

**THE HUMAN RIGHTS RESPONSIBILITIES OF HOST  
STATES IN RELATION TO CHILD MARRIAGES  
INVOLVING REFUGEES**

**A STUDY OF EUROPEAN RESPONSES TO THE EUROPEAN  
REFUGEE CRISIS**

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## ABSTRACT

Child marriage is defined as a marriage or informal union in which one of the spouses is under the age of 18. It is a widespread form of gender-based violence rooted in gender inequality, religious and cultural beliefs, and traditions. The practice is often associated with poverty, lack of education, domestic violence, and early pregnancy which entails serious health implications for girls. In times of armed conflict, child marriage frequently occurs as a coping strategy due to an increase of poverty and security threats. Ongoing crises in the Middle East and Africa have brought hundreds of thousands of refugees to Europe. Among them are hundreds of minor married girls, and European states are often unsure how to deal with them.

This thesis aims to identify state obligations under international and European regional human rights law and refugee law. It finds that international human rights documents seek to eliminate child marriage through criminalisation of the practice but fail to determine a minimum age of marriage. International refugee law recognises child marriage as an asylum ground but does not stipulate binding provisions regarding family unity with the girl's parents or her husband. Analysis of European law shows that the approach adopted by the Council of Europe corresponds with UNHCR guidelines, including a broad understanding of family. The European Union, on the other hand, follows a more restrictive way, excluding married minors from family reunification with their parents and preventing them from reunification with their spouse until a certain age. Several European states have tightened their laws and no longer recognise any child marriages concluded abroad. This paper argues that this narrow approach ignores the need for a case-by-case assessment and thus violates international standards of child protection, particularly the best interests principle.

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## TABLE OF CONTENTS

PLAGIARISM DECLARATION.....	i
ABSTRACT.....	ii
ACKNOWLEDGEMENTS .....	iii
TABLE OF CONTENTS.....	iv
LIST OF ABBREVIATIONS .....	vii
CHAPTER 1.....	1
INTRODUCTION.....	1
1. INTRODUCTION AND PROBLEM STATEMENT.....	1
2. RESEARCH QUESTIONS AND OBJECTIVES .....	5
3. SIGNIFICANCE OF THIS THESIS .....	5
4. LITERATURE REVIEW .....	7
5. METHODOLOGY.....	8
6. CHAPTER OUTLINE.....	9
CHAPTER 2.....	11
UNDERSTANDING CHILD MARRIAGE.....	11
DEFINITION, CAUSES, AND CONSEQUENCES .....	11
1. INTRODUCTION.....	11
2. DEFINITION.....	11
3. CAUSES AND CONSEQUENCES.....	12
3.1. Gender inequality.....	12
3.2. Religion, culture, tradition, and honour .....	13
3.3. Education.....	15
3.4. Poverty .....	16
3.5. Domestic violence and sexual abuse.....	17
3.6. Health.....	18

3.7. Lack of birth and marriage certificates .....	19
4. LINKS TO OTHER HUMAN RIGHTS ISSUES .....	20
4.1. Sexual exploitation, slavery, and forced child labour .....	20
4.2. Statelessness .....	23
5. CHILD MARRIAGE IN ARMED CONFLICTS AND WAR .....	24
6. CONCLUSION.....	27
CHAPTER 3.....	29
CHILD MARRIAGE IN INTERNATIONAL HUMAN RIGHTS LAW AND REFUGEE LAW .....	29
1. INTRODUCTION.....	29
2. INTERNATIONAL HUMAN RIGHTS LAW .....	29
2.1. Minimum age for marriage .....	30
2.2. State obligation to prevent child marriages .....	36
3. INTERNATIONAL REFUGEE LAW .....	39
3.1. Flight from an (impending) marriage .....	40
3.2. Family reunification with her parents .....	45
3.3. Arrival with the girl's husband or subsequent reunification with him ....	46
4. CONCLUSION.....	47
CHAPTER 4.....	50
THE EUROPEAN APPROACH.....	50
1. INTRODUCTION.....	50
2. COUNCIL OF EUROPE.....	51
2.1. Gender-based asylum claims.....	53
2.2. Family unity.....	54
3. EU .....	56
3.1. Family reunification with her parents .....	58
3.2. Arrival with her husband or subsequent reunification with him .....	59
4. NATIONAL APPROACHES .....	59

4.1. Germany.....	59
4.2. Netherlands and Sweden.....	61
5. CONCLUSION.....	61
CHAPTER 5.....	64
CONCLUSION AND RECOMMENDATIONS.....	64
BIBLIOGRAPHY .....	68

## LIST OF ABBREVIATIONS

BIA	Best Interests Assessment
BID	Best Interests Determination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Courts of Human Rights
EU	European Union
FRD	Family Reunification Directive
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced People
ILO	International Labour Organization
QD	Qualification Directive
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund (formerly: United Nations International Children's Emergency Fund)

# CHAPTER 1

## INTRODUCTION

### 1. INTRODUCTION AND PROBLEM STATEMENT

In 2011, the United Nations General Assembly adopted a resolution<sup>1</sup> that designated 11 October as the annual International Day of the Girl Child, the first of which was celebrated in 2012 and addressed the goal to end child marriage.<sup>2</sup>

Child marriage has been identified and condemned by the international community as a gross violation of human rights, a harmful practice, and a severe form of gender-based violence.<sup>3</sup> Since inequality between women and men has been recognised to be a major obstacle to global progress, target 5.3 of the Sustainable Development Goals<sup>4</sup> lists the elimination of ‘all harmful practices, such as child, early and forced marriage and female genital mutilation’ as one means of achieving the goal of gender equality and empowerment of girls and women and urges governments to take adequate measures to meet this target.

UNICEF defines child marriage ‘as a formal marriage or informal union before age 18’.<sup>5</sup> Although boys are also affected by this phenomenon, the vast majority of children involved are girls, which places child marriages at the interface between children’s rights and women’s rights. Child marriage remains widespread across all continents and cultures. UNICEF estimates that ‘more than 650 million women alive today were married as children.’<sup>6</sup> Every year, 12 million underage girls get married.<sup>7</sup> In 2018, around 21 per cent of the young female world population have been subjected

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<sup>1</sup> UN General Assembly Resolution 66/170 ‘International Day of the Girl Child’, UN Doc. A/RES/66/170, adopted on 19 December 2011.

<sup>2</sup> UN Women ‘International Day of the Girl Child 2012’, available at <http://www.unwomen.org/en/news/in-focus/girl-child/2012>, accessed on 15 June 2018.

<sup>3</sup> UN General Assembly Resolution 69/156 ‘Child, Early and Forced Marriage’, UN Doc. A/RES/69/156, adopted on 18 December 2014.

<sup>4</sup> UN General Assembly Resolution 70/1 ‘Transforming our World: The 2030 Agenda for Sustainable Development’, UN Doc. A/RES/70/1, adopted on 25 September 2015.

<sup>5</sup> UNICEF ‘Child Marriage’, available at [https://www.unicef.org/protection/57929\\_58008.html](https://www.unicef.org/protection/57929_58008.html), accessed on 14 June 2018.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

to child marriage.<sup>8</sup> The regions with the highest rates of child marriage are sub-Saharan Africa and South Asia.<sup>9</sup>

The factors correlated to child marriage, most prominently gender inequality, poverty, a lack of education, and religious and cultural beliefs, are complex and tend to be both a cause and consequence of child marriage. In conflict settings, additional factors such as increased poverty and an exacerbated level of violence may induce parents or legal guardians to marry off a girl in her adolescence, more often than not against her will in a desperate attempt to protect her.<sup>10</sup> However, child marriages have a devastating impact on the girls' lives and impede the enjoyment of a range of fundamental rights. With the link to early childbirth, girls face a much higher risk of pregnancy and birth-related complications and long-term health problems. They are likely to drop out of school, which contributes to the perpetuation of poverty. Furthermore, child brides often become victims of domestic violence as a result of power and age inequality between the spouses.<sup>11</sup>

Child marriage is not a phenomenon that is unknown in modern Europe. Official rates vary between two per cent in Ukraine and 23 per cent in Turkey, but real figures are likely to be higher as child marriages are often not registered.<sup>12</sup> Child marriages are most prevalent among poor rural communities and fringe groups such as the Roma people in the Balkan countries.<sup>13</sup> A recent study shows that over half of all Roma girls in Serbia marry before their 18<sup>th</sup> birthday.<sup>14</sup> In the large majority of European countries, the minimum age for marriage is set at 18 years, but many allow for a marriage at a younger age, mostly 16, with parental and/or judicial consent.<sup>15</sup>

Since 2015, Europe has experienced a massive influx of refugees and other migrants. The highest numbers of asylum applications in the European Union (EU)

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<sup>8</sup> UNICEF 'Child Marriage: Latest Trends and Future Prospects' (2018) UNICEF, New York, 3.

<sup>9</sup> UNICEF 'Infographic: Child Marriage Around the World', available at [https://www.unicef.org/protection/57929\\_child-marriage-infographic.html](https://www.unicef.org/protection/57929_child-marriage-infographic.html), accessed on 14 June 2018.

<sup>10</sup> Girls Not Brides 'Why Does Child Marriage Happen?', available at <https://www.girlsnotbrides.org/why-does-it-happen/>, accessed on 14 June 2018.

<sup>11</sup> S Jain & K Kurz *New Insights on Preventing Child Marriage. A Global Analysis of Factors and Programs* (2007) 7-9.

<sup>12</sup> UNICEF 'Preventing Child Marriage', available at <https://www.unicef.org/eca/what-we-do/child-marriage>, accessed on 12 June 2018.

<sup>13</sup> Ibid.

<sup>14</sup> I Djordjevic & L Gavrilovic *Child Marriage Among the Roma Population in Serbia* (2017) 5.

<sup>15</sup> United Nations *2016 Demographic Yearbook* 67 ed (2017) 609-610.

were reached in 2015 and 2016, with around 1.3 billion asylum applications per year.<sup>16</sup> Those figures dropped to about 705 000 asylum applications in 2017. 650 000 of those were first time asylum applicants. Most of the refugees came from Syria, representing a share of 27.8 per cent in 2016 and 15.8 per cent in 2017. In the same year, other significant countries of origin were Iraq and Afghanistan, with 7 per cent of asylum seekers coming from those states, respectively, and Nigeria and Pakistan, that accounted for 6 per cent and 5 per cent of refugees, respectively. In 2017, only one quarter of asylum seekers in the age group of 14 to 17 was female; amongst refugees between 0 and 13 years, girls accounted for 48 per cent of applications.<sup>17</sup>

While girls only form a relatively small part of minor refugees in the EU, they face specific problems and dangers in areas of conflict in their home countries as well as during the flight, such as sexual violence and sexual exploitation. One way in which families try to protect their underage daughters and, consequently, the family's honour, is to marry them off. Even though child marriage was a common practice in Syria before the conflict, figures show that the number of Syrian child brides in refugee camps in neighbouring countries is on the rise. Whereas in pre-war Syria until 2011, around 13 per cent of women were married by the age of 18,<sup>18</sup> numbers have risen to 35 per cent of all Syrian refugees in Jordan, according to statistics of the Chief Islamic Justice Department for 2015.<sup>19</sup> For the same year, a study conducted by the Université Saint-Joseph of Beirut, Lebanon, found that 23 per cent of Syrian refugee girls staying in Lebanon were married before the age of 18.<sup>20</sup> However, actual figures could be higher due to the high number of unregistered marriages.

When those child brides move on to Europe to seek asylum, be it accompanying their husband, or applying for family reunification with either the husband or their parents who are already present in European territory, their host states have to decide

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<sup>16</sup> Eurostat Statistics explained 'Asylum Statistics' (16 March 2018), available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics#Main\\_statistical\\_findings](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Main_statistical_findings), accessed on 13 June 2018.

<sup>17</sup> Ibid.

<sup>18</sup> Girls Not Brides 'Child Marriage and the Syrian Conflict: 7 Things You Need to Know' (20 June 2017), available at <https://www.girlsnotbrides.org/child-marriage-and-the-syrian-conflict-7-things-you-need-to-know/>, accessed on 13 June 2018.

<sup>19</sup> M Ghazal 'Child Marriage on the Rise Among Syrian Refugees' *The Jordan Times* (11 June 2016), available at <http://www.jordantimes.com/news/local/child-marriage-rise-among-syrian-refugees>, accessed on 13 June 2018.

<sup>20</sup> Saint Joseph University 'News Brief Child Marriage' (30 June 2015), available at <http://www.sciences-po.usj.edu.lb/pdf/News%20Brief%20Too%20Young%20To%20Wed.pdf>, accessed on 13 June 2018.

the fundamental question how they are supposed to deal with the girls. The issue has caused heated political and public debates and further fuelled increasing aversions against refugees among the population. Some states, for example Denmark and Norway, have changed their initial practice of letting child brides stay with their husbands and have turned to separating the couples unless there are exceptional circumstances.<sup>21</sup> The Netherlands and Germany have gained major attention for changes in their respective domestic legislation regarding child marriages. Until December 2015, the Dutch law would recognise child marriages concluded abroad, provided that the marriage had been registered in the couple's home state and was considered compatible with the Dutch *ordre public*. Under the Forced Marriage Prevention Act,<sup>22</sup> however, 'a marriage concluded abroad while one of the spouses is below the age of 18 will not be recognised in the Netherlands, unless both spouses have reached the age of 18 in the meanwhile'.<sup>23</sup> Similarly, the German legislature adopted the Federal Act on Combatting Child Marriage<sup>24</sup> in July 2017. Referring to marriages concluded abroad, Art 2(1) of this act stipulates that such a marriage is void under German law when one of the spouses is a foreigner and was under 16 at the time of the wedding, and when one of the spouses was between 16 and 18 years old, the marriage can be dissolved by a German judge. Art 2(4) exempts cases in which the minor spouse was born before 22 July 1999 or where the marriage, which is valid under foreign law, existed until the minor spouse reached the age of majority and none of the spouses had their habitual residence in Germany to that date.

These measures have been justified on the ground that they advance the best interests of the child brides. However, the principle of the best interests of the child is just one factor of many that have to be considered when dealing with child marriages, and it appears that states neglect their other international obligations stemming from human rights law. The issue at hand is far more complex than governments may want to realise and deserves a careful and thoughtful legislative process.

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<sup>21</sup> Women in the World 'Some Child Brides Tolerated in Scandinavian Refugee Asylum Centers, Despite Ban' (22 April 2016), available at <https://womenintheworld.com/2016/04/22/some-child-brides-tolerated-in-scandinavian-refugee-asylum-centers-despite-ban/>, accessed on 13 June 2018.

<sup>22</sup> De Wet Tegengaan Huwelijksdwang, Gazette 2015, 354.

<sup>23</sup> A Wijffelman 'Child Marriage and Family Reunification: An Analysis Under the European Convention on Human Rights of the Dutch Forced Marriage Prevention Act' (2017) 35 *Netherlands Quarterly of Human Rights* 104 at 105.

<sup>24</sup> Gesetz zur Bekämpfung von Kinderehen, Federal Law Gazette I 48/2017, 2429.

This study will concentrate on child marriages that involve girls who got married before entering European territory and are still under the age of 18 when doing so. While other cases also meet the definition of child marriage, mainly those where the girl bride has come of age in the meantime, the issue of underage girls seems far more pressing in the current political debate in Europe.

## **2. RESEARCH QUESTIONS AND OBJECTIVES**

This mini-thesis aims to provide a comprehensive overview and understanding of child marriage in the international and European regional framework as well as in the context of refugee law. As European states have been taken rather by surprise with this phenomenon during the ongoing influx of refugees, this thesis undertakes to examine their obligations under international and regional human rights law through a women's and children's rights lens.

In particular, this thesis aims to answer the following research questions:

- a. What is the status of child marriage in international and European regional human rights law?
- b. What are the implications of the prohibition of child marriage in international and European regional human rights law?
- c. What role does the marital status of a child bride play in refugee law?
- d. How and to what extent are European states obliged to protect refugee child brides?

In addressing these questions, the thesis seeks to identify the fundamental principles that should guide European governments in their policy-making and propose recommendations on how states can ensure that child refugee brides enjoy their human rights.

## **3. SIGNIFICANCE OF THIS THESIS**

The phenomenon of child marriages has gained considerable attention of international organisations, human rights agencies, and other international and national stakeholders and decision-makers. This has led to the adoption of an increasing number of

international and national legal documents, policies, laws, and other measures to prevent child marriages.

