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### **International law as an instrument to combat child marriage**

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## International law as an instrument to combat child marriage

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The purpose of this article is to examine the international instruments that have an impact on child marriage in order to determine its legality from an international perspective and to assess whether international treaties are an effective means of reducing the practice. The paper argues that international law plays a significant role in the campaign against child marriage because it emphasises the gravity of the issue. It is conceded that international treaties cannot themselves secure a reduction in the number of child marriages that occur and that appropriate programmes must be developed in order to ensure that the law is implemented nationally and locally.

**Keywords:** child marriage; international law; human rights; programmes to delay marriage

### Introduction

In April 2009 Congresswoman Betty McCollum introduced a Bill into the US House of Representatives aimed at protecting girls in developing countries through the prevention of child marriage.<sup>1</sup> If the Bill is successfully passed, the legislation will authorise funding for programmes designed to tackle the issue. The introduction of the Bill followed a number of high profile events relating to child marriage across the globe. In January of this year Saudi Arabia's most senior cleric, Sheik Abdul-Aziz Al Sheik, was quoted as stating that 'a girl aged ten or twelve can be married and those who think she's too young are wrong'.<sup>2</sup> The Saudi Human Rights Commission is thus pressing the government to specify a minimum age for marriage and to end the practice of child marriage.<sup>3</sup> In 2004, the Moroccan Family Code, which was unanimously approved by both Houses of Parliament, set 18 as the legal age for marriage.<sup>4</sup> Last September, Cheikh Mohamed Ben Abderrahman Al Magraoui, a religious leader, issued a fatwa suggesting that the marriage of girls as young as nine should be permitted. Morocco's High Council of Ulemas responded with a statement condemning the fatwa, whilst the King's prosecutor launched an official government inquiry to investigate the decree and Al Magraoui's competence.<sup>5</sup> Similar problems have been experienced in the Yemen, whose parliament enacted legislation in February 2009 specifying 17 as the minimum age for marriage. Again, a fatwa has been issued against the legislation by Sheikh Abdul-Majid al-Zindani, the rector of Al-Eman University.<sup>6</sup>

The international community opposes child marriage and has urged national governments to eradicate the practice. The purpose of this paper is to analyse international

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instruments that have an impact on child marriage in order to determine its legality from an international perspective. It will begin by discussing the causes and consequences of child marriage and will end by considering whether the international law instruments explored earlier in the paper, can effectively address the issue and whether alternative approaches should be adopted.

### Causes and consequences of child marriage

The United Nations Fund for Population Analysis<sup>7</sup> (UNFPA) and the United Nations Children's Fund<sup>8</sup> (UNICEF) both consider a child marriage to be one involving a person under the age of 18. The practice primarily affects females: indeed, UNFPA has estimated that more than 100 million girls under the age of 18 will be married in the next decade.<sup>9</sup> Early marriage is prevalent in sub-Saharan Africa and Southern Asia but also occurs in Latin America and the Caribbean. In Africa 42% of young women between the ages of 15 and 24 were married before reaching 18, whilst in Southern Asia, the figure rises to 48%.<sup>10</sup> As Jenson and Thornton point out, there has been little change in the incidence of early marriage in these regions since the 1950 s.<sup>11</sup> Research conducted by UNICEF found that the practice of child marriage predominantly occurs in rural areas<sup>12</sup> where traditional attitudes towards women and marriage are more deeply rooted<sup>13</sup> and is most 'common among the poorest 20% of the population'.<sup>14</sup> It is also evident that girls who do not attend primary school are more likely to be married before the age of 18 than girls who do receive a primary education.<sup>15</sup>

There are several reasons why child marriage continues in some parts of the world. The UNICEF Innocenti Research Centre explains that 'poverty is one of the major factors underpinning early marriage' as an impoverished family may regard a young girl as an economic burden.<sup>16</sup> Securing her marriage therefore enables the family to transfer the responsibility of caring for her to others.<sup>17</sup> Furthermore, in certain African countries the family may receive a sum of money or goods as the bride price for their daughter.<sup>18</sup> According to Levine *et al.*, this can motivate poor families to arrange for their daughters to be married at a young age.<sup>19</sup> Jenson and Thornton further indicate that 'economic pressures for early marriage may be strengthened where grandparents or other relatives are left to care for children orphaned by AIDS'.<sup>20</sup> Marrying off a young girl has consequently been described as a 'strategy for economic survival'.<sup>21</sup>

Early marriage also occurs because of the value placed on a girl's virginity in traditional societies and the perceived need to protect girls from sexual exposure.<sup>22</sup> A female will thus be married at a young age to ensure that she is a virgin when she marries and to guarantee that she does not become pregnant before marriage, which would bring shame on the family. In some areas (e.g. rural Ethiopia) a girl who is not married by late adolescence is regarded as a disgrace and her father is considered a failure.<sup>23</sup> Levine *et al.* explain that this is because communities that practice child marriage define a woman's social standing in terms of marriage and child bearing.<sup>24</sup> These entrenched gender roles, combined with the importance attached to virginity mean that there is demand for young brides.<sup>25</sup> Jenson and Thornton also claim that men may prefer young brides because they are more easily controlled, less assertive and better able to perform household activities.<sup>26</sup>

In conflict torn areas (e.g. Northern Uganda), parents have also been known to allow their daughters to marry members of the militia in order to secure protection for the family.<sup>27</sup> In addition, young girls in Algeria, Chad and the Sudan have been abducted by militias and forced to marry them.<sup>28</sup> It is thus evident that early marriage is caused by a combination of economic, social and political factors. Bunting consequently argues that

‘the socio-economic conditions in which girls, adolescents and young women live and marry need to be examined and addressed’ in order to reduce the number of child marriages.<sup>29</sup>

It should also be noted that the practice of marrying children at a young age, often in contravention of national legislation, is facilitated by the fact that many jurisdictions do not have a dependable system for registering births and marriages. According to the Innocenti Research Centre, approximately 40 million births are unregistered each year<sup>30</sup> and it seems that the problem is most acute amongst indigenous populations<sup>31</sup> and in rural areas.<sup>32</sup> As the Innocenti Report explains: ‘without a birth certificate, a child has no defence against age-related rights abuses’ such as child marriage.<sup>33</sup> Similarly, many countries with a high incidence of child marriage do not require marriages to be registered or do not have a reliable registration system. This makes it easier for a family to marry off a child who has not reached the minimum age for marriage. If improvements are made to the birth and marriage registration system, the number of child marriages should naturally fall.

