF “The State of the World’s Children 2015: Reimagine the Future: Innovation for Every Child Digital Report” Table 9, Child Protection 89. See also UNICEF “Ending Child Marriage: Progress and Prospects” 2014 5.

<sup>23</sup> UNICEF “The State of the World’s Children 2015: Reimagine the Future: Innovation for Every Child Digital Report” 84-89; African Union (AU), ACERWC “Concept Note of the 25<sup>th</sup> Day of the African Child (DAC) 2015” para 5 <http://www.acerwc.org/?wpdmdl=8515> (accessed 17-02-2016). The highest levels of child marriage in Africa are found in Niger, Central African Republic, Chad, Malawi, South Sudan, Somalia, Mali, Mozambique and Nigeria.

<sup>24</sup> See UNICEF “A Profile of Child Marriage in Africa” 2015 [http://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single\(1\).pdf](http://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single(1).pdf) (accessed 18-09-2016).

<sup>25</sup> *Ibid*.

<sup>26</sup> See, for example, UNFPA “Girlhood, Not Motherhood: Preventing Adolescent Pregnancy” 2015 [http://www.unfpa.org/sites/default/files/pub-pdf/Girlhood\\_not\\_motherhood\\_final\\_web.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/Girlhood_not_motherhood_final_web.pdf) (accessed 21-08-2018); UNICEF “Ending Child Marriage: Progress and Prospects” 2014; UNFPA “State of the World Population 2013: Motherhood in Childhood – Facing the Challenge of Adolescent Pregnancy” 2013 <http://www.unfpa.org/sites/default/files/pub-pdf/EN-SWOP2013.pdf> (accessed 21-08-2018); Raj “When the Mother is a Child: The Impact of Child Marriage on the Health and Human Rights of Girls” 2010 *Archives of Disease in Childhood* 931-935; UNICEF “State of the World’s Children 2009” <https://www.unicef.org/sowc09/docs/SOWC09-FullReport-EN.pdf> (accessed 20-01-2018); UNFPA “Obstetrics Fistula Needs Assessment Report: Findings from Nine African Countries” 1-5 <http://www.unfpa.org/sites/default/files/pub-pdf/fistula-needs-assessment.pdf> (accessed 07-02-2016); UNICEF “Early Marriage: Child Spouses” 2001 *Innocenti Digest* 2-8 <https://www.unicef-irc.org/publications/pdf/digest7e.pdf> (accessed 12-10-2017). See also Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc CEDAW/C/GC31-CRC/C/GC/18 (14 November 2014) para 22.

Child marriage can lead to complications related to pregnancy and childbirth.<sup>27</sup> Many girls under the age of 18 are not physically mature and therefore unprepared for sexual intercourse or child birth. Thus, adolescent pregnancy entails considerable risk. According to UNICEF, pregnancy-related deaths are the leading cause of mortality among girls aged 15 to 19 years worldwide, accounting for some 70,000 deaths each year.<sup>28</sup> Girls under the age of 15 are particularly at higher risk of serious health problems including placental tears, obstruction during delivery, obstetric fistulae and death.<sup>29</sup>

Beyond the reproductive health risks to the girls concerned, babies born of child brides are often susceptible to such risks as low birth weight, malnutrition and impaired cognitive development.<sup>30</sup>

Because child marriage is often characterised by coercive and unprotected sexual practices,<sup>31</sup> it exposes child brides to sexually transmitted infections, including HIV,<sup>32</sup> notwithstanding that child marriage is often justified as a prevention strategy from HIV infection and other sexually transmitted diseases.<sup>33</sup> Child marriage further places child brides at increased risk of domestic violence, abuse and exploitation.<sup>34</sup>

Recent research by the World Bank indicates that child marriage has adverse economic and developmental implications for the countries concerned.<sup>35</sup> It deprives millions of girls of the

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<sup>27</sup> Nour 2009 *Reviews in Obstetrics and Gynaecology* 54.

<sup>28</sup> UNICEF “The State of the World’s Children” 2009 14.

<sup>29</sup> See UNFPA “Girlhood, Not Motherhood: Preventing Adolescent Pregnancy” 2015 9-10; Nour “Health Consequences of Child Marriage in Africa” 2006 *Emerging Infectious Diseases* 1644-1649. Many young girls in marriage in countries like Benin, Chad, Malawi, Mali, Mozambique, Niger, Nigeria, Uganda, and Zambia are affected by obstetric fistula, a childbirth related medical condition caused by prolonged obstructed labour. See UNFPA “Obstetrics Fistula Needs Assessment Report: Findings from Nine African Countries” 1-5.