Obviously, the focus lies on the fight to end child marriage. International conventions urge states to prohibit and criminalise child marriages, and debates and aid programmes, aware of the interlinked causes of child marriage, revolve around the question of how to improve the dire living conditions of families in states with high rates of child marriage in order to discourage parents from marrying off their underage daughters. Most studies, however, focus on settings of relative peace, where it is comparatively more likely that measures reach their respective target groups and where it takes less effort to evaluate outcomes and effects. Remarkably less attention has been paid to child marriages in settings of war. It is a well-known fact that violence against women exacerbates during armed conflicts, but the overall complexity of such circumstances and the raise of violence in general often overshadow this problem.

Due to the novelty of child marriages in the refugee context on the European continent, even less literature can be found in this context. The aspect of refugee law adds a new dimension to the discussion regarding child marriages. Here, the focus shifts from prevention towards the fundamental issue of how to deal with child marriages that existed prior to the entry to the host state and related implications regarding refugee status of family members involved.

It is an essential obligation of every European state to protect a refugee's fundamental human rights, regardless of their marital status. Therefore, this thesis is significant as it will examine the relevant international and European regional legislative frameworks regarding state obligations to protect a child bride's human rights. It will help understand those obligations and outline the fundamental principles that European states have to take into account when dealing with refugee child marriages.

This dissertation aims to contribute to the scarce literature on state obligations in the context of child marriages and refugee law by answering the research questions elaborated earlier and hopes to provide useful conclusions that can guide European states that are in the process of adapting their domestic laws in view of the increasing number of child brides seeking asylum in their territory.

#### 4. LITERATURE REVIEW

In recent years, child marriage has gained considerable attention of human rights agencies and scholars, with a focus on the causes and negative consequences of this phenomenon. All authors agree that child marriage is deeply rooted in gender discrimination and that its manifold causes and consequences are interconnected.

Susanne Louis B. Mikhail describes child marriage as a form of sexual exploitation, given that in most cases it is the parents and not the girl who consent to the marriage and because some form of payment to another party than the girl is involved.<sup>25</sup> Using similar arguments, Elizabeth Warner identifies child marriage as a form of trafficking in girls, forced prostitution, or forced labour as the girls are ‘too young to make an informed choice in the matter.’<sup>26</sup>

Aisha Hutchinson and others assert that armed conflicts and displacement make girls and women more vulnerable to sexual violence as family and community as well as governmental networks and structures break down. Hence, child marriages ‘may be seen as protective strategies or the only option for vulnerable young women and their families. Nonetheless, while such strategies might ensure survival in the short term, in the longer term they can have many consequences for women’s sexual and reproductive health.’<sup>27</sup>

Sheila Menz points out the link between child marriages and statelessness and argues that child marriage ‘can also be a modality through which women seek to gain protection from the vulnerabilities associated with statelessness – protection the institutions of one’s home nation normally provides.’<sup>28</sup> The relevance of this argument in the context of armed conflicts and refugee law is obvious.

Nora Honkala criticises that refugee women who base their claim on the fact that they have fled from forced marriages are mostly subsumed under the ground of a particular social groups, leaving the ground of political opinion narrowly interpreted

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<sup>25</sup> SLB Mikhail ‘Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation’ (2002) 10 *Gender & Development* 43 at 44-6.

<sup>26</sup> E Warner ‘Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls’ (2004) 12 *American University Journal of Gender, Social Policy & the Law* 233 at 235.

<sup>27</sup> A Hutchinson, P Waterhouse, J March-McDonald, S Neal & Roger Ingham ‘Understanding Early Marriage and Transactional Sex In the Context of Armed Conflict: Protection at a Price’ (2016) 42 *International Perspectives on Sexual and Reproductive Health* 45 at 47.

<sup>28</sup> S Menz ‘Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community’ (2016) 104 *California Law Review* 497 at 501-2.

and underused. This approach would deny women the ability and right to hold a political opinion and therefore contribute to the perpetuation of the public/private dichotomy and denial of women's agency. As Honkala finds, '[b]y opposing such practices as FGM and forced marriage – intimately tied with patriarchal power structures – a woman *is* expressing her political opinion.'<sup>29</sup>

Samantha Arnold states that the increasing influence of human rights law on the definition of persecution in international refugee law 'has led to the expansion of the term to include various harms that affect children (among others), such as (...), underage marriage (...).'30 She also stresses that in cases of child marriages, parents or caregivers are the persecutors and act as barriers to a girl's access to adequate state protection while the state is unwilling or unable to interfere in this allegedly private matter.

The literature review shows that most existing sources focus on isolated aspects of child marriage, for example, its causes, consequences, and prevention, child marriage in conflict settings, or child marriage as an asylum ground. However, few authors, or none, have analysed states' human rights obligations regarding refugee child brides in the asylum procedure. In light of the European refugee crisis, there is hence a significant gap in the existing literature that this thesis seeks to close.

## 5. METHODOLOGY

This mini-thesis will adopt a literature-based approach and examine the existing primary and secondary sources relevant to the topic. Primary sources are mainly international and regional human rights treaties, in particular the Universal Declaration of Human Rights<sup>31</sup> (UDHR), International Covenant on Civil and Political Rights<sup>32</sup>

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<sup>29</sup> N Honkala "'She, of Course, Holds No Political Opinions" Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims' (2017) 26 *Social & Legal Studies* 166 at 171.

<sup>30</sup> S Arnold *Children's Rights and Refugee Law. Conceptualising Children within the Refugee Convention* (2018) 93.

<sup>31</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/RES/3/217A, adopted on 10 December 1948.

<sup>32</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, adopted on 16 December 1966, entered into force on 23 March 1976.

(ICCPR), the International Covenant on Economic, Social and Cultural Rights<sup>33</sup> (ICESCR), the Convention on Consent, to Marriage, Minimum Age of Marriage and Registration of Marriages<sup>34</sup> (Marriage Convention), the Convention on the Elimination of All Forms of Discrimination Against Women<sup>35</sup> (CEDAW), the Convention on the Rights of the Child<sup>36</sup> (CRC), the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>37</sup> (usually referred to as European Convention on Human Rights – ECHR), the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence<sup>38</sup> (hereinafter: Istanbul Convention) and the Convention Relating to the Status of Refugees<sup>39</sup> (hereinafter: Refugee Convention). The analysis of their relevant provisions is completed by General Comments and Concluding Observations of treaty monitoring bodies and significant jurisdiction of the European Court of Human Rights (ECtHR). Those documents outline state obligations and principles that have to be considered when adopting national laws and measures.

Secondary resources will be consulted in order to provide additional information on the subject matter and allow for an in-depth analysis thereof. This will include books, scholarly journals and articles, and internet sources.

## 6. CHAPTER OUTLINE

This chapter has set out the problem statement that European states have to deal with married minor refugee girls increasingly and tend to adopt policies and laws that might contravene their obligations stemming from international and regional human rights

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<sup>33</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, adopted on 16 December 1966, entered into force on 3 January 1976.

<sup>34</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 UNTS 231, adopted on 7 November 1962, entered into force on 9 December 1964.

<sup>35</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, adopted on 18 December 1979, entered into force on 3 September 1981.

<sup>36</sup> Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49, adopted on 20 November 1989, entered into force on 2 September 1990.

<sup>37</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, ETS No. 005, adopted on 4 November 1950, entered into force on 3 September 1953.

<sup>38</sup> Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS No. 210, adopted on 11 May 2011, entered into force on 1 August 2014.

<sup>39</sup> Convention Relating to the Status of Refugees, 189 UNTS 150, adopted on 28 July 1951, entered into force on 22 April 1954.

instruments. It has further specified the central research question: What obligations do European states have when dealing with refugee child brides? Many European states seem to feel at unease when confronted with these girls in the asylum process and have changed their practices after public outcries, perhaps at the cost of the girls' rights. Some states have adopted laws that may even contravene international and regional human rights documents. Hence, this study is important as it aims to give a comprehensive overview on the existing international and regional European human rights obligations regarding child marriage and refugee law. This will contribute to the scarce literature on child brides in European refugee law. Furthermore, this chapter has explained the methodology employed to do so.

Chapter Two will provide general information on child marriages. It will therefore discuss its definition, its causes and consequences, and various other factors related to child marriages. The analysis will then focus on child marriage in wars and conflicts and examine how this context affects child marriage and the children involved.

The third chapter will elaborate on how international human rights frameworks deal with the issue of a minimum age for marriage and seeks to map out state obligations regarding the protection of girls. It will also analyse child marriage in the context of international refugee law.

Then, Chapter Four will explore the European framework regarding child marriages. This includes relevant provisions of conventions of the Council of Europe, jurisdiction of the ECtHR, as well as legislation of the EU. It will also analyse European national laws that have been changed in the context of the recent refugee crisis.

The fifth chapter will provide a conclusion of the findings.

## CHAPTER 2

### UNDERSTANDING CHILD MARRIAGE

#### DEFINITION, CAUSES, AND CONSEQUENCES

### 1. INTRODUCTION

Chapter 2 provides a comprehensive overview of the causes and consequences associated with child marriage in order to explain the impact it has not only on a girl and her family but also on the community and nation as a whole. The chapter will begin with a discussion of the definition of ‘child marriage’ and its components. The following part will then focus on the general factors that contribute to child marriage, while the fourth part will explore and analyse links between child marriage and other human rights abuses and issues. The final part will discuss how armed conflicts and wars affect parents’ decisions to marry off their underage daughters.

### 2. DEFINITION

As explained in Chapter 1, child marriage is a form of gender-based violence and has been defined by the UN as a marriage in which at least one spouse is under the age of 18. Human rights documents, first and foremost the CRC, define or refer to a child as a person younger than 18.<sup>40</sup> In the context of child marriages, the term marriage does not only refer to a legal matrimony in a strict sense but embraces every form of ‘betrothal or union between two people, recognised under civil law, religious law and/or customary rites’,<sup>41</sup> regardless of a possible formal registration of such marriage.<sup>42</sup> Hence, ‘[c]hild marriage is defined as any legal or customary union involving a boy or girl below the age of 18.’<sup>43</sup>

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<sup>40</sup> Art 1 CRC.

<sup>41</sup> C Turner *Out of the Shadows: Child Marriage and Slavery* (2013) 6.

<sup>42</sup> Ibid.

<sup>43</sup> J Parsons, J Edmeades, A Kes, S Petroni, M Sexton & Q Wodon ‘Economic Impacts of Child Marriage: A Review of the Literature’ (2015) 13 *The Review of Faith & International Affairs* 12 at 12.

This generalist approach to the definition of a child does not take into account notions of childhood and transition to adulthood that may differ according to culture, society, and time. Historically, the understanding of what constitutes childhood and what is expected of children has changed constantly. In many cultures, adolescence has only gradually gained recognition as a specific phase between childhood and adulthood. Since there is no global understanding of childhood, the rather Western idea thereof as enshrined in human rights documents does not correspond to the real-life experiences of most children in developing countries.<sup>44</sup> Notwithstanding this valid argument, this paper will employ the standardised definition of child marriage.

In general, child brides have not yet reached the state's age of legal majority when they enter a marriage. The younger the girl, the less capable she is to fully understand the purport of marriage and freely to give her consent. Additionally, most child marriages are arranged by the parents or guardians; the very persons she has been taught to respect and obey. These factors place child marriage on the same footing as forced marriages.<sup>45</sup>

### **3. CAUSES AND CONSEQUENCES**

As this chapter will demonstrate, the causes and consequences associated with child marriage are complex and heavily interconnected. While some factors can be observed in all settings where child marriages occur, others are more specific and depend on the respective circumstances.

#### **3.1. Gender inequality**

Gender inequality is deeply rooted in most societies, regardless of their history, ethnicity, culture, or religion. Patriarchal systems use natural sexual functions to ascribe different roles to men and women and place lower value on women and girls who are expected to comply with certain behaviour and expectations. For example, women's ability to give birth has resulted in the stereotypical role as housewives and

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<sup>44</sup> A Bunting 'Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue' (2005) 14 *Social & Legal Studies* 17 at 18 and 21-2.

<sup>45</sup> R Gaffney-Rhys 'International Law as an Instrument to Combat Child Marriage' (2011) 15 *The International Journal of Human Rights* 359 at 365-6.

primary caregivers who stay at home and do not play a role in public life. In many cases, discrimination is systemic and institutionalised, legally, socially, economically, and politically. As a result, girls and women are deprived of their rights in all spheres of life.<sup>46</sup> Although discrimination on grounds of sex and gender has been banned by the major international human rights documents,<sup>47</sup> customary law, and general principles of law,<sup>48</sup> discrimination and inequality remain persistent worldwide.

Based on these imputed stereotypical roles it is perceived that girls are ready for marriage at a younger age, generally when hitting puberty, than boys or men who are expected to be financially stable before they marry.<sup>49</sup> Younger brides promise longer periods of fertility and thus more children, a family constellation that is still preferred in conservative societies. Furthermore, they are expected to be more submissive and obedient than older girls and adult women.<sup>50</sup> Often this leads to a considerable age disparity between the spouses, especially in polygynous societies. This age gap contributes to gender inequality within the marriage as young girls are less likely to voice their opinion and assert themselves, leaving them vulnerable to the control and authority of their husband.<sup>51</sup>

### 3.2. Religion, culture, tradition, and honour

Like many other gender-specific violations of human rights, child marriage is a harmful traditional practice based on certain interpretations of cultural and religious beliefs.<sup>52</sup> As Wadesango, Rembe, and O Chabaya note, '[h]armful traditional and cultural practices maintain the subordination of women in society and legitimize and perpetuate gender based violence.'<sup>53</sup> Child marriage is not linked to one singular religion but occurs in all denominations.<sup>54</sup> All major religions allocate different roles

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<sup>46</sup> K van Marle & E Bonthuys 'Feminist Theories and Concepts' in E Bonthuys & C Albertyn (ed) *Gender, Law and Justice* (2007) 20-2.

<sup>47</sup> See Art 2 UDHR, Art 2(1), 3, and 26 ICCPR, Art 2(2) and 3 ICESCR, and Art 2 CEDAW.

<sup>48</sup> D Cassel & J Guzman 'The Law and Reality of Discrimination Against Women' in KD Askin & DM Koenig (ed) *Women and International Human Rights Law* (1999) 287-95.

<sup>49</sup> Bunting op cit (n44) 27.

<sup>50</sup> Wahhaj 'A Theory of Child Marriage' (2015) Discussion Papers No. 1520, School of Economics, University of Kent, Canterbury, 4-5.

<sup>51</sup> Turner op cit (n41) 10-1.

<sup>52</sup> DJ Sullivan 'Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution' (1992) 24 *New York University Journal of International Law and Politics* 795 at 795.

<sup>53</sup> N Wadesango, S Rembe & O Chabaya 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13 *The Anthropologist* 121.

<sup>54</sup> See for example a study on eight countries in Jain & Kurz *New Insights* op cit (n11) 25.

to men and women in a hierarchical system and require men's control over and the submission of women.<sup>55</sup> However, it is disputed among and within religious communities whether a particular religious belief does in fact encourage child marriages. This suggests that the practice of child marriage derives from the interpretation of religious sources rather than being explicitly stated in religious provisions.<sup>56</sup>

Culture, on the other hand, has been defined as 'the set of shared spiritual, material, intellectual and emotional features of human experience that is created and constructed within social praxis.'<sup>57</sup> Religion and culture are not synonymous but highly interrelated and influence each other. It has been observed that 'just as there is no such thing as a society without a culture, there exists no culture without some form of religion.'<sup>58</sup>

Tradition can be described as 'the handing down of information, beliefs, and customs by word of mouth or by example from one generation to another without written instruction'<sup>59</sup> and can refer to both culture and religion. Cultural and religious traditions favour men over women and place high value on men's and family's honour which mainly depends on girls' and women's purity and virginity. Non-marital sex and children born out of wedlock bring shame to families in conservative communities, and late marriages are perceived to increase the risk of pre-marital sexual activity and therefore contravene the precept to enter into marriage as a virgin.<sup>60</sup> Often, girls are regarded as sexual beings as soon as they reach puberty. Hence, older age might become an obstacle to marriage, and parents are prompted to marry off their daughters at an early age to prevent pre-marital sexual exposure and to protect family honour and the girl's virginity until marriage.<sup>61</sup>

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<sup>55</sup> CW Howland 'Women and Religious Fundamentalism' in KD Askin & DM Koenig (ed) *Women and International Human Rights Law* (1999) 533.

<sup>56</sup> Turner op cit (n41) 41.

<sup>57</sup> Y Ertürk 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences. Intersections Between Culture and Violence Against Women', Human Rights Council Fourth session (17 January 2007), UN Doc. A/HRC/4/34, para 17.

