



THE UPR PROJECT AT BCU

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About the UPR Project at BCU:

Birmingham City University's Centre for Human Rights was created in 2014 to promote human rights, ensure access to justice, and enhance the rule of law around the world. We seek to achieve this through leading research, education, and consultancy. We submit expert reports to international human rights regions, provide advisory services to governments and nongovernmental organisations, draft legal opinions and file legal briefs in domestic courts and in international human rights courts.

The Centre for Human Rights established the UPR Project in 2018 as part of our consultancy service. We engage with the Human Rights Council's review process in offering support to the UPR Pre-sessions, provide capacity building for UPR stakeholders and National Human Rights Institutions, and file stakeholder reports in selected sessions. The UPR Project is designed to help meet the challenges facing the safeguarding of human rights around the world and to help ensure that UPR recommendations are translated into domestic legal change in member state parliaments. We fully support the UPR ethos of encouraging the sharing of best practice globally to protect everyone's human rights.

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INTRODUCTION

1. South Africa is party to seven of the nine core international human rights treaties.¹ This report focuses upon the Government's international commitments and assesses the extent to which supported recommendations in the UPR third cycle in 2017 have been implemented. Three themes are selected:
 - i. Racism and Hate Crimes
 - ii. HIV/AIDS Prevention and Treatment
 - iii. Child, Early, and Forced Marriage (CEFM)
2. In the third cycle South Africa received 243 recommendations of which 193 were accepted.² This submission welcomes the Government's overwhelming support of the third cycle recommendations on **racism and hate crimes** (40 supported; 0 noted), **HIV/AIDS policies** (11 supported; 0 noted) and the **prohibition of CEFM** (4 supported; 4 noted) – these are discussed below.
3. Concerning the UN's nine core treaties, we recommend that the Government should:
 - i. Incorporate into domestic law the individual complaints procedures through the adoption of the Optional Protocols for the International Covenant on Economic, Social and Cultural Rights (ICESCR) (article 2) and the Convention on the Rights of the Child (CRC) (article 5).
 - ii. Likewise, incorporate into domestic law the inquiry procedures under the Optional Protocol for the ICESCR (article 11) and the CRC (article 13).
4. Additional recommendations focus upon the Government's engagement with the wider human rights safeguarding mechanisms and the aims of the Sustainable Development Goals (SDG). Concerning the SDGs, 25% of the UPR recommendations for the third cycle reflected Goal 16 (Peace, Justice and Strong Institutions), 19% on Goal 10 (reduced inequalities), 17% on Goal 5 (gender equality), and 16% on Goal 3 (Good Health and Well-Being).³

RACISM AND HATE CRIMES

A. South Africa and International Law on Racism and Hate Crimes

International Law and the Prohibition of Racism and Hate Crimes

5. The prohibition of discrimination in the form of racism is enumerated in the Universal Declaration of Human Rights (UDHR) article 2,⁴ the International Covenant on Civil and Political Rights (ICCPR) articles 2(1) and 26,⁵ and the ICESCR article 2(2).⁶ A definition of 'racial discrimination' is provided in the International Convention on the Elimination

of All Forms of Racial Discrimination (ICERD) article 1.⁷ Applying ICERD article 4 ratifying states should, ‘undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination,’ with sub-paragraphs (a)-(c) mandating the establishing of domestic law prohibiting racism and providing appropriate punishment of perpetrators.⁸

6. In March 2019 the Government launched the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Tolerance (NAP),⁹ and identified commendable strategies for ameliorating the effects of racism in South Africa. NAP is informed by the ‘general principles of universality, interdependence and indivisibility of human rights, participation and inclusion, progressive realisation, accountability, equality and non-discrimination,’¹⁰ and that it, ‘provides the basis for the development of a comprehensive public policy against racial discrimination.’¹¹
7. However, in 2020 Human Rights Watch published the results of its findings of continued xenophobic violence,¹² and South African media reported on the continued ‘us-versus-them’ narrative which is a significant cause of such violence.¹³ Discriminatory practices were also affirmed in 2020 when the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, visited South Africa and stated:

[t]he relative safety of persons with albinism in South Africa has been adversely affected by discrimination. In the context of challenges related to racism and xenophobia, migrant persons with albinism are at a heightened risk of being targeted, both for being a foreigner and for albinism.¹⁴

8. What this demonstrates is that there is still a need for the implementation of the NAP to distinguish between identifying the inherent racism of the past under the Apartheid era, with the development of effective strategies for preventing further racism and xenophobia.
9. The previous visit of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance was in 1998,¹⁵ and there is yet to be a subsequent visit of the Special Rapporteur. It is clear that a visit by the UN mandate would provide a holistic review of the presence of racism and related issues, and provide a cogent opportunity for independent input and advice for meeting of NAP targets.