<sup>30</sup> *Ibid.*

<sup>31</sup> Due to the vast age gaps between them and their husbands, child brides are often unable to negotiate safe sexual activity, use of contraceptives or birth spacing with their husbands. See Raj 2010 *Archives of Disease in Childhood* 931-935.

<sup>32</sup> UNFPA “Marrying too Young: End Child Marriage” 2012. Clark, Bruce and Dude “Protecting Young Women from HIV/AIDS: The Case against Child and Adolescent Marriage” 2006 *International Family Planning Perspectives* 79-88 79. Girls tend to be susceptible to sexually transmitted infections due to biological factors such as hormonal fluctuations and the permeability of vaginal tissue, and social factors such as unequal power relations that render it difficult for girls and young women to negotiate safe sex. See UNICEF “Early Marriage: Child Spouses” 2001 *Innocenti Digest* 10.

<sup>33</sup> Nour 2009 *Reviews in Obstetrics and Gynaecology* 54.

<sup>34</sup> Girls Not Brides “Violence against Girls” <https://www.girlsnotbrides.org/themes/violence-against-girls/> (accessed 12-10-2017).

<sup>35</sup> See, for example, Wodon, Male, Nayihouba, Onagoruwa, Savadogo, Yedan, Edmeades, Kes, John, Murithi, Steinhaus and Petroni “Economic Impacts of Child Marriage: Global Synthesis Report” 2017 *World Bank*

skills, knowledge and employment prospects that would enable them lift their families out of poverty and contribute to their countries' development.<sup>36</sup>

Child marriage also undermines the realisation and enjoyment of virtually all of the rights of the affected children, including the rights to life, the highest attainable standard of physical and mental health, education, equality, non-discrimination, personal development, participation in civic life, protection from harmful practices, and freedom from abuse and exploitation.<sup>37</sup> Key concerns include the denial of childhood and adolescence, the lack of opportunities for personal development, adverse impacts on psychological and emotional well-being,<sup>38</sup> as well as denial of reproductive health and educational opportunities. Importantly, it denies the affected child spouse the freedom to choose if, when and whom to marry in direct violation of the guarantee enshrined in various human rights instruments that marriage must be entered into with the free and full consent of the intending spouses.<sup>39</sup>

In sum, for boys and girls alike, child marriage has far-reaching physical, intellectual, psychological and emotional consequences and undermines their rights.

### **3 THE NORMATIVE COMPLEMENTARITY OF THE CHILDREN'S CHARTER AND WOMEN'S PROTOCOL**

All human rights are interdependent and interrelated: the fulfilment of one right often depends, in whole or in part, upon the fulfilment of other rights. This principle has been affirmed by the African Children's Committee and the African Commission. In particular, the two human rights bodies have affirmed the interrelatedness of children's and women's rights in the context of child marriage, emphasizing that the principle of interrelatedness of human rights entails that:

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*Publications* 2017 <http://documents.worldbank.org/curated/en/530891498511398503/Economic-impacts-of-child-marriage-global-synthesis-report/> (accessed 18-01-2017).

<sup>36</sup> Girls Not Brides "Ending Child Marriage in Africa: A Brief" 2015.

<sup>37</sup> UNFPA "Marrying Too Young: End Child Marriage" 2012 11; Girls Not Brides "Child Marriage and Education: An Information Sheet" 1 <https://www.girlsnotbrides.org/wp-content/uploads/2016/12/Child-Marriage-and-Education-Girls-Not-Brides-June-2016.pdf> (accessed 11-10-2017).

<sup>38</sup> See UNICEF "Early Marriage: Child Spouses" 2001 *Innocenti Digest* 9.

<sup>39</sup> See, for example, UDHR art 16(2); International Covenant on Economic, Social and Cultural Rights art 10(1); International Covenant on Civil and Political Rights art 23(3); African Women's Protocol art 6(a). See also SADC Protocol on Gender and Development art 8(2)(b).

“[A] determination as to the meaning, content or ambit of the prohibition of child marriage in the Maputo Protocol and the African Children’s Charter requires a simultaneous consideration of the overall purpose and objective of these two instruments and the totality of rights, freedoms and provisions they enshrine.”<sup>40</sup>

Furthermore, “the prohibition against child marriage in Article 6 of the Maputo Protocol and Article 21(2) of the African Children’s Charter is interdependent and interlinked with a number of other rights recognised under the two instruments”.<sup>41</sup>

It is also worth pointing out at the outset that the African human rights system is itself predicated on the functional and normative complementarity<sup>42</sup> of the various normative frameworks and institutional mechanisms.<sup>43</sup> Thus, for example, article 42(a)(iii) of the Children’s Charter enjoins the African Children’s Committee to “cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the Child”, while article 46 requires the Committee, in implementing its mandate, to draw inspiration from, inter alia, the provisions of the African Charter on Human and Peoples’ Rights (ACHPR). In a similar vein, article 45(1)(c) of the ACHPR enjoins the African Commission to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights” while article 60 requires the Commission to draw inspiration from the provisions of various instruments on human and peoples’ rights.<sup>44</sup>

Child marriage equally affects the rights of children and the rights of women.<sup>45</sup> It is thus clear that the Children’s Charter and Women’s Protocol are normatively complementary in

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<sup>40</sup> Joint General Comment of the African Commission on Human and Peoples’ Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage, 2017 para 15.