<sup>58</sup> B Winter 'Religion, Culture and Women's Human Rights: Some General Political and Theoretical Considerations' (2006) 29 *Women's Studies International Forum* 381 at 382.

<sup>59</sup> Merriam-Webster 'Tradition' (3 July 2018), available at <https://www.merriam-webster.com/dictionary/tradition>, accessed on 10 July 2018.

<sup>60</sup> Gaffney-Rhys op cit (n45) 360.

<sup>61</sup> Bunting op cit (n44) 28-9.

### 3.3. Education

Education is an important factor associated with child marriages, and the lack thereof is both a major cause and a striking consequence of this practice. The role of girls as housewives and mothers is often regarded or turns out to be incompatible with their life as school girls as they have to take care of their new family.<sup>62</sup> As a result, early marriage often marks the end of a girl's formal education.

On the other hand, girls with little or no education are three times as likely to marry before the age of 18.<sup>63</sup> The reasons for girls not to attend school in the first place are manifold and are often linked to gender inequality and poverty. Many families cannot afford the costs of education and/or rather spend scarce economic resources on boys as girls are expected to become housewives and mothers and will not need education to enter the labour market.<sup>64</sup> Hence, it is perceived that investing in a girl's education is not worthwhile but that staying at home and helping the family before marriage is a better preparation for her future life.<sup>65</sup>

The lack of education has a major impact on a girl's life and her environment. School is an important place for children to socialise, build up supporting networks, and gain skills and knowledge that are essential in later stages of life. Dropping out of school impedes a girl's personal development, often leaves her isolated from peers, reduces her decision-making ability, and makes her more vulnerable to the control of her husband and in-laws. This may affect the allocation of household resources since studies have shown that households where women have a greater say spend more money on education and health which has positive effects on the next generation.<sup>66</sup>

Furthermore, little education in combination with high fertility and the negative health impacts of child marriage impede girls' access to the formal labour market. Limited chances to paid employment in turn adversely affect household income and contribute to poverty. On a higher level, the economic growth of the community and nation is diminished when women do not participate in the labour force as productivity

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<sup>62</sup> S Lee-Rife, A Malhotra, A Warner & A McGonagle Glinski 'What Works to Prevent Child Marriage: A Review of the Evidence' (2012) 43 *Studies in family planning* 287 at 293.

<sup>63</sup> Girls Not Brides 'What is the Impact of Child Marriage: Education', available at <https://www.girlsnotbrides.org/themes/education/>, accessed on 10 July 2018.

<sup>64</sup> Gaffney-Rhys op cit (n45) 361.

<sup>65</sup> Wadesango et al. op cit (n53) 121-2.

<sup>66</sup> Parsons et al. op cit (n43) 13-5.

and investment are reduced.<sup>67</sup> Illiteracy and inadequate education also hinder girls from accessing information on health and their rights. All this contributes to gender inequality between the spouses and in society and has a strong intergenerational effect.<sup>68</sup>

### 3.4. Poverty

Poverty is a factor that countries or communities with high rates of child marriage have in common. As explained above, it is closely related to the factor of education and a likely consequence of a lack thereof. Poverty makes the whole family vulnerable to economic shocks, such as illness, and reduces the investment in health and education of both the parents and children.<sup>69</sup> Poverty is an increasingly female problem, women represent the majority of the world's poorest and their number is growing. Discriminatory policies, laws, and practices such as child marriage contribute to what is called the feminisation of poverty, perpetuate gender inequality, and make it increasingly difficult for women to overcome poverty for themselves and their children.<sup>70</sup>

Poverty also acts as a key driver for child marriage. In societies that value boys more than girls, poor families may see their daughters as an economic burden and so they marry them off early to ease their financial situation.<sup>71</sup> Moreover, in many countries child marriages involve some kind of financial transaction. While two different forms can be observed, both serve as an incentive for poor families to marry off a girl at a young age. In the dowry system, the bride or her family hands over gifts or payments to the husband's family. Posing an additional financial expenditure, families may be required to transfer less for a younger and less educated bride. In the bride price system, on the other hand, assets are transferred from the husband's to the girl's family.<sup>72</sup> As virginity is highly valued, the bride price may be higher for a

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<sup>67</sup> See, for example, the following studies: J Chaaban & W Cunningham *Measuring the Economic Gain of Investing in Girls: The Girl Effect Dividend* Policy Research Working Paper (2011); K Elborgh-Woytek, M Newiak, K Kochhar, S Fabrizio, K Kpodar, P Wingender, B Clements & G Schwartz *Women, Work, and the Economy: Macroeconomic Gains from Gender Equity* (2013).

<sup>68</sup> Parsons et al. op cit (n43) 15-6.

<sup>69</sup> Parsons et al. op cit (n43) 16.

<sup>70</sup> UN Women 'The Feminization of Poverty', available at <http://www.un.org/womenwatch/daw/followup/session/preskit/fs1.htm>, accessed on 11 July 2018.

<sup>71</sup> Gaffney-Rhys op cit (n45) 360.

<sup>72</sup> Turner op cit (n41) 24.

younger bride. Both cases might bring financial relief in the short term but the impacts on the girl's life are devastating.<sup>73</sup>

### 3.5. Domestic violence and sexual abuse

Due to the age gap and power inequality in many child marriages, girls are much more vulnerable to become victims of all sorts of abuse and violence by their husband and in-laws. It is estimated that girls who are married by 15 are at a 50 per cent higher risk to be subjected to physical or sexual violence at the hands of their husband than those who marry as adults.<sup>74</sup>

Psychological violence may stem from humiliation and threats. Furthermore, many girls lose their familiar environment and networks as they drop out of school and are expected to move in with their husband and fulfil the tasks of a housewife they are not mature enough to accomplish. This may result in isolation and loneliness.<sup>75</sup>

Physical violence may include pushing, hitting, and beating and can result in serious injuries. Marital rape is not criminalised in many countries,<sup>76</sup> and husbands often feel entitled to engage in sexual activity with their wife at any time. Girls often lack power to negotiate consensual sex or get raped after denying sex. Isolation, shame, and impunity of perpetrators result in continuous rape and suffering. The lack of financial resources or the husband's control over property and possible income leave a girl dependent and make it almost impossible for her to leave her abusive husband.<sup>77</sup> Domestic violence, in turn, has a negative effect on the household's financial situation as it reduces the victim's productivity and may require expenditures on medical treatment. Furthermore, violence has a transgenerational effect and thus perpetuates domestic violence and gender inequality in future generations.<sup>78</sup>

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<sup>73</sup> Parsons et al. op cit (n43) 13.

<sup>74</sup> Girls Not Brides 'What is the Impact of Child Marriage: Violence Against Girls', available at <https://www.girlsnotbrides.org/themes/violence-against-girls/>, accessed on 11 July 2018.

<sup>75</sup> Turner op cit (n41) 18;

<sup>76</sup> Michelle J. Anderson 'Marital Rape Laws Globally: Rationales and Snapshots Around the World' in Kerstin Yllö & M. Gabriela Torres (ed) *Marital Rape: Consent, Marriage, and Social Change in Global Context* (2016) 180.

<sup>77</sup> Warner op cit (n26) 240-1; Parsons et al. op cit (n43) 16; Turner op cit (n41) 18; Jain & Kurz op cit (n11) 8-9; Girls Not Brides *What is the Impact of Child Marriage: Violence* op cit (n74).

<sup>78</sup> Parsons et al. op cit (n43) 16.

### 3.6. Health

This section describes the serious and lasting effects that child marriages can have on young girls both mentally and physically. Physical, sexual, and emotional abuse as well as early pregnancy and childbirth all take their toll and have devastating effects on a girl bride's health.

#### 3.6.1. Mental health

Continuous domestic abuse in its different forms, overload with domestic tasks, and isolation can lead to serious mental health problems, including depression.<sup>79</sup> Sexual abuse during childhood, in particular, has been linked to further conditions such as posttraumatic stress disorder, borderline personality disorder, increased risk of suicidal behaviour, including self-mutilation, and higher rates of suicide attempts.<sup>80</sup>

#### 3.6.2. Physical health

Apart from bodily injuries caused by domestic abuse, early pregnancy constitutes a major risk factor for girl brides. Conservative societies often pressure girls to prove their fertility and become pregnant soon, and repeatedly, after the wedding. Their lack of education and decision-making power gives them little access to information on contraceptives and reproductive health.<sup>81</sup> In fact, '[c]omplications in pregnancy and childbirth are the leading cause of death in girls aged 15-19 globally.'<sup>82</sup> The younger a girl, the less her body is developed enough to go through pregnancy and delivery. Pregnant girls often do not receive proper antenatal medical care and experience obstructed or prolonged childbirths. The underdevelopment of a young girl's pelvic bones is likely to result in obstetric fistula, a condition that 'involves perforations inside the vagina, bladder or rectum causing urine and faeces to leak uncontrollably.'<sup>83</sup>

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<sup>79</sup> NM Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2 *Reviews in Obstetrics and Gynecology* 51 at 53.

<sup>80</sup> FM Daray, SM Rojas, AJ Bridges, CL Badour, L Grendas, D Rodante, S Puppo & F Rebok 'The Independent Effects of Child Sexual Abuse and Impulsivity on Lifetime Suicide Attempts Among Female Patients' (2016) 58 *Child Abuse & Neglect* 91 at 92.

<sup>81</sup> Jain & Kurz op cit (n11) 7.

<sup>82</sup> Girls Not Brides 'What is the Impact of Child Marriage: Health', available at <https://www.girlsnotbrides.org/themes/health/>, accessed on 12 July 2018.

<sup>83</sup> Gaffney-Rhys op cit (n45) 362.

The risk for girls between 10 and 15 to suffer a fistula is an alarming 88 per cent.<sup>84</sup> If not treated, the condition can be fatal,<sup>85</sup> leave the woman infertile, and may cause her husband to abandon her as she is seen as unclean due the uncontrolled leakage of excretions.<sup>86</sup>

Early pregnancy and childbirth also affect the babies born to young mothers. The risk of preterm delivery and low birth weight is much higher for girls under 18. The rate of stillbirths and infant mortality is also much higher. Often, both mother and child suffer from malnutrition caused by poverty, little knowledge about adequate feeding, and insufficient medical care. The poor overall health condition increases the baby's risk to contract diseases and can have adversely effects on its future life.<sup>87</sup>

Moreover, child brides are more likely to acquire sexually transmitted diseases, particularly HIV. It is estimated that girls and young women represent two thirds of all new HIV infections among people between 10 and 24. Girls brides are more likely to be affected than non-married peers because their husbands are often much older than them and likely to have had previous sexual relations. Those girls also lack power to insist on safer sex, are expected to conceive and reproduce early and frequently, and may be raped by their husbands. Additionally, they lack knowledge of the disease, its prevention, and the availability of health services.<sup>88</sup>

### **3.7. Lack of birth and marriage certificates**

It is unknown how many child marriages are actually concluded every year. This is not least due to the fact that many countries lack reliable systems to issue birth certificates and that rural communities do not have access to such systems. As a consequence, a girl's age cannot be verified when she is supposed to get married. Likewise, countless marriages remain unrecorded, especially in states with legal pluralism where only civil, but no customary and religious marriages may be registered.<sup>89</sup> Such systems fail to protect minor girls from marriage in the first place

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<sup>84</sup> Nour op cit (n79) 54.

<sup>85</sup> Gaffney-Rhys op cit (n45) 362.

<sup>86</sup> Bunting op cit (n44) 31.

<sup>87</sup> Nour op cit (n79) 54.

<sup>88</sup> Girls Not Brides 'Child Marriage and HIV: An Information Sheet' (February 2017), available at [https://www.girlsnotbrides.org/wp-content/uploads/2016/07/Child-Marriage-HIV-brief\\_Final.pdf](https://www.girlsnotbrides.org/wp-content/uploads/2016/07/Child-Marriage-HIV-brief_Final.pdf), accessed on 12 July 2018.

<sup>89</sup> Bunting op cit (n44) 23; Warner op cit (n26) 244; Gaffney-Rhys op cit (n45) 361.

and then make it hard to prove that a marriage had ever existed. However, in such a case, the girl may not be able to claim her rights and an undocumented marriage cannot be dissolved.<sup>90</sup>

## 4. LINKS TO OTHER HUMAN RIGHTS ISSUES

### 4.1. Sexual exploitation, slavery, and forced child labour

Several characteristics that can be observed in child marriages are closely related to other grave human rights violations, namely sexual exploitation, slavery and slavery-like practices, and forced child labour. While it is arguably morally disturbing to establish a linkage between the socially and legally sanctified institution of marriage with horrific human rights violations, it cannot be ignored that child marriage itself has been recognised as such a violation, and that they do, in fact, share certain features.<sup>91</sup> A married girl may feel much more like being subjected to exploitation, slavery or forced labour than being in a marriage that is supposed to protect her.

Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime<sup>92</sup> (hereinafter: Palermo Protocol) is of major importance to associate child marriage on the one hand and sexual exploitation, slavery, and forced labour on the other hand.

Article 3(a) of the Palermo Protocol stipulates that

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (...).

Subparagraph (b) states that the victim’s consent is irrelevant when they were subjected to any of the means enlisted in subpara (a). The protection of children goes

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<sup>90</sup> Turner op cit (n41) 39.

<sup>91</sup> Mikhail op cit (n25) 43-4; Warner op cit (n26) 262.

<sup>92</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res. 55/25, annex II, 55 UN GAOR Supp. (No. 49) at 60, UN Doc. A/45/49 (Vol. 1) (2001), adopted on 15 November 2000, entered into force on 25 December 2003.

even further as subpara (c) does not require any of those means in the process in order to constitute trafficking of children. Finally, subpara (d) defines as a child every person under 18 and notably does not allow for exceptions to this age limit.

The elements that connect all four phenomena are the power imbalance between the girl and the man and the girl's *de facto* inability to change her situation. An underage girl is normally not able to give her free and fully informed consent to getting married, but the marriage is arranged by her parents. In most societies where child marriages occur, it is socially unacceptable or legally difficult or impossible to get a divorce. Hence, a girl is stuck in an unwanted and abusive marriage without a realistic chance to leave. Within the marriage, she is exposed to her husband's authority and control, is financially dependent on him, and may be subjected to violence, rape, and threats. Often, she is considered to belong to the husband, which gives him a sense of ownership. This understanding is reinforced through the involvement of financial transactions in child marriages. Further pressure to stay in the marriage may stem from the family's unwillingness or inability to return the dowry or bride price they have received.<sup>93</sup> Another factor is the severe implications that all practices have on the girl's health.<sup>94</sup>

#### **4.1.1. Sexual exploitation**

Particularly in conservative societies, marriage is the only place where legitimate sex can take place and is expected to happen, and unlike in prostitution, the wife is expected to have sex only with her husband and not as a business. However, there is mostly still some form of transaction implicated.<sup>95</sup> Often, it is not the girls who can freely dispose over her dowry or bride price, but the husband or family receive the whole amount. Likewise, in (child) prostitution a procurer will habitually collect and control the girl's earnings.<sup>96</sup>

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<sup>93</sup> Mikhail op cit (n25) 46-8; Turner op cit (n41) 17-9 and 23-4.

<sup>94</sup> Menz op cit (n28) 517.

<sup>95</sup> Warner op cit (n26) 264-5.

<sup>96</sup> Mikhail op cit (n25) 44-5.

#### 4.1.2. Slavery and slavery-like practices

The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention<sup>97</sup> (hereinafter: Slavery Convention) defines slavery in Art 1(I) as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’ Thus, in assessing whether such powers are exercised in a child marriage and hence amount to slavery, the key elements are to what extent the freedom of movement and control over a girl’s property are limited by her husband, and if she has given her informed consent and understands the nature of marriage.<sup>98</sup> However, as described above, it is doubtful that an underage girl is able to give her full consent and she is often under her husband’s control for various reasons.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>99</sup> (hereinafter: Supplementary Slavery Convention) includes as slavery-like any systems in which ‘[a] woman without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group’<sup>100</sup> and

[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.<sup>101</sup>

Hence, the Supplementary Slavery Convention aims to protect girls from servile marriages in which she is expected to do domestic and/or manual work that may be too hard and overwhelming for a young girl, and only her husband or in-laws benefit from that arrangement.<sup>102</sup>

#### 4.1.3. Forced labour

Regarding the worst forms of child labour, Art 3(a) of the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child

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<sup>97</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 LNTS 253, adopted on 25 September 1926, entered into force on 9 March 1927.

<sup>98</sup> Turner op cit (n41) 17.

<sup>99</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, adopted on 30 April 1956, entered into force on 30 April 1957.

<sup>100</sup> Art 1(c)(i) Supplementary Slavery Convention.

