UNIVERSITY OF ESSEX

DISSERTATION

SCHOOL OF LAW

LLM/MA IN: International Humanitarian Law

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DISSERTATION TITLE

The Regulation of Child Marriages in International Humanitarian Law

COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)

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UNIVERSITY OF ESSEX

SCHOOL OF LAW

LLM in International Humanitarian Law

2018-2019

Supervisor: Professor Noam Lubell

DISSEETATION

The Regulation of Child Marriages in International Humanitarian Law

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Registration Number (optional): 1802178

Number of Words: 20,000

Date Submitted: 24 September 2019
The Regulation of Child Marriages in International Humanitarian Law

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A thesis submitted for the degree of Master of Laws (LL.M.) in International Humanitarian Law

University of Essex, School of Law

September, 2019
Acknowledgement

This thesis would not have been written if it was not for the great support and contributions of my parents, Stiphanos Teka Kidane and Emebet Tamirat Debella. Gashiyya and Tabiyya, I have no words for you. Thank you for dreaming on my behalf, when I didn't and helping me realize my dreams, once I did. I only wish I could be half the person you two deserve. Mimisha, Mamituye, Kukusha and Babiyya, thank you for being the consistent reminders of the grace of God. Abiyya, your prayers have been with me all along and all is because of them. Belaiyya, Misiruye, Nigistyye, Zeleya, Yeteye and Hamushiyya, I have no words for each one of you and everyone you have brought to the family. Thank you all for having been part of this journey, from the start. Amenitiyya, thank you is not enough for all the time you invested to help me. Blenyye, Hewaniyye, Hiwiiyye, Kidiyye, Makiyye, and Tizuye, I appreciate that you encouraged me and helped to keep me disciplined in the past few months. Wininyye and Allan, thank you for creating a home away from home for me and taking me under your wings, over the past year. Thank you, God, for Your presence and for putting all these wonderful people in my life. I would also like to extend my gratitude to my supervisor, Professor Noam Lubell, who has given me complete autonomy in writing this dissertation whilst providing his invaluable advice whenever necessary. The process has taught me a lot and I am grateful. Chevening Scholarships, the UK government’s global scholarship program, funded by the Foreign and Commonwealth Office (FCO) and partner organizations has funded my study and stay in the UK; thank you.
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Introduction

The Sustainable Development Goals (SDGs), adopted in 2015, laid the blueprint for a world that leaves no one behind. In order to achieve its aim, the document set out 17 integrated, indivisible, global in nature and universally applicable goals. Gender equality and empowerment of all women and girls, which has been constrained due to multiple factors for centuries, is one of the 17 goals. In order to achieve this, the United Nations (UN) set the elimination of all harmful practices – factors contributing to hold girls and women back, as one of the major targets. Harmful practices are practices and behaviours grounded in discrimination, often intersecting with violence, causing harm and suffering that surpasses the immediate physical and mental consequences. They have the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children. Child marriage - one of the multiple hurdles girls face in their life – is a harmful practice. The calls made, over the years, by multiple organs contributed to the inclusion of child marriages as a harmful traditional practice in the SDGs. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for example, provided “the betrothal and the marriage of a child shall have no legal effect”, in its document from 1979.

Yet, 12 million girls are still getting married every year, before reaching their 18th birthdays. Without further progress, 150,000,000 additional girls will be married by 2030. The prevalence of child marriage around the world is not the same all over the world, just as the number of the world’s young population is not. The African continent accounts for the highest number of children in the world with

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1. **Transforming our world: the 2030 Agenda for Sustainable Development**, 21 October 2015, A/RES/70/1
3. *id* [n.1] para.55
4. *id*, Goal 5
5. *id*, Target 5.3
6. **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**, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, para.15
7. *id*
9. *id*[n.1] Target 5.3
11. *id*, art.16(2)
13. *id*
47% of its population under the age of 18.\textsuperscript{14} The African Charter on the Rights and Welfare of the Child\textsuperscript{15} (ACRWC) tries to protect these children from different harms, including child marriage.\textsuperscript{16} However, the reality is not yet corresponding with the legal document as the continent has the one of the highest rates of child marriages.\textsuperscript{17} The prevalence of child marriage remains high compared to the growing child population in the continent.\textsuperscript{18} Hence, it is important to undertake a study in this area.

Child marriages is not a new area of research. However, previous legal researches have mainly addressed this topic from a human rights perspective.\textsuperscript{19} The limited documents that have explored the topic in situations of armed conflicts have addressed areas such as gender-based violence.\textsuperscript{20} Gender-based violence is any harmful act directed against individuals or groups of individuals because of their gender.\textsuperscript{21} Sexual violence forms only one part of this large concept of act, hence, falling between the cracks during discussions regarding child marriages. The decision of the Special Court of Sierra Leone that drew a distinction between traditional or customary practices of marriage of girls and the phenomenon of ‘forced marriage’ during the conflict has also diverted the already limited focus given to child marriage on certain types of child marriages.\textsuperscript{22} Drawing back from these trends, this paper tries to analyze child marriages in terms of sexual violence. It does not create any division between the types

\begin{flushleft}
\textsuperscript{14} ‘Generation 2030 Africa 2.0: Prioritizing investments in children to reap the demographic dividend’, (2017), United Nations International Children’s Emergency Fund, p.16
\textsuperscript{15} African Charter on the Rights and Welfare of the Child, 11 July 1990
\textsuperscript{16} id art.21(2)
\textsuperscript{17} ‘Ending Child Marriage: Progress and prospect’, (2013), United Nations International Children’s Emergency Fund, p.1; Asia also has a very high rate of child marriages. The ten countries with the highest rates of child marriages are either in Africa or in Asia.
\textsuperscript{20} A good example can be Jolena Zabel, ‘Untying the Knot: Child Marriage in Situations of Armed Conflict’, (2016), Political Science Honors Projects
\textsuperscript{22} The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused), Separate concurring opinion of the Hon. Justice Julia Sebutinde Appendix to judgment Pursuant to Rule 88(c), SCSL-2004-16-T, Special Court for Sierra Leone, 19 July 2007, para.11
\end{flushleft}
of marriages involving children under the age of 18. However, it recognizes child marriage affect girls disproportionately; hence, it will only analyze the child marriages of girls. There has been also been deliberate effort to focus on Africa due to the personal interest of the researcher. In order to do this, the examples given are of African countries. Moreover, the only regional documents referred are only those from Africa.

This is a thesis for the program of International Humanitarian Law. Therefore, the focus will primarily be on International Humanitarian Laws (IHL). However, there will be references to different International Human Rights Laws (IHRL) and International Criminal Law instruments, but only to complement the discussion on IHL. IHL and IHRL are interrelated regimes that cooperate. IHL does not preclude the applicability of IHRL. The International Court of Justice (ICJ) has affirmed this when it decided, while the prohibition of certain acts has to rely on the lex specialis i.e. IHL, the protection extended by the International Covenant on Civil and Political Rights (ICCPR) continues even during armed conflicts, unless suspended due to public emergency. The Court has also ruled that some rights might be matters of both IHL and IHRL. The ICJ further strengthened this by holding Uganda responsible for the violation of both IHL and IHRL violations committed by its armed forces. Therefore, it would in line with the practice to refer to this branch of law. However, it does not mean child marriage only violates the rights that are mentioned in this thesis. Due to the interdependent and interrelated nature of human rights, all human rights would be affected one way or the other.

The references made to the provisions of the Rome Statute are made with the recognition of the mental element that is required for all crimes under the International Criminal Court (ICC) as the

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26 International Covenant on Civil and Political Rights, 16 December 1966
28 The two other possibilities are the exclusive applicability of each law. The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004], ICJ Rep. 136, Advisory Opinion of 9 July 2004, International Court of Justice, paras.102-106
intention of the person to engage in a conduct and at least being aware that the consequences will occur in ordinary course of events. Accordingly, in child marriage whereby a man is married to a girl child, the conduct - child marriage - is clearly engaged in. The existence of intent and knowledge can be inferred from relevant facts and circumstances. The immediate and long-term consequences of child marriage, which will be discussed later, are so grave that it cannot be any more obvious. Accordingly, the author is of the opinion that the mental element required under article 30 of the Statute if fulfilled.

This paper tries to answer the question ‘does IHL regulate child marriages in situations of armed conflicts?’ In order to address this question, the paper is divided into four chapters. The first Chapter aims to give a background on child marriages. After defining child marriages, it will compare it with early, arranged and forced marriages. The selection of the three marriages follows the multiple literatures that raised them together with child marriages. After that, the paper will try to review some driving factors of child marriage. It addresses six different but interrelated factors: culture, economic instability and value, social stigma and protection, independence, failure of structures and lenient and inconsistent legal rules. Then, the effects of child marriages - pregnancy and childbirth, diseases, domestic violence, adverse psychological impacts are analysed. Finally, the Chapter addresses the impact of child marriages on the society.

The second Chapter is reserved to create a ground why child marriage can amount to sexual violence. It analyses the concept of consent in child marriages. After briefly highlighting the importance and recognition of consent, it proceeds to analyse what consent is. Then, it will divide the existing discussion regarding children’s ability to give consent into two: the need to limit children’s decision-making versus absolute recognition to children’s decision making based on age and maturity. This will be used to inform the discussion that will be divided into three: the age mark of 18, children’s evolving capacities and agency. The Chapter concludes by clarifying the position taken based on the discussion in Chapters 1 and 2.