<sup>41</sup> *Ibid.*

<sup>42</sup> As stated earlier, the term “complementarity” is used, in the present article, to refer to the mutually reinforcing relationship between the norms contained in the Children’s Charter and Women’s Protocol and, to some extent, the relationship between the African Commission and the African Children’s Committee.

<sup>43</sup> See, generally, Pan African Lawyers Union (PALU) *Guide to Complementarity within the African Human Rights System* 2014. See also African Children’s Charter arts 42 and 64; and African Charter on Human and Peoples’ Rights (ACHPR) arts 45(1)(c) and 60; and Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples’ Rights arts 2 and 7.

<sup>44</sup> See also article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights which provides that the Court complements the Commission and article 7 which requires the Court to apply provisions of the African Charter and “any other relevant human rights instruments ratified by the States concerned”.

<sup>45</sup> Joint General Comment of the African Commission on Human and Peoples’ Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage, 2017 para 4.

relation to efforts to combat child marriage. What follows is a discussion of the pertinent provisions in the two instruments and how they complement each other.

The Children's Charter is designed to promote and protect the rights and welfare of the child. The overall purpose of the Women's Protocol is to prevent all forms of discrimination against women in Africa. In this context, the States parties to both instruments are obliged to adopt such legislative or other measures as may be necessary to give effect to the provisions of the two instruments, including the prohibition on child marriage.<sup>46</sup> Both instruments contain substantive provisions for the promotion and protection of the rights and welfare of female children in Africa.

As noted earlier, age is a decisive factor in the definition of child marriage. The Children's Charter unequivocally defines a child as "every human being below the age of 18 years".<sup>47</sup> While the Women's Protocol contains no definition of a child, its definition of "women" in article 1(k) includes girls. The inclusion of girls is an affirmation of the complex situation of persons of the female gender in Africa, whether young or old.<sup>48</sup> In child and forced marriage cases, for example, irrespective of the age of child bride, complex situations arise. At a young age, a girl assumes the roles and responsibilities of an adult woman, including having sexual relations with her spouse, child bearing and rearing, domestic work as well as cultural roles associated with marriage.<sup>49</sup> Therefore the inclusion of girls in the definition of women is critical to efforts to address child marriage. It also reinforces the provisions in other relevant African human rights instruments, in particular the Children's Charter.

Both the Children's Charter and the Women's Protocol explicitly prohibit child marriage. Article 21(2) of the Children's Charter provides:

"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."

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<sup>46</sup> Children's Charter art 1; Women's Protocol art 2(1).

<sup>47</sup> Art 2. Cf. article 1 of the UN Convention on the Rights of the Child which defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". See also Mezmur "The African Children's Charter versus the Convention of the Rights of the Child: A Zero-Sum Game?" 2008 *Southern African Public Law* 16.

<sup>48</sup> Geldenhuys *et al* "The African Women's Protocol and HIV: Delineating the African Commission's General Comment on Articles 14 (1) (d) and (e) of the Protocol" 2014 *African Human Rights Law Journal* 681 683.

<sup>49</sup> African Union (AU), ACERWC "Concept Note of the 25<sup>th</sup> Day of the African Child (DAC) 2015" para 26.

This provision confirms the age of majority or maturity of a child. In other words, girls (and boys) under 18 are not adults and therefore not sufficiently mature to enter into marriage.<sup>50</sup>

In a similar vein, article 6 of the Women's Protocol enjoins the States parties to "ensure that women and men enjoy equal rights and are regarded as equal partners in marriage" and to "enact appropriate national legislative measures to guarantee that: (a) no marriage shall take place without the free and full consent of both parties; and (b) the minimum age of marriage for women shall be 18 years". In addition, and in much the same vein as article 21 of the Children's Charter, article 6 (d) of the Women's Protocol enjoins the States parties to enact national legislative measures to ensure formal registration of all marriages, in order for marriages to be legally recognised. Nevertheless, formal registration of traditional marriages remains a major challenge across Africa, particularly because such marriages are conducted privately by the families concerned.