Various international organisations (e.g. UNICEF, The International Women’s Health Coalition and FORWARD<sup>34</sup>) have campaigned to eliminate the practice of early marriage because of the harm suffered by the child. First, child marriage generally curtails a girl’s education, which is potentially harmful because she may then lack awareness of basic reproductive health issues and because of the power imbalance that consequently exists between the spouses.<sup>35</sup> A study conducted by Lloyd and Mensch of girls aged between 20 and 24 in twenty sub-Saharan countries found that marriage was the reason for leaving school in 3% of cases in Cote D’Ivoire (at the lowest end of the spectrum) and 28% of cases in Togo (at the highest end).<sup>36</sup> This means that 72% of girls in Togo and 97% of girls in Burkina Faso did *not* leave education because of marriage. Furthermore, many girls who participated in the study had never been schooled at all (18% in Burkina Faso and 96% in Kenya and Zimbabwe). The authors thus concluded that the risk of leaving school due to reasons other than child birth or marriage far exceed the risks associated with these events. However, in many cases a girl’s education will be terminated because the family cannot afford to school her or because further education is not deemed necessary as the girl is destined to marry and have children. As explained above, poverty and traditional gender roles both contribute to early marriage. It can therefore be argued that marriage *does* cause the discontinuation of education.

Secondly, child marriage is condemned because young girls are required to enter into a sexual relationship, which can be physically and psychologically damaging. As a result, the Pan-African Forum against the Sexual Exploitation of Children has cited child marriage as a form of sexual abuse.<sup>37</sup> Bunting points out that many girls in the UK and North America begin sexual activity at a similar age to adolescent brides in sub-Saharan Africa but such activity is not labelled sexual exploitation.<sup>38</sup> However, a key difference between the two is that British and American teens generally choose to enter into a sexual relationship with boys who are usually the same age, whereas young girls in Africa are required to marry and often forced to engage in sexual intercourse. It should also be noted that in some jurisdictions a married couple might not immediately cohabit. For example, Caltabiano and Castiglioni found that Nepalese spouses might delay cohabitation for months or even years if it is necessary to wait for the bride to physically mature or for appropriate housing to become available.<sup>39</sup> Despite such delays, the median age at first cohabitation and sexual intercourse still remains below the age of 18.<sup>40</sup>

Girls who are married as children are likely to become pregnant at a young age, due to the pressure to demonstrate fertility as soon as possible. This is cause for serious concern as girls aged between ten and fourteen are five times more likely to die in pregnancy or child birth than women aged between 20 and 24.<sup>41</sup> The most common medical problem

associated with young motherhood is obstetric fistula, which is caused by obstructed labour.<sup>42</sup> The latter occurs because the girl's pelvis is relatively small, due to the fact that she is not fully developed (and may also suffer from malnutrition). Although obstetric fistula can lead to death, Levine *et al.* report that more than 2 million girls live with fistulas and that this number increases by approximately 100,000 per annum.<sup>43</sup> This condition involves perforations inside the vagina, bladder or rectum causing urine and faeces to leak uncontrollably. UNFPA points out that obstetric fistula is 'both preventable and treatable and is virtually unknown in places where early pregnancy is discouraged, young women are educated, family planning is accessible and skilled medical care is provided at child birth'.<sup>44</sup> It is thus extremely rare in western jurisdictions even where there are high levels of teenage pregnancy. This particular problem associated with child marriage could therefore be alleviated by improvements in medical care.

Early motherhood is also cause for concern because it can affect a girl's fertility<sup>45</sup> and children born to adolescents are more likely to die than infants born to older mothers. Indeed, Nour found that mortality rates for babies born to mothers under the age of 20 are 73% higher than infants born to older women.<sup>46</sup> Of course, the level of infant mortality is affected by living conditions and access to medical attention. Again, it is a problem associated with young marriage that can be ameliorated by addressing other issues.

Entering into an unprotected sexual relationship can also affect the health of a young bride because of the risk of contracting HIV.<sup>47</sup> According to UNFPA, teenage brides are contracting HIV at a faster rate than sexually active single girls.<sup>48</sup> This is because their husbands are often several years older than them<sup>49</sup> and have had various sexual partners. However, Bhattacharya's research suggests that HIV is a serious risk for all brides as 75% of people living with HIV or AIDS in India are married.<sup>50</sup> Delaying the marriage of females will not therefore eliminate the problem if the men that they marry are still engaging in unprotected sexual intercourse prior to marriage.

Research undertaken by UNICEF in 16 sub-Saharan jurisdictions revealed that the husbands of 15–19 year old girls are on average ten years older than their wives.<sup>51</sup> Bunting explains that this disparity occurs because girls are destined to be wives and mothers and are thus deemed ready for marriage at an earlier age than men who need to complete their education or training and need to be financially secure.<sup>52</sup> This age difference (combined with the disparity that exists in terms of education) creates a power imbalance between spouses. As a consequence, a young wife is more likely to be beaten or threatened by her husband than an older woman is and she is more likely to believe that such behaviour is justifiable.<sup>53</sup> However, Jensen and Thornton found that such beliefs are also held by older brides. In India, 48% of women aged 30 or over stated that a husband can legitimately beat his wife in certain circumstances. Although this figure is lower than that relating to girls aged 15 or under (62% of whom agreed that a husband can beat his wife), it nonetheless represents a significant number of older women.<sup>54</sup> It should also be noted that, according to Westoff, older husbands are often in a better position to provide for the wife and any children of the union.<sup>55</sup> The age disparity between the spouses can therefore be advantageous as well as disadvantageous.