B. Implementation of Recommendations from the Third Cycle

Recommendations Concerning International Law

10. The Government received five recommendations concerning international law. **Congo** (139.31) urged the facilitation of a visit of the Special Rapporteur on Contemporary Forms of Racial Discrimination, Xenophobia and Related Intolerance, **Uruguay** (139.50) encouraged that national law complies with ICERD, and **Honduras** (139.63) advised the Government to fully engage with the Human Rights Committee. **Ecuador** (139.42) and **China** (139.58) affirmed adopting the initiatives of the Durban Declaration and

Programme of Action. **All of these recommendations were supported by the Government** but the visit of the Special Rapporteur **has not yet occurred**, and there is a **continual need** to comply with international standards and facilitate UN mandate visits.

Recommendations Concerning the National Law on Racism and the Prohibition of Hate Crimes

11. The Government received nine recommendations regarding national law on racism and seven on the related issue of hate crimes. **Tunisia** (139.48), **Côte d’Ivoire** (139.78), **Central African Republic** (139.75), **Iraq** (139.86) and **Yemen** (139.149) called for continued efforts for domestic processes to combat racism. The creation and application of the NAP was affirmed by **United Arab Emirates** (139.49), **Ethiopia** (139.53), and **Togo** (139.54). Enhancing the Government’s strategies for combatting hate crimes as it relates to racism was recommended by **Republic of Moldova** (139.52), **Spain** (139.43), **Estonia** (139.51) **Madagascar** (139.44), **Norway** (139.45), **Cuba** (139.46), and **Israel** (139.70). **The Government supported all of these recommendations** but the example cited in paragraph 7 above demonstrates a failure to safeguard against incidents of racism and violence motivated by racism and discrimination.

Recommendations on Foreign Nationals

12. The Government received thirteen recommendations concerning racism against foreign nationals. **Congo** (139.77), **Bangladesh** (139.74), **Kenya** (139.82), provided observations to safeguard against race crimes on ‘non-nationals’ and ‘foreigners,’ and **Chad** (139.79) focused upon ‘migrants,’ with **Greece** (139.79) widened the focus to ‘all manifestations of any form of racism’ to include all ‘non-citizens,’ as did the **State of Palestine** (139.66). **Rwanda** (139.83) called for the strengthening of measures to protect foreign nationals, as did **Canada** (139.60). **Greece** (139.79) and **Senegal** (139.73) called for the protection of refugees, asylum seekers and migrants. The **Central African Republic** (139.68) called for the prosecution of perpetrators and **Uganda** (139.69) recommended the punishment of offenders, with the **Central African Republic** (139.64) calling for the improvement of ‘police responses to violence against foreigners.’ **The Government supported all of these recommendations** but is failing to protect the rights of foreign nationals as identified in paragraph 7 above.

Recommendations on Albinism

13. The government received six recommendations on the protection of people with albinism. **Portugal** (139.91), **Mauritania** (139.96), **Congo** (139.92) and **Israel** (139.93) called for the protection of the rights of people with albinism. **Honduras** (139.95) recommended enhancing the protective mechanisms within the Government’s actions plans, and **Sierra Leone** (139.94) recommended thorough investigations and prosecution of crimes against people with albinism. **The Government supported all of these recommendations** but is

failing to protect the rights identified in the report of the Independent Expert cited in paragraph 7 above.

C. Recommendations

14. We recommend that the Government of South Africa should:

- i. Ensure national law is in full compliance with ICERD.
- ii. Organise a country visit of the Special Rapporteur on Contemporary Forms of Racial Discrimination, Xenophobia, and Related Intolerance.
- iii. Adopt the recommendations of the 2020 Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism.
- iv. Adopt the above recommendations (i)-(iv) as an expression of mutual reinforcement of commitments to promote both the SDGs and the UPR. The human rights values expressed in both the UPR and the SDGs can be woven together to promote policy coherence.