The third Chapter aims to understand the position of child marriages within IHL. It analyzes the regulation of sexual violence in armed conflicts to better protect the girl child from child marriages. In

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31 id art.30(2)
order to do this, it will elaborate what sexual violence is and how it intersects with child marriages. It will use the inputs from Chapter 2 whereby the lack of consent takes the concept of ‘marriage’ out of the picture for children. It will address sexual violence, hence child marriages, within the basic principles of IHL. After the discussion of the major principles of IHL – distinction, necessity, proportionality and humanity – the Chapter will address the regulation of sexual violence in IHL. Considering the use of diverse wordings in IHL, there will also be a discussion on how IHL has approached personal safety – a matter directly related with sexual violence, hence child marriages too. This will conclude the discussion of the Chapter. The final Chapter will conclude and make recommendations.
Chapter One: Elements of Child Marriages

1.1. Understanding Child Marriages

Child marriages are defined as any formal or informal unions or marriages in which one or both spouses are under 18 years old. The age cap is derived from the Convention on the Rights of the Child (CRC). The Convention recognizes that every human being under the age of 18 is a child, unless majority is attained earlier under domestic jurisdictions.

There are different terms that are usually discussed in connection with child marriages. These are early, arranged and forced marriages. Child and early marriages are usually used interchangeably. However, early marriages also include cases whereby one or both spouses are older than 18, but have compromised ability to grant consent, due to physical, emotional, sexual and psychosocial development or lack of information regarding the person’s life options. Hence, marriages that involve adults with physical or emotional immaturity or one without sufficient information without choices can be considered as early marriages. After all, age is not the sole criterion to assess one’s capability to make decisions. Maturity also determines capability. Accordingly, child and early marriages are slightly different.

Arranged marriages refer to marital unions whereby the bride and groom are selected by third parties, rather than each other. However, they may not necessarily be forced on one or both intending spouse(s). There are instances whereby child marriage and arranged marriages may intersect. Whenever third parties determine who an underage is going to marry, the marriage is considered as an arranged marriage of a child. This would be the case even when only one of the intending spouses has been selected by a third party. However, a marriage can also be arranged for mature individuals who are older than 18 years of age. Therefore, whilst child marriages that are the result of the involvement

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33 id [n.6] para.20; id [n.23] para.4
34 Convention on the Rights of the Child, 20 November 1989
35 id art.1
36 id [n.23] para.5
37 id
40 id p.41
of parents and other individuals in the selection of the spouses are arranged, the two types of marriages are different.

Forced marriages are marriages that occur without the full and free consent of one or both of the intending spouses due to duress, intense social or family pressure.\footnote{id [n.6] para.23; id [n.23] para.6} The inability of one or both of the intending spouses to end or leave the marriage due to similar external pressure determines whether the marriage is forced or not.\footnote{id} Such marriages were a particular feature of the armed conflict in Sierra Leone 1991-2002 where the abduction of girls with majority forced to marry members of armed forces was far too common.\footnote{Chris Coulter, ‘Female Fighters in Sierra Leone War: Challenging the Assumptions?’, (2008) 88, Feminist Review, 54-73, p.55} Due to the evolving capacities and autonomy of children, there is recognition for child marriages that are consensually entered.\footnote{id [n.6] para.20} Moreover, forced marriage can also occur when individuals who have attained majority enter a marriage without their full and free consent. Therefore, forced marriages and child marriages are not synonymous.

Accordingly, all the marriages mentioned above have distinct central elements. Child marriage focuses on the age of the intending spouses. Maturity of the intending spouses is the basis of evaluating whether an early marriage exists or not. On the other hand, the role of third parties in selecting the intending spouses determines if it is an arranged marriage. In contrast, forced marriage is a marriage that lacks the consent of at least one of the parties to the marriage. Thus, all of them can intersect with child marriages whenever a person under the age of 18 is involved.\footnote{The different types of marriages can also intersect with each other.}

\subsection*{1.2. Underlying Causes of Child Marriage}

Harmful practices are deeply rooted in stereotyped roles based social attitudes.\footnote{id [n.6] para.6} Sex and gender-based labels, power imbalances, inequalities and discrimination perpetuate the widespread existence of these practices that often involve violence or coercion.\footnote{Goran Therborn, ‘Between sex and power – Family in the World, 1900-2000’, (2004), Routledge, p.17} A system of social structures and practices in which men dominate, oppress and exploit women, patriarchy is the reality of our current world.\footnote{id} All agents of socialization process - family, religion, the legal, economic and political systems, educational
institutions and the media - are pillars of the system and structure. Hence, it is possible to assert patriarchy as the root of existing social attitudes, including harmful practices that influence a man’s internalized belief of male superiority necessitating controlling and dominating his wife, directly or indirectly. Meanwhile, they leave all women in a subordinate position.

Child marriage, as a harmful traditional practice, is also a result of the patriarchal system. Different political contexts, including armed conflict further affect how much child marriage establishes harmful, unequal, power dynamics. In the following sections, we will identify the major patriarchal socialisation processes as causes of child marriage. Within patriarchy, there is no one exclusive underlying cause of child marriage as most factors are interrelated. However, depending on a specific case, some factors are more relevant than others and few may not even be a cause in specific situations.

1.2.1. Culture

Culture is notoriously difficult to define. It is an elusive concept with no precise bounds. Yet, it is important to frame it in a certain way in order to assess whether it is a cause of child marriages. Accordingly, culture can generally be defined as the belief and behaviours that a social group shares. It is a way of life of members of a society. Africa, as a continent composed of over 50 States, has diverse cultures. Yet, there are essential characters that have been integral in the identity of Africans throughout the continent. We can broadly divide these characters into two: the strong influence of religion and the concept of obligations that underlies social contributions across all age groups. Both characters heavily contribute to the high rate of child marriage in the continent.

50 Sylvia Walby, ‘Theorizing Patriarchy’, (1990), Basil Blackwell, p.20
51 id [n.20] p.23
Most traditional African religions acknowledge that the Creator created both women and men equally. They also enjoy a flourishing female imagery on all levels of the supernatural. However, the introduction of Christianity and Islam, which have embedded patriarchy within them, diminished the practice of traditional religions. They introduced different expectations that, with time, came to form part of the cultural values of African societies. One of these expectations is premarital chastity, which is an integral religious value of these ‘newly-introduced’ religions. This expectation is even stricter on women in most parts of the continent. After all, the religions account for the majority of the continent’s population. In addition, societies in the continent are deeply religious with religion permeating all realms of life to the extent that life is perceived holistically with religion. Accordingly, members of the societies use the religions to justify the expectation towards girls’ sexuality. Unfortunately, one way of preserving premarital chastity has been child marriage, which would allow parents to marry their girl children off as virgins. In West Africa – the sub-region with highest prevalence of child marriage in Sub-Saharan Africa - the high regard to virginity at marriage contributes to child marriage.

Ubuntu, a South African term that translates to ‘I am because you are’ is a great reflection of African communities. Africans believe that it is only in the community where the life of the individual acquires true meaning. Accordingly, most Africans generally recognize and enforce obligations. The obligation bearers in African communities are individuals of all ages; hence, girls also have obligations.

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56 Fulata Lusungu Moyo, ‘Religion, Spirituality and Being a Women in Africa Gender Construction within the African Religio-Cultural Experiences’, *(2004)*, 61, Agenda: Empowering Women for Gender Equity, 72-78, p.74: The literature is divided on whether African traditional religions should be seen as one religion or various components reflecting shared views. However, the growing consensus on it indicates the recognition as one religion whereby the intrinsic or innate equality of all individuals is upheld and an absolute dignity to the person is ascribed to.


58 *id* [n.55]

59 The age of Aishah at the time of Marriage to Prophet Muhammad; The pregnancy of Mary was an amusement due to the value given to female chastity. In the Bible, especially in the Old testament, it is difficult to identify contemporary day child marriage situations due to the hundreds of years people used to live to.

60 A study from 2014 states that Christianity and Islam each account for 500 million of the population of Africa. ‘Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa’, (2010), Pew Forum on Religion & Public Life, p.ii


towards their family and community in general. Their obligations emanate from, among others, the need for marriages. In Africa, marriages are, primarily, institutions of procreation.65 Women’s role in the procreation is tremendous due to biological and social expectations.66 Women do not only carry pregnancy to term and breastfeed their children, but also are believed to be best suited to raise the children more than men with love and care while fathers are the supposed breadwinners. Child marriage is a facilitating mechanism whereby the girls that marry early would have more children; therefore, effectively fulfilling their societal obligation. Moreover, it is a common belief that the younger a girl is, the more men would pursue her because she is marriageable.67 This would give the girls and their families more options to choose the ‘best candidate’ from, because of which girls are forced to get married before they reach the age of 18.

1.2.2. Economic Instability and Value

Poverty and economic insecurity play a critical role in the perpetuation of child marriages. Child marriages are a common practice for economic survival and security.68 By marrying girls off, families ease their financial burden with fewer mouths to feed in the house. The high rate of child marriage in the poorest countries of the world is an accurate reflection to this correlation.69 This decision is made due to the perceived role of women in the community. There is high cost related with raising children.70 When struggling to generate an income that can cover the cost, families make the decision to reduce these costs using different means. School is not valued as an avenue to future social and economic stability for a girl, hence, millions of girls are out of school in Africa and many will never set foot in a classroom.71 Moreover, girls are only for marriage and child bearing; thus, they are mere economic

70 id [n.67] p.17
burdens who would be leaving their parents household eventually. Therefore, the earlier they leave, the less cost the family would incur in fulfilling even their basic needs. As a result, girls are married off while they are only children. Income that is received by giving away the girls encourages parents even more. In Egypt, for example, it is a common practice for poor parents to marry off their young daughters to rich husbands in the Gulf, in exchange for money. Armed conflicts affect all aspects of life, including the economy. As a result, families marry their girls off due to economic instability, especially during armed conflicts.