If the age difference between the spouses is significant, the wife is more likely to be widowed. A widow may lack the ability to financially support herself and her children and research demonstrates that widows are poorly treated in certain societies.<sup>56</sup> In some countries early marriage also regularly leads to early divorce. For example, Tilson and Larsen found that in the Amhara region of Ethiopia, which has one of the highest divorce rates in the world, early marriage is a predictor of divorce.<sup>57</sup> Like widows, divorced women are sometimes ostracised and poorly treated in their communities.<sup>58</sup>

The position of a child wife is made even worse if the marriage is polygynous which is common in some areas that practice early marriage.<sup>59</sup> For example, UNICEF found that 40% of girls in Haiti who were married before the age of 18 are in a polygynous union.<sup>60</sup> The international community is generally opposed to polygynous marriage because it violates a woman's dignity and her right to equality with men.<sup>61</sup> The violation of female dignity is particularly acute if a bride is young, for as Mikhail explains, girls who are married into a polygynous union find that their principal role is to serve the other wives.<sup>62</sup>

The discussion above has demonstrated that children can suffer significant harm if they are required to marry. Although some of the problems associated with child marriage can be alleviated by addressing social, economic and political factors and improving medical services<sup>63</sup> the harm that is currently suffered by a child who is required to marry is unacceptable. It is not therefore surprising that the issue has attracted the attention of human rights organisations, such as UNICEF, FORWARD and the Committee on the Rights of the Child (which is responsible for monitoring the United Nations Convention on the Rights of the Child 1989) and is treated as an international human rights issue. The following section examines the provisions of the various international law instruments that have an impact on child marriage in order to determine its legality from an international perspective.

### International law relating to child marriage

The earliest instruments adopted by the international community did not contain an express prohibition against child marriage, however, several human rights agreements provided 'men and women' with a right to marry. For example, article 16(1) of the Universal Declaration of Human Rights 1948 states that 'men and women of full age' have the right to marry, whilst article 23(2) of the International Convention on Civil and Political Rights 1966, article 17(2) of the American Convention on Human Rights 1969 and article 12 of the European Convention on Human Rights 1953 grant the right to marry to 'men and women of marriageable age'. Eriksson explains that the terms 'full age' and 'marriageable age' can refer to the age at which an individual reaches legal majority or the age at which an individual reaches sexual maturity.<sup>64</sup> However, Eriksson argues that the draftsmen intended to prevent child marriages as they used the words 'men and women', rather than 'males and females'. The Arab Charter on Human Rights, which was only agreed in 2004, contains similar provisions to the instruments above as article 33 also stipulates that 'men and women of marrying age have the right to marry ...' It could be argued that the League of Arab States, which adopted the Charter, wished to prevent child marriage as it has also utilised the words 'men and women'. It certainly seems that the seven Arab States that have ratified the Charter wished to prevent the marriage of very young girls as the minimum age for marriage in each of the jurisdictions is no lower than 15.<sup>65</sup>

The UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1957 adopts a similar approach to the general human rights instruments discussed above, as it does not explicitly forbid child marriage but implicitly does so, as it requires state parties to abolish certain practices associated with early marriage. For example, article 1(c) stipulates that contracting states 'shall take all practicable and necessary legislative and other measures to bring about ... the complete abolition of any institution or practice whereby a woman without the right to refuse is promised or given in marriage in payment of consideration in money or in kind to her parents, guardian, family or other person or group'. As explained earlier, the payment of bride price is a common feature of child marriage. Article 2 requires state parties to specify 'suitable minimum ages of marriage' and 'to encourage the use of facilities whereby the consent

of both parties may be freely expressed in the presence of a competent civil or religious authority' in order to eradicate the practice referred to in article 1(c). The inclusion of a provision relating to age for marriage, suggests that the United Nations considered early marriage to be a 'practice similar to slavery'.

In 1975 the UN adopted the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), article 16(2) of which categorically states that 'the betrothal and the marriage of a child shall have no legal effect'.<sup>66</sup> However, the Convention does not define a child and as a result it is unclear which marriages are actually forbidden. Article 2 of the United Nations Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962 provides that contracting states must 'take legislative action to specify a minimum age for marriage' whilst article 16(2) of CEDAW goes on to stipulate that 'all necessary action, including legislation, shall be taken to specify a minimum age for marriage'.<sup>67</sup> Although these conventions oblige states to determine a minimum age for marriage they do not prescribe or even suggest one. In 1965, the United Nations General Assembly recommended that the minimum age for marriage 'should not be less than fifteen' and that 'no marriage shall be legally entered into by any persons under this age except where a competent authority has granted a dispensation . . . for serious reasons'.<sup>68</sup> The law in most jurisdictions complies with the UN Recommendation as relatively few have specified a minimum age for marriage that is below the age of 15.<sup>69</sup> However, several countries allow a child to marry prior to reaching 15 if parental consent is present (e.g. Cyprus, Columbia, Israel and Lithuania) which contravenes the UN Recommendation as it requires a dispensation from a competent authority.<sup>70</sup> Furthermore, several states (e.g. the Sudan, Chad and Saudi Arabia) do not comply with the UN Recommendation, the Convention on Consent to Marriage or CEDAW, as they have not enacted legislation stipulating a minimum age for marriage. In the Sudan custom dictates that boys and girls can marry once they have reached sexual maturity but in Chad and Saudi Arabia children can be married at any age. None of these jurisdictions has signed the UN Convention, however, Chad and Saudi Arabia have ratified CEDAW. This demonstrates that ratifying an international instrument does not necessarily signify a genuine commitment to all of its provisions.

Since the UN made its recommendation in 1965, it has adopted the Convention on the Rights of the Child (1989), article 1 of which defines a child as a person 'below the age of eighteen unless under the law applicable to the child, majority is attained earlier'. The Committee on the Rights of the Child, which monitors the implementation of the Convention, 'strongly recommends that state parties review and where necessary reform their legislation and practice to increase the minimum age for marriage with and without parental consent to eighteen years for both boys and girls'.<sup>71</sup> Furthermore, UN organisations, such as the UNFPA and UNICEF define a child marriage as one involving a person under the age of 18. The marriage of a person who has not reached 18 could now be considered a child marriage, which according to CEDAW should have no legal effect. It is highly unlikely that the United Nations intended to prohibit the marriage of any person under the age of 18 when it adopted CEDAW, given that many jurisdictions that ratified it e.g. the United Kingdom and Canada, permit such marriages to take place in certain circumstances (e.g. where the parents of a 16 or 17 year old consent). Furthermore, draft 4 of the convention prohibited 'child marriage and the betrothal of young girls before puberty' which demonstrates that the primary focus of article 10 was the prevention of very early marriage.<sup>72</sup> It can also be argued that omitting a minimum age for marriage constitutes implied approval of the UN Recommendation. It therefore seems that the marriage of a person under the age of 15 should have no legal effect unless dispensation has been obtained from a competent

authority, whereas the marriage of person between 15 and 18 years of age should be strongly discouraged.