HIV/AIDS

A. South Africa and International Law on HIV/AIDS

International Law on HIV/AIDS

15. The general principle of the human right to healthcare is found in ICESCR article 12 and in the development of medical science and treatment, article 15(1)(b) recognises the right of everyone ‘[t]o enjoy the benefits of scientific progress and its applications.’ The Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS have established the International Guidelines on HIV/AIDS and Human Rights and made recommendations providing, ‘guidance for Governments and others on how to best promote, protect and fulfil human rights in the context of the HIV epidemic.’¹⁶
16. The South African National AIDS Council launched the ‘Let Our Actions Count’ National Strategic Plan for HIV, TB and STIs 2017-2022 (NSP).¹⁷ The NSP affirmed that in 2017 there were 7.1million people in South Africa living with HIV/AIDS,¹⁸ and it had initiated a plan to eliminate HIV as a ‘public health threat[] by 2030.’¹⁹ The NSP serves as a ‘roadmap for the next stage of [South Africa’s] journey towards a future where HIV, TB and STIs are no longer public health problems.’²⁰
17. On World AIDS Day, 1 December 2021, the Deputy President David Mabuza stated the Government was, ‘determination to end AIDS as a public health threat by 2030,’ and that it was committed, ‘to make strides towards achieving the United Nations’ Sustainable Development Goals, more specifically the goal on good health and well-being of the people.’²¹

18. However, it is clear that South Africa has not yet translated these aspirations into a demonstrable ability to meet the targets. UNAIDS estimate that in South Africa, in 2020, there were 7.8million people living with HIV/AIDS²² (an increase of 700,000 of the NSP figure in 2017, cited above). In reviewing the data on HIV/AIDS in South Africa, the Center for Strategic and International Studies' article *The World's Largest HIV Epidemic in Crisis: HIV in South Africa*, states:

[n]early 4,500 South Africans are newly infected every week; one-third are adolescent girls/young women [] ages 15-24. These are staggering figures, by any stretch of the imagination. Yet, the HIV epidemic is not being treated like a crisis.²³

19. The commendable aspirations of the Government and the NSP, for the 2030 goal, has not yet rendered a significant reduction of HIV/AIDS infections. The Government needs to provide greater resources and financing of the NSP if it is to eradicate the spread of HIV/AIDS in South Africa.

B. Implementation of Recommendations from the Third Cycle

Recommendations Concerning National Efforts and Non-Discrimination

20. The Government received nine recommendations concerning the domestic policies on HIV/AIDS. **Libya** (139.167), **Turkey** (139.168), **Algeria** (139.169), and **Islamic Republic of Iran** (139.171) called for the continued efforts to deal with the disease. **Malaysia** (139.161) identified the need for universal healthcare coverage. **Angola** (139.170), **Maldives** (139.163) and **Holy See** (139.162) focused on the need for public health coverage to include the rural areas, with **Japan** (139.166) on continuing the Government's measures to eliminate discrimination and increase its efforts to tackle HIV infection by ensuring equal access to treatment and support. **The Government supported all of the recommendations**, however, paragraphs 15-19 above demonstrate a failure to implement these recommendations.

Recommendations Concerning Improving Education and Knowledge

21. Two recommendations focused on South Africa's need for sex education and healthcare plans. **Iceland** (139.173) recommended '[i]mprove knowledge among health-care workers and adolescents about sexual and reproductive health and rights, including through comprehensive sexuality education that involves men and boys.' **Denmark** (139.172) called on the Government to '[e]nsure comprehensive sexuality education in the school curriculum, including on consent, contraception and gender-based violence.' **The Government supported both of these recommendations** and the NSP provides strategies for the dissemination of knowledge on HIV/AIDS and sex education. However, this hitherto has not translated into a practical thwarting of the spread of the disease in South Africa.