Moreover, the payment of bride prices, which varies among practising communities, increases the vulnerabilities of girls to child marriages. These payments can be substantial enough to affect the life of the girls’ family lives and a society’s distribution of wealth. Received in cash or kind, in exchange of a girl, bride prices highly motivate parents to marry their daughters off at an early age. On the one hand, they are means of recovering investments made on girls and lessening the economic instability for the families. On the other hand, they are payments that the men or their families make as payments for the right to their future wives’ labour and reproductive capabilities. In most parts of Africa, the practice of offering bride price is very common. In some communities, the bride price gets higher when the age of the girl is younger. This gives the families an initiative to marry off their children at a much younger age. In situations of armed conflicts, economic hardship is exacerbated creating further economic hurdle for families that use bride prices as a coping tool. Thus, girls would be married off at an early age.

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73 ‘Child Marriage in the Middle East and North Africa’, (2017), United Nations International Children’s Emergency Fund Middle East and North Africa Regional Office in collaboration with the International Center for Research on Women, p.36. This payment is not similar to the cultural bride price. This is a payment by random strangers, usually tourists, to take the girls away supposedly as wives.
75 id [n.6] para.24
77 id [n.72]
78 id [n.76] p.158
79 id
1.2.3. Social Stigma and Protection

Families want to protect the family name and the future of their daughters through marriage.\(^82\) Due to the stigma attached to women’s sexuality, the sexual experience of girls is discouraged. Hence, when found sexually involved with a person of the opposite sex, families force girls to institutionalize the relationship to keep the family name intact. It is a way of guaranteeing a future for the girl, who would otherwise be left without a husband due to her ‘wrong deeds’ of being involved in sexual acts. Marriage is encouraged even when the girl has not consented to the sexual act.\(^83\) This leaves the girl to spend a lifetime with the man who has sexually assaulted her, for the sake of the family name. Perceived as a tool to cope with shame and stigma following sexual abuse, child marriage is used to avert the social stigma that may come from being a survivor of sexual violence.\(^84\)

Families also use child marriage to safeguard girls from becoming targets of sexual abuse.\(^85\) During armed conflicts, other forms of sexual violence are also exacerbated.\(^86\) Such violence, including rape, would lead to the exposure of girls to sexual activities and sometimes to pregnancy. If girls contest such marriages, they are given ultimatums without which they cannot undertake basic activities, such as going to school. A Ugandan abductee who returned to live with her uncle was told that he would not pay for her school fees if she was not to marry the man that attempted to rape her.\(^87\)

1.2.4. Independence

Children grow progressively and undergo multiple changes - physical, emotional and mental – until they mature completely.\(^88\) Their sexuality is part of this process and while individual and social contexts

\(^{82}\) id [n.20] p.21
\(^{84}\) id [n.68]
\(^{85}\) id [n.37] p.1
contribute as well, it develops extensively over adolescence. Adolescence is a time where children consider occasional and/or experimental involvements in health threatening-activities as less dangerous. It is both a period of great potential and turbulent thought processes. Children misperceive outcomes - they believe there must be multiple instances of exposure to dangerous activities in order to experience the negative consequence. As a result, they make tough decisions and later realize their mistakes. This is also the case when girls decide to get married before they reach the age of 18, without any pressure from their families or other people and sometimes even against the protest from such people.

Girls that have disagreements with their families and feel no longer safe in their home environment resort to marriage as a way out. Moreover, they do not equally enjoy their families’ economic wealth and gains, with their male family members. Therefore, marriages is their future guarantee as they usually bear the greater cost of the breakdown of the family particularly where the State provides little or no economic safety net. Most girls lack both the skills and resources to escape such settings due to low level of education. One out of five children of primary school age, most of whom are girls, is out of school in Africa. This directly affects girls’ potential that has an economic value in societies and could be developed in educational institutions. They are instead socially trained with house chores that are not valued enough as income earning activities. They are instilled with social expectation and the necessary skills required of future good wives. Accordingly, they are left with marriages as their sole option. Young divorced or widowed single mothers also get married for lack of alternative options. They use the financial assistance they get from their (new) husband to help themselves and their

91 id p.7
92 id [n.37] p.2
93 General Recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), 30 October 2013, CEDAW/C/GC/29, para.1
95 id [n.86] pp. 155-156;
families. Marriage is also an instrument for girls in armed forces who make conscious attempts to protect themselves and negotiate their security during their time in with the armed forces.96

Girls may initiate marriage as a way of reinstating their and their families' honour particularly when found pregnant. There are also girls who want to get married for they have fallen in love. However, the cultural influence that shapes girls into aspiring to become a wife might bias their actual interest; therefore, it is rarely hard to know if it is genuine.

1.2.5. Failure of Structures

The breakdown of law and order and community cohesion especially threatens girls and young women.97 Governments have the obligations to respect, protect and fulfil citizens' human rights.98 Armed conflicts affect governments’ capabilities to undertake its obligations because public finances are complicated.99 The income of the government lowers due to the destruction of the sources of tax and rise of military expenditures.100 This directly affects the day-to-day performance of the government that fails to deliver the protection to ordinary citizens. Hence, even in States where child marriage is prohibited, it would be difficult for the government to implement the law and punish those that marry a child. For example, access to education, which is generally a protective factor that reduces early marriage, increases the risk of abduction and forced child marriage during armed conflicts.101 This is because active fighting prohibits police forces from protecting the girls and the school environment, as they would have during peacetime. In such instances, girls are highly exposed to abductions and marriages.

Furthermore, conflict undermines sexual morality. The breakdown of social order and the ensuing brutalization fuels male aggression against women.102 Amidst such breakdowns whereby a violent

99 ‘Regional Economic Outlook: Sub-Saharan Africa: recovery amid elevated uncertainty’, (2019), International Monetary Fund, p.25
100 id
102 id [n.73] p.724
atmosphere and a vacuum of stable societal structures is created, previously unacceptable acts become tolerable.\textsuperscript{103} This has been the case in Northern Uganda whereby traditional social institutions that influence behaviour and regulate sex were rendered dysfunctional by conflict.\textsuperscript{104} Girls are affected by this as they are brutally subjected to violence in different forms, including child marriages. The changes have a long-term consequence for social norms with the elevated levels of the behaviours persisting even in the post-conflict period.\textsuperscript{105} Thus, child marriages that are outcomes of such circumstances would persist long after the end of the armed conflict. This cause is especially relevant in situations of armed conflicts where formal government structures and social cohesion are usually disturbed.

1.2.6. Lenient and Inconsistent Legal Rules

The non-stringent requirement set by State laws on consent directly contributes to the rate of child marriages. The Federal Family Code of Ethiopia\textsuperscript{106}, for example, allows the intending spouses, one of their parents or guardians to apply for a marriage when the spouses are as young as 16, for a serious cause.\textsuperscript{107} This puts children under the age of 18 but older than 16 at the risk of child marriages. Moreover, in Ethiopia, child marriages rate stands at 58%.\textsuperscript{108} This is an indicator to the prevalence of the practice; and it can only be aggravated with government lenience. Moreover, the absence of an exhaustive list by the legislature opens the door for members of the community to abuse the loophole. There is no guarantee to ensure the Minister of Justice, which makes the final decision, is free of bias and patriarchal conceptions that sympathize with child marriage.

Legal regulations of countries reflect the entrenched gender inequality in societies. The age of consent of girls, that is lower than boys provided in States’ laws are indicators of such reflections.\textsuperscript{109} This may

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\textsuperscript{104} Wilson Winstons Muhwezi, Eugene Kinyanda, Margaret Mungherera, Patrick Onyango, Emmanuel Ngabirano, Julius Muron, Johnson Kagugube and RehemaKajungu, 'Vulnerability to high risk sexual behaviour (HRSB) following exposure to war trauma as seen in post-conflict communities in eastern Uganda: a qualitative study', (2011) 5(22), Conflict and Health, 1-15, p.2
\textsuperscript{105} id [n.96] p.46
\textsuperscript{107} id art.7(2)
\textsuperscript{108} ‘Ethiopia Demographic and Health Survey 2016’, (2017), Central Statistical Agency [Ethiopia] and ICF, p.67
\end{flushleft}
be in line with the sexuality of girls that develops between their 12 and 18 years, two years earlier than boys do.\textsuperscript{110} However, they do not fully mature until the age of 18, not even until their mid-twenties.\textsuperscript{111} Thus, they require protection extended due to their status as children. Irrespective of this, States have laws that provide lower age of marriage to girls, which make the latter more susceptible to child marriage. In Africa, multiple countries still have varying age of consent for marriage.\textsuperscript{112} Tanzania’s family code allowed for girls as young as 14 to get married.\textsuperscript{113} In 2016, the High Court of Tanzania took steps to end this by deeming Section 13 of the Law of Marriage Act unconstitutional.\textsuperscript{114} However, the government has, instead of passing laws in accordance with the ruling, appealed against the High Court’s Judgment.\textsuperscript{115} It has been two years since the Court of Appeals has still not passed a decision.\textsuperscript{116} This is one of the multiple examples of governments’ lack of willingness in tackling this harmful practice.