In contrast to the above, the instruments adopted by the African Union are far more explicit.<sup>73</sup> Article 21 of the African Charter on the Rights and Welfare of the Child 1990 requires state parties to enact legislation specifying 18 as the minimum age for marriage, whilst article 7(b) of the Protocol to the African Charter on Human and People's Rights (on the Rights of Women in Africa 2003) states that 'the minimum age of marriage for men and women shall be 18 years'. The law in many African jurisdictions contravenes the Charters: as explained above, Chad and the Sudan have not specified a minimum age for marriage and allow very young children to marry. In addition, girls are permitted to marry at the age of 14 in Madagascar and Mozambique, whilst boys and girls can marry at the age of 12 in Equatorial Guinea. Several countries (e.g. Benin, Cameroon, Niger and Mali, all of which have ratified the Charters) have complied with the UN Recommendation on the minimum age for marriage, but now find themselves in violation of the African Charters as girls who have reached the age of 15 can marry.<sup>74</sup> This might suggest that requiring states to specify 18 as a minimum age for marriage is a step too far and that 15 is a more acceptable minimum age for many African jurisdictions. It should also be noted that certain states have enacted legislation to comply with the African Charters, but these civil laws exist alongside personal laws which enable young people to be married at a far earlier age. For example, in Eritrea the minimum age for marriage is 18, however, Muslims do not have to comply with the legislation as they are subject to Shariah law which contains no minimum age for marriage.<sup>75</sup> Most girls actually marry between the ages of 13 and 15. In fact, the Committee on the Rights of the Child has recently commented that the levels of child marriage are actually increasing in this jurisdiction.<sup>76</sup> In Nigeria the law recognises three types of marriage: those that comply with the civil law, those celebrated in accordance with customary laws and those subject to Islamic law.<sup>77</sup> Whilst the civil law specifies 18 as the minimum age for marriage, local customs and Islamic law allow individuals to be married at a much earlier age.<sup>78</sup> Consequently, the average age for marriage for girls in Nigeria is 17 and in the State of Kebbi, the average age is only 11.<sup>79</sup> This suggests that the enactment of national and international laws cannot reduce the incidence of child marriage on their own.<sup>80</sup>

The data above demonstrate that brides in certain regions are very young indeed and would not therefore be sufficiently mature to genuinely consent to the marriage. Because the age for marriage is generally lower than the age of legal majority, the girl 'will have little if any say in the choice of marriage partner and not having a legal veto cannot refuse to comply with the wishes of a parent or guardian'.<sup>81</sup> Banda thus confirms that there is a correlation between early and forced marriage'.<sup>82</sup> The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights 1966, has also emphasised the link between marriageable age and the need for marriage to be consensual. Paragraph 23 of General Comment 28 indicates that the minimum age for marriage should enable the individual 'to make an informed and uncoerced decision'. Given that young children are not sufficiently mature to provide informed consent, jurisdictions that permit young children to marry thus violate the international instruments that require both parties to agree to the marriage. Article 16(2) of the Universal Declaration of Human Rights 1948, article 10(1) of the International Covenant on Social, Economic and Cultural Rights 1966, article 23(3) of the International Covenant on Civil and Political Rights 1966, article 1 of the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962, article 16(1)(b) of CEDAW 1975, article 17(3) of the American Convention on Human Rights 1969 and



article 33 of the Arab Charter on Human Rights 2004 *all* require the parties to a marriage to provide 'free and full consent'. The organisation FORWARD, argues that 'any child marriage constitutes a forced marriage' and thus contravenes international law 'because even if the child appears to give their consent anyone under the age of eighteen is not able to make a fully informed choice'.<sup>83</sup> This is generally the case in non-western jurisdictions with a high incidence of child marriage, as the union is usually arranged by the child's family and does not involve the free and full consent of the child. For example, Erulkar's study of rural Ethiopia found that 85% of married girls had not consented to the union. Furthermore, younger brides were less likely to have provided consent than older girls.<sup>84</sup> Child marriage and forced marriage are therefore inextricably linked and therefore need to be tackled simultaneously.

The Human Rights Committee has also stressed that the minimum age for marriage needs to be the same for men and women.<sup>85</sup> This is because article 2(1) of the International Covenant on Civil and Political Rights 1966, which the Committee monitors, prohibits discrimination on the ground of sex. Several other international instruments contain a general prohibition against discrimination on the ground of sex (e.g. the UN Declaration of Human Rights 1948 and the European Convention on Human Rights 1953), whilst article 16(1) of CEDAW expressly provides that discrimination against women must be eliminated in all matters relating to marriage, which would include the minimum age for marriage. The UN Convention on the Rights of the Child 1989 also forbids sex discrimination (article 2(1)) and as a consequence, the Committee on the Rights of the Child has criticised the law in several jurisdictions (e.g. Mexico and Columbia) for allowing girls to marry at a younger age than boys.<sup>86</sup> As Banda explains, states attempt to justify the discrepancy in age for marriage on the basis that 'girls mature faster than boys'.<sup>87</sup> However, Banda contends that allowing girls to marry at an earlier age 'reinforces ideas about their availability' and thus puts them at risk.<sup>88</sup>

The United Nations Convention on the Rights of the Child 1989 contains several additional provisions that are relevant to child marriage. Although the Convention does not expressly prohibit child marriage, the latter will violate several of its articles that are designed to protect children. For example, article 34 provides a right to protection from sexual exploitation and sexual abuse. As explained earlier the Pan-African Forum considers child marriage to be a form of sexual exploitation and consequently breaches article 34. Similarly, article 24 contains a right to health and protection from harmful traditional practices. As sexual intercourse and procreation can damage a young girl's health, UNICEF<sup>89</sup> and the Committee on the Rights of the Child have declared that child marriage constitutes a 'harmful traditional practice'.<sup>90</sup> Furthermore, article 19 prohibits all forms of physical or mental violence, injury, abuse, maltreatment or exploitation, all of which many young wives are known to have suffered. Early marriage may also contravene article 28(1) of the Convention, which provides a right to education, as the latter is generally curtailed when a child is required to wed. In addition, article 7(1) of the Convention indicates that every child should be registered immediately after birth. As explained earlier, marrying a child at a very young age, often in contravention of national laws is made easier if there is no reliable system of registering births. The existence of these articles explains why the Committee on the Rights of the Child often comments on child marriage even though it is not specifically mentioned in the Convention.