<sup>101</sup> Art 1(d) Supplementary Slavery Convention.

<sup>102</sup> Turner op cit (n41) 22-5.

Labour<sup>103</sup> (hereinafter: ILO Convention 182) includes in the definition thereof ‘all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.’ This provision illustrates the similarities between forced labour and slavery as outlined above.

In the Convention Concerning Forced or Compulsory Labour<sup>104</sup> (hereinafter: ILO Convention 29), forced labour is defined as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’<sup>105</sup> This provision has been interpreted broadly. The term work or service does not only refer to formal paid employment but also encompasses trafficking for sexual exploitation. Threatened penalties may include violence, loss of economic or other privileges, and other means of intimidation.<sup>106</sup>

Similar to the case of slavery, the key elements that link child marriage and forced child labour are a girl’s dependency on her husband, the limitation of rights and freedoms, isolation, and the inability to leave.<sup>107</sup>

## 4.2. Statelessness

Statelessness is another human rights issue that arises in the context of child marriage. A person is stateless when he or she ‘is not considered as a national by any State under the operation of its law.’<sup>108</sup> It is estimated that around ten million people worldwide are stateless. As no state feels responsible for them, they are often denied access to basic rights, such as the right to health care, education and work, and the freedom to movement.<sup>109</sup> Some of the causes for statelessness are the official withdrawal of the

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<sup>103</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 2133 UNTS 161, adopted on 17 June 1999, entered into force on 19 November 2000.

<sup>104</sup> Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 UNTS 55, adopted on 28 June 1930, entered into force on 1 May 1932.

<sup>105</sup> Art 2(1) ILO Convention 29.

<sup>106</sup> Turner op cit (n41) 29.

<sup>107</sup> Turner op cit (n41) 30-31; Warner op cit (n26) 265.

<sup>108</sup> Art 1(1) of the Refugee Convention.

<sup>109</sup> UNHCR ‘Ending Statelessness’, available at <http://www.unhcr.org/afr/stateless-people.html>, accessed on 13 July 2018.

nationality by the state, discriminatory laws that, for example, forbid women to pass on their nationality, and inadequate birth registration systems.<sup>110</sup>

Child marriage and statelessness are intertwined in various ways. A lack of birth certificates perpetuates the problem of statelessness and contributes to the occurrence of child marriages, as was explained above. Since people without a nationality face grand difficulties to enjoy their fundamental rights, they are more vulnerable to exploitation and trafficking. Therefore, parents may see child marriage as a means to protect their daughters.<sup>111</sup> Where nationality is only passed on by the father, the fear of her or her children otherwise left stateless may be a reason for a girl to stay in an unwanted marriage. However, marriage itself can also leave a girl stateless, that is in case her husband has a different nationality, her country of origin withdraws her nationality and she cannot acquire her husband's nationality.<sup>112</sup> International efforts to end statelessness may thus play a considerable role in the fight against child marriages.

## **5. CHILD MARRIAGE IN ARMED CONFLICTS AND WAR**

In recent years, it has been more widely discussed and recognised that women and girls are even more vulnerable than everybody else to gender-based violence in settings of armed conflict and war, and the list of possible perpetrators, both state and non-state actors, is long.<sup>113</sup> It has been argued that the increased rate of violence does not emerge out of nothing but the level of violence against women that is existent in pre-conflict communities is likely to exacerbate during conflict.<sup>114</sup> Sexual violence, in particular, affects women disproportionately and is often used as a weapon of war.<sup>115</sup>

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<sup>110</sup> Menz op cit (n28) 505-6.

<sup>111</sup> Menz op cit (n28) 501-2.

<sup>112</sup> Menz op cit (n28) 5011-2.

<sup>113</sup> Committee on the Elimination of Discrimination Against Women 'General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations' UN Doc. CEDAW/C/GC/30, adopted on 18 October 2013, para 34.

<sup>114</sup> R Manjoo & C McRaith 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas' (2011) 44 *Cornell International Law Journal* 11 at 15-6.

<sup>115</sup> Manjoo & McRaith op cit (n114) 12.

It can amount to a war crime, a crime against humanity, and torture, or constitute an element of genocide.<sup>116</sup>

Child marriage may occur as a tactic of war, where young girls are kidnapped and married to warriors,<sup>117</sup> or as an attempt to protect girls from increased sexual violence and the overall dire situation.<sup>118</sup> Conflicts as well as natural disasters have a considerable impact on the prevalence of this practice: ‘Nine out of the ten countries with the highest child marriage rates are considered either fragile or extremely fragile states.’<sup>119</sup> While child marriage itself does not provoke state fragility, its factors and drivers, particularly poverty and economic stagnation or instability, are related to crises.<sup>120</sup>

Even when states have legislation and policies in place that are supposed to protect young girls from getting married, conflicts mostly result in the collapse of law and order and a breakdown of law enforcement and social networks. The government and the judicial system lose their legitimacy and ability to function properly or may not reach all parts of the country. Additionally, conflicts make it difficult to obtain the required documents or financial means to officially register a marriage.<sup>121</sup> As outlined before, a lack of certificates also increases the risk of statelessness.

When poverty is a decisive factor in times of relative peace, the influence of this driver increases during war. Property and livelihoods are destroyed, and a country’s economy suffers, while scarce national and private resources are rather spent on military expenses and sheer survival than on education or health care. In this context, parents might see themselves even more urged to marry off their underage daughters in order to ease their economic burden and protect the girl from hunger.<sup>122</sup> Increased poverty has also been found to contribute to a greater age gap between the girl and

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<sup>116</sup> Stop Rape Now ‘Analytical and Conceptual Framing of Conflict-Related Sexual Violence’ (June 2011), available at <http://stoprapenow.org/uploads/advocacyresources/1321456915.pdf>, accessed on 17 July 2018.

<sup>117</sup> Manjoo & McRaith op cit (n 114) 12-3.

<sup>118</sup> A Hutchinson, P Waterhouse, J March-McDonald, S Neal & R Ingham ‘Understanding Early Marriage and Transactional Sex in the Context of Armed Conflict: Protection at a Price’ (2016) 42 *International Perspectives on Sexual and Reproductive Health* 45 at 46-7.

<sup>119</sup> Girls Not Brides ‘Child Marriage in Humanitarian Settings’ (October 2017), 1, available at <https://www.girlsnotbrides.org/wp-content/uploads/2016/05/Child-marriage-in-humanitarian-settings.pdf>, accessed on 17 July 2018.

<sup>120</sup> GT Lemmon *Fragile States Fragile Lives. Child Marriage Amid Disaster and Conflict* Working paper (2014) 3.

<sup>121</sup> Lemmon op cit (n 120) 1 and 5.

<sup>122</sup> Lemmon op cit (n 120) 1 and 6.

groom as older men are perceived as more established and wealthier, hence more able to provide for the girl.<sup>123</sup>

Wars and armed conflicts also act as an additional barrier to girls' education to a greater extent than to that of boys. Apart from school buildings being destroyed or used as shelters, trips to and from school can become too dangerous and girls drop out of school due to safety concerns.<sup>124</sup>

For many parents, marriage can constitute a presumed way to protect their daughter from increased sexual violence or kidnapping during conflicts and they believe her to be safer with a husband. The stigma of pre-marital sex and children born out of wedlock as well as shame and an alleged violation of honour in that context may also contribute to the parents' decision.<sup>125</sup> A family's distress may cause them to take a rushed decision and marry their daughter to a man they do not know. This may make the girl even more vulnerable to violence in the marriage.<sup>126</sup>

The already precarious situation of girls in conflict settings becomes even worse in case of displacement. Camps for refugees and internally displaced people (IDP) are established to protect those who had to flee their homes but in fact they expose families to new risks and challenges. Social networks break down amid the flight, and poverty and the perceived or real threat of sexual violence and trafficking exacerbate in camps.<sup>127</sup> Furthermore, refugee and IDP camps enable girls to interact with the opposite sex in ways that may not have been possible at home. Parents do not want their daughters to get pregnant and fear for their virginity and honour.<sup>128</sup> Access to education may also become more difficult for displaced girls as schools may not be available or far away, they may not understand the language of instruction, or families cannot afford school fees.<sup>129</sup> Under these dire circumstances, parents often see no alternative to marrying off their daughters. Sometimes, child marriage is even

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<sup>123</sup> J Schlecht *A Girl No More: The Changing Norms of Child Marriage in Conflict* (2016) 18.

<sup>124</sup> Lemmon op cit (n120) 7.

<sup>125</sup> J Myers *Untying the Knot. Exploring Early Marriage in Fragile States* (2013) 25-6; Lemmon op cit (n120) 7-8; Schlecht op cit (n123) 13-7.

<sup>126</sup> SA Bartels, S Michael, S Roupetz, S Garbern, L Kilzar, H Bergquist, N Bakhache, CDavison & A Bunting 'Making Sense of Child, Early and Forced Marriage Among Syrian Refugee Girls: A Mixed Methods Study in Lebanon' (2018) 3 e000509 *BMJ Global Health* 10; Schlecht op cit (n123) 24.

<sup>127</sup> Schlecht op cit (n123) 1, 13-5, and 17-8; Myers op cit (n125) 25-6; Girls Not Brides *Child Marriage in Humanitarian Settings* op cit (n119) 2.

<sup>128</sup> Schlecht op cit (n123) 15-6.

<sup>129</sup> Schlecht op cit (n123) 20.

‘reintroduced as a coping strategy during the crisis’<sup>130</sup> in communities that otherwise had low rates of child marriages. This has been found to be the case among Syrian refugees who have fled from urban areas.<sup>131</sup> As explained above, though, the consequences of early marriage are devastating, and what is supposed to be a girl’s protection can turn out to be the exact opposite.

## 6. CONCLUSION

This chapter has provided an overview of what constitutes child marriage and its causes and consequences. Child marriage is a formal union in which at least one of the spouses is not yet 18 years old and it remains a widespread practice worldwide. While some have criticised this definition for failing to consider different concepts and realities of childhood and adolescence, it is clear that early marriage poses a risk to the girl’s development and her health and can furthermore impact her community and whole nations. Gender inequality, tradition and culture, education, and poverty are key factors contributing to child marriage, while health problems as well as the perpetuation of women’s subordination, gender-based violence, and poverty are arguably the most striking consequences of child marriage. The link between child marriages, education, poverty, and health creates a vicious circle with an adverse intergenerational effect that also contributes to state fragility.

This chapter has also discussed the relation between child marriage and other human rights issues, namely statelessness, sexual exploitation, slavery, and forced labour. Child marriage and sexual exploitation, slavery, and forced child labour share certain characteristics, most notably the power imbalance between the girl and the man and her inability to change her situation. The girl lives under her husband’s control, depends on him economically, and her rights and freedoms are restricted. Furthermore, she is often subjected to violence and may be expected to do domestic and/or manual work for her husband and his kinship. Hence, the Palermo Protocol, the Slavery Convention, the Supplementary Slavery Convention, and the ILO Conventions 182 and 92 are also useful tools in the fight against child marriage. Stateless persons often face difficulties to access basic rights like education and health care. They are also

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<sup>130</sup> Schlecht op cit (n123) 27.

<sup>131</sup> UNICEF Middle East and North Africa Regional Office & International Center for Research on Women *Child Marriage in the Middle East and North Africa. Executive Summary* (2017) 4.

more vulnerable to exploitation and trafficking. Thus, child marriage may be seen as a way to protect a girl without nationality.

In times of armed conflict and war, child marriage may occur as a weapon of war and as a means to protect girls from increased levels of sexual violence and poverty. As a result of the collapse of law and order and the breakdown of law enforcement and social networks, girls are less protected from getting married early. Hence, child marriages are concluded even more often or may be reintroduced in conflict settings.

In view of the dramatic implications that child marriages have on various levels, it is not surprising that the international community has addressed this practice extensively. The next chapter will thus examine how international human rights documents seek to prevent child marriages and protect girls. It will also place child marriage in the context of international refugee law.

## **CHAPTER 3**

# **CHILD MARRIAGE IN INTERNATIONAL HUMAN RIGHTS LAW AND REFUGEE LAW**

### **1. INTRODUCTION**

Child marriage is a serious violation of a girl's human rights and can even be life-threatening. The practice remains a persistent problem globally despite efforts of the international community to eradicate it. The present chapter critically analyses the international key documents dealing with child marriage regarding the question whether they explicitly determine a marriageable age. It also examines which state obligations result from international human rights law in order to protect the girls involved. In particular, the documents under scrutiny are the UDHR, ICCPR, ICESCR (in sum called the International Bill of Rights), the Marriage Convention, CEDAW, and CRC. The study will also look at the work of treaty monitoring bodies and other UN organs relating to the issue at hands.

When refugee child brides arrive in another country and decide to seek asylum there, additional issues arise. Now, the host state not only has to adhere to international human rights law but also has to meet the obligations stemming from international refugee law. The second part of this chapter will therefore analyse child marriage in the context of international refugee law, the main source being the Refugee Convention.

### **2. INTERNATIONAL HUMAN RIGHTS LAW**

A range of international human rights treaties address the right to marry and require the full and free consent of both spouses but fail to determine a specific marriageable age or age of majority and ways to ensure consensual marriages. They further require states to adopt legislative and other measures to give full effect to the respective treaty provisions. However, these treaties are not self-executing and lack enforcement mechanisms. It is therefore up to the individual states to define age limits and adopt

laws and measures relating to consent.<sup>132</sup> This section will first analyse relevant international documents regarding their stipulations on a minimum age for marriage and then proceed to discuss what further measures states are obliged to adopt.

## 2.1. Minimum age for marriage

### 2.1.1. International Bill of Rights

The so-called International Bill of Rights comprises the UDHR, the ICCPR, and the ICESCR. The UDHR is of legally non-binding character but has gained importance as it has influenced the two Covenants and other human rights treaties.<sup>133</sup>

All three documents enshrine the right to marry and require the free and full consent of both spouses.<sup>134</sup> They do not, however, specify a minimum marriageable age, as the UDHR grants the right to marry to ‘[m]en and women of full age’,<sup>135</sup> and the ICCPR refers to ‘men and women of marriageable age’.<sup>136</sup> It can be argued that the usage of the terms men and women relates to adults and intends to prevent child marriages, but it still leaves room for other interpretations since the marriageable age may depend on the age when a girl reaches sexual maturity or hits puberty. Generally, this happens at a lower age than the age of legal majority. The wording of the respective provisions of the International Bill of Rights may therefore be understood as to ban very early marriage but is not precise enough to address child marriage *per se*.<sup>137</sup>

In 2000, the Human Rights Committee (HRC), the treaty monitoring body created under the ICCPR, adopted its General Comment No. 28 on Article 3 dealing with the equality of rights between women and men. It also elaborates on the questions of minimum age and consent and acknowledges that the two factors are interrelated. Regarding the minimum age, the HRC holds that states ought to determine the marriageable age on the basis of criteria that ‘should ensure women’s capacity to make

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<sup>132</sup> Warner *op cit* (n26) 247-9.

<sup>133</sup> Warner *op cit* (n26) 254.

<sup>134</sup> Art 16(2) UDHR, Art 23(3) ICCPR, Art 10(1) ICESCR.

<sup>135</sup> Art 16(1) UDHR.

<sup>136</sup> Art 23(2) ICCPR.

<sup>137</sup> Gaffney-Rhys *op cit* (n45) 363.

an informed and uncoerced decision.’<sup>138</sup> In the following, the HRC describes cases in which a woman’s right to freely enter a marriage may be violated. That is, for example, in case of rape when social pressure urges her to marry her rapist or where discriminatory laws or practices limit a woman’s choice regarding her husband. Furthermore, polygamy contravenes the principle of equality in marriage.<sup>139</sup> Again, it can be deducted from General Comment No. 28 that young children are arguably not mature enough to give their informed consent, but it is too vague to provide clear guidelines concerning the minimum age.

In sum, the International Bill of Rights creates the state obligation to determine a minimum age for marriage but does not make any recommendations regarding a specific age. On the contrary, its wording creates loopholes that allow states to legalise child marriage.

### **2.1.2. Marriage Convention**

Similar to the International Bill of Rights, Article 1(1) of the Marriage Convention stipulates that ‘[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.’ According to para (2), however, the physical presence of one of the spouses is not necessary ‘when the competent authority is satisfied that the circumstances are exceptional and that the party has, before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent.’ In this regard, the Marriage Convention clearly fails its objective to protect vulnerable persons such as children. It does not define what exceptional circumstances are and thus undermines the maxim of consent. This provision is likely to protect traditional and religious ceremonies in which girls face a greater risk to get married early.<sup>140</sup>

Article 2 requires State Parties to determine a minimum age and further states that ‘[n]o marriage shall be legally entered into by any person under this age, except

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<sup>138</sup> Human Rights Committee ‘General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)’, UN Doc. CCPR/C/21/Rev.1/Add.10, adopted on 29 March 2000, para 23.