1.3. The Negative Impacts of Child Marriage

Child marriage has various negative impacts. These impacts do not only have a short-term effect, but also long-term ones that sometimes last throughout the life cycle of a girl. Beyond the girls, they also affect their family and the society in general. The impact of child marriage on girls is both physical and psychological and ends up depriving them of the opportunity to know, exercise and enjoy their human rights and fundamental freedoms.\textsuperscript{117} The children born out of the marriage or from a previous relationship of the girls also suffer in the process. Moreover, societies are highly impacted due to the negative impact child marriage has on the performance of a State, economically. Child marriage, on

\begin{flushleft}
\textsuperscript{110}id [n.88]
\textsuperscript{113} Tanzania - The Law of Marriage Act, 1971 as amended by Act 23/73, Act 15/80 and Act 9/96, art.13(2)(a)
\textsuperscript{114} Rebecca Z. Gyumi vs. The Attorney General, Judgment, The High Court of Tanzania, 8 July 2016, pp.26-27
\end{flushleft}
average, reduces earnings in adulthood by nine percent that ending it alone could generate, in additional earnings and productivity, 179 million USD per year in Burkina Faso.¹¹⁸

In the following sections, we will assess these impacts, with a focus on the health aspect because the components of health encompass all other aspects of girls’ lives; they can easily influence and be influenced by the latter. Health is a complete mental, physical, and social state of wellbeing, rather than mere absence of diseases.¹¹⁹ Child marriages affect all these components of health, inflicting physical, mental or sexual harm or suffering, with both short- and long-term consequences.¹²⁰ Moreover, the experiences of girls at adolescence, a pivotal period of transition to adulthood, determine their adult health status.¹²¹

1.3.1. Pregnancy and Child Birth

Maternity, in its essence, is a major health burden for women as its weight primarily and heavily falls on them, for both biological and social reasons.¹²² Adolescents in Northern Uganda identified being “child mothers as the largest problem affecting girls.¹²³ It is also surrounded with potential health dangers including maternal morbidity and mortality. Women are physiologically susceptible to iron deficiencies which increases the risk of maternal and neonatal adverse outcomes.¹²⁴ Higher than average maternal morbidity and mortality rates are often attributed to child marriages that result in early and frequent pregnancies and childbirths.¹²⁵

¹¹⁸ ‘The Economic Impacts of Child Marriage: Key Findings’, (2018), International Center for Research on Women, p.3; This is
¹¹⁹ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, 19-22 June 1946 signed on 22 July, 1946 signed by the representatives of 61 States (Official Records of the World Health Organization, no.2, p.100) and entered into force on 7 April 1948
¹²⁰ id [n.23] para.10
¹²² id [n.65] p.15
¹²³ Susan McKay and Dyan Mazurana, ‘Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone, and Mozambique: Their Loves During and After War’, (2004), Rights & Democracy (International Centre for Human Rights and Democratic Development), p.53
¹²⁵ id [n.6] para.22; id [n.65] p.32; The girl child - Report of the Secretary-General, 3 August 2011, A/66/257, para.36
Maternal morbidity is any physical or mental illness or disability directly related to pregnancy and/or childbirth. The health risks posed in the process of maternity are grave when the women involved are girls whose bodies have not yet fully matured for motherhood. The common risks of pregnancy and childbirth, including high blood pressure, blood loss, and anaemia are also experienced by girls. They are especially at a higher risk of obstetric fistula, a child birth injury whereby a hole is created between the vagina and rectum or bladder leaving the woman incontinent of urine, faeces or both. The root cause of obstetric fistula is poverty that underlies malnutrition. Malnutrition causes the underdevelopment of the skeleton including pelvis leading to obstructed labour.

The African continent has the highest total fertility rate in the world, at an estimated 4.6 children per a woman. Societies value marriages, primarily, for their procreative roles. Hence, consumption often forms part of marriages, even in those marriages that involve a child. Poverty is also evident across Africa; more than half of the more than 700 million people living under extreme poverty live in the continent. Accordingly, most of its women, including girl children giving birth are susceptible to obstetric fistula. Yet, there are only limited numbers of maternal health facilities most of which are poorly equipped across the continent failing to meet the demand. The Addis Ababa Fistula Hospital, exclusively serving women with Obstetric Fistula, is the first of its kind in the world. The Hospital treats 2000 patients annually, a number that is much lower when compared to the 26,000 women living with it and 9000 new cases registered every year.

128 The girl child - Report of the Secretary-General, 3 August 2011, A/66/257, para.36
130 id
Maternal mortality is death that results from pregnancy or childbirth-related complications.\textsuperscript{136} Complications from pregnancy and childbirth are the leading causes of death amongst adolescent children.\textsuperscript{137} Multiple factors, such as race, ethnicity, and culture of the girls or the societies they are in, contribute to this differently as they determine the roles, expectations and decision-making power of girls on themselves and their families.\textsuperscript{138} 99\% of maternal deaths occur in developing countries.\textsuperscript{139} Adolescents have an increased risk of death during pregnancy or childbirth. 20 countries, 14 of which are in Sub-Saharan Africa account for 82\% of the world’s maternal mortality of adolescents.\textsuperscript{140} While the lifetime risk of maternal mortality is generally 1 in 41 births in low-income countries, Africa has an even lower rate with 1 in 36.\textsuperscript{141} This is an indicator to the role that resource constraints play.\textsuperscript{142}

The lack of knowledge, absence of (fully equipped) facilities and/or excessive control to the sexual and reproductive health decisions of the girls by their husbands or other family members greatly contribute to the limitation girls’ access to sexual and reproductive health services.\textsuperscript{143} This restricts their access to preventive, treatment and rehabilitative tools. There is high disparity in the coverage of basic maternal interventions that can tackle maternal morbidity and mortality rates in Africa. Southern Africa has an almost universal coverage whilst one third of pregnant women in West Africa receive no antenatal care.\textsuperscript{144} Thus, on top of child marriage which makes girls susceptible to maternal mortality and morbidity, the lack of (access to) health services further exacerbates the number. Armed conflict both generates

\textsuperscript{137} id [n.127]
\textsuperscript{140} Andrea Nove, Zoe Matthews, Sarah Neal and Alma Virginia Camacho, ‘Maternal mortality in adolescents compared with women of other ages: evidence from 144 countries’, (2014) 2, The Lancet Global Health, 155-164, p.159
\textsuperscript{142} id
\textsuperscript{143} Anouka van Eerdewijk, Mariam Kamunyu, Laura Nyirinkindi, Rainatou Sow, Marlies Visser and Eisbet Lodenstein 'The State of African Women report', (2018), Right by Her, p.221
conditions for increased morbidity and mortality and weakens the capacity for dealing with the increase in adverse health conditions.\textsuperscript{145}

1.3.2. Diseases

Marriage, assumed safe, marks the sexual debut of many adolescent girls.\textsuperscript{146} However, sexually transmitted diseases (STDs), particularly human immune deficiency virus (HIV) and human papilloma virus (HPV) affect married girls more.\textsuperscript{147} The potential exposure to STDs is determined by, among others, the frequency with which one has intercourse, use of condoms and other STDs protective methods, and whether the partner is infected or not.\textsuperscript{148} Child marriages also contribute to reproductive health risks.\textsuperscript{149} The expectation of childbearing makes girls even more prone to diseases. The suffering of the infertile girl, and of any girl in an infertile marriage, can be very real.\textsuperscript{150} Hence, they are under intense pressure to prove their fertility. Accordingly, they end up having sexual intercourse with their husbands frequently, but without protective methods.\textsuperscript{151} Girls are also physiologically prone to such infections because their vaginas are not well lined with protective cells and their cervix may be easily eroded.\textsuperscript{152} Moreover, husbands are substantially older and 30\% more likely to have HIV.\textsuperscript{153} Polygynous marriages, a widely practiced culture around the continent, also contributes a great deal in the spread of the diseases.\textsuperscript{154} The health effects are both immediate and long-term. For example, the ‘bush wives’ have reported multiple medical complications years after their marriages that resulted.\textsuperscript{155} During the trial at the Special Court for Sierra Leone, Mrs. Zainab Hawa Bangura – the expert witness for the

\begin{itemize}
\item \textsuperscript{146}Shelley Clark, ‘Early Marriage and HIV Risks in Sub-Saharan Africa’, (2004) 35(3), Studies in Family Planning, 149-160, p.149
\item \textsuperscript{147}\textit{id} [n.65]
\item \textsuperscript{148}\textit{id} [n.145] p.154
\item \textsuperscript{149}General recommendation No. 36 (2017) on the right of girls and women to education, 16 November 2017, CEDAW/C/GC/36, para 52
\item \textsuperscript{150}\textit{id} [n.65] p.17
\item \textsuperscript{151}\textit{id} [n.71]
\item \textsuperscript{152}\textit{id}
\item \textsuperscript{153}\textit{id} [n.145] p.156
\item \textsuperscript{154}\textit{id} [n.145] p.158
\item ‘Bush wives’ is a phrase that referred to a phenomenon whereby young girls or women were captured or abducted and forcibly taken as wives during the Sierra Leone War between 1991 and 2002. For a detailed discussion on this, please refer to Chris Coulter, ‘Bush Wives and Girl Soldiers: Women’s Loves through War and Peace in Sierra Leone’, (1st edn Cornell University Press 2009)
\end{itemize}
prosecution – provided that some of the ‘bush wives’ were still experiencing diverse medical problems including stomach pains years after they experienced the sexual acts.\textsuperscript{156}

Armed conflicts also change the access to and benefit from structures that promote sexual and reproductive health and rights.\textsuperscript{157} Their effects, however, are not the same on all members of the community; they leave those in child marriages and in need of medical services disproportionately affected. They threaten girls and young women because they become particularly vulnerable due to the threats to their sexual and reproductive health because of the armed conflict.\textsuperscript{158} They damage public and private medical and health care infrastructures.\textsuperscript{159} During armed conflicts, funding diverts towards the conflicts because military expenditures rise; as a result, health services become underfunded and/or underprovided.\textsuperscript{160} Moreover, protecting and supporting sexual and reproductive health comes at a price in settings of armed conflict, due to the security threats that add to the existing patriarchy that restrains girls.