Similar provisions can be found in several other human rights instruments. For example, article 26 of the United Nations Declaration of Human Rights, article 13 of the United Nations Convention on Social, Economic and Cultural Rights and article 41 of the Arab Charter on Human Rights provide a right to education. Article 5 of the UN Declaration,

article 3 of the European Convention on Human Rights, article 5 of the American Convention on Human Rights, article 8 of the Arab Charter and article 7 of the UN Covenant on Civil and Political Rights prohibit torture, inhuman and degrading treatment, all of which are known to occur within a child marriage. In addition, the United Nations considers child marriage to be a 'practice similar to slavery'. Early marriage thus contravenes article 4 of the European Convention, article 6 of the American Convention, article 10 of the Arab Charter, article 4 of the UN Declaration and article 8 of the Convention on Civil and Political Rights all of which prohibit slavery, as well as several articles of the Convention on the Abolition of Slavery itself. The requirement to register all births, which is contained in the Convention on the Rights of the Child, also appears in article 24(2) of the International Covenant on Civil and Political Rights 1966. Article 2 of the UN Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery encourages contracting parties to register all marriages whilst article 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962, provides that all marriages shall be registered by the competent authority. As explained earlier, establishing a reliable system for registering marriages is a prerequisite for the enforcement of national laws on marriageable age. This obligation constitutes a major challenge for many jurisdictions. For example, India has declared that it cannot practically enforce the compulsory registration of marriages due to the 'variety of customs, religions and levels of literacy'.<sup>91</sup>

It is thus evident that early marriage violates a wide range of human rights, namely, the right to marry, the right to equality, the right to education and the right to be free from torture and slavery, which are contained in several regional and global instruments. De Silva De-Alwis argues that 'locating child marriage as a human rights violation helps to raise it as a grave public concern rather than a private matter between families'.<sup>92</sup> In contrast, Bunting claims that a human rights approach is not an appropriate strategy given 'the complexity of both marriage and age'.<sup>93</sup> The following section of this paper will consider whether international (and indeed national) law can effectively tackle the issue of child marriage.

### **International law as an instrument to combat child marriage**

The international instruments discussed in the previous section are those aimed at 'setting normative standards' that 'are to be adhered to by state parties in their own internal policy making'.<sup>94</sup> Ratifying an international treaty constitutes a commitment to achieving its goals and should consequently precipitate the introduction or amendment of national laws and policies. In relation to child marriage, the ratification of an instrument that makes it explicitly clear that the practice is unacceptable should prompt national governments to amend their laws and policies accordingly. As explained above, De Silva De-Alwis argues that child marriage must be treated as a human rights issue in order to emphasise the gravity of the matter. This should serve to convince state parties to take the necessary steps to amend their laws and policies. De Silva De-Alwis further points out that making child marriage the subject of international treaties helps to ensure that states are held accountable for failing to address the issue.<sup>95</sup> If the treaty establishes a body to monitor compliance or hear complaints, a state party that has failed to comply with its treaty obligations will have some sort of public ruling made against it. The adverse publicity and political pressure that follows such a ruling can induce a change of attitude on the part of the national government.

Arguably the biggest problem associated with norm setting instruments is that the principles contained within it 'may be expressed at such a level of generality as to be worthless

or meaningless'.<sup>96</sup> This is particularly problematic if the instrument is a global one, for as Lowe and Douglas stress, 'obtaining worldwide agreement to a set of wide ranging norms which can be implemented nationally is obviously a difficult task and runs the risk that such norms will be pitched at a fairly minimal or very general level'.<sup>97</sup> This paper has indicated that the global instruments containing provisions relevant to child marriage are not as clear as they could be. The only global (as opposed to regional) instrument that expressly forbids child marriage is the Convention on the Elimination of all Forms of Discrimination Against Women, which does not actually define a child. The matter is further obfuscated by the fact that the United Nations recommendation on the minimum age for marriage and the definition of a child contained in the UN Convention on the Rights of the Child conflict. As a consequence of this lack of clarity, state parties might interpret the term 'child' differently, for as Bridgeman and Monk point out, it is not a universally defined concept.<sup>98</sup> If a state party prohibits the marriage of persons under the age of 15, it may feel that adheres to CEDAW and yet may face criticism from the Committee that monitors its compliance or the Committee on the Rights of the Child.

The question that naturally follows is whether global instruments such as CEDAW and the Convention on the Rights of the Child should be more explicit in terms of the prohibition against child marriage. According to the African Alliance for Women's Reproductive Health Rights an 'international standard for the minimum age for marriage' should be the starting point in the campaign against child marriage.<sup>99</sup> This proposition is attractive, as a uniform minimum age for marriage cannot be subject to varying interpretations. But should the minimum age for marriage be 15 as the United Nations recommended in 1965 or 18 in accordance with the definition of a child contained in the UN Convention on the Rights of the Child and the provisions of the African Charters? Setting 15 as the global minimum age for marriage seems to be a realistic goal for jurisdictions with traditionally high levels of early marriage and is thus likely to gain wide spread support. This is corroborated by the fact that several jurisdictions that have recently raised the minimum age for marriage (or specified a minimum age for the first time) have stipulated the age of 15, e.g. Mali in 2006, Niger in 2007 and Bahrain in 2008. However, stipulating 15 as the minimum age for marriage would contradict the provisions of the UN Convention on the Rights of the Child and the African Charters, which unlike the UN Recommendation of 1965, are binding treaties. It would also arguably undermine the work of organisations such as UNICEF, which attempt to encourage communities to delay marriage of young girls until they reach 18. Although an international treaty specifying 18 as the minimum age for marriage is likely to attract less support than one that stipulates 15, the former seems to be the only logical step for the international community to take.