C. Recommendations

22. We recommend that the Government of South Africa should:

- i. Ratify the Optional Protocol to the ICESCR for the Committee to receive communications under article 2 from individuals or groups based upon the Governments' HIV/AIDS policies, and adopt the article 11 inquiry procedures for the examination of 'grave or systematic' violations.
- ii. Invite the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, to conduct a country visit to review and advise upon the HIV/AIDS policies.
- iii. Provide more investment to widen access to HIV/AIDS treatment, including antiretroviral medicines.
- iv. Prioritise sex education programmes in schools and invest more in media programmes raising awareness of HIV/AIDS.
- v. Adopt the UPR recommendations in an expression of mutual reinforcement of commitments to promote the SDG 3 (Good Health and Well-being).

CHILD, EARLY, AND FORCED MARRIAGE

A. South Africa and International Law on CEFM

International Law and the Prohibition of CEFM

23. International law has established the minimum age for marriage as being 18-years-old.²⁴ The Secretary-General of the United Nations,²⁵ the General Assembly,²⁶ and the Human Rights Council²⁷ have all affirmed CEFM as a human rights violation and that such practice should be outlawed worldwide. The UNFPA-UNICEF Global Programme to End Child Marriage (GPECM),²⁸ is promoting this globally, and SDG 5 aims to '[a]chieve gender equality and empower all women and girls,' with target 5.3 being to, '[e]liminate all harmful practices, such as child, early and forced marriage.'²⁹
24. The United Nations Children's Fund (UNICEF) has estimated 12million CEFMs occur per year with nearly 650million women and girls alive today who became brides before they were 18-years-old.³⁰ The GPECM estimates that from 2011-2020 the proportion of girls who have married has decreased by 15% but this still means that during this period there have been around 110million child marriages.³¹
25. In 2018, the South Africa Development Community (SADC) reported that in South Africa 6% of marriages in the country were child marriages.³² This is an increase from 2003 as Girls Not Brides stated that 4% of girls were married before their 18th birthday, and 1% of boys were married before their 15th birthday.³³

26. CEFM leads to human rights violations involving significant opportunities for physical and mental abuse. In 2020 the National Strategic Plan on Gender-Based Violence and Femicide, observed, ‘[t]he intersection of [violence against women] and [violence against children] occurs at various stages of life, but most pronounced with intimate partner violence during adolescence, with child marriage []’.³⁴
27. Specific examples of such violence occurs in the practice of ukuthwala, which constitutes examples of harmful tradition practices of child, early and forced marriage.³⁵ Girls Not Brides have observed that ukuthwala has been used to justify the abduction of girls as young as 12 to be married off to older men.³⁶ The Government has conceded the practice in its Fifth Periodic Report to the Committee on the Elimination of Discrimination against Women in 2019,³⁷ but also provided examples of prosecution of those responsible for forced marriages.³⁸
28. In 2021 the Concluding Comments of the Committee on the Elimination of Discrimination against Women, stated that it was ‘concerned about the persistence of harmful practices, mainly ukuthwala (the abduction of women and girls) for child or forced marriage,’ and called on the Government to:
- [c]riminalize the harmful practice of ukuthwala and ensure that all cases of ukuthwala...are investigated, that perpetrators are prosecuted and adequately punished, and that women and girls in such unions have access to protection, including adequate shelters, and victim support services.³⁹

B. Implementation of Recommendations from the Third Cycle

Recommendations Concerning National Law and Safeguarding Mechanisms

29. The Government received eight recommendations on child marriage. **Kenya** (139.222) recommended the complete harmonization of national law with the CRC. **Haiti** (139.221) recommended the harmonization of national law and practice prohibiting child marriage. **Slovenia** (139. 225) **Sierra Leone** (139.223), **Zambia** (139.224) and **Belgium** (139.226) affirm the need for national law to prohibit marriage below the age of 18. **Hungary** (139.228) and **Germany** (139.227) focused on education and the need for the prosecution of the practice of ukuthwala. **The Government supported four and noted four.** It is clear that the Government is aware of the problem of CEFM, but national law needs to be harmonized, policing mechanisms improved, and educative programmes disseminated to eradicate CEFM from South African society.

C. Recommendations

30. We recommend that the Government of South Africa should:

- i. Harmonize all national law on marriage to clearly delineate a national minimum age of 18-years-old, so that in practice there can be no exceptions due to custom or tradition.
- ii. Ratify the Optional Protocol to the CRC on a communications procedure under article 5, and adopt the inquiry procedure under article 13.
- iii. Initiate an enhanced educative programme to teach society about the human rights violations inflicted by CEFM.
- iv. Adopting the above recommendations (i)-(iv) as an expression of mutual reinforcement of commitments to promote SDG 5.