1.3.3. Domestic Violence

Domestic violence refers to violence that emanates from the household and within relationships defined by familial or emotional attachment.\textsuperscript{161} It encompasses abuse by any member of a household but is mostly perpetuated by intimate partners.\textsuperscript{162} Intimate partner violence (IPV) is any behaviour within an intimate relationship that causes physical, psychological or sexual harm to those in the relationship.\textsuperscript{163} It can be sexual violence which includes forced sexual intercourse and other forms of sexual coercion; emotional (psychological) abuse, such as insults, belittling, constant humiliation, intimidation, threats of harm; and/or controlling behaviours that consists of isolating a person from family and friends, monitoring their movements, and restricting access to financial resources, employment, education or medical care.\textsuperscript{164}

\textsuperscript{156} id [n.22] para.15
\textsuperscript{157} id [n.96]
\textsuperscript{158} id
\textsuperscript{159} id [n.73]
\textsuperscript{160} id
\textsuperscript{162} id
\textsuperscript{163} ‘Understanding and addressing violence against women’, (2012), World Health Organization, p.1
\textsuperscript{164} id
Power and control underlie IPV. These are reflected through the personality traits, institutional roles, and culture that affect the balance of power in intimate relationships. Girls are often married to substantially older men. The relatively stronger economic power and control these men have can also be derived from the underlying causes of child marriages. The girls are expected to conform to the interests of the husband in all regard. These put the girls in a subordinate position of power and control. Therefore, child marriage contributes to an increased risk of domestic violence.

Domestic violence has a profound impact on the physical and mental health of those who experience it. It carries a high burden of morbidity and ill health. Furthermore, it places adolescents on a lifelong trajectory of violence, either as victims or perpetrators. Elements of their new relationships mirror that of their former marriages where they endured physical violence and inability to leave or escape these relationships. Forced marriage in an armed group has an impact similar to consequences of childhood sexual abuse, such as difficulties with relationships throughout the life cycle. A feeling of loss of control and helplessness developed in childhood makes individuals, especially women, more vulnerable to physical and sexual abuse in adult life.

1.3.4. Psychological

Mental health forms a major part of the health components. Moreover, physical health issues often occur simultaneously with mental health issues. Child marriage is associated with reduced mental health and well-being. Increased feelings of fearfulness, depression, anxiety, post-traumatic stress

165 Jennifer A. Scarduzio, Kellie E. Carlyle, Kate Lockwood Harris, and Matthew W. Savage, “‘Maybe She was Provoked’: Exploring Gender Stereotypes About Male and Female Perpetrators of Intimate Partner Violence’, (2016) 23(1), Violence Against Women, 89-113, p.92
167 id [n.17]
168 id [n.148]
172 id [n.86] p.158
173 id
disorder, suicidal ideation, loss of self-efficacy, and substance abuse are all mental health issues that compound and correspond to physical health issues.\textsuperscript{176} For example, women affected by obstetric fistula suffer as their husbands abandons and the community stigmatizes, even blames, them for their condition.\textsuperscript{177} The social isolation and abandonment lead to low self-esteem, depression and prolonged emotional trauma.\textsuperscript{178} The experience of violence is also associated with mental health problems such as depression, anxiety and post-traumatic stress disorder.\textsuperscript{179}

1.3.5. Impact on Society

The experiences of women at adolescence, a pivotal period of transition to adulthood, determine their adult health status.\textsuperscript{180} The effects of one such experience – child marriage – is not only limited to the child brides. It adversely affects the performance of human development indicators such as infant mortality rate, maternal mortality rate, nutrition and education of children and young mothers.\textsuperscript{181} The children that are born from children are adversely affected as they are at a greater risk of perinatal infant mortality and morbidity.\textsuperscript{182} Stillbirths and new born deaths are very common in child marriages.\textsuperscript{183} It is 50\% higher in mothers under the age of 20, with mothers under the age of 18 taking substantial amount of the number.\textsuperscript{184} Moreover, child marriages impose very significant social and economic cost. It reinforces existing inequalities between men and women.\textsuperscript{185} They help to maintain women in subordinate roles and contribute to their lower level of education, skills and work opportunities.\textsuperscript{186} A World Bank study has

\textsuperscript{180} id [n.170]
\textsuperscript{183} ‘Motherhood in Childhood Facing the Challenge of adolescent pregnancy’, (2013), United Nations Fund for Population Activities, p.22
\textsuperscript{184} id
\textsuperscript{185} id [n.180] p.44
\textsuperscript{186} id [n.117]
also shown that child marriages could cost developing countries trillions of dollars by 2030. Moreover, they contribute to higher total fertility as women marrying earlier tend to both have children earlier and bear more children over their lifetime. Curbing child marriage could lower fertility rates by about a tenth in countries such as Niger and Ethiopia, where child marriage is one of the highest in the world.

Therefore, the effects of child marriage spills over to affect people beyond the girls in the marriages. This by itself has long-lasting effects as it creates fractured societies.

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Marriage is an institution of comprehensive union that joins spouses in mind and body as it is begun by commitment and sealed by sexual intercourse.\textsuperscript{189} This institution can have a concrete foundation only when there is consent.\textsuperscript{190} The Latin legal maxim \textit{nuptias non concubitus, sed consensus facit} which translates into consent and not cohabitation constitutes marriage, emphasizes the value of this important element of a marriage.\textsuperscript{191} Consent is fundamental for at least three reasons. Firstly, the presence of consent to marriage is important not immediately but also in the long term.\textsuperscript{192} It is an indicator to the voice the individual spouses would have, and the value given to it, throughout the marriage. Secondly, consent is a means to protect individual autonomy.\textsuperscript{193} It is the basis not only to the start and continuation of the marriage, but also the potential end in the event the spouses decide to do so. Thirdly, consent will have impact on the society, at large. The family is the natural and fundamental unit of a society.\textsuperscript{194} It influences the societal structures while it is also responsive to such settings in which it operates.\textsuperscript{195} Marriages are one way of creating a family, hence positioned as the nucleus of a society. Thus, beyond the spouses and their children, if they decide to have any, how the marriage is instituted would impact the role of the family in the society. Therefore, consent of both parties is an indispensable element to the validity of a marriage.\textsuperscript{196}

\textsuperscript{189} Robert P. George, Sherif Girgis, and Ryan T. Anderson, ‘Amicus Brief in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal’, (2013), p.5; There are multiple relationships that this definition might not (seem to) cover, among others one recognized by the writers themselves: the marriage of infertile couple. Please see Andrew Forsyth, ‘Defining Marriage’, (2014) 97(3), Soundings: An Interdisciplinary Journal, 297-322, for criticisms against the Amicus Brief. There will not be any critical analysis on marriage as it is outside of the scope of this thesis. The focus of the discussion will instead be on one element of a marriage – consent.\textsuperscript{190} id p.3
\textsuperscript{192} Andrew Forsyth, ‘Defining Marriage’, (2014) 97(3), Soundings: An Interdisciplinary Journal, 297-322, P.315
\textsuperscript{193} id
\textsuperscript{194} Universal Declaration of Human Rights, 10 December 1948, art.16(3); International Covenant on Civil and Political Rights, 16 December 1966, art.23(1); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, art.10(1)
\textsuperscript{195} Floyd Mansfield Martinson, ‘Family in Society’, (1970), Dodd, Mead & Company, Inc. p.v
Recognizing its relevance, international instruments have incorporated consent as a requirement to marriage. The Universal Declaration of Human Rights\textsuperscript{197} (UDHR) provides the institution of marriage should only be entered with consent of intending spouses.\textsuperscript{198} The declaration is supported by legally binding conventions as well.\textsuperscript{199} The ICCPR states that no marriage shall be entered in the absence of consent.\textsuperscript{200} The International Covenant on Economic, Social and Cultural Rights\textsuperscript{201} (ICESCR) also provides that consent is required for marriage.\textsuperscript{202} CEDAW further reinforces the recognition given to consent in the Covenants.\textsuperscript{203} After all, a woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.\textsuperscript{204} Similarly, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages\textsuperscript{205} (The Convention on Consent) requires consent of both parties as a requirement to enter into marriage.\textsuperscript{206} The Recommendation to this Convention\textsuperscript{207} also sets the same requirement.\textsuperscript{208} Furthermore, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa\textsuperscript{209} (The Maputo Protocol), the regional equivalent of CEDAW in Africa, recognizes this fundamental component of a marriage.\textsuperscript{210}