By its very nature, child marriage entails the absence of free, full and informed consent on the part of one or both intending spouses. While it prohibits child marriage, the Children's Charter makes no express mention of the requirement of free and full consent of both parties to the marriage. It can be argued, however, that this lacuna is not necessarily fatal to efforts to combat child marriage for three reasons. First, free and full consent is not a requirement for a child marriage to be unlawful. What is critical is that one or both of the intending spouses be under 18. Second, article 6(a) of the Women's Protocol explicitly requires that marriage be entered into with the free and full consent of both parties. In view of the complementary character of the two instruments, article 6(a) of the Women's Protocol may, arguably, address the lacuna in the Children's Charter regarding free and full consent. Third, and as the African Children's Committee and Africa Commission have rightly observed, the language employed in the two instruments "clearly stipulates that children under the age of 18 are not capable of giving full and free consent to a marriage".<sup>51</sup> The two human rights bodies have further underscored that a child's inability to consent to marriage can never be supplemented or cured

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<sup>50</sup> CEDAW, General Recommendations made by the Committee on the Elimination of Discrimination against Women No. 21: Equality in Marriage and Family Relations, at the 13<sup>th</sup> Session, 1994 paragraph 36 <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (accessed 23-03-2016).

<sup>51</sup> Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage 2017 para 6.

with the addition of parental consent given on behalf of a child, since the requirement of “full” entails total consent on the part of the person concerned.<sup>52</sup>

According to the African Children’s Committee and the African Commission, the prohibition on child marriage enshrined in article 21(2) of the Children’s Charter and article 6 of the Women’s Protocol is interdependent and interconnected with a number of other rights guaranteed under the two instruments.<sup>53</sup> These include the rights to education,<sup>54</sup> health,<sup>55</sup> rest, play, leisure and recreation;<sup>56</sup> security and protection against child abuse, torture, exploitation and cruel, inhuman or degrading treatment and punishment;<sup>57</sup> parental care and protection,<sup>58</sup> as well as the prohibitions against discrimination;<sup>59</sup> child labour;<sup>60</sup> sexual exploitation and sexual abuse of children;<sup>61</sup> unwanted or forced sex and all forms of violence against women,<sup>62</sup> and the abduction, sale and trafficking of children,<sup>63</sup> to list a few.

We share the view espoused by the African Children’s Committee and African Commission. Not only are the foregoing provisions complementary, they are also critical to efforts to combat child marriage in Africa. Thus, for example, the guarantees on the rights to health and education are important in the context of efforts to address child marriage. To illustrate further, article 14 of the Women’s Protocol guarantees women’s (including children) right to control their fertility, choose the method of contraception, when to have children, the number of children and spacing, protection from sexually transmitted infections and their overall wellbeing. As noted earlier, child marriage impairs the realisation of a broad range of children’s rights including the rights to health and education. More particularly, child brides are, owing to the age difference between themselves and their spouses, unable to negotiate safe sexual practices or contraception, thereby exposing themselves to the various risks that attend unprotected sex or pregnancy. Importantly, a rights framework affords an empowering framework that can underpin efforts to combat child marriage.

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* para 15.

<sup>54</sup> Children’s Charter art 11; Women’s Protocol art 12.

<sup>55</sup> Children’s Charter art 14; Women’s Protocol art 14.

<sup>56</sup> Children’s Charter art 12.

<sup>57</sup> Children’s Charter art 16; Women’s Protocol art 4.

<sup>58</sup> Children’s Charter arts 19 and 20.

<sup>59</sup> Children’s Charter art 3; Women’s Protocol art 12.

<sup>60</sup> Children’s Charter art 15; Women’s Protocol art 13(g).

<sup>61</sup> Children’s Charter art 27.

<sup>62</sup> Children’s Charter art 11; Women’s Protocol art 4(2)(a).

<sup>63</sup> Children’s Charter art 29; Women’s Protocol art 4(2)(g).

The Children's Charter and the Women's Protocol both contain (complementary) provisions that view harmful practices<sup>64</sup> as human rights violations and enjoin the States parties to take steps to ensure that such practices are prevented and eliminated.<sup>65</sup> It is generally accepted that child marriage is a harmful practice.<sup>66</sup> Mezmur aptly notes that "the challenge that some traditional practices and customs (also in the form of customary law) pose for the advancement of children's rights in Africa is immense".<sup>67</sup>

Article 5 of the Women's Protocol requires the States parties "to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women" and which are inconsistent with accepted international standards. It further requires them to take all necessary legislative measures and other measures to eradicate such practices, including through raising public awareness of such harmful practices; legislative prohibition of, inter alia, female genital mutilation; provision of necessary support to victims of harmful practices; and protection of women (and girls) who are at risk of being subjected to harmful practices.<sup>68</sup>

Similarly, under article 21(1) of the Children's Charter, States parties are obliged to "take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and growth of the child", in particular those customs and practices prejudicial to the health of the child; and those discriminatory to the child on the basis of sex or other status.