¹ The core international treaties that South Africa has ratified are: International Covenant on Civil and Political Rights, (1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) 16 December 1966; Convention on the Rights of the Child, G.A. Res. 44/25, 20 November 1989; Convention on the Elimination of All forms of Discrimination Against Women, New York, 18 December 1979; Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965; Convention on the Rights of Persons with Disabilities, New York, 13 December 2006; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 10 December 1984. It is yet to ratify: the International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families, G.A. Res 45/158, 18 December 1990; the Convention for the Protection of All Persons from Enforced Disappearances, New York, 23 December 2010.

² South Africa: Infographic, <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session27/ZA/SOUTH_AFRICA_Infographic_27th.pdf>

³ Ibid.

⁴ UDHR, article 2 ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour...’

⁵ ICCPR, article 2(1) ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour...’ and article 26 ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour...’

⁶ ICESCR, article 2(2) ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour...’

⁷ ICERD, article 1 ‘In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

⁸ ICERD article 4 (a) ‘Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.’

South Africa’s declaration under ICERD is:

The Republic of South Africa-

‘(a) declares that, for the purposes of paragraph 1 of article 14 of the Convention, it recognises the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the Republic’s jurisdiction claiming to be victims of a violation by the Republic in any of the rights set forth in the Convention after having exhausted all domestic remedies.

and

(b) indicates that, for the purposes of paragraph 2 of article 14 of the Convention, the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention.'

⁹ Report of the Independent Expert on the enjoyment of human rights by persons with albinism, Visit to South Africa, A/HRC/43/42/Add.1, 9 January 2020, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/003/52/PDF/G2000352.pdf?OpenElement>> (accessed 10 March 2022).

¹⁰ National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, <https://www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf> p. 6. (accessed 10 March 2022).

¹¹ Ibid, p. 12.

¹² "They Have Robbed Me of My Life" Xenophobic Violence Against Non-Nationals in South Africa, Human Rights Watch, September 2020, <https://www.hrw.org/sites/default/files/media_2020/09/southafrica0920_web_0.pdf> (accessed 10 March 2020).

¹³ Government action plan fails to curb xenophobic violence in SA, Daily Maverick, 17 September 2020, <<https://www.dailymaverick.co.za/article/2020-09-17-government-action-plan-fails-to-curb-xenophobic-violence-in-sa/>> (accessed 10 March 2022)

¹⁴ Supra, n. 9, p. 17.

¹⁵ Commission Mission to South Africa (24 February – 5 March 1998) E/CN.4/1999/15/Add.1 27 January 1999, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/103/91/PDF/G9910391.pdf?OpenElement>> (accessed 10 March 2022).

¹⁶ International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version, UN Publication, Sales No. E.06.XIV.4, 2006, p. 6. <<https://www.ohchr.org/sites/default/files/Documents/Publications/HIVAIDSGuidelinesen.pdf>> (accessed 10 March 2022).

¹⁷ Let Our Actions Count: South Africa's National Strategic Plan for HIV, TB and STIs 2017-2022, <https://sanac.org.za/wp-content/uploads/2017/06/NSP_FullDocument_FINAL.pdf> (accessed 10 March 2022).

¹⁸ Ibid. p. 6.

¹⁹ Ibid, p. 3.

²⁰ The National Strategic Plan, The South African National AIDS Council, <[https://sanac.org.za/about-sanac/the-national-strategic-plan/#:~:text=The%20National%20Strategic%20Plan%20\(NSP,form%20of%20specific%20measurable%20objectives.](https://sanac.org.za/about-sanac/the-national-strategic-plan/#:~:text=The%20National%20Strategic%20Plan%20(NSP,form%20of%20specific%20measurable%20objectives.)> (accessed 10 March 2022).

²¹ Address by Deputy President David Mabuza at the Commemoration of World AIDS Day held at Saselamani Stadium, Xikundu Village, Limpopo Province, 10 December 2021, <<https://sanac.org.za/address-by-deputy-president-david-mabuza-at-the-commemoration-of-world-aids-day-held-at-saselamani-stadium-xikundu-village-limpopo-province/>> (accessed 10 March 2022).