<sup>139</sup> General Comment No. 28, para 24.

<sup>140</sup> Warner op cit (n26) 249-50.

where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.’ Unlike the preamble, which refers to the age of puberty but is itself not legally binding, this provision of the Marriage Conventions sets no absolute age minimum to be respected by states. Notably, Article 2 allows for exceptions to be granted by the competent authority but does not stipulate which reasons can be invoked as serious enough. This leaves the assessment of the circumstances very much to the authority’s discretion and enables arbitrary decisions at a girl’s expense. The problem is compounded where no official birth records are available to ascertain a girl’s age and not even puberty serves as a determining factor. Additionally, the Marriage Convention does not establish a monitoring body or reporting mechanisms and results to be of limited use to effectively combat child marriage.<sup>141</sup>

In 1965, the UN General Assembly adopted the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>142</sup> (hereinafter: Marriage Recommendation) which lays down four principles. Principle I reproduces Article 1 of the Marriage Convention and in this respect does not offer any new indication regarding the required consent. Principle II goes one step further than its counterpart, Article 2 of the Marriage Convention, as it demands states to determine a minimum age ‘which in any case shall not be less than fifteen years of age’. While Principle II still allows for exceptions, phrased in equal wording as Article 2, it sets a much clearer general limit and seeks to ban very early marriage. Most states comply with the minimum age of 15, hence it can be assumed that this age limit achieves broad consensus.<sup>143</sup>

### 2.1.3. CEDAW

Article 16 of CEDAW deals with marriage and family life. According to Art 16(1), women and men have the same right to marry (a) and to freely choose their spouse and to marry with their full and free consent (b). Article 16(2) enshrines that ‘[t]he betrothal and the marriage of a child shall have no legal effect’ and requires states to

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<sup>141</sup> Warner op cit (n26) 250.

<sup>142</sup> UN General Assembly Resolution 2018 (XX) ‘Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages’, UN Doc. A/RES/2018(XX), adopted on 1 November 1965.

<sup>143</sup> Gaffney-Rhys op cit (n45) 368.

determine a minimum marriageable age and establish registration systems. Thus, CEDAW does prohibit child marriages explicitly, but since it fails to define the term child and does not suggest an appropriate minimum age, it may be understood as to ban only very early marriage. Ultimately, CEDAW does not provide much more clarity than the previous human rights documents.<sup>144</sup>

#### 2.1.4. CRC

The CRC does not include any provisions regarding marriage but contains some that do relate to child marriage. As per Art 1, ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ Hence, for the first time an international human rights document provides a definition of who is a child, only to then create a significant loophole that becomes relevant in the case of child marriage. The CRC does not define majority, and the exemption in Art 1 allows for national legislation to declare girls to have reached majority upon marriage, irrespective of their actual age. This would *de facto* legitimate child marriages. In light of that, it is debatable whether married girls even remain under the scope of protection of the CRC when domestic laws treat them as persons of age.<sup>145</sup>

In case it is argued that the CRC is still applicable, several other provisions are relevant. Importantly, Art 3(1) requires all state institutions and authorities to consider the best interests of the child in all their actions. Furthermore, the CRC protects children’s right to life,<sup>146</sup> freedom from all forms of mental and physical violence,<sup>147</sup> the highest attainable standard of health,<sup>148</sup> and education.<sup>149</sup> Where girl brides are expected to do hard domestic or manual work, this could violate the right to rest and leisure<sup>150</sup> and the right ‘to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.’<sup>151</sup> Moreover, the CRC enshrines the right to protection from all

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<sup>144</sup> Warner op cit (n26) 253-4; Gaffney-Rhys op cit (n45) 364.

<sup>145</sup> Warner op cit (n26) 251-2.

<sup>146</sup> Art 6(1) CRC.

<sup>147</sup> Art 19(1) CRC.

<sup>148</sup> Art 24(1) CRC.

<sup>149</sup> Art 28 (1) CRC.

<sup>150</sup> Art 31(1) CRC.

<sup>151</sup> Art 32(1) CRC.

forms of sexual exploitation and sexual abuse.<sup>152</sup> Importantly, Art 12 requires that children be heard in all judicial and administrative proceedings that affect them and that their views shall be taken into account, considering their age and maturity.

In light of the CRC, the treaty body for CEDAW, the Committee on the Elimination of Discrimination Against Women (hereinafter: CEDAW Committee) adopted General Recommendation No. 21,<sup>153</sup> where it holds ‘that the minimum age for marriage should be 18 years for both man and woman’,<sup>154</sup> arguing that younger persons have not achieved sufficient maturity and capacity to assume the responsibilities that come with marriage.

The CRC’s monitoring body, the Committee on the Rights of the Child (hereinafter: CRC Committee), has also adopted various General Comments that address the issue of child marriage. In General Comment No. 4, the CRC Committee acknowledges that married children are deprived of the protection under the CRC and recommends that ‘States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.’<sup>155</sup> General Comment No. 13<sup>156</sup> highlights the social costs and other negative implications that early and forced marriages entail<sup>157</sup> and lists these practices as harmful.<sup>158</sup> In General Comment No. 20,<sup>159</sup> the CRC Committee acknowledges that girls become more vulnerable to gender-based violence during adolescence, including early and forced marriage<sup>160</sup> and reaffirms ‘that the minimum age limit should be 18 years for marriage’.<sup>161</sup>

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<sup>152</sup> Art 34 CRC.

<sup>153</sup> Committee on the Elimination of Discrimination Against Women ‘General Recommendation No. 21: Equality in Marriage and Family Relations’ adopted at the Thirteenth session (17 January-4 February 1994) 49 UN GAOR Supp. (No. 38) at 1, UN Doc. A/49/38.

<sup>154</sup> General Recommendation No. 21, para 36.

<sup>155</sup> 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’, UN Doc. CRC/GC/2003/4, adopted at the Thirty-third session (19 May-6 June 2003), para 20.

<sup>156</sup> Committee on the Rights of the Child ‘General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence’, UN Doc. CRC/C/GC/13, adopted on 18 April 2011.

<sup>157</sup> General Comment No. 13, para 16.

<sup>158</sup> General Comment No. 13, para 29(e).

<sup>159</sup> Committee on the Rights of the Child ‘General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence’, UN Doc. CRC/C/GC/20, adopted on 6 December 2016.

<sup>160</sup> General Comment No. 20, para 27.

<sup>161</sup> General Comment No. 20, para 40.

In the first ever Joint General Recommendation/General Comment,<sup>162</sup> the CEDAW Committee and the CRC Committee dedicate a whole chapter to the practice of child and/or forced marriages and expressly declare that ‘child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.’<sup>163</sup> However, they also hold that

a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.<sup>164</sup>

Ultimately, the two Committees qualify the requirement of a uniform marriageable age of 18 years and allow for a more flexible approach under certain circumstances. However, they do not provide indication of what constitutes maturity and legitimate exceptional grounds.

### **2.1.5. Slavery, Forced Labour, and Trafficking**

The Supplementary Slavery Convention links certain practices to child marriage.<sup>165</sup> Regarding Art 1(c)(i), which describes the practice where ‘[a] woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind’, the difficulties lie in assuming that the term woman also includes the girl child and in the issue around the right, or real possibility, to refuse.<sup>166</sup>

Article 2 of the Supplementary Slavery Convention further stipulates that

States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.

By including a provision that requires the determination of the marriageable age on the national level, the UN arguably clarifies that it regards early marriage as a

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<sup>162</sup> Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, adopted on 14 November 2014.

<sup>163</sup> Joint General Recommendation No. 31/General Comment No. 18, para 20.

<sup>164</sup> Ibid.

<sup>165</sup> See Chapter 2.4.1.2.

<sup>166</sup> Warner op cit (n26) 255.

practice that is similar to slavery.<sup>167</sup> However, it does not solve the question what minimum age is regarded as appropriate.

It is striking that the Marriage Recommendation, CEDAW, the CRC, and the Committees' General Comments and General Recommendations are somewhat conflicting or contradictory when it comes to the interpretation of the term child and the determination of a suitable minimum age for marriage. This lack of clarity reflects the different understandings of childhood on a global scale.<sup>168</sup> The International Bill of Rights and the Supplementary Slavery Convention do not provide clarity in that respect either. Hence, all these documents fail to establish clear guidelines regarding the minimum age for marriage that states ought to stipulate on the domestic level.

## **2.2. State obligation to prevent child marriages**

State Parties to international treaties are obliged to give full effect to the respective treaty provisions. Accordingly, Art 2(2) ICCPR obliges states 'to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.' Article 2(f) CEDAW and Art 4 CRC contain similar provisions.

In para 7 of General Comment No. 31<sup>169</sup>, the HRC notes that

Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

The CEDAW Committee has held that appropriate measures to protect the enjoyments of the Convention rights as required in Art 2 CEDAW comprise all 'steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations'.<sup>170</sup>

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<sup>167</sup> Gaffney-Rhys op cit (n45) 363-4.

<sup>168</sup> Gaffney-Rhys op cit (n45) 368.

<sup>169</sup> Human Rights Committee 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13, adopted on 29 March 2004.

<sup>170</sup> General Recommendation No. 28, para 37(b).

Thus, the adoption of legal measures on the national level that prohibit and criminalise child marriage may be necessary in order to eliminate this practice. The Joint General Recommendation No. 31/General Comment No. 18 goes one step further and recommends states to ensure ‘[t]hat legislation establishes jurisdiction over offences of harmful practices that applies to nationals of the State party and habitual residents even when they are committed in a State in which they are not criminalized’.<sup>171</sup> This extends the applicability of national criminal law to child marriages concluded abroad and seeks to discourage parents to bring their daughters to their home country to marry them off there.

Hence, a great focus lies in the prevention of child marriages, but little emphasis is placed on the question of how to deal with married girls and the marriages themselves. The prohibition of child marriage is comparatively easy since it seeks to prevent the creation of such a relationship. Evidently, ‘regulating already existing marriages is of an inherently different nature and also significantly more complex.’<sup>172</sup> Here, decision makers are confronted with a lived reality, that is a couple living together, perhaps with children. While Art 16(2) CEDAW states that ‘[t]he betrothal and the marriage of a child shall have no legal effect’, reality is more complicated, and this provision arguably creates more problems in practice. First, as explained above, the term child is not defined in CEDAW. Secondly, it may be to the girl’s detriment to annul the marriage. Thirdly, it is unclear whether this provision ceases to apply in cases where the girl reaches the legal age of majority. Fourthly, in cases with transborder implications, such as refugee cases, the host state may prohibit child marriage but can be confronted with girls who legally married in their home state.

Binding documents of international human rights law are silent on these issues. It is clear, however, that child brides are entitled to general human rights, such as the right to life, liberty, and security of the person,<sup>173</sup> the right to freedom from slavery and servitude,<sup>174</sup> the right to education<sup>175</sup> and work,<sup>176</sup> and the right to the highest

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<sup>171</sup> Joint General Recommendation No. 31/General Comment No. 18, para 55(l).

<sup>172</sup> S Witting ‘“Girls belong in school, and not in front of the altar”: Is the German Bill on Child Marriages Violating International Law?’ (19 April 2017), available at <https://verfassungsblog.de/girls-belong-in-school-and-not-in-front-of-the-altar-is-the-german-bill-on-child-marriages-violating-international-law/>, accessed on 12 November 2018.

<sup>173</sup> Art 3 UDHR, Art 6(1) and 9(1) ICCPR, Art 6(1) and 37(b) CRC.

<sup>174</sup> Art 4 UDHR, Art 8 ICCPR.

<sup>175</sup> Art 26(1) UDHR, Art 13(1) ICESCR, Art 10 CEDAW, Art 28 CRC.

<sup>176</sup> Art 23(1) UDHR, Art 6(1) ICESCR, Art 11 CEDAW.

attainable standard of physical and mental health.<sup>177</sup> Regarding the second question raised above, only the Joint General Recommendation No. 31/General Comment No. 18 gives some insight, stating that

The best interests of the child and the protection of the rights of girls and women should always be taken into consideration and the necessary conditions must be in place to enable them to express their point of view and ensure that their opinions are given due weight. Careful consideration should also be given to the potential short-term and long-term impact on children or women of the dissolution of child and/or forced marriages and the return of dowry payments and bride prices.<sup>178</sup>

In General Comment No. 12, the CRC Committee has recognised that the right to be heard in terms of Art 12 CRC and the best interests principle of Art 3(1) CRC are interdependent and complementary.<sup>179</sup> According to General Comment No. 14, the best interests principle is a threefold concept that constitutes a substantive right, an interpretative legal principle, and a rule of procedure.<sup>180</sup> An assessment of the best interests ‘should be undertaken in each individual case, in light of the specific circumstances of each child’<sup>181</sup> and take into account

the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc.<sup>182</sup>

The CRC Committee also establishes that the elements to be considered in the assessment of the best interests are the child’s view and identity, preservation of the family environment and maintaining of relations, care, protection and safety of the child, a possible situation of vulnerability of the child, and the child’s right to health and education.<sup>183</sup> These factors have to be given due weight depending on the circumstances and balanced by the age and maturity of the child.<sup>184</sup> Where the best interests of the child conflict with other rights or interests, such as a state’s interest to

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<sup>177</sup> Art 12(1) ICESCR, Art 12 CEDAW, Art 24 CRC.

<sup>178</sup> Joint General Recommendation No. 31/General Comment No. 18, para 53.

<sup>179</sup> Committee on the Rights of the Child ‘General Comment No. 12 (2009): The Right of the Child to be Heard’, UN Doc. CRC/C/GC/12, adopted at the Fifty-first session (25 May-12 June 2009) para 68 and 70-4.

<sup>180</sup> Committee on the Rights of the Child ‘General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)’, UN Doc. CRC/C/GC/14, adopted at the Sixty-second session (14 January-1 February 2013), para 6.

<sup>181</sup> General Comment No. 14, para 48.

<sup>182</sup> Ibid.

<sup>183</sup> General Comment No. 14, para 52-79.

<sup>184</sup> General Comment No. 14, para 80-3.

control immigration, it is important to highlight that the best interests of the child are not merely one consideration but a primary one and hence have to be given larger weight.<sup>185</sup>

Joint General Recommendation No. 31/General Comment No. 18 thus reinforces the importance of the best interests principle and the right to be heard. Undoubtedly, these principles must be respected in all cases involving child brides, regardless of their legal status. Although this provision does not elaborate on what possible impacts the dissolution of the marriage can have, it apparently recognises that a simple annulment of the marriage may not always be the only and best solution. In combination with the best interests principle and the right to be heard, one may conclude that in some cases, the maintenance of the marriage is in fact the adequate solution. The same must apply in cases where child brides turn 18. At this age, women are free to choose if and whom to marry. Consequently, they should also be given the right to decide whether to stay in an already concluded marriage or not.

Regarding the fourth question related to transborder cases, the next section will analyse state obligations stemming from international refugee law.

### **3. INTERNATIONAL REFUGEE LAW**

The Refugee Convention serves as a starting point in this context. It was adopted in 1951, hence long before CEDAW and the CRC, and it does not include any provisions regarding child refugees. Nonetheless, the five grounds of persecution enlisted in Art 1(A)(2) of the Refugee Convention - race, religion, nationality, membership of a particular social group, and political opinion – as well as the Refugee Convention *per se* are also applicable on children as human beings. Furthermore, Art 22(1) of the CRC obliges State Parties

to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Similarly, the CRC Committee, in General Comment No. 6, stated that

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<sup>185</sup> General Comment No. 14, para 39.

When assessing refugee claims of unaccompanied or separated children, States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by UNHCR [United Nations High Commissioner for Refugees] in exercising its supervisory functions under the 1951 Refugee Convention. In particular, the refugee definition in that Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children.<sup>186</sup>

Likewise, the CEDAW Committee has commented that

A gender-sensitive approach should be applied at every stage of the asylum process. This means that women's claims to asylum should be determined by an asylum system that is informed, in all aspects of its policy and operations, by a thorough understanding of the particular forms of discrimination or persecution and human rights abuses that women experience on grounds of gender or sex.<sup>187</sup>

Accordingly, the Refugee Convention and other human rights documents, in particular CEDAW and the CRC, are interconnected and allow for or even require a children's rights and gender-sensitive approach in refugee law.<sup>188</sup> The following part will analyse different scenarios involving child brides and the respective state obligations under international refugee law.