It is also notable that both instruments provide for a range of non-legislative strategies, such as education (both formal and informal) and awareness-raising<sup>69</sup> which could play a key role

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<sup>64</sup> Drawing on article 1(g) of the Women's Protocol, the African Children's Committee and the African Commission have defined "harmful practices" as "all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their rights to life, health, dignity, education and physical integrity". Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage, 2017 para 6. See also CEDAW/C/GC/31-CRC/GC/C/GC/18 para 15. The Committee on the Rights of the Child has provided a non-exhaustive list of harmful practices in its General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, UN Doc CRC/C/GC/8 (21 August 2006) and General Comment No. 13: The right of the child to freedom from all forms of violence, UN Doc CRC/C/GC/13 (18 April 2011).

<sup>65</sup> African Children's Charter art 21(1) and African Women's Protocol art 5.

<sup>66</sup> CEDAW/C/GC/31-CRC/GC/C/GC/18 para 6.

<sup>67</sup> Mezmur 2008 *Southern African Public Law* 18.

<sup>68</sup> Arts 5(a) – (d).

<sup>69</sup> See, for example, Children's Charter arts 14(2)(h), 15(2) and 16(1); Women's Protocol arts 2(2), 4(2)(d), 5(a), 8(c) and 12.

in changing social norms and eradicating deeply ingrained traditional and cultural perceptions and attitudes that legitimise and reinforce the child marriage in Africa.<sup>70</sup>

As a final point, there is no explicit provision concerning the relationship between the African Children's Committee and the two ACHPR bodies (the African Commission and the Court). Nevertheless, all these bodies are obliged, in fulfilling their mandates, to cooperate with each other and to draw inspiration from each other's normative frameworks. In short, these bodies can promote and protect children's rights, including those impaired by child marriage, through their respective mandates.

#### **4 EFFECTIVE IMPLEMENTATION OF THE CHILDREN'S CHARTER AND THE WOMEN'S PROTOCOL: SOME CHALLENGES**

Despite the comprehensive scope of the Children's Charter and the Women's Protocol and their normative complementarity in the context of efforts to address child marriage, there are some challenges that impede effective implementation and enforcement of the norms that the two instruments contain. We highlight only four: non-ratification, reservations, tardiness or non-compliance with state party reporting obligations and non-compliance, by States parties, with the recommendations of the Children's Committee and African Commission.

Under international law, a treaty generally binds only those states that have consented to be bound by its terms. Such consent is commonly expressed through ratification or accession.<sup>71</sup> Of the 55 Member States of the African Union, 48 have ratified the Children's Charter,<sup>72</sup> while 39 have ratified the Women's Protocol.<sup>73</sup> Seven countries which are among the 21 with the

<sup>70</sup> Malhotra *et al* "Solutions to End Child Marriage: What the Evidence Shows" International Centre for Research of Women (ICRW) 6-13 [www.icrw.org/files/publications/Solutions-to-End-Child-Marriage.pdf](http://www.icrw.org/files/publications/Solutions-to-End-Child-Marriage.pdf) (accessed 14-05-2015). See also Article 2 (2) of the African Women's Protocol.

<sup>71</sup> According to article 2(1)(b) of the Vienna Convention on the Laws of Treaties 23 May 1969, Treaty Series, vol. 1155 'Ratification' is when "a State establishes on the international plane its consent to be bound by a treaty".

<sup>72</sup> As at 15 June 2017. The States which are yet to become parties include the Democratic Republic of Congo, Morocco, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, South Sudan; and Tunisia. See [https://au.int/sites/default/files/treaties/7773-sl-african\\_charter\\_on\\_the\\_rights\\_and\\_welfare\\_of\\_the\\_child\\_1.pdf](https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf) (accessed 21-02-2018). See also Mohamed "Morocco Rejoins the African Union after 33 years" 31 January 2017 Aljazeera News [www.aljazeera.com/news/2017/01/morocco-rejoins-african-union-33-years-170131084926023.html](http://www.aljazeera.com/news/2017/01/morocco-rejoins-african-union-33-years-170131084926023.html) (accessed 22-02-2017).

<sup>73</sup> As at 7 September 2017. Those yet to become parties include Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Madagascar, Morocco, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, South Sudan, Sudan and Tunisia. See African Union "List of Countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" 07 September 2017 <https://au.int/sites/default/files/treaties/7783-sl->

highest rates of child marriage in the world – Niger (76 percent), Central African Republic (68 percent), Chad (67 percent), South Sudan (52 percent), Eritrea (41 percent), Madagascar (41 percent) and Ethiopia (40 percent) - and three in this group – South Sudan (52 percent), Somalia (45 percent) and Democratic Republic of Congo (37 percent) – have not yet ratified or acceded to the Women’s Protocol and the Children’s Charter, respectively.