The discussion above shows consent is accepted both in the literature and international law as a prerequisite to marriage. Yet, what is this important element of a marriage? Is mere acceptance of a marriage equivalent to consent? What is the role of consent in child marriage? What can be the potential acts that the phrase ‘child marriage’ replaces? In order to answer these questions, the following section will be divided into three parts. The first part will briefly address the definition of consent and its

\textsuperscript{197} Universal Declaration of Human Rights, 10 December 1948
\textsuperscript{198} id art.16(2)
\textsuperscript{199} The UDHR, as a legal instrument is merely a declaration. While there are scholars that argue the Declaration has attained customary international law, there is no universal agreement on whether the whole document has attained such a status.
\textsuperscript{200} id [n.197] art.23(3)
\textsuperscript{201} International Covenant on Economic, Social and Cultural Rights, 16 December 1966
\textsuperscript{202} id art.10(1)
\textsuperscript{203} id [n.10] art.16(1(b))
\textsuperscript{204} General Recommendation No.21: Equality in marriage and family relations, 1994, contained in document A/49/38, para.16
\textsuperscript{205} Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962
\textsuperscript{206} id art.1
\textsuperscript{207} Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly resolution 2018 (XX), 1 November 1965
\textsuperscript{208} id principle (1(A))
\textsuperscript{209} Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003
\textsuperscript{210} id art.6(a)
constituting elements. The second part assesses why marriage is mere illusion when one of the parties is a girl child. In order to illustrate this, the focus will be on the absence of consent in such act. The third part will address what this act can instead be, in the contemporary world.

2.1.1. Consent

The Black’s Law Dictionary defines consent as:

> ‘an agreement, approval or permission to some act or purpose, esp. given voluntarily by a competent person; legally effective assent’. \(^{211}\)

Therefore, in marriage, consent is the agreement of the capable intending spouses to marry each other, voluntarily. The intending spouses should go directly to each other. \(^{212}\) The different legal instruments that require consent further state that there should be full and free consent. \(^{213}\)

Free consent refers to voluntary acceptance of an offer. \(^{214}\) Marriage is a contract. However, it is not a sort of contract that third parties have any power to exact. \(^{215}\) Free consent is an objective standard as the lack of voluntary involvement can be established. The distortion of free consent can be caused due to multiple factors including duress or force, among others. \(^{216}\) On the other hand, full consent is a subjective requirement whereby the ability of the intending spouses to make decisions is evaluated. This rationality of the parties is ascertained through the physical and mental maturity. \(^{217}\) Age is one mechanism to assess maturity. International law has introduced the age of 18 as a general mark to indicate the transition from childhood to adulthood. \(^{218}\) However, age remains to be only one of the indicators of one’s ability to give full consent for multiple factors can contribute/impede maturity. Thus, the ability to give free and full consent depends on the issue in question.

\(^{213}\) id [n.10] art.16(1(b)); id [n.195] art.16(2); id [n.26] art.23(3); id [n.203] art.1; id [n.207] art.6(a)
\(^{215}\) id p.196
\(^{216}\) Joseph Jackson, ‘Consent of the Parties to Their Marriage’, (1951) 14(1); The Modern Law Review, 1-26, p.2
\(^{217}\) id p.1
\(^{218}\) id [n.34] art.1
2.1.2. Consent in Child Marriage

Only capable spouses can give free and full consent. The concept of capability has long been in the centre of the child rights debate. This was further intensified with the CRC’s definition of the child which was a crucial part of the Convention which set 18 as the age of adulthood. This is a rule unless the domestic law of a State provides otherwise. The CRC is the major international child Law instrument. It brought the international community together for the protection of the rights of children as the most widely ratified major human rights instrument. On the contrary, the absence of absolute recognition to everyone under the age of 18 as a child, irrespective of a domestic law left the discourse regarding the extent of children’s capability open. Accordingly, there is a continued divide regarding children’s capability to consent to marriage.

The divide can broadly be put in two groups. The first group advocates that all human beings under 18 are children, hence do not have the capability to make decision regarding certain matters including marriage (Group 1). The second group, on the other hand, promotes children’s ability to make decisions, even in life changing matters like marriage, due to their evolving capability and different maturity levels (Group 2).

2.1.2.1. 18 as the Age Mark

The two groups have differing stands regarding the conception of 18 as the age mark. Group 1 relies on the international discourse on marriage which indicates the universal standard for age of consent should be 18. There have been pressures from different international fronts to call for mandatory minimum age for marriage that leaves no space for exceptions. The Committees on the Elimination of

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219 Age of consent to marriage should not be confused with age of sexual consent. Age of consent to marriage refers to the minimum age whereby a person is deemed capable to consent to marry while age of sexual consent refers to the age whereby one earns the legal capability to consent to sexual intercourse. The reference to consent throughout this thesis refers to that of marriage, unless otherwise explicitly stated.


221 "id [n.34] art.1

222 The United States of America is the only country that has not ratified the CRC. List of countries that have ratified can be found on https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en

Discrimination against Women has called for 18 as minimum age of marriage.\textsuperscript{224} The Committee noted that marriage entails responsibilities, hence should not be entered without full maturity and capacity to act.\textsuperscript{225} The Committee on the Rights of the Child followed up on this by strongly recommending 18 as the minimum age of marriage.\textsuperscript{226} In this recommendation, the Committee specifically focused on the harmful consequences of marriage to the health of girls.\textsuperscript{227} Moreover, the joint statement of the Committees has further strengthened this position by rejecting any traditional, religious, cultural or economic grounds that justify child marriages.\textsuperscript{228} African regional instruments have also specified 18 as the minimum age of marriage.\textsuperscript{229} The documents further require the registration of marriage in official registry.\textsuperscript{230} On the one side, this would ensure that States actively engage in preventing child marriages. On the other hand, in a continent where the culture of registering vital events such as marriage is very low coupled with the resource constraints that chain governments from making such an institution available everywhere, this may be an unrealistic expectation by the lawmaker. Similarly, the global recognition of the harms of child marriage has contributed to the increase in the legal age of marriage to 18, in the domestic legislations of various countries around the world, as well.\textsuperscript{231} Between 2012 and 2017, 15 countries have increased the minimum age of marriage to 18 or removed exceptions.\textsuperscript{232} Only three of the countries - Chad, Malawi and Zimbabwe - were from Africa.\textsuperscript{233} The mandatory age requirement with no exception for marriage before the age of 18 is directly related with consent because it would leave no scenarios whereby children can be married, even with their consent.

\textsuperscript{224} \textit{id} [n.204] para.36
\textsuperscript{225} \textit{id}
\textsuperscript{227} \textit{id}
\textsuperscript{228} \textit{id} [n.23] para.13. The statement was issued on behalf of, in addition to the two committees, the Special Representative of the Secretary-General on Violence against Children, the Working Group on the issue of discrimination against women in law and practice, the Special Rapporteur on the sale of children, child prostitution and child pornography, the Special Rapporteur on contemporary forms of slavery, its causes and consequences, the Special Rapporteur on violence against women and the Special Rapporteur on trafficking in persons, especially in women and children.
\textsuperscript{229} \textit{id} [n.209] art.6(b); \textit{id} [n.15] art.21(2)
\textsuperscript{230} \textit{id} [n.209] Art.6(d); \textit{id} [n.15] Art.21(2)
\textsuperscript{233} \textit{id}
Group 2, on the other hand, considers 18 as an arbitrary cut-off point, with historical roots in Western society.\textsuperscript{234} It undermines the agency of the individual under 18 which is shaped by complex structural dependencies.\textsuperscript{235} Class, gender and racialized positioning contribute to the outcomes significantly.\textsuperscript{236} Having been born and lived in a social environment with societal obligations that are completely different from a person of the same age in a Western society, the decisions they make are shadowed with the age mark. The uniform age of consent for marriage that is grounded in the colonial project ignores the diversity of childhoods in different parts of the world.\textsuperscript{237} By setting a certain number as an age of attaining majority, without any scientific proof, international child law has introduced a potential contest to children’s differing ability to make decisions. The recognition of consideration of maturity together with age cannot amend this challenge because it still leaves the final decision to rely on parties other than the individuals under the age of 18.