### **3.1. Flight from an (impending) marriage**

This scenario is arguably the easiest for states to deal with. It involves an underage girl who flees from the threat of being married against her will or from an already concluded marriage. She arrives alone and has no relatives in the territory of the host state. It is obvious that she does not wish to enter or continue in this marriage, hence the question whether a possible marriage shall be recognised is less relevant.

#### **3.1.1. Persecution of children**

One core element of the refugee definition is the persecution for reasons of at least one of the five grounds recognised in the Refugee Convention. The term persecution,

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<sup>186</sup> Committee on the Rights of the Child 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', UN Doc. CRC/GC/2005/6, adopted at the Thirty-ninth session (17 May-3 June 2005), para 74.

<sup>187</sup> Committee on the Elimination of Discrimination Against Women 'General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' UN Doc. CEDAW/C/GC/32, adopted at the Fifty-ninth session (20 October-7 November 2014), para 25.

<sup>188</sup> Arnold op cit (n30) 123.

however, is not defined in the Refugee Convention. The drafter's reason not to include a definition was to allow for a sufficiently flexible interpretation. UNHCR has described persecution as 'to comprise human rights abuses or other serious harm, often, but not always, with a systematic or repetitive element.'<sup>189</sup> Hathaway has defined persecution as 'the sustained or systematic denial of basic human rights demonstrative of a failure of state protection.'<sup>190</sup> Without doubt, child marriage violates a range of fundamental human rights enshrined in key human rights documents. Thus, UNHCR has recognised that forced or child marriage constitutes a child-specific form of persecution that is 'influenced by [the children's] age, lack of maturity or vulnerability.'<sup>191</sup>

Typically, in the case of child marriage persecution does not stem from the state or a state actor but private individuals, namely the family or relatives of the girl. In such a case, the girl has to show that her state of origin is unwilling or unable to protect her. Unwillingness can be manifested where laws explicitly allow children to get married. In other cases, the state may tolerate the practice and simply not enforce laws against child marriage.<sup>192</sup> The most obvious example for a state's inability to protect a girl from a child marriage is if it 'has completely or effectively failed or ceased to function.'<sup>193</sup> This may be the case with failed states or states in war. More common cases relate to states that have no laws and policies in place that prohibit and punish child marriages. In other words, there is no system available that the state is reasonably willing to operate to detect, prosecute, and punish persecutors.<sup>194</sup> Hence, not only must the state establish an adequate system to prohibit child marriage, but this system must also be effective to protect a girl.

For many refugee child brides, however, it may be irrelevant whether they sought protection from their state of origin. Most notably, since parents or other custodians are likely to be the persecutor, they are obviously not able or willing to seek state protection on behalf of the girl and 'may act as a barrier to accessing adequate

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<sup>189</sup> United Nations High Commissioner for Refugees 'Master Glossary of Terms' (June 2006) Rev.1, 16.

<sup>190</sup> JC Hathaway & M Foster *The Law of Refugee Status* 2 ed (2014) 185.

<sup>191</sup> United Nations High Commissioner for Refugees 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees' (22 December 2009), UN Doc. HCR/GIP/09/08, para 18.

<sup>192</sup> Hathaway & Foster op cit (n 190) 297-9.

<sup>193</sup> Hathaway & Foster op cit (n 190) 307.

<sup>194</sup> Hathaway & Foster op cit (n 190) 308.

protection.’<sup>195</sup> The CEDAW Committee has acknowledged this in General Recommendation No. 32 and stated that

(...) the fact that a woman asylum seeker has not sought the protection of the State or made a complaint to the authorities before her departure from her country of origin should not prejudice her asylum claim, especially where violence against women is tolerated or there is a pattern of failure in responding to women’s complaints of abuse. It would not be realistic to require her to have sought protection in advance of her flight.<sup>196</sup>

In particular where child marriage is rooted in religious or cultural beliefs, gender-based violence may be regarded a private issue that authorities do not interfere with. Furthermore, a girl is not required to seek protection from her own state if this increases her risk of persecution at the hands of state or non-state actors.<sup>197</sup> In these cases, state protection is thus *de facto* not available for a girl.

### **3.1.2. Child marriage as an asylum ground**

The Refugee Convention names five grounds on which a person may be persecuted to meet the refugee definition. These are race, religion, nationality, membership of a particular social group, and political opinion.<sup>198</sup> Although the Refugee Convention does not address gender, UNHCR considers ‘an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status.’<sup>199</sup> Consequently, child marriage must be subsumed under at least one of these categories in order to constitute an asylum ground.

#### **3.1.2.1. Religion**

As explained in Chapter 2, the practice of child marriage may be based on religious beliefs that ascribe different roles to men and women.<sup>200</sup> The right to freedom of

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<sup>195</sup> Arnold op cit (n30) 116.

<sup>196</sup> General Recommendation No. 32, para 29.

<sup>197</sup> Hathaway & Foster op cit (n190) 327-9.

<sup>198</sup> Art 1(A)(2) Refugee Convention.

<sup>199</sup> UNHCR ‘Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ (7 May 2002), UN Doc. HCR/GIP/02/01, para 2.

<sup>200</sup> See Chapter 2.3.2.

religion is enshrined in major human rights documents<sup>201</sup> and is to be understood to encompass religion as a belief, an identity, and a way of life.<sup>202</sup> A girl's refusal to participate in the allegedly religious practice of child marriage 'may be perceived as evidence that [she] holds unacceptable religious opinions regardless of what she actually believes.'<sup>203</sup> As a consequence, she may be subject to persecution based on her actual or imputed religious beliefs.<sup>204</sup>

### 3.1.2.2. Political opinion

The ground of political opinion also has to be interpreted broadly. It not only comprises political activities, but any opinion related to the state, government, its policies, or society, whether actual or ascribed by others.<sup>205</sup> The refusal to conform to traditional notions of behaviour may well be regarded an opinion on gender roles in society and state policy and hence be seen as a political opinion implicit in conduct.<sup>206</sup> Particularly in states with little or no separation between religion and state institutions, the persecution grounds of religion and political opinion may overlap in gender-related claims.<sup>207</sup>

In practice, some hesitance to consider gender-based asylum claims on the grounds of religion and political opinion can be observed. Usually, they have been dealt with under the category of membership of a particular social group.<sup>208</sup> It has been criticised that this depoliticisation of a woman's or girl's asylum claims falsely interprets her (implicit) political resistance as a private behaviour and by doing so denies her political agency.<sup>209</sup> Hathaway and Foster therefore suggest that a gender-sensitive interpretation of political opinion should consider the unequal distribution and exercise of power in a given society and understand that female agency may

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<sup>201</sup> See Art 18 UDHR, Art 18 ICCPR, Art 14 CRC, Art 9 ECHR, Art 10 CFREU.

<sup>202</sup> UNHCR 'Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees' (28 April 2004), UN Doc. HCR/GIP/04/06, para 5.

<sup>203</sup> UNHCR *Guidelines Gender-Related Persecution* op cit (n199) para 25.

<sup>204</sup> Hathaway & Foster op cit (n190) 402-3.

<sup>205</sup> UNHCR *Guidelines Gender-Related Persecution* op cit (n199) para 32.

<sup>206</sup> Hathaway & Foster op cit (n190) 421-2.

<sup>207</sup> UNHCR *Guidelines Gender-Related Persecution* op cit (n199) para 26; UNHCR *Guidelines Child Asylum Claims* op cit (n191) para 47.

<sup>208</sup> Hathaway & Foster op cit (n190) 422-3; Honkala op cit (n29) 168-9.

<sup>209</sup> Honkala op cit (n29) 178-9.

challenge these inequalities which may be seen as the expression of a political opinion.<sup>210</sup>

### 3.1.2.3. Membership of a particular social group

The term particular social group is not defined in the Refugee Convention. UNHCR has described it as

(...) a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>211</sup>

This approach aims to reconcile the *eiusdem generis* and the social perception test and seeks to offer two alternatives by which a social group may be constituted, that is, a common characteristic or perception by society.<sup>212</sup>

It is widely recognised that women constitute a particular social group on the basis of their sex or gender, clearly an innate and immutable characteristic.<sup>213</sup> It is not necessary that every member of this group is persecuted, but the risk has to be linked to her membership to this group, in other words, her gender. Likewise, the size of the group is irrelevant.<sup>214</sup>

Age is another immutable characteristic and often intersects with other asylum grounds. In the case of child marriage, the factors gender and age combined formulate the social group of girls.<sup>215</sup>

In sum, the Refugee Convention does not explicitly mention gender-based violence. However, its refugee definition does allow for these cases to be covered. Girls who flee abroad from the threat of being married or from an already concluded marriage may base their asylum claim on the grounds of religion, political opinion, and/or membership to a particular social group.

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<sup>210</sup> Hathaway & Foster op cit (n190) 423.

<sup>211</sup> UNHCR *Guidelines Gender-Related Persecution* op cit (n199) para 29.

<sup>212</sup> Hathaway & Foster op cit (n190) 429.

<sup>213</sup> Hathaway & Foster op cit (n190) 436-7.

<sup>214</sup> UNHCR *Guidelines Gender-Related Persecution* op cit (n199) para 30-1; Hathaway & Foster op cit (n190) 436-41.

<sup>215</sup> Hathaway & Foster op cit (n190) 450-1; UNHCR *Guidelines Child Asylum Claims* op cit (n191) para 50.

### 3.2. Family reunification with her parents

In this scenario, a married girl leaves her state of origin without her husband, perhaps due to a war, but she is not persecuted individually. She wishes to reunite with her parents who have been granted asylum in the host state.

International human rights documents recognise that family constitutes the basic unit of society and as such is entitled to protection from the state.<sup>216</sup> The Refugee Convention itself does not specify a right to family unity but its drafters were aware of the importance of this right. Hence, the Conference of Plenipotentiaries also unanimously adopted Recommendation B on the Principle of unity of the family<sup>217</sup> in which it considers ‘that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee’. This recommendation, albeit non-binding, is indicative of the Refugee Convention’s objectives and serves as a guideline in the drafting and application of national refugee law.

Moreover, Art 9(1) CRC stipulates ‘that a child shall not be separated from his or her parents against their will’ unless ‘such separation is necessary for the best interests of the child.’ Of particular importance is furthermore Art 10(1) CRC which determines that ‘applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.’

UNHCR has adopted a broad definition of family. On the one hand, it presumes that ‘a relationship of social, emotional or economic dependency’<sup>218</sup> exists among members of the nuclear family and on the other hand requires this relationship to be proven among other family members. This definition of extended family may include married minor children and their spouses provided they are dependent on the refugee. Regarding married minor children, ‘a best interests assessment is generally required to determine what protection needs and resulting interventions may be needed in their

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<sup>216</sup> See Art 12 and 16(3) UDHR, Art 17 and 23(1) ICCPR, Art 10(1) ICESCR, Art 8 ECHR, Art 7 and 33(1) CFREU.

<sup>217</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B, UN Doc. A/CONF.2/108/Rev.1, adopted on 25 July 1951.

<sup>218</sup> F Nicholson *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (2018) 32.

respective best interests.<sup>219</sup> Furthermore, the definition adopted by UNHCR includes the best interests principle and thus refers back to the CRC.

In light of these guidelines, it is crucial to consider the merits of each individual case. That, however, is only possible if a girl is given the right to voice her opinion and express her will.

### **3.3. Arrival with the girl's husband or subsequent reunification with him**

In this scenario, a married girl either arrives together with her husband or seeks subsequent family reunification with him. These cases raise the question for host states whether to recognise the marriage and allow the couple to live together in their territory.

The Refugee Convention does not provide further guidelines for this scenario. In principle, Recommendation B regarding the protection of family unity applies here too. UNHCR has recognised that 'there are situations where a resettlement submission for a married refugee child together with their spouse may be warranted due to compelling protection needs or vulnerabilities in the family.'<sup>220</sup> This comprises cases where it is necessary to ensure that the girl receives the protection she needs or to maintain family unity with her parents.<sup>221</sup> Thus, UNHCR has developed internal guidelines on the resettlement assessment regarding married children. After the identification of the case-specific need for resettlement, UNHCR staff shall conduct a Best Interests Assessment (BIA) or Best Interests Determination (BID) to find a durable solution.<sup>222</sup> While the latter is a formal process, both procedures require the participation of experts, the child whose opinion should be given due consideration, and her family members. The less formal BIA applies if both spouses are minors and are about to resettle with at least one parent and may be applied where a child is married to an adult. However, BID may be necessary in the latter case since the assessment depends on the individual circumstances of the case and the child's protection needs. BID is further required if both spouses are minors and about to

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<sup>219</sup> Nicholson *op cit* (n218) 33.

<sup>220</sup> UNHCR 'Resettlement Assessment Tool: Married Children' (June 2011), available at <https://cms.emergency.unhcr.org/documents/11982/44343/Resettlement+Assessment+Tool+Married+Children/a55931ac-8489-4557-b29a-10eb697eb40c>, accessed on 12 November 2018, 4.

<sup>221</sup> *Ibid.*

<sup>222</sup> For a detailed description of BIA and BID, see UNHCR 'Guidelines on Determining the Best Interests of the Child' (May 2008), 22-4.

resettle without a parent and if the couple has a child whose best interests must also be taken into consideration.<sup>223</sup> Particularly, the assessment should include the girl's current living arrangements,<sup>224</sup> the circumstances which led to the marriage,<sup>225</sup> and the girl's physical, psychological, social, and legal needs, specifically related to the child marriage.<sup>226</sup> The outcome of this assessment 'will provide guidance on whether resettlement with their spouse is in the married child's best interests.'<sup>227</sup>

If a state is willing to host a minor refugee with their spouse, they should provide information on whether this marriage will be legally recognised, whether the spouses will be allowed to live together, and whether there is a risk that the state will recognise the minor spouse but not her husband or vice versa. If the child marriage with an adult spouse is not recognised in the receiving state, he will have to submit his own refugee claims.<sup>228</sup>

Of course, these guidelines do not constitute or describe any state obligations regarding refugee child brides. However, they clearly state that under certain circumstances, which have to be assessed thoroughly, it may be in the girl's best interests to stay with her husband. It may hence be necessary that host states do recognise child marriages concluded abroad and allow the couple to stay together. This illustrates the difference between the prohibition of the conclusion of child marriages and dealing with already existing child marriages.

#### 4. CONCLUSION

The present chapter has examined international human rights law regarding the issue of an appropriate minimum age of marriage. The understanding of childhood may differ depending on time and context, and while human rights documents and treaty bodies condemn the practice, there is no legally binding provision establishing a universally accepted minimum marriageable age. In fact, there are loopholes that may allow states to legalise child marriages, at least those involving older girls. There is consensus that the ability to give free and full consent to marriage depends on the age

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<sup>223</sup> UNHCR *Resettlement Assessment Tool* op cit (n220) 4-6.

<sup>224</sup> Step 2.2, UNHCR *Resettlement Assessment Tool* op cit (n220) 6-7.

<sup>225</sup> Step 2.5, UNHCR *Resettlement Assessment Tool* op cit (n220) 7-8.

<sup>226</sup> Step 2.6, UNHCR *Resettlement Assessment Tool* op cit (n220) 8.

<sup>227</sup> UNHCR *Resettlement Assessment Tool* op cit (n220) 6.

<sup>228</sup> UNHCR *Resettlement Assessment Tool* op cit (n220) 10.

and maturity of the child. The Committees for CEDAW and the CRC have recommended a minimum age of 18 years while allowing for exceptions in specific circumstances, when marriage may be entered at age 16. The Marriage Recommendation, on the other hand, recommends 15 as the absolute minimum age. As a result, there is no consensus in international human rights law regarding a suitable minimum age for marriage. This reflects different understandings of childhood that can be found worldwide, manifested, in turn, in heterogeneous national laws on child marriage.

This chapter has also discussed state obligations regarding the prevention of child marriage which remains in the legal focus. In particular, necessary measures include the criminalisation of child marriage and punishment of perpetrators. However, significantly less guidance can be found regarding child marriages that have already been concluded. CEDAW establishes that child marriages shall have no legal effect, but reality is more complex, and a strict annulment and dissolution of the marriage is arguably neither easy nor always the best option to protect the girl. Finding the best solution requires a careful assessment of the girl's living circumstances and best interests and may result in the recommendation to let her stay with her husband.