There are various reasons for this state of affairs. With respect to the Women’s Protocol, some of the States that have large Muslim populations and are yet to ratify the Protocol tend to argue that the provisions of the Protocol are at odds with Sharia law.<sup>74</sup> Another reason for non-ratification may be the experience(s) of some of the States that ratified the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and made reservations to some of its provisions.<sup>75</sup> For example, Niger ratified the CEDAW but entered reservations<sup>76</sup> which were considered incompatible with the objectives and purpose of the treaty.<sup>77</sup> Niger wanted to preclude the application of provisions concerning women, family and social relations because they were contrary to the existing customs and practices in the State.<sup>78</sup> In 2006, the Parliament of Niger rejected a proposal to ratify the Women’s Protocol.<sup>79</sup>

A second key challenge is the entry of reservations to the two treaties by some of the States parties. For example, South Africa, which ratified the Women’s Protocol in December 2004, has entered three reservations thereto.<sup>80</sup> One of the reservations relates to article 6 (d) of the

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protocol\_to\_the\_african\_charter\_on\_human\_and\_peoples\_rights\_on\_the\_rights\_of\_women\_in\_africa.pdf (accessed 21-02-2018).

<sup>74</sup> Viljoen “An Introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” 2009 *Wash & Lee J.C.R & Soc. Just* 11-46 and 41-42 (footnote 174). See also Mujuzi “The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: South Africa’s Reservation and Interpretative Declarations” 2008 *Law, Democracy and Development* 41-61 47-49.

<sup>75</sup> *Ibid* 48-49; Viljoen 2009 *Wash & Lee J.C.R & Soc. Just* 41-42(footnote 174). According to Article 2 (1) d of the Vienna Convention on the Laws of Treaties (VCLT) 1969, reservation means “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

<sup>76</sup> The reservations related to articles 2 (d) and (f), 5(a) and (b), 15 (4), 16 (1) (c), (e) and (g) of the CEDAW.<sup>76</sup>

<sup>77</sup> Mujuzi 2008 *Law, Democracy and Development* 48. See also UN Women “Declarations, Reservations & Objections to CEDAW” <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N50> (accessed 05-03-2017).

<sup>78</sup> *Ibid*.

<sup>79</sup> Mckaiser “Niger MPs Reject Protocol on Women’s Rights” *iol News* 6 June 2006 <http://www.iol.co.za/news/africa/niger-mps-reject-protocol-on-women-s-rights-1.280492#.Vly7sWy6HIV> (accessed 30-11-2015).

<sup>80</sup> These include reservations to article 4 (2) (j), which prohibits the imposition of the death penalty on pregnant and nursing mothers; article 6 (d) which requires that every marriage be registered in order to be legally recognised; and article 6 (h) which provides for equality of rights between men and women with respect to nationality of their children except contrary to the national legislation. South Africa has also made two

Protocol which requires that every marriage be registered in order to be legally recognised. South Africa's reservation limits the application of this provision. Thus, section 4 (9) of its Recognition of Customary Marriages Act<sup>81</sup> provides that failure to register a customary marriage does not affect the validity of that marriage.

Another example was the reservation made by Egypt with respect to article 21(2) of the Children's Charter which prohibits child marriage and specifies the minimum age of marriage to be 18 years.<sup>82</sup> This reservation limited and undermined the objectives of the Children's Charter in the context of child marriage and in the promotion and protection of the rights of girls in that country. Egypt has since withdrawn the reservation and set the legal age of marriage at 18 years in line with international standards.<sup>83</sup>

It should be noted that reservations limit the application of the treaty in relation to the State concerned.<sup>84</sup> It thus stands to reason that reservations made to any rights that have a bearing on child marriage weaken the objective(s) of either the Women's Protocol or the Children's Charter. Reservations also undermine efforts at ending child marriage and at advancing the promotion and protection of the rights and welfare of girls in Africa.

It is also notable that, unlike the Convention on the Rights of the Child,<sup>85</sup> both the Children's Charter and the Women's Protocol do not expressly provide for reservations. Nevertheless, Mezmur and Sloth-Nielsen argue in respect of the Children's Charter that the absence of a provision on reservations can be interpreted to mean:

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interpretative declarations regarding article 1(f) which defines "discrimination against women" and article 31 which deals with the question of whether South Africa offers more favourable provisions for the realisation of the rights of women. See Mujuzi 2008 *Law, Democracy and Development* 41-61.