2.1.2.2. Children and their Evolving Capacities

Both groups recognize the evolving capacities of children. Group 1 supports children’s evolving capacities are limited as they are still in the process of development, hence, they are unable to make major life decisions.\textsuperscript{238} It provides that children are unable to give or withhold their consent as they can easily be pressured to get married due to this lack of power to resist.\textsuperscript{239} They are particularly in a disadvantage where the husband-to-be is significantly older and the girls have limited education as the latter would generally have limited decision-making power in relation to their own lives.\textsuperscript{240} Group 2 relies on the historical development of the conception of childhood. It notes that the construction of the normative global child that is required to be provided with ‘normal growth and development’ restricted to activities of schooling and recreating only emerged in the 20\textsuperscript{th} century.\textsuperscript{241} The

\textsuperscript{234} \textsuperscript{id [n.223]} p.566
\textsuperscript{236} \textsuperscript{id}
\textsuperscript{238} \textsuperscript{id [n.223]} p.566
\textsuperscript{240} \textsuperscript{id [n.6]} para.22
\textsuperscript{241} Kate Cregan and Denise Cuthbert, ‘\textit{Global Childhoods: Issues and Debates}’, (2014), SAGE, p. 55
current trends that call for limitation on children’s capacity to make decision in every aspect, including marriage, completely ignores the socially constructed nature of childhood and concealing the diversity of childhoods in different parts of the world.\textsuperscript{242} This is why international law has not yet set a concrete age of consent for marriage. The Convention on Consent has left the decision to domestic legislators.\textsuperscript{243} As a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her/his life, a child between the ages of 16 and 18 can exceptionally be permitted to marry provided that the child is mature and capable, grounds assessed by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.\textsuperscript{244}

2.1.2.3. The Girl Child and Agency

Human agency has been one of the points of contention regarding the girl child’s ability to consent to marriage. Group 2 draws how young women are portrayed as passive victims, especially during periods of conflict.\textsuperscript{245} Concepts like marriage, family and reproduction are often used without their specification in local cultural and historical contexts.\textsuperscript{246} In a similar manner, child marriage gives an image of girls as oppressed victims needing rescue by Western conception of human rights. Yet, the literature describes agency and resilience in the actions of these young women and girls - for example, through the use of their sexuality to bargain themselves into “domestic units” in the context of military groups.\textsuperscript{247} Hence, painting the experience and decision of children in an unequivocally universal and negative light, irrespective of the experience of the children involved might in itself be contrary to the aims of children’s right to have opinions and for these opinions to matter.\textsuperscript{248} These are decisions that may be similar to any person over the age of 18 would make, put in the same context.

Group 1 pushes back by stating that often, measures that involve sexual intercourse are used when few other choices and resources are available, consequently, these young women may not have true

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{242} *id* [n.237] p.18
\item \textsuperscript{243} *id* [n.237] art.2
\item \textsuperscript{244} *id* [n.6] para.20
\item \textsuperscript{245} Medina Haeri and Nadine Puechguirbal, ‘From helplessness to agency: examining the plurality of women’s experiences in armed conflict’, (2010) 92(877), International Review of the Red Cross, 103-122, p.109
\item \textsuperscript{246} Chandra Talpade Mohanty, ‘Under Western eyes: Feminist scholarship and colonial discourses’, (1988) 30(1), Feminist Review, 61-88, p.75
\item \textsuperscript{247} *id* [n.123] p.93
\item \textsuperscript{248} Heidi Viterbo, ‘Childhood Trials: Law, Rights and Childhood in Israel/Palestine’, (forthcoming), Chapter 4, pp.16-17
\end{enumerate}
\end{footnotesize}
agency.\textsuperscript{249} It is very hard to say they are involved with their free and full consent when the only option they have is to marry the person that comes their way. The socio-economic factors that provide only limited options cloud the girl child’s judgments as it becomes a means to an end goal of self-preservation.\textsuperscript{250} The majority of them know little or nothing about sex before they are married, therefore frequently fear it.\textsuperscript{251} They rarely give informed consent that their first sexual encounters are often forced.\textsuperscript{252} After all, the need to protect children emanates from the conception of children as the most vulnerable individuals.\textsuperscript{253} Innocence, dependence and helplessness are their hallmarks, hence, they deserve legally recognized right to childhood.\textsuperscript{254}

\textbf{2.1.2.4. Children, capable of consenting?}

There is a growing emphasis on children’s participation rights in the language of child law and policy in recent years.\textsuperscript{255} Therefore, there should be recognition to children as active agents in their own lives who are entitled to be listened to, respected, and granted increasing autonomy in the exercise of rights. After all, children’s right to have views and for such views to be given due weight is one of the four pillars of the rights of the child.\textsuperscript{256} However, children’s entitlement to protection should also be taken into consideration in the law and policy designs. This follows the other pillar to the rights of the child: the best interest of the child.\textsuperscript{257} The two principles - respect for the views of the child and the best interest of the child - have complementary roles.\textsuperscript{258} Hence, it is important to consider both in the assessment of the girl child’s ability to consent to marriage. In doing so, multiple factors indicate that child marriage is not in the best interest of the child due to the short term and long-term effects, discussed in the previous chapter. Moreover, the need to give due weight does not necessarily mean the views of children would always be determinant factors in the outcome. The law is structured in such a way that children’s

\begin{flushright}
\textsuperscript{249} \textit{id} [n.97] p.47
\textsuperscript{250} Geraldine Van Bueren, ‘\textit{The International Law on the Rights of the Child}', (1995), Martinus Nijhoff, p.52
\textsuperscript{251} \textit{id} [n.179] p.156
\textsuperscript{252} \textit{id} [n.223] p.566
\textsuperscript{253} Howard Cohen, ‘\textit{Equal Rights for Children}', (1980), Littlefield, Adams & Co., p.1
\textsuperscript{254} \textit{id} [n.248] p.9
\textsuperscript{256} General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention, 15 October 1991, CRC/C/5, para.13(d)
\textsuperscript{257} \textit{id} para.13(b)
\textsuperscript{258} General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para.74
\end{flushright}
preferences are just one factor, amongst many to consider for decision makers, not necessarily given any particular priority.\textsuperscript{259} Hence, while recognizing there may be many factors that lead the girl child to intend to marry before reaching the age of 18, child marriage should not be excused in the illusion of consent for the following reasons:

1. Researches have supported that human beings do not attain full maturity by the age of 18; it has actually emerged that human beings do not completely mature until their mid-twenties.\textsuperscript{260} Therefore, irrespective of the original roots of 18, it is now important to ensure children can be provided with the resources to grow and become fully capable individuals as they are not, yet, mature enough. Child marriage is a threat to this because of the effects it has on the future of girls.

2. There are very few child marriages that are based on ‘consent’. These are usually consented for the girls either have no other option or have very limited information the idea of marriage. Therefore, the marriage is hardly based on a full and free consent, from the start. Moreover, coercion is inherent in certain circumstances such as armed conflict.\textsuperscript{261} Therefore, children need even more protection from consenting to marriage because they are incapable of doing so.

3. The consideration of the majority is the basis to formulate a law. Hence, the fact that there are exceptional individuals amidst millions of children should not be a ground to create exceptions. In this particular case, the concept of consent can be abused. Families would use the gap to fulfil their dreams of marrying off a virgin girl or lessening their economic burdens. Girls would use the loophole to bring a husband that can support them and their families. Hence, allowing child marriages ‘in exceptional’ circumstances, especially in a patriarchal world that has distorted understanding of the value of girls, will threaten the protection of the majority.

\textsuperscript{260} id [n.112]
\textsuperscript{261} The Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998, para.688
4. The protective dimension of child rights prevails.\textsuperscript{262} Underneath an adult appearance or behaviour, all those under the age of 18 remain children who are less able to make life-changing decisions and/or foresee the consequences, hence require full protection.\textsuperscript{263}

Accordingly, I consider all marriages that involve a child under the age of 18 as forced marriages. In this thesis, any formal or informal union or marriage, forced or otherwise, between a female under the age of 18 (girl child) and a combatant aged older than 18 is considered a child marriage. There is no discussion on marriage between two children due to the Pandora’s Box it will open, especially regarding international criminal law and children’s responsibilities.

\textsuperscript{262} \textit{id} [n.255] pp.275-276
\textsuperscript{263} \textit{id} [n.248] pp.8-9; Gus Waschefort, ‘\textit{International Law and Child Soldiers}’, (Hart, 2015), p.11
Chapter Three: Child Marriage and the Law

The cultivation of violence among men finds its peak in the army where an all-male grouping built around glorification of male strength is a contributing factor to violence against women. There is direct linkage between militarization and patriarchy. The use of violence - including IPV - increases during conflicts due to the level of frustration that is taken out on the weak. Women are overall more negatively affected by the indirect and long-term consequences of armed conflict than men. Among others, the incidence and risk of the marriage of a girl child is highly exacerbated in humanitarian settings.

The discussion in Chapter 2 has tried to highlight that there is no such thing as ‘marriage’ between a child and an adult for there is lack of full and free consent for two reasons: the nature of such acts which children are forced into and in the rare cases they consent, the incapability of the child. Hence, it is important to investigate what the act can constitute. Child marriage shares characteristics of components of sexual violence. Accordingly, the first part of this Chapter will analyse sexual violence. It then explains how child marriage amounts to sexual violence. It will be followed with the second part which will address the legal framework of IHL and sexual violence.


The World Health Organization (WHO) defines sexual violence as ‘any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work’. It incorporates a continuum of behaviours which include any violence, physical or psychological, carried out through sexual means or by targeting sexuality and/or sexual characteristics of a victim. Coercion includes physical force, psychological

264 id [n.50] p.134
269 id [n.179] p.149
intimidation, blackmail or other threats; when a person is unable to give consent.\textsuperscript{271} Sexual violence also includes rape, defined as physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object.\textsuperscript{272}

In the Law of Armed Conflicts, sexual violence has been defined as an act of sexual nature committed on a person under coercive circumstances.\textsuperscript{273} It requires neither penetration nor physical contact.\textsuperscript{274} Rape is a ‘physical invasion of sexual nature’ that forms part of sexual violence.\textsuperscript{275} In the \textit{Furundzija} case, the court had concluded that penetration of the vagina and anus by the penis or any other object or mouth by the penis, however slight, would constitute rape when accompanied with coercion.\textsuperscript{276} The \textit{Foca} case reaffirmed the same understanding of rape.\textsuperscript{277} Coercion has remained a required element in the act of sexual violence, particularly rape.\textsuperscript{278} It does not necessitate physical force as different forms of duress that prey on fear or desperation may constitute coercion.\textsuperscript{279} In the context of armed conflicts, sexual violence is a result of militarized, hetero-nationalist hegemonic masculinity and acts as an expression of supreme dominance.\textsuperscript{280} Hence, the already ideally positioned gender construct of being a ‘man’ becomes even more strengthened with arms. Accordingly, members of armed forces would be in a privileged position to showcase their dominance by marrying a girl child.