The transborder implication of girl brides seeking asylum in a different state raises further questions. This chapter has therefore also analysed the status of child marriage in international refugee law under consideration of three different scenarios. First, a girl may flee her home state because of an impending or already concluded marriage. The fact that child marriage is well established in refugee law as an asylum ground is not surprising considering the general focus on prevention of this practice. A girl may base her asylum claim on the ground of religion, membership of a particular social group, and/or political opinion. Secondly, a married girl may wish to reunite with her parents in another state. Family unity is widely protected under international law, and UNHCR has adopted a broad definition of family that comprises not only the nuclear family but under certain circumstances also members of the extended family. A married girl and her parents may have such 'a relationship of social, emotional or economic dependency'<sup>229</sup> entitled to protection. Thirdly, a girl arriving to a third state accompanied by her husband is generally also entitled to protection of family unity. Internal UNHCR guidelines require the conduction of BIA or BID in order to assess

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<sup>229</sup> Nicholson op cit (n218) 32.

the girl's individual circumstances and needs and find a durable solution according to her best interests. Again, the result of this assessment may recommend that the spouses stay together. In this case, it is important to consider whether the host state recognises the marriage and allows them to cohabit.

In sum, in both international human rights law and refugee law, the focus lies on the prevention of child marriage and less guidance is provided regarding marriages that already exist. The fourth chapter will discuss the European approach towards child marriage in human rights law and asylum law.

## CHAPTER 4

### THE EUROPEAN APPROACH

#### 1. INTRODUCTION

It is clear that child marriage is prohibited in international human rights law. States are obliged to ban and criminalise this practice. The recognition of child marriage as an asylum ground in international refugee law reflects this preventive approach. Less clear, however, are the appropriate minimum age for marriage and state obligations regarding children who are already married, in particular when these children cross state borders in the context of asylum law.

The recent refugee influx in Europe reached its peak in 2015 and 2016. Since then, European states are increasingly confronted with married girls who seek asylum in their territory. In July 2016, Germany had registered almost 1 500 married children with foreign citizenship, about 1 150 of which were girls. Most married children came from Syria, Afghanistan, and Iraq.<sup>230</sup> The vast majority of girls, that is 994 individuals, were between 16 and 18 years old.<sup>231</sup> For the same period, a study found that around 130 married children were present in Sweden, and girls made up 97 per cent of these. Most were between 16 and 18 years old.<sup>232</sup> Furthermore, '[a]necdotal evidence on the profile of married children suggests that a majority of girls are married with adult men, mostly young men aged 19 or 20 years.'<sup>233</sup> Assuming that these figures are representative for the whole continent, most married girls arriving in Europe are thus between 16 and 18 years old and their husbands are only few years older than them.

Compared to absolute numbers of asylum seekers,<sup>234</sup> these figures seem almost insignificant, but it is in this context that the gaps in international law become obvious. EU states have lamented 'a general lack of guidance with respect to married children.'<sup>235</sup>

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<sup>230</sup> European Union Agency for Fundamental Rights (FRA) *Current Migration Situation in the EU: Separated Children* (2016) 9.

<sup>231</sup> Response of the Parliamentary State Secretary to a Written Parliamentary Question (8 September 2016) German Bundestag, 18th Legislative Period, Drucksache 18/9595, 21.

<sup>232</sup> FRA op cit (n230) 10.

<sup>233</sup> FRA op cit (n230) 9-10.

<sup>234</sup> See Chapter 1.1.

<sup>235</sup> FRA op cit (n230) 10.

The present chapter will therefore analyse the existing European legal systems with respect to child marriage against the standard of international human rights law and refugee law. This includes the frameworks established by the Council of Europe (CoE) and the EU. Since several European states, namely the Netherlands, Germany, and Sweden, have changed or are about to change their national laws in reaction to the refugee crisis, their approaches will also be discussed in light of international and European frameworks.

## **2. COUNCIL OF EUROPE**

The ECHR is the key human rights document in the European continent. Article 12 ECHR provides that '[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' Another relevant CoE treaty is the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). Article 3(g) clarifies that the term women also includes girls under 18; hence there is no doubt that the Istanbul Convention aims to protect minor girl children as well. According to Art 32, 'Parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.' Furthermore, Art 37(1) requires State Parties to 'take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.' Going one step further, Art 37(2) obliges State Parties to also criminalise 'luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage'. This provision corresponds with para 55(l) of the Joint General Recommendation No. 31/General Comment No. 18.<sup>236</sup>

Binding CoE documents thus provide little more information regarding a minimum marriageable age than comparable international human rights documents. In fact, there is no consensus among European states in that regard. While most states have set the general marriageable age at 18, many allow for adolescents to get married at a younger age, that is 15 or 16 years, provided that they have the consent of their

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<sup>236</sup> See Chapter 3.2.2.

parents or a judge.<sup>237</sup> Also, like its international counterparts, the Istanbul Convention obliges states to criminalise child marriage and punish those who force a child into a marriage. However, the wording of the Istanbul Convention is arguably more sensitive regarding the dissolution of child marriages than Art 16(2) CEDAW since it does not say that child marriages have no legal effect whatsoever. Instead, its Art 37(1) stipulates that forced marriages *may* be declared void or be annulled or dissolved under the condition that no undue burden is placed on the victim. This language recognises that an existing marriage is a complex situation that requires due consideration of all factors and that the dissolution even of a forced marriage may not always be the most appropriate option.

In 2005, the Parliamentary Assembly of the CoE adopted a resolution<sup>238</sup> on forced and child marriages in which it urges Member States to determine 18 years as the minimum marriageable age<sup>239</sup> and possibly establish acts of forced marriage as criminal offences.<sup>240</sup> Furthermore, states may ‘refrain from recognising forced marriages and child marriages contracted abroad except where recognition would be in the victims’ best interests with regard to the effects of the marriage, particularly for the purpose of securing rights which they could not claim otherwise’.<sup>241</sup> Here, the Parliamentary Assembly provides clear guidelines, yet legally non-binding, on how to prevent child marriages from being contracted in Europe but also recommends how states should deal with marriages concluded elsewhere when spouses come to the continent subsequently. This is in line with the analysis of the binding provision of Art 37(1) of the Istanbul Convention. Moreover, this resolution makes a clear distinction between the prevention of child marriage through the determination of 18 as the minimum age and criminalisation of the practice and dealing with already existing child marriages.

Furthermore, the Istanbul Convention makes dispositions for the case that the residence status of a victim of violence depends on that of her spouse and their marriage is dissolved. Article 59(1) provides that she shall be granted an autonomous residence permit ‘in the event of particularly difficult circumstances’, regardless of

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<sup>237</sup> See Chapter 1.1.

<sup>238</sup> Parliamentary Assembly ‘Resolution 1468 (2005)’, adopted on 5 October 2005.

<sup>239</sup> Resolution 1468 (2005) para 14.2.1.

<sup>240</sup> Resolution 1468 (2005) para 14.4.

<sup>241</sup> Resolution 1468 (2005) para 14.2.4.

how long the couple had been married. Regrettably, the Istanbul Convention does not define or further describe the term ‘particularly difficult circumstances’. The Explanatory Report<sup>242</sup> suggests that being a victim of one or more of the forms of violence covered by the Istanbul Convention coincides with experiencing particularly difficult circumstances. It has been argued, however, that this would make the use of this term superfluous.<sup>243</sup> Instead, there may have to be further circumstances that require the issuing of an autonomous residence, such as medical needs that can only be met in the host state, the woman being pregnant or having small children, or her having community ties in the host state.<sup>244</sup> Another possible interpretation is that ‘particularly difficult circumstances’ require a forward-looking assessment of what might happen to a woman if she is returned to her home country, similar to the assessment to be conducted in cases of non-refoulement, but not reaching this threshold.<sup>245</sup> All these possibilities may be applicable in the case of child brides. Ideally, all of them should be considered under this provision in order to find the most suitable solution that corresponds with the best interests of the child.

### **2.1. Gender-based asylum claims**

The drafters of the Istanbul Convention were aware of the possible gender dimension of the refugee definition. Hence, Art 60(1) of the Istanbul Convention obliges state parties

to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention Relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.

Moreover, Art 60(2) requires a gender-sensitive interpretation of the asylum grounds. Thus, this provision is in line with the UNHCR Guidelines mentioned above.<sup>246</sup>

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<sup>242</sup> Council of Europe ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence’ CETS No. 210, adopted on 11 May 2011, para 303.

<sup>243</sup> V Stoyanova ‘A Stark Choice: Domestic Violence or Deportation?’ (2018) 20 *European Journal of Migration and Law* 53 at 63.

<sup>244</sup> Stoyanova op cit (n243) 64.

<sup>245</sup> Stoyanova op cit (n243) 64-5.

<sup>246</sup> See Chapter 3.1.2

## 2.2. Family unity

The most crucial provision regarding family unity is Art 8 ECHR which enshrines the right to respect for private and family life. A landmark decision<sup>247</sup> concerned two Afghan nationals seeking asylum in Switzerland. They had married in a religious ceremony in Iran when the girl was 14 and her groom 18 years old but never got a marriage certificate. The couple had entered Europe via Italy where both spouses had registered as asylum seekers. For this reason, their asylum applications in Switzerland were rejected. While subsequently the girl's asylum claim was reexamined by Swiss authorities, her husband was expelled to Italy but returned to Switzerland illegally only three days later and was then tolerated there. Both spouses were later granted asylum in Switzerland.<sup>248</sup>

The ECtHR held that 'Article 8 of the Convention cannot be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14 year old child.'<sup>249</sup> It further stated that such obligation cannot be read into Art 12 ECHR either.<sup>250</sup> In this conclusion, the ECtHR followed the state's arguments 'that the applicants' religious marriage was invalid under Afghan law and in any case was incompatible with Swiss *ordre public* due to the first applicant's young age'.<sup>251</sup>

However, as the ECtHR also recognised in this case, it is settled case-law 'that the notion of "family life" in Article 8 is not confined solely to families based on marriage and may encompass other *de facto* relationships'.<sup>252</sup> When assessing whether these other relationships amount to family life, 'a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means'.<sup>253</sup> While in the present case the ECtHR decided that in no case could there have been a violation of Art 8 since the couple had only been separated for a very short time,<sup>254</sup> Judge Nicolaou issued a concurring opinion in which he pointed out 'that the non-recognition of the purported marriage could not exhaust the question

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<sup>247</sup> Z.H. and R.H. v Switzerland (2016), Court (Third Section), Application no. 60119/12.

<sup>248</sup> Z.H. and R.H. v Switzerland *supra* (n247) at 6-20.

<sup>249</sup> Z.H. and R.H. v Switzerland *supra* (n247) at 44.

<sup>250</sup> *Ibid.*

<sup>251</sup> Z.H. and R.H. v Switzerland *supra* (n247) at 43.

<sup>252</sup> Z.H. and R.H. v Switzerland *supra* (n247) at 42.

<sup>253</sup> *Ibid.*

<sup>254</sup> Z.H. and R.H. v Switzerland *supra* (n247) at 45.

of whether the applicants did or did not have a family life together.’<sup>255</sup> That is to say, even when a marriage is considered invalid, the relationship between the spouses may still constitute family life and is hence entitled to protection under Art 8. In the context of child brides seeking asylum in Europe, this scope of protection is crucial.

Two important issues rise in the analysis of this case. First, the marriage under consideration was found to be invalid under the law of the spouses’ home country. Secondly, the ECtHR reiterated its settled case-law regarding its understanding of the term family life and other *de facto* relationships. In other words, even where European states do not recognise a foreign marriage, the underlying relationship may still amount to family life that is protected under Art 8 ECHR. Additionally, the broader concept of private life in terms of Art 8 ECHR includes, but is not limited to, the right to establish and develop relationship with other human beings and the right to personal development and self-determination. One element protected as part of the personal sphere is a person’s sexual life.<sup>256</sup>

Hence, there are good arguments to justify a state’s obligation to protect the relationship of a married girl and her husband as family and private life in terms of Art 8 ECHR. This does not prevent or exclude states from assessing whether a married girl actually wants to stay in this marriage and with her husband. This issue has to be carefully examined in the asylum process in order to offer adequate protection to the girl. As stated before, a girl’s right to be heard and taken seriously as well as her best interests are fundamental principles of the CRC and UNHCR guidelines. In his concurring opinion on *Z.H. and R.H. v Switzerland*, Judge Nicolaou cited a medical report on the girl’s condition that stated that she was terrified about the idea to find herself without her husband, leaving her with suicidal thoughts, sleepless, and unable to eat.<sup>257</sup> When faced with such a medical condition, a separation from her husband is unlikely to be in the girl’s best interest. However, in other cases the asylum process might offer a girl the chance to escape an unwanted marriage. A case-by-case assessment and decision is essential to ensure the highest standard of protection for all married refugee girls.

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<sup>255</sup> *Z.H. and R.H. v Switzerland* supra (n247), Concurring Opinion of Judge Nicolaou.

<sup>256</sup> *E.B. v France*, Court (Grand Chamber), Application no. 43546/02, at 43.

<sup>257</sup> *Z.H. and R.H. v Switzerland* supra (n247), Concurring Opinion of Judge Nicolaou (original quote in French).

The ECtHR's jurisdiction corresponds with the definition of family adopted by UNHCR and is arguably applicable both in cases when a girl arrives with her husband and seeks reunification with her parents. Even when one assumes that the relationship between a married girl and her parents does not amount to family life, their relationship is certainly protected under the notion of private life that is equally entitled to protection under Art 8 ECHR. There is no precise definition of what constitutes private life in terms of Art 8 ECHR, but the Court's jurisdiction has made it clear that it describes 'a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world.'<sup>258</sup> This broader concept 'encompasses, *inter alia*, the right to establish and develop relationships with other human beings'.<sup>259</sup> Following this approach and considering CRC provisions on the best interests and the right to be heard as well as UNHCR guidelines regarding married children, states are obliged to conduct a thorough assessment of each individual case and respect the girl's view, and ultimately may have to allow the family to stay together, be that the girl and her husband or the girl and her parents.

### 3. EU

The Charter of Fundamental Rights of the European Union<sup>260</sup> (CFREU) recognises the right to marry and to found a family 'in accordance with the national laws governing the exercise of these rights.' According to the Explanations Relating to the Charter of Fundamental Rights,<sup>261</sup> this right is based on Art 12 ECHR but leaves out references to men and women in order to 'cover cases in which national legislation recognises arrangements other than marriage for founding a family.'<sup>262</sup> Interestingly, though, there is no reference to a minimum marriageable age.

The CFREU does not define who it considers a child but includes a special provision on the rights of children in Art 24. It includes the right to the necessary protection and care, the right to express their view and to be heard (para (1)), enshrines

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<sup>258</sup> I Roagna *Protecting the Right to Respect for Private and Family Life Under the European Convention on Human Rights* (2012) 12.

<sup>259</sup> See, for example, *E.B. v France* supra (n256) at 43.

<sup>260</sup> Charter of Fundamental Rights of the European Union, OJ 2007/C 303/01, adopted on 7 December 2000, entered into force on 1 December 2009.

<sup>261</sup> Explanations Relating to the Charter of Fundamental Rights, OJ 2007/C 303/02, adopted on 14 December 2007.

<sup>262</sup> Explanations Relating to the Charter of Fundamental Rights op cit (n261) Explanation on Article 9.

the principle of the best interests (para (2)), and a child's right to maintain a personal relationship and contact with both parents (para (3)). Thus, the CFREU does not provide more information or more extensive rights than international documents analysed in Chapter 3.

However, there is extensive EU secondary legislation aiming to harmonise asylum procedures among EU states. In terms of Directive 2011/95/EU<sup>263</sup> (Qualification Directive, hereinafter: QD), acts of a gender-specific or child-specific nature may constitute persecution within the meaning of Article 1(A)(2) of the Refugee Convention.<sup>264</sup> Consequently, as in international law, EU law requires that child marriage must be subsumed under at least one of the five persecution grounds in order to constitute an asylum ground and demands a gender-sensitive and child-sensitive approach.

The QD has adopted a cumulative approach in respect of the persecution ground of membership in a particular social group. In terms of Art 10(1)(d),

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Recalling that UNHCR has defined a particular social group as a group sharing common characteristics *or* being perceived as a such a group by society,<sup>265</sup> the QD's requirement that both tests must be satisfied has created an additional burden for asylum applicants since it may be difficult to prove that a certain group is in fact perceived as such by society. Also, adequate country information is often not available to authorities assessing an asylum claim.<sup>266</sup> Since this persecution ground is habitually the most relevant for women's asylum claims,<sup>267</sup> this additional threshold may limit its applicability on girls seeking international protection and result in the denial of asylum, very much in contrast to the girl's best interests.

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<sup>263</sup> Directive 2011/95/EU of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (13 December 2011) OJ L 337/9.

<sup>264</sup> Art 9(2)(f) QD.