Cultural differences between western and non-western jurisdictions are frequently cited as a barrier to the adoption of international treaties. For example, Bunting contends that the 'assumptions underlying much of the international effort to address early marriage are western assumptions about childhood and adolescence' which misses the complexity of the matter.<sup>100</sup> This suggests that a regional, rather than a global approach may be more appropriate. Indeed, Lowe and Douglas argue that 'it may be more fruitful to develop agreed standards at a regional level where there is greater cultural, economic and political similarity between states'.<sup>101</sup> A regional strategy towards child marriage has been developed by the African Union, which drafted the African Charter on the Rights and Welfare of the Child 1990 and the Protocol to the African Charter on Human and People's Rights (on the Rights of Women) 2003. These instruments explicitly declare that the minimum age for marriage must be 18 and do not therefore suffer from the lack of clarity attributable to the global instruments examined earlier. Although the law in many African jurisdictions has been

amended to comply with the charters (e.g. Algeria, Botswana and Cape Verde), several state parties have maintained laws that permit persons under the age of 18 to marry (e.g. Benin and Equatorial Guinea). In addition, the practice of child marriage has continued in jurisdictions that have introduced legislation that complies with the Charters. For example, Erulkar and Muthengi reported that 19% of Ethiopian girls are married before their 15 birthdays, despite the fact that the minimum age for marriage has been 18 since 2003.<sup>102</sup> In the Amhara region, which is the second largest in the country, this figure rises to 50%. The African Charters have not yet proved to be particularly successful in terms of reducing the incidence of child marriage, however their impact may be amplified if an international treaty is adopted that also stipulates 18 as the minimum age for marriage as the message contained in the global instrument will be reinforced by the regional one and vice versa.

The data above relating to child marriage indicates that a ban on child marriage at an international, regional or national level cannot itself eliminate the practice. This fact is recognised by the international community, for the UNICEF Innocenti research centre has stressed that national 'legislation on its own may have only a limited impact'.<sup>103</sup> But the Innocenti Report proceeds to explain that 'the very process of legislative examination and reform is an essential step towards change'.<sup>104</sup> Furthermore, as Jenson and Thornton point out, the enactment of national legislation is significant as 'such laws signal the importance of the issue'.<sup>105</sup> Unfortunately, this signal does not always reach the communities that it needs to, for as Bunting explains, the minimum age for marriage 'may be virtually unknown by the majority of the population'.<sup>106</sup> Lack of publicity is thus a major problem, which the international community has urged national governments to address. For example, the Committee on the Rights of the Child praised Sierra Leone for introducing laws that prohibit harmful traditional practices such as child marriage, but emphasised that 'awareness raising' was necessary to improve the level of compliance.<sup>107</sup> In addition, national legislation that sets an appropriate minimum age for marriage needs to be coupled with a system to ensure that birth and marriage registration are compulsory, as these are pre-requisites to the effective enforcement of a minimum age for marriage. Furthermore, legislation prohibiting forced marriage and discrimination on the ground of sex and age are required in order to 'strike out the root causes of child marriage'.<sup>108</sup>

It is conceded that the enactment of national legislation that tackles these issues, even if they are well publicised, cannot combat child marriage on their own. As Bunting explains, it is essential to implement a series of 'culturally appropriate' programmes that address the socio-economic conditions in which girls and young women live.<sup>109</sup> Such projects, which have been extensively examined in the literature pertaining to child marriage, tend to focus on educating children, their families and communities, improving economic opportunities for girls and providing financial incentives to delay marriage.<sup>110</sup> Many of these programmes have successfully reduced the number of child marriages contracted in the geographical area within which they operate.<sup>111</sup> The practical benefits derived from such projects are not disputed. However, it can be argued that their success is dependent upon the existence of international treaties that label child marriage a human rights issue, for many such programmes would not be created or funded if the international community had not made its views on the matter clear. Furthermore, projects designed to reduce the number of child marriages can currently be justified on the ground that they implement international (and national) laws and thus protect the human rights of children. If early marriage does not constitute a human rights violation, many programmes aimed at delaying marriage could be considered an imposition of western values regarding marriage on non-western societies. This paper consequently advocates legal reform *and* the development of contextualised local programmes: an approach that has gained the support of

many international organisations e.g. UNICEF, the International Women's Health Coalition and FORWARD.

## Conclusion

Research undertaken by International Organisations such as UNICEF indicates that the practice of child marriage remains prevalent in some parts of Africa and Asia. Although the international community opposes early marriage due to the harm suffered by the child, the binding instruments that have been adopted by the United Nations do not make it clear which marriages are actually forbidden. This lack of clarity is a major drawback of the global human rights instruments. In contrast, the African Charters explicitly prohibit the marriage of a person who has not reached the age of 18, but the Charters and the national laws that implement them are not effectively enforced. This may be due to the fact that national laws stipulating 18 as a minimum age for marriage are not well publicised and that the systems for registering births and marriages are not reliable. Furthermore, several states have taken no steps to implement the prohibition on child marriage, presumably because they are not genuinely committed to the ban or because they simply cannot fulfil their obligations. This paper argued that setting a uniform minimum age for marriage would be advantageous as it sends a clear message that early marriage is unacceptable. It is conceded that international and national laws cannot themselves reduce the incidence of child marriage and that the adoption of international and national legislation must be accompanied by appropriate local strategies to address the causes of early marriage. Nonetheless, such programmes would not exist if the international community did not take a clear stance on child marriage. The part that international law plays in the campaign against early marriage should not therefore be underestimated.