Marriage has historically been used to legitimize a range of forms of sexual violence against women.\textsuperscript{281} The inclusion of the term ‘marriage’ in child marriage is also a continuance of this habit. The Sierra Leone Trial Chamber has found that the use of ‘wife’ indicates the perpetrator’s intent to exercise

\begin{footnotes}
\footnotetext{271} \textit{id} [n.178] p.149
\footnotetext{272} \textit{id}
\footnotetext{273} \textit{id} [n.261]
\footnotetext{274} \textit{id}
\footnotetext{275} \textit{id}
\footnotetext{278} \textit{id} [n.276] para.185(ii)
\footnotetext{279} \textit{id} [n.261]
\footnotetext{281} The still debatable marital rape can be one example of such conclusions. The ‘private’ and ‘public’ matter dichotomy that is raised, especially concerning IPV, has led to the physical injury of multiple women around the world.
\end{footnotes}
ownership right over the victim.\textsuperscript{282} Associating the acts of sexual violence with the term 'marriage' and referring to the victims as 'wives', leads to the behaviour not only to be tolerated but also justified as the terms strategically position the girl child to a position of less power to run away. ‘Wives’ romanticizes the action and devalues the level of crime committed.

Child marriage is a form of sexual violence.\textsuperscript{283} It fulfils all the criteria set by both the WHO and the multiple cases that have strengthened the coverage of the issue in IHL. It is a sexual act directed against girls due to their sexuality using coercion. The institution is particularly a hub for the rape of girls as the girls are forced to engage in sexual intercourse, often even before they reach the age of 18. It endangers the emotional and physical wellbeing of girls by prematurely forcing them into sexual activity.\textsuperscript{284} It also exposes them to other forms of sexual violence, as well.\textsuperscript{285} Child marriage creates a culture where victims are devalued, sexual violence is tolerated, and perpetrators are not held accountable.\textsuperscript{286}

3.2. The Regulation of Child Marriage in Armed Conflicts

IHL regulates international armed conflicts (IACs) and non-international armed conflicts (NIACs).\textsuperscript{287} It provides for obligations of an absolute character whereby a violation by one party does not allow another to breach its responsibilities.\textsuperscript{288} However, there are differing requirements in order to initiate its use in these conflicts. An IAC occurs when there is use of force between States.\textsuperscript{289} Additional Protocol I\textsuperscript{290} provides for an exception. This exception is when people fight against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination.\textsuperscript{291} There are two different thresholds for NIAC. Common Article 3 provides the lower threshold merely stating, ‘conflict not of international character’.\textsuperscript{292} The statement lacks a legal definition, but it is widely accepted that the article governs armed conflicts between state armed forces and non-state armed forces or

\textsuperscript{282} \textit{id} [n.261] para.13
\textsuperscript{283} \textit{id} [n.179] p.156
\textsuperscript{284} \textit{id} [n.38] p.3
\textsuperscript{285} \textit{id}
\textsuperscript{286} \textit{id} [n.270] p.2
\textsuperscript{287} A.P.V. Rogers, ‘Law on the battlefield’, (3rd edn Manchester University Press 2012), p.3
\textsuperscript{289} The \textit{Geneva Conventions} of 12 August 1949, Common Art.2
\textsuperscript{290} Protocol Additional to the \textit{Geneva Conventions} of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
\textsuperscript{291} \textit{id} art.1(4)
\textsuperscript{292} The \textit{Geneva Conventions} of 12 August 1949, Common Art.3
those between non-state armed forces. Additional Protocol II has a higher threshold. The Protocol only applies to armed conflicts between state armed forces and dissident armed forces or other organized armed groups, which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.

The Geneva Conventions and their protocols, the major instruments in IHL, regulate the conduct of the two types of armed conflicts. They aim to address the shortcomings of the legal frameworks that could not prevent the atrocities of World War II. In order to do so, they provide protection to people who do not or no longer take part by putting the distinction of armed forces and civilians, among others, as central elements of the regulation. Girls also benefit from these legal protections. The protections can be general – as part of the civilian population and/or specific – due to their sex and age. The following parts will be divided into three sections. The first section will follow the fundamental principles and rules of IHL to assess whether child marriage can be a violation of IHL. It will then address how sexual violence has been addressed within the realm of IHL. This will be used to elaborate on potential coverage of child marriage within the legal framework of IHL. The last section will highlight the major human rights violations that may occur as a result of child marriage.

3.2.1. Principles of IHL

IHL is founded upon principles that aim to limit the effects of armed conflict. These principles are the principles of distinction, necessity, proportionality and humanity. The principle of distinction is fundamental in determining who States and non-State actors can target during an armed conflict.

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293 Jelena Pejic, ‘The protective scope of Common Article 3: more than meets the eye’, (2011) 93(881), International Review of the Red Cross, p.3
294 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
295 id art.1(1)
296 ‘International Humanitarian Law’, (2016), International Committee of the Red Cross, p.4
300 id [n.296] p.10
301 id
Therefore, it is a major protection tool for civilians. On the other hand, the principle of necessity determines how a military target can be attacked. Therefore, it is relevant to members of the State armed forces and non-State armed groups. The principle of proportionality requires the suspension of attacks when/if an attack on legitimate military objectives can cause excessive civilian harm. Hence, though aimed at protecting civilians, it has effect on both civilians and combatants. The principle of humanity deals with treating persons under the power of an adversary humanely. The following subsections would analyse these principles vis-à-vis child marriages.

3.2.1.1. Principle of Distinction

The principle of distinction is a fundamental doctrine in IHL. It requires parties to a conflict to direct attack only against combatants and military objects as opposed to civilian persons and civilian objects. Civilians and hors de combats are not legitimate objects of attack. This is required under both IAC and NIAC. The prohibition of spreading terror among the civilian population is fundamental to the protection of girls. It is a confirmation to the general protection that girls enjoy as civilians and it stems from the principle of distinction. IHL prohibits violence, act or threat, whose primary purpose of which is spreading terror amongst civilians. The terms violence, acts and threats are much broader than ‘attacks’. These acts are particularly reprehensible for they are frequent and inflict particularly cruel suffering upon the civilian population. They do not necessarily require attacks in which there is

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302 id
303 id
304 id
308 id [n.290] art.48; id [n.294] art.13(2)
310 id [n.290] art.51(2), id [n.294] art.13(2); id [n.305] Rule 2
312 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, para.4785
a resort to military force. Acts that constitute such violence include assault, rape, abuse and torture of women and children among others.  

Child marriage is a sexual violence and in instances whereby consummation is involved, it amounts to rape. It can easily spread terror amongst civilians. It is an act that adversely affects the life of a girl and her surrounding both immediately and in the long-term. It is frequent, both in terms of how it occurs in a girl’s life and generally as a trend. A girl, once married, would suffer from the effects of child marriage until the marriage ends. The marriage may last for as long as the armed conflict. Child marriages are also frequent in terms of their occurrence. Nine out of the ten countries with the highest child marriage rates are considered fragile states. There has also been a practice of abducting and marrying girls by different non-state armed groups. Child marriage inflicts cruel pain and suffering upon the civilian population as the girls would be impacted by all the effects addressed in Chapter 1. 

Thus, a child marriage between a civilian or hors de combat girl with combatant man would be in direct contradiction with the principle of distinction. This would violate IHL.

3.2.1.2. The Principle of Necessity - Restriction on Means and Methods of Warfare

IHL regulates the conduct of military operations in an armed conflict by defining proper and permissible uses of weapons and military tactics. Attacking forces are required to not use means and methods of warfare that are ‘of a nature to cause superfluous injury or unnecessary suffering’. This is one of the cardinal principles of IHL. By limiting the means and methods of warfare, IHL tries to limit the

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313 id [n.311]
314 id [n.305] Rule 2
318 id [n.290] art.35(2)
319 id [n.27] para.238
effects of armed conflict to only removing the adversary from armed combat. This prohibition has attained a status of customary international law.

i. Child Marriage as a Prohibited Weapon of War

IHL, recognizing the impact sexual violence would have on women, absolutely prohibits all forms of sexual violence. Rape is a weapon of war widely recognized as an illegal act that forms part of a planned and targeted policy, instead of mere by-product of war exacerbated during armed conflicts. Beyond 'sexual gratification', it generates fear and is part of an attack against the 'enemy'. It is used to achieve militaristic, masculinist and/or nationalist goals of destroying a community, among others. It has a systematic, pervasive, or officially orchestrated aspect. Rape during armed conflicts is one of the reflections of how the social wrong created due to patriarchy in peacetime reveals itself in a larger scale and more open manner. The approximately 5,000 'pregnancies of war' of the Rwandan Genocide reflect the prevalence of, generally sexual violence, and particularly rape, during armed conflicts. As discussed above, child marriage is a form of sexual violence. When consummation is involved, it becomes rape. It only seems different because it creates a 'legitimate institution' for the violence against children. It serves armed forces to feed their masculine ego whilst creating fear towards the girl child and the larger community. The