<sup>81</sup> Act 120 of 1998.

<sup>82</sup> Other reservations made by Egypt include article 24 (dealing with adoption) articles 30(a)-(e) (on children of imprisoned mothers) article 44 mandate of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) to receive communications) and article 45(1) (regarding the mandate of the ACERWC to conduct investigations into state parties). Mezmur and Sloth-Nielsen "An Ice-breaker: State Party Reports and the 11<sup>th</sup> Session of the African Committee of Experts on the Rights and Welfare of the Child" 2008 *African Human Rights Law Journal* 596-614.

<sup>83</sup> At the time Egypt made the reservation to article 21 (2) in 1999, the minimum age of marriage for boys was set at 18 years and girls at 16 years. But in 2008 the minimum age of marriage for girls was increased to 18 years. On February 11, 2015 Egypt withdrew the reservations to article 21(2). See Human Rights Watch "Egypt: Small Forward Steps on Child Rights" March 4 2015 <https://www.hrw.org/news/2015/03/04/egypt-small-forward-steps-child-rights> (accessed 03/03/2017).

<sup>84</sup> Mezmur and Sloth-Nielsen 2008 *African Human Rights Law Journal* 614; Mujuzi 2008 *Law, Democracy and Development* 46-50.

<sup>85</sup> See Convention on the Rights of the Child, art 51.

“[O]n the one hand that reservations are allowed while on the other, that they are not. One could argue, if reservations were to be disallowed, it is international practice that a specific provision to that effect is explicitly provided.”<sup>86</sup>

In addition, reservations are recognised in treaty-making processes and are often used to enable as many State Parties as possible to ratify the treaties in question.<sup>87</sup> Nevertheless, as provided in article 19 of the Vienna Convention, any reservations made to any treaty must be compatible with the object and purpose of that treaty.

The domestication and implementation of international standards are critical to the promotion and protection of all human rights, including children’s rights. Nevertheless, as the Special Rapporteur on the Rights of Women in Africa rightly states, “[t]here is still a huge gap between commitments pursuant to the ratification of the texts [in the Women’s Protocol] and the reality of women’s lives”.<sup>88</sup> Although many States have domesticated the norms enshrined in the Children’s Charter and the Women’s Protocol, either in specific legislation<sup>89</sup> or as part of the broader principles of gender equality and elimination of discrimination in their Constitutions,<sup>90</sup> some have challenges in implementing these standards mainly due to factors such as financial incapacity, corruption, lack of political will and deeply ingrained traditional practices.<sup>91</sup> Formal registration of traditional and religious marriages remains a major challenge

<sup>86</sup> Mezmur and Sloth-Nielsen 2008 *African Human Rights Law Journal* 614.

<sup>87</sup> Mujuzi 2008 *Law, Democracy and Development* 46-47. See the Vienna Convention 1969 arts 19-23.

<sup>88</sup> AU/ ACHPR “Status of Implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa” 2016 3.

<sup>89</sup> For example, by virtue of Article 144 of the Namibian Constitution, the Protocol is part of the Namibian Constitution and the effect of this Article is that the rights of women and girls provided in the Protocol are enforceable within Namibia by the judiciary and quasi-judicial bodies. See Republic of Namibia’s 6<sup>th</sup> Report on the African Charter on Human and Peoples’ Rights 2015 Part Three para 32 [http://www.achpr.org/files/sessions/58th/state-reports/6th-20112014/namibia\\_state\\_6th\\_periodic\\_report.pdf](http://www.achpr.org/files/sessions/58th/state-reports/6th-20112014/namibia_state_6th_periodic_report.pdf) (accessed 15-10-2016). Other examples include but not limited to South Africa’s Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Nigeria’s Child’s Right Act 2003 and Trafficking in Persons (Prohibition and Enforcement) Administration Act 2015; Malawi’s Gender Equality Act 2013 and Marriage, Divorce and Family Relations Act 2015; Benin’s Act No. 2011-26 of 9 January 2012 on the Prevention and Repression of Violence against Women; Namibia’s combating of Domestic Violence Act No. 4 of 2003 and the Combating of Rape Act No. 8 of 2000 and Angola’s Domestic Violence Act.

<sup>90</sup> For example, the Constitutions of Kenya, South Africa, Rwanda, Zimbabwe enshrine the principles of gender equality. See AU/ ACHPR “Status of Implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa” 2016 3-8.