## Notes

1. International Protecting Girls by Preventing Child Marriage Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-987> (accessed 1 July 2009).
2. Mohammed Jamjoom, 'UNICEF "deeply concerned" about the marriage of 8 year old. April 14th 2009', <http://www.edition.cnn.com/2009/WORLD/meast/04/14/saudi.cchild.marriage/index.html> (accessed 20 April 2009).
3. Ibid.
4. Although a judge can authorise the marriage of a girl aged between 15 and 17 in exceptional cases.
5. WLUMI, 'Morocco: Moroccan Ulemas Denounce Fatwa Authorising Under Age Marriage. 3/10/08', Women's Learning Partnership for Rights, Development and Peace, <http://www.wluml.org/English/newsfulltxt.shtml?Cmd%5B157%5D=x-157-562579> (accessed 24 March 2009).
6. ASIANEWS, 'A Fatwa against Yemeni Law Setting Minimum Age for Marriage', <http://www.Asianews./index.php?l=en&art=14588&size=A> (accessed 24 March 2009).
7. UNFPA, 'Child Marriage Fact Sheet: State of World Population 2005', [http://www.unfpa.org/swp/2005/presskit/factsheets/facts\\_child\\_marriage.htm](http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm) (accessed 20 March 2009).
8. UNICEF, 'Child Marriage: A Harmful Traditional Practice. A Statistical Exploration', (UNICEF: New York, 2005), 1.
9. UNFPA, 'Child Marriage Fact Sheet'.
10. Ibid.
11. Robert Jenson and Rebecca Thornton, 'Early Female Marriage in the Developing World', *Gender and Development* 11, no. 2 (2003): 12. Notable exceptions are Turkey and Egypt where the average age has increased.
12. UNICEF, 'Child Marriage', 5.

13. Ruth Levine *et al.*, *Girls Count – A Global Investment and Action Agenda* (Centre for Global Development Washington, DC, 2008), 43.
14. UNICEF, 'Child Marriage', 6.
15. UNICEF, 'Child Marriage', 6.
16. UNICEF INNOCENTI RESEARCH CENTRE, 'Early Marriage Child Spouses', *Innocenti Digest*, no. 7 (2001): 6.
17. *Ibid.*, 2.
18. *Ibid.*, 6.
19. Levine *et al.*, *Girls Count*, 43.
20. Jenson and Thornton, 'Early Female Marriage in the Developing World', 17.
21. *Ibid.*, 1.
22. *Ibid.*, 2.
23. Annabel Erulkar and Eunice Muthengi, 'Evaluation of Berhane Hewan: A Program to Delay Child Marriage in Rural Ethiopia', *International Perspectives on Sexual and Reproductive Health* 35, no. 1 (2009): 6.
24. Levine *et al.*, *Girls Count*, 44.
25. Jenson and Thornton, 'Early Female Marriage in the Developing World', 18.
26. *Ibid.*, 18.
27. *Ibid.*, 6.
28. Susanne Louis B. Mikhail, 'Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation', *Gender and Development* 10, no. 1 (2002): 45.
29. Annie Bunting, 'Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue', *Social and Legal Studies* 14, no. 1 (2005): 18.
30. UNICEF INNOCENTI RESEARCH CENTRE, 'Early Marriage Child Spouses', 15.
31. CRC General Comment No. 11 on Indigenous Children and their Rights under the Convention CRC/C/GC/11 Para. 41.
32. Concluding Observations: Sierra Leone 2008 CRC/C/SLE/CO/2 Para. 33.
33. UNICEF INNOCENTI RESEARCH CENTRE, 'Early Marriage Child Spouses', 15.
34. The Foundation for Women's Health, Research and Development, <http://www.forwarduk.org.uk> (accessed 16 June 2009).
35. See below.
36. Cynthia Lloyd and Barbara Mensch, 'Marriage and Childbirth as Factors in Dropping out from School: An Analysis of DHS Data from sub-Saharan Africa', *Population Studies* 62, no. 1 (2008): 1.
37. Pan-African Forum against the Sexual Exploitation of Child (2001) cited in UNICEF, 'Childinfo. Monitoring the Situation of Children and Women', 2008, <http://www.childinfo.org/marriage.html> (accessed 20 May 2009).
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39. Marcantonio Caltabiano and Maria Castiglioni, 'Changing Family Formation in Nepal: Marriage, Cohabitation and First Sexual Intercourse', *Family Planning Perspectives* 34, no. 1 (2008).
40. *Ibid.*
41. UNFPA, 'Child Marriage Fact Sheet'.
42. See Rebecca Cook, Bernard Dickens and S. Syed, 'Obstetric Fistula: The Challenge to Human Rights', *International Journal of Gynecology and Obstetrics* 87 (2004): 72.
43. Levine *et al.*, *Girls Count*, 45.
44. Cited in Bunting, 'Stages of Development', 20.
45. Anita Raj *et al.*, 'Prevalence of Child Marriage and its Effects on Fertility and Fertility Control Outcomes of Young Women in India: A Cross-sectional, Observational Study', *The Lancet* 373, no. 9678 (2009): 1883.
46. Nour (2006) cited in Levine *et al.*, *Girls Count*, 45.
47. See Shelley Clarke, 'Early Marriage and HIV Risks in Sub-Saharan Africa', *Studies in Family Planning* 35, no. 3 (2004): 149.
48. UNFPA, 'Child Marriage Fact Sheet'.
49. See below.
50. Gauri Bhattacharya, 'Socio-cultural and Behavioural Contexts of Condom use in Heterosexual Married Couples in India: Challenges to HIV Prevention Programmes', *Health Education and Behaviour* 31, no. 1 (2004): 101.
51. UNICEF INNOCENTI RESEARCH CENTRE, 'Early Marriage Child Spouses', 5.
52. Bunting, 'Stages of Development', 27.