²² South Africa: Country Factsheets, 2020, UNAIDS, <<https://www.unaids.org/en/regionscountries/countries/southafrica>> (accessed 10 March 2022).

²³ Sara M. Allinder and Janet Fleischman, The World's Largest HIV Epidemic in Crisis: HIV in South Africa, Center for Strategic and International Studies, 2 April 2019, <<https://www.csis.org/analysis/worlds-largest-hiv-epidemic-crisis-hiv-south-africa>> (accessed 10 March 2022).

²⁴ In this submission definitions are adopted of 'child marriage,' 'early marriage,' and 'forced marriage,' as provided by the Office of the High Commissioner for Human Rights (OHCHR). The Office of the High Commissioner for Human Rights identifies that:

"child marriage" is a marriage in which at least one of the parties is a child. According to the Convention on the Rights of the Child, a child is "every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier (CRC art 1).

"early marriage" is often used interchangeably with "child marriage" and refers to marriages involving a person below 18 in countries where the age of majority is attained earlier or upon marriage. Early marriage can also refer to marriages where both spouses are 18 or older but other factors make them unready to consent to marriage, such as their level of physical, emotional, sexual and psychosocial development, or a lack of information regarding the person's life options.

“forced marriage” is any marriage which occurs without the full and free consent of one or both of the parties and/or where one or both of the parties is/are unable to end or leave the marriage, including as a result of duress or intense social or family pressure.

See, Preventing and eliminating child, early and forced marriage, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/26/22, 2 April 2014, paras. 4-6. See also, Child and forced marriage, including in humanitarian settings, OHCHR, Women’s Rights and Gender Section, <<https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx>> (accessed 10 March 2022). There are various acronyms to describe this human rights issues: Early Child and Forced Marriage (ECFM), Child Marriage (CM), Forced Marriage (FM), but in this submission we adopt ‘Child, Early and Forced Marriage,’ (CEFM – which is adopted from the Sustainable Development Goal 5.3) as we take a child to be any person below the age of 18, and agree with the evolving human rights position that the circumstance of a marriage of someone below the age of 18 is *ipso facto* a human rights violation. It is noted that the category of ‘early’ needs further clarification to distinguish it from children up to the age of 18, with the timeframe where ‘early’ is applied to. The word ‘early’ could also have psychological components to it in the mental health assessment of vulnerable people susceptible to forced marriage. The General Comment No. 20 CRC, para 40. The General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, ‘reaffirms that the minimum age limit should be 18 years for marriage. See also, para 69. ‘The Committee is deeply concerned at the challenges faced by many States to achieve equality in the enrolment of girls and boys and keep girls in school beyond primary education. Investment in girls’ secondary education, a commitment necessary to comply with articles 2, 6 and 28 of the Convention, also serves to protect girls from child and forced marriage, sexual exploitation and early pregnancy.’ The Convention on the Rights of the Child (1989 article 2 (2), states:

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

Article 6(2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 28 (1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.

This reflected the threshold identified in the Convention for the Elimination of all forms of Discrimination Against Women, (1979) (CEDAW) article 16(2), which provides that, ‘the betrothal and the marriage of a child shall have no legal effect,’ and the Convention on the Rights of the Child (1989) (CRC), article 1 states, ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ As a child is every person below 18-years-old, this is the age limit for determining child and early marriage. The exception provided for the possibility of ‘majority’ being attained before this age is not applicable in the context of CEFM.

²⁵ Child, early and forced marriage, UNGA/75/262, 28 July 2020.

²⁶ Child, early and forced marriage, UNGA Resolution 73/153, A/RES/73/153, 17 December 2017.

²⁷ Child, early and forced marriage in times of crisis, including the COVID-19 pandemic, 7 October 2021, A/HRC/48/L.7Rev.1, para 1 states:

[u]rges States to respect, protect and fulfil the human rights of all women and girls, including those subject to child, early and forced marriage, which include the right to education and the right to the highest attainable standard of physical and mental health, including the right to sexual and reproductive health, to promote equality in all aspects of marriage and its dissolution...