<sup>265</sup> See Chapter 3.1.2.3.

<sup>266</sup> Hathaway & Foster op cit (n 190) 432-5.

<sup>267</sup> UNHCR *Guidelines Gender-Related Persecution* op cit (n 199) para 28.

### 3.1. Family reunification with her parents

In absence of a universal definition of the term family, most European states have adopted a narrow definition that includes only the nuclear family. This term usually includes spouses and their minor, unmarried children.<sup>268</sup> Council Directive 2003/86/EC<sup>269</sup> (Family Reunification Directive, hereinafter: FRD) follows a similar approach. Its preamble states that '[m]easures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law',<sup>270</sup> with a particular reference to Art 8 ECHR. However, contrary to the broad definition of family adopted by the ECtHR, family members that shall be entitled to family reunification under the FRD only includes the spouse and the couple's minor children.<sup>271</sup> Furthermore, Art 4(1)(d) explicitly requires that '[t]he minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.' This definition clearly excludes married children from reunification with their parents. Thus, married girls are no longer part of the nuclear family they formed with their parents but have founded their own nuclear family with their husband. As Sanna Mustasaari puts it,

[t]he problem of belonging of the child-wife/mother lies in that she is simultaneously a child (a role prescribed upon a dependant person in need of care) and a carer or a spouse (a role prescribed upon an autonomous person and provider of care), which makes it difficult to define the one (nuclear) family to which she belongs.<sup>272</sup>

This narrow definition only takes into account that the minor is married but ignores the circumstances of this marriage and the *de facto* situation the minor finds herself in. This provision clearly ignores CRC standards and contravenes the ECtHR's and UNHCR's definition of family as well as UNHCR guidelines as it does not even allow for a best interests assessment. Furthermore, contrary to Art 24(1) CFREU, the girl's right to express her views and to be heard and ultimately her personal autonomy and agency, according to her age and maturity, are denied. By doing so, the QD accepts to deny a married girl the protection and care of her parents.<sup>273</sup>

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<sup>268</sup> Nicholson op cit (n218) 31.

<sup>269</sup> Council Directive 2003/86/EC on the Right to Family Reunification (22 September 2003) OJ L 251/12.

<sup>270</sup> Preamble para 2 FRD.

<sup>271</sup> Art 4(1) FRD.

<sup>272</sup> S Mustasaari 'The Married Child Belongs to No One: Legal Recognition of Forced Marriages and Child Marriages in the Reuniting of Families' (2014) 26 *Child & Family Law Quarterly* 261 at 273.

<sup>273</sup> Mustasaari op cit (n272) 274-5.

### **3.2. Arrival with her husband or subsequent reunification with him**

The preamble of the FRD holds that this directive should also be applied when families enter together.<sup>274</sup> However, Art 4(5) FRD also allows states to determine a minimum age for spouses, 21 years at maximum, before they are allowed to reunite. This provision seeks ‘to ensure better integration and to prevent forced marriages’.<sup>275</sup> However, it remains somewhat unclear how the age limit would actually prevent forced marriages from happening abroad when none of the spouses is a European citizen. Furthermore, as in the previous case, this provision does not consider international standards of child protection as enshrined in the CRC and established in UNHCR guidelines. On the other hand, it also violates the principles of a child’s right to be heard and the best interest under the CFREU. Also, the FRD does not leave any room for a thorough assessment of individual circumstances of each girl. To the extent that states implement this clause in their national laws, they are likely to violate their obligations under international and European law.

## **4. NATIONAL APPROACHES**

This section will discuss how some European states have reacted legislatively to child marriages in their territories. Since most European countries allow minors under the age of 18 to get married under certain circumstances, stricter laws do not only affect asylum seekers from non-European states but also apply to European spouses who got legally married in their home state when one of them was under 18 and subsequently decide to move to one of the states discussed below.

### **4.1. Germany**

The German Federal Act on Combatting Child Marriage, adopted in July 2017, stipulates that a marriage involving a foreigner is void under German law when the spouse was younger than 16 when entering the marriage,<sup>276</sup> unless the minor spouse has reached the age of majority and none of the spouses had their habitual residence

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<sup>274</sup> Preamble para 7 FRD.

<sup>275</sup> Art 4(5) FRD.

<sup>276</sup> Art 2(1) Federal Act on Combatting Child Marriage.

in Germany to that date.<sup>277</sup> Furthermore, a foreign marriage can be dissolved by a judge when one of the spouses was between 16 and 18 years old.<sup>278</sup>

The law establishes two exceptions.<sup>279</sup> First, a marriage must not be dissolved if the formerly minor spouse has reached the age of majority and declares that he or she wants to remain married. Secondly, dissolution is ruled out if due to exceptional circumstances this constitutes a case of such hardship for the minor spouse that the continuation of the marriage is required exceptionally. According to Art 4(1), it is irrelevant for the recognition as refugee of a minor if the marriage was declared void or annulled under German law, however this does not apply to the spouse who had reached the age of majority when the marriage was concluded.

It may be plausible to distinguish between marriages concluded before the age of 16 and between 16 and 18 in terms of the girl's maturity and capability to fully understand the implications of a marriage. However, the German law fails to consider the complexity of reality. In declaring marriages void if one spouse was under 16, it follows Art 16(2) CEDAW and creates all the problems pointed out in that context. In contrast to CRC and UNHCR standards, it does not provide for any case-by-case assessment to determine the best interests of the girl, denies her right to be heard and ignores whatever negative implications the annulment of the marriage may have on her and her children.

Regarding marriages concluded between 16 and 18 years, the wording of the German Act is more liberal since marriages *can* be dissolved, hence there is apparently some discretion for authorities. However, the exception clause is too narrow to cover all cases. Given that the Act does not provide a legal definition of what constitutes exceptional circumstances or an exceptional case of hardship, it is possible that those terms are interpreted very narrowly, leaving hardly any options for its application. Hence, without a careful assessment of the girl's circumstances and compliance with CRC and UNHCR standards, her best interests are likely to be violated.<sup>280</sup>

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<sup>277</sup> Art 2(4) Federal Act on Combatting Child Marriage.

<sup>278</sup> Art 2(1) Federal Act on Combatting Child Marriage.

<sup>279</sup> Art 1(5) Federal Act on Combatting Child Marriage.

<sup>280</sup> Witting op cit (n172).

## 4.2. Netherlands and Sweden

The Dutch Forced Marriage Prevention Act, adopted in December 2015, goes even further than the German law. According to the new Art 10:32(c) of the Dutch Civil Code, a marriage concluded outside the Netherlands will not be recognised under Dutch law if one of the spouses was under 18, unless both spouses have reached the age of majority at the time of the recognition of the marriage. In Sweden, the government has recently proposed a similar bill that would annul marriages concluded when one spouse was under 18 unless they have since reached the age of majority and wish to stay together.<sup>281</sup>

This strict approach does not allow for any exceptions and does not stipulate any assessment of the girl's individual circumstances. It thus violates the rights and principles established in the CRC, the Istanbul Convention, and the CFREU, particularly the right to be heard and have her opinion considered according to her age and maturity. Moreover, it manifestly disregards the best interests principle. By assuming that the continuation of the marriage always contravenes the girl's best interests, the imperative annulment of this marriage stipulated by the Dutch law and Swedish bill ignores that various reasons may have caused the girl to marry and that she and her husband may have build a strong relationship, in particular if they have fled together, have children, and if her husband is the only trusted person close to her in the country of refuge. Furthermore, this approach is not in line with UNHCR guidelines and recommendations regarding married children. The Netherlands and Sweden, once their bill will enter into force, are likely to prejudice girls and infringe their fundamental rights. Amendments to these acts are thus urgently necessary to comply with international and European human rights law and protect girls according to their needs.

## 5. CONCLUSION

The present chapter has analysed European legal frameworks regarding child marriage. Treaties of the CoE and EU primary law provide little more information

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<sup>281</sup> Radio Sweden 'Proposal to Tighten Child Marriage Ban Moves Forward' (23 August 2018), available at <https://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=7025578>, accessed on 29 August 2018.

regarding the legal age of marriage than international documents. Like their international counterparts, they require the criminalisation of child marriage. Furthermore, European law also recognises gender-based violence as an asylum ground. Arguably, European law provides more binding provisions regarding the treatment of married minor refugees, albeit following rather opposite approaches.

According to the CoE's Istanbul Convention, forced marriages may be declared void or be annulled or dissolved provided that no undue burden is placed on the victim. Contrary to CEDAW, this allows for a best interests assessment that considers the girl's specific life situation. Furthermore, in a decision involving married minor refugees, the ECtHR reiterated that even when states do not recognise a child marriage concluded abroad, the relationship between the spouses may still constitute family life and is hence entitled to protection under Art 8 ECHR. Arguably, the same principle should apply when a married girl seeks family reunification with her parents since their relationship may also meet the ECtHR's broad definition of family. This approach is consistent with recommendations and guidelines adopted by UNHCR and ensures that cases are decided on their merits and girls receive the protection they need.

Secondary EU law regulates asylum procedures extensively but is likely to violate international and European human rights law. EU directives have adopted a narrow definition of family that only includes spouses and their unmarried minor children. This definition precludes married girls from reunification with their parents *a priori*, without any possibility to do a case-by-case assessment. Furthermore, the FRD allows EU member states to determine a minimum age for spouses which may not exceed 21 years before a married couple may reunite. These limitations do not have due regard to the best interests principle of the CRC and CFREU and do not consider the broad definition of family adopted by UNHCR and the ECtHR. Thus, EU secondary law fails to respect a married girl's rights and denies her the protection she needs.

Several European states, above all the Netherlands and Germany, have changed their national laws in order to prevent child marriages. Germany annuls all marriages concluded abroad by at least one spouse under 14 but at least stipulates exceptions in hardship cases if the minor spouse is between 16 and 18 years old and would be unduly hard hit by a dissolution of the marriage. Moreover, marriages may not be dissolved if

the formerly minor spouse has reached the age of majority and declares that he or she wants to continue the marriage.

The Dutch law and the Swedish proposed bill are significantly stricter and do not recognise child marriages concluded abroad at all. This leaves no room for a case-by-case assessment and violates the CRC, the Istanbul Convention, and the CFREU as well as UNHCR recommendations. States following this approach urgently have to understand that there is a difference between the prevention of child marriage and the handling of already existing marriages and should adapt their laws accordingly.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

Child marriage is defined as a marriage in which one of the spouses is under the age of 18. The practice is a global phenomenon that affects millions of girls every year. Since the majority of children involved are girls, child marriage has been identified as a form of gender-based violence.

This thesis has explored the causes and consequences associated with child marriage and highlighted how they are interlinked. Child marriage has its roots in gender inequality, religious and cultural beliefs and traditions that ascribe different roles to women and men, as well as a society's understanding of honour. Poverty and the lack of education are decisive factors contributing to the perpetuation of the practice. Often, girls are considered an economic burden that families seek to ease by marrying their daughters off early. Dowry and bride prize systems provide additional incentives to do so. Child marriage has an enormous impact on the girl's physical and mental development and violates a number of her fundamental human rights, including her right to life, health, and education. Most married girls leave school to take care of the household and bear children. Early pregnancy and childbirth constitute significant risk factors for married girls and are the leading cause of death in girls between 15 and 19. The link between lack of education, poverty, and poor health creates a vicious circle that has an adverse intergenerational effect and perpetuates the practice of child marriage. The characteristics shared by child marriages and other grave human rights violations, namely sexual exploitation, slavery and slavery-like practices, and forced child labour, underline the severity of this harmful practice. Like any other form of gender-based violence, the number of child marriages rises in settings of armed conflict and war due to the increase of poverty and threats against girls and women.

Several international human rights instruments ban child marriages. One reason why they do this is because children are not mature enough to fully understand all implications of a marriage, give their full and free consent, and assume the resulting obligations. From an examination of the relevant documents on the minimum age of marriage and state obligations to protect girls, it is striking that there is no legally

binding international treaty that sets a general minimum marriageable age. Recommendations by the UN General Assembly and treaty monitoring bodies differ between 15 and 18 years. This loophole reflects the fact that there is no universally accepted concept of childhood and consequently no universally accepted minimum age for marriage.

The study of international documents has further shown that their focus lies on the prevention and ban of this practice. States are obliged to criminalise child marriage and prosecute and punish those who participate in the conclusion of such a marriage. In light of the high number of child marriages concluded annually, this is clearly a crucial part of the fight against child marriage. However, the regulation of child marriages that are already concluded is fundamentally different to the prevention of the practice. A certain bond may have developed between the spouses, and simple annulment of the marriage is in some cases unlikely to meet the girl's protection requirements.

The preventive approach is reflected in the fact that child marriage is recognised as an asylum ground under international refugee law. The Refugee Convention requires a children's rights approach in its interpretation and application. In cases of child marriages, persecution typically occurs at the hands of the girl's parents or other care-takers while the state is unwilling or unable to protect her, either because it has not established a system to detect, prosecute, and punish persecutors or because such system is ineffective. A girl can base her asylum claim on the grounds of religion, political opinion, and/or membership to a particular social group.

Less clear, however, are the cases of married girls seeking family reunification with her parents and of girls arriving in the receiving state accompanied by their husband. Generally, the principle of family unity is widely recognised and protected under international law. UNHCR has adopted a broad definition of family, describing it as 'a relationship of social, emotional or economic dependency'<sup>282</sup> and has explicitly held that the right to family reunification may include married minor children and their spouses provided they are dependent on the refugee. UNHCR guidelines require a thorough assessment of the individual circumstances of each case to find a durable solution according to the girl's best interests. This may result in the finding that the

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<sup>282</sup> Nicholson *op cit* (n218) 32.

most appropriate solution is to let spouses stay together. Proper assessment demands that girls are given the right to be heard and that their voice is duly considered in the procedure. In any case, the girl's best interests shall be the guiding principle.

Traditionally, European states have low rates of child marriage. However, the refugee influx of recent years has confronted states with an increasing number of cases involving married girls seeking asylum in their territory. In order to assess their obligations under regional European legal frameworks, the analysis involved a review of the relevant instruments adopted by the CoE as well as EU primary and secondary law. The CoE has acknowledged that dissolution of forced marriages may place an undue burden on the victims and that recognition of the marriage may be in the victim's best interests. Furthermore, the ECtHR has repeatedly held that other *de facto* relationships may also be entitled to the protection of family life in terms of Art 8 ECHR. In the case of *Z.H. and R.H. v Switzerland*, the ECtHR stated that European states may be under an obligation to protect the relationship between a refugee girl and her husband even when they do not recognise the marriage concluded abroad since this relationship may still amount to family life. This broader definition seems preferable and in line with international human rights obligations and recommendations since it requires the assessment of each case in order to determine the girl's best interests. Due assessment also gives her an opportunity to express her view that has to be considered in the procedure.

Relevant EU law allows for family reunification only for the nuclear family, that is, spouses and their unmarried minor children. This limitation means that married girls no longer form a family with their parents but have founded their own family with their husband. It thus precludes married girls from reunification with their parents without an individual assessment of the circumstances of her marriage and her actual situation. This narrow definition of family operates to deny a married minor girl the protection and care of her parents. Furthermore, a minor girl and her husband as a married couple meet the narrow definition of family under EU law. However, under Art 4(5) of the FRD states may determine a minimum age for spouses, 21 years at maximum, before they are allowed to reunite. While this provision may be effective to prevent EU citizens from getting forcefully married abroad as minors, it may violate the rights of those who arrive to Europe as refugees since it violates the right to family unity and disrespects the girl's best interests.

Some states, like Germany and the Netherlands, have reacted to the incidence of child marriage and changed their legislation, raising the minimum marriageable age to 18 without exceptions and limiting the recognition of marriages concluded abroad. To the extent that they categorically outlaw the recognition of such marriages, they can frustrate efforts to prevent child marriages in order to protect girls and to regulate already existing child marriages. The latter requires a more sensitive approach and a careful assessment of the merits of each case and may result in the finding that it is in the girl's best interests to stay with her husband. By not including an adequate assessment, these states violate international and European law on the child's right to be heard and the best interests principle.

To prevent child marriages, it is essential to probe and criminalise this practice. However, when dealing with married (refugee) girls, the paramount objective should be to protect her from harm, ensure her well-being, and avoid (further) victimisation and trauma. In order to achieve this goal and to comply with international human rights law and the jurisdiction of the ECtHR, the EU and its member states should adopt a flexible approach to child marriage which allows for a case by case consideration of each incident and includes the girl as an agent who has the right to be heard and her views be taken into account while considering her age and maturity and the fact that she is both a wife and a child in need of special protection.

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