53. UNFPA, 'Child Marriage Fact Sheet'.
54. Jenson and Thornton, 'Early Female Marriage in the Developing World', 15.
55. Charles Westoff, 'Trends in Marriage and Early Childbearing in Developing Countries', *DHS Comparative Reports No. 5* (Maryland: ORC Macro, 2003).
56. WORLDPUBLICOPINIONORGSTAFF, 'World Public Opinion on the Treatment of Widows and Divorced Women', *Programme on International Policy Attitudes* (University of Maryland, 2008).
57. Dana Tilson and Ulla Larsen, 'Divorce in Ethiopia: The Impact of Early Marriage and Childlessness', *Journal of Bioscience* 32, no. 3 (2000): 355.
58. WORLDPUBLICOPINIONORGSTAFF, 'World Public Opinion on the Treatment of Widows and Divorced Women'.
59. The CEDAW Committee has indicated that polygyny is harmful to women because it contravenes her right to equality. See Para. 14 CEDAW General Recommendation 21 on Equality in Marriage in Family Relations, UNGAOR 1994 Doc. No. A/47/38.
60. UNICEF, 'Child Marriage', 15.
61. Paragraph 14 of CEDAW General Recommendation 21 on Equality in Marriage and Family Relations, UN GAOR 1994 Doc. No. A/47/38 and Paragraph 24 of Human Rights Committee General Comment No. 28 Equality of Right Between Men and Women.
62. Mikhail, 'Child Marriage and Child Prostitution', 45.
63. See Bunting, 'Stages of Development', 31.
64. Maja Eriksson, 'Article 16' in *The Universal Declaration of Human Rights: A Commentary*, ed. Aide Eide *et al.* (Oxford: Scandinavian University Press, 1992), 243.
65. The Charter has been ratified by Jordan, Bahrain, Libya, Algeria, the United Arab Emirates, Palestine and Yemen. See Carole Vann, 'Arab Charter on Human Rights Courts Controversy', *Human Rights Tribune*, February 4, 2008, <http://www.humanrights-geneva.info/Arab-Charter-on-human-rights,2715> (accessed 17 July 2009).
66. The Convention was based on the Declaration on the Elimination of Discrimination Against Women 1967.
67. As explained above article 2 of the Convention on Slavery also urges state parties to specify a minimum age for marriage.
68. United Nations General Assembly Resolution 18 (XX).
69. Information on the legal minimum age for marriage is taken from the UN website (last updated December 2008), <http://www.data.un.org/DocumentData.aspx?id=126>. Examples of states that do not comply with the recommendation include Equatorial Guinea where the minimum age is 12 for boys and girls and Bolivia, Madagascar and Mozambique which allow girls to marry at 14.
70. All of the above have ratified CEDAW.
71. Committee on the Rights of the Child General Comment No. 4 Adolescent Health and Development in the Context of the Convention on the Rights of the Child, CRC/GC/2004/4 Para. 16.
72. Lars Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women* (London: Martinus Nijhoff Publishers, 2000), 184.
73. Previously known as the Organisation for African Unity.
74. Other states have 15 as the minimum but have not ratified the African charters e.g. Democratic Republic of the Congo.
75. Rangita De Silva De-Alwis, *Child Marriage and the Law – Legislative Reform Initiative Paper Series* (New York: Division of Policy and Planning, UNICEF, 2007), 38. This is also the case in Sri Lanka.
76. Concluding Observations: Eritrea 2008 CRC/C/ERI/CO/3 Para. 62.
77. See Toyo Nyoko, 'Revisiting Equality as a Right: the Minimum Age of Marriage Clause in the Nigerian Child Rights Act 2003', *Third World Quarterly* 27 (2006): 1299.
78. The position is similar in India. See Catherine Mackinnon, 'Sex Equality under the Constitution of India: Problems, Prospects and Personal Laws', 4 *International Journal of Constitutional Law* 4 (2006): 181.
79. UNFPA, 'Child Marriage Fact Sheet'.
80. See later.
81. Fareda Banda, *Project on a Mechanism to Address Laws that Discriminate against Women* (Geneva: Office of the High Commissioner for Human Rights – Women's Rights and Gender Unit, 2008), 64.

82. Ibid.
83. See n. 34.
84. Erulkar and Muthengi, 'Evaluation of Berhane Hewan', 7.
85. Human Rights Committee General Comment 28 on Equality of Rights Between Men and Women, CCPR/C/21/Rev1/Add10 Para. 23. See also General Comment 19 CCPR/1990 on the protection of the Family, the Right to Marry and Equality of Spouse Para. 4.
86. Concluding Observations of the Committee on the Rights of the Child on Mexico, 10.11.99/CRC/C/15/Add.112 and Concluding Observations of the Committee on the Rights of the Child on Columbia, 2006/CRC/C/COL/CO/3.
87. Banda, *Project on a Mechanism to Address Laws that Discriminate against Women*, 64.
88. Ibid., 65.
89. As demonstrated by the title of their 2005 Report: UNICEF, 'Child Marriage'.
90. CRC General Comment No 4. See n. 71, Paras 6 and 20. The optional protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 also prohibits harmful traditional practices and sexual exploitation.
91. India, UN Doc. A/55/38 Para. 62.
92. De Silva De-Alwis, *Child Marriage and the Law*, 6.
93. Bunting, 'Stages of Development', 18.
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95. De Silva De-Alwis, *Child Marriage and the Law*, 6.
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97. Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (Oxford: Oxford University Press, 2007), 24.
98. Jo Bridgeman, and Daniel Monk, 'Introduction: Reflections on the Relationship Between Feminism and Child Law', in *Feminist Perspectives on Child Law*, ed. Jo Bridgeman and Daniel Monk (London: Cavendish, 2000), 3.
99. IPAS, *African Alliance for Women's Reproductive Health Rights – A Handbook for Advocacy in the African Human Rights System* (Chapel Hill: IPAS, 2006), 29.
100. Bunting, 'Stages of Development', 33.
101. Lowe and Douglas, *Bromley's Family Law*, 24.
102. Erulkar and Muthengi, 'Evaluation of Berhane Hewan', 6.
103. UNICEF INNOCENTI RESEARCH CENTRE, 'Early Marriage Child Spouses', 18.
104. Ibid.
105. Jenson and Thornton, 'Early Female Marriage in the Developing World', 17.
106. Bunting, 'Stages of Development', 27.
107. See n. 32, Para. 58.
108. De Silva De-Alwis, *Child Marriage and the Law*, 6.
109. Bunting, 'Stages of Development', 18.
110. See for example Levine *et al.*, *Girls Count*.
111. See for example the various projects cited in the Innocenti Digest: UNICEF INNOCENTI RESEARCH CENTRE, 'Early Marriage Child Spouses'.

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