<sup>91</sup> See Child Rights International Network (CRIN) “Enforcing Children’s Rights in Inefficient National Systems” <https://www.google.co.za/#q=CRIN+enforcing+children%27s+rights+in+inefficient+legal+system&> (accessed 04-03-2017); Freeman “Human Rights” in Burnell, Rakner and Randall (eds) *Politics in the Developing World* (2014) 275-287 280; Office of the High Commissioner for Human Rights (OHCHR) “The Negative Impact of Corruption on the Enjoyment of Human Rights” <http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf> (accessed 04-03-2017).

across Africa because these are conducted privately by families. This has a direct implication for efforts to combat marriage since formal registration can play an important role in enforcing a minimum age of marriage, thereby contributing to efforts to prevent and end child marriage.

Finally, it is worth mentioning that the State parties to both the Children's Charter and Women's Protocol have an obligation to submit periodic reports on measures taken, progress made and challenges encountered in the implementation of the rights and obligations enshrined in the two instruments.<sup>92</sup> Nevertheless, many States parties have been tardy in complying with their reporting obligations.<sup>93</sup> In addition, many States parties fail to implement the concluding observations and recommendations of the Children's Committee and the African Commission.<sup>94</sup>

Clearly, the challenges outlined above undermine efforts to end child marriage in Africa. Nevertheless, we consider that these challenges can be addressed in through increased dialogue and advocacy<sup>95</sup> between the African Children's Committee, African Commission and African Union Member States may encourage states to ratify the two instruments as well as discourage the entry of reservations to the key provisions contained therein. This would be particularly helpful with respect to those states that have argued that some of the provisions in the Children's Charter and the Women's Protocol are contrary to the existing customs and practices

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<sup>92</sup> See article 43 of the Children's Charter and article 26 Women's Protocol (read together with article 62 of the ACHPR).

<sup>93</sup> As of March 2017, only 34 states parties to the Children's Charter had submitted their periodic reports on implementation, with many of the reports being submitted late. See ACERWC "Initial Reports" <http://acerwc.org/initial-reports/> (accessed 04-03-2017). According to the 2016 report of the Special Rapporteur on the Rights of Women in Africa concerning the submission of state reports under article 62 of the ACHPR nine States (Algeria, Burkina Faso, Djibouti, Ethiopia, Kenya, Namibia, Niger, Nigeria and South Africa) were up to date; 10 States (Cameroon, Cote D'Ivoire, Gabon, Liberia, Malawi, Mozambique, Sahrawi, Senegal, Sierra Leone, and Uganda) were late with submission of one report; four States (Angola, Libya, Sudan and Togo) were late with two reports; five States (Benin, Botswana, Madagascar, and Rwanda) were late with three reports; 18 States (Cape Verde, Central African Republic, Chad, Egypt, Democratic Republic of Congo, The Gambia, Guinea Republic, Kingdom of Lesotho, Mali, Mauritania, Mauritius, Seychelles, Swaziland, Tunisia, Zambia and Zimbabwe) and six States (Comoros, Equatorial Guinea, Eritrea, Guinea Bissau, Sao Tome and Principe, and Somalia) had not submitted any report. See AU/ ACHPR "Status of Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" 2016 13-14.

<sup>94</sup> Murray and Long *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (2015) 48-49; ACERWC "Concluding Observations" [www.acerwc.org/concluding-observations/](http://www.acerwc.org/concluding-observations/) (accessed 05-03-2017).

<sup>95</sup> Mezmur 2006 *African Human Rights Law Journal* 559 and 565.

within their state.<sup>96</sup> Through dialogue and advocacy, states parties that have entered reservations to provisions that have a bearing on child marriage may be persuaded to reconsider their reservations. In addition, dialogue and advocacy could assist states parties to adopt more effective measures for implementing their obligations to end child marriage as well as to align such efforts with their international and regional human rights obligations.

## 5 CONCLUSION

This article has offered some reflections on the normative complementarity of the Children's Charter and the Women's Protocol, and to some extent, the functional complementarity of the Children's Committee and the African Commission. Both the Children's Charter and Women's Protocol explicitly prohibit child marriage and contain a number of provisions that are not only interconnected but are complementary in nature.

The article has also highlighted some key challenges to the effective implementation of the provisions on child marriage contained in the two instruments. These include non-ratification of the two instruments by some AU Member States (some of which have high rates of child marriage), the entry of reservations to key provisions, non-compliance with reporting obligations and failure to implement the recommendations of the bodies responsible for monitoring the two instruments. The article has suggested that these challenges can be addressed through increased dialogue and advocacy between the Children's Committee, the African Commission and AU Member States with the aim of encouraging states to ratify both instruments and discouraging them from entering reservations to the key provisions relating to child marriage.

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<sup>96</sup> See Mujuzi 2008 *Law, Democracy and Development* 48; UN Women "Declarations, Reservations & Objections to CEDAW" and Mckaiser "Niger MPs Reject Protocol on Women's Rights" iol News 6 June 2006.