²⁸ UNFPA-UNICEF Global Programme to End Child Marriage, <<https://www.unicef.org/protection/unfpa-unicef-global-programme-end-child-marriage>> (accessed 10 March 2022).

²⁹ Sustainable Development Goals, <<https://sdgs.un.org/goals/goal5>> (accessed 10 March 2022).

³⁰ See, Child Marriage: Latest Trends and Future Prospects, UNICEF, 2018, <<https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>> (accessed 10 March 2022).

³¹ Act Now: Accelerating Gender Equality by Eliminating Child Marriage in a Pandemic, UNFPA-UNICEF Global Programme to End Child Marriage, Annual Report, October 2020, p. 8. <<https://www.unicef.org/media/108461/file/Act%20now.pdf>> (accessed 10 March 2022).

³² A Guide to Using the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage For Parliamentarians, Civil Society Organisations and Youth Advocates, p. 6 <<https://www.girlsnotbrides.org/documents/885/SADC-Model-Law-Toolkit.pdf>> (accessed 10 March 2022).

³³ Girls Not Brides, South Africa, <<https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas-regions-and-countries/south-africa/>> (accessed 10 March 2022).

³⁴ National Strategic Plan on Gender-Based Violence and Femicide: Human Dignity and Healing, Safety, Freedom and Equality in Our Lifetime, 11 March 2020 <https://www.gov.za/sites/default/files/gcis_document/202006/stratplan-gbvs.pdf> (accessed 10 March 2022).

³⁵ In 1954 the General Assembly of the United Nations adopted a resolution reviewing the practices affecting the human dignity of women and the Preamble observed that:

in certain areas of the world, women are subject to customs, ancient laws and practices relating to marriage and the family which are inconsistent with [the UDHR].

and that:

the elimination of such customs, ancient laws and practices would tend to the recognition of the human dignity of women and contribute to the benefit of the family as an institution.

and so under article 1, the State should take all appropriate measures to:

eliminating completely child marriages and the betrothal of young girls before the age of puberty and establishing appropriate penalties where necessary.

Status of women in private law: customs, ancient laws and practices affecting the human dignity of women General Assembly of the United Nations declared, by resolution 843 (IX) of 17 December 1954, Article 1:

[u]rges all States, including States which have or assume responsibility for the administration of Non Self-Governing and Trust Territories, to take all appropriate measures in the countries and Territories under their jurisdiction with a view to abolishing such customs, ancient laws and practices by ensuring complete freedom in the choice of a spouse; abolishing the practice of the bride-price; guaranteeing the right of widows to the custody of their children and their freedom as to remarriage; eliminating completely child marriages and the betrothal of young girls before the age of puberty and establishing appropriate penalties where necessary; establishing a civil or other register in which all marriages and divorces will be recorded; ensuring that all cases involving personal rights be tried before a competent judicial body; ensuring also that family allowances, where these are provided, be administered in such a way as to benefit directly the mother and child.

³⁶ Girls Not Brides, South Africa, <<https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/south-africa/>> (accessed 10 March 2022).

³⁷ Fifth periodic report submitted by South Africa, CEDAW/C/ZAF/5, 28 October 2019, the state noted:

Ukuthwala is an “irregular” form of marriage which was practised in a certain culture. It was characterised by a staged abduction between two consenting adults who either lacked the bride price to get married, or whose parents were disapproving of the proposed marriage. The main aim was to force the girl’s family to enter into marriage negotiations. (para 37).

Section 28 of the Constitution states that a child’s best interests are of paramount importance in every matter concerning the child and that a “child” means a person under the age of 18 years. Therefore custom, cultural or religious rights cannot undermine the rights of children. South Africa regards the abuse of Ukuthwala as a criminal and harmful practice that robs children of their childhood and impacts negatively on their health, development and gender equality. The practices that are dehumanising to young girls and women are regarded as unfair discrimination and rights espoused in PEPUDA can be enforced in the Equality Courts. (para 39).

³⁸ See, *Jezile v. S and Others* [2015] ZAWCHC 3110.

³⁹ Concluding observations on the fifth periodic report of South Africa, CEDAW/C/ZAF/CO/5, 23 November 2021

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fZAF%2fCO%2f5&Lang=en> p. 9 (accessed 10 March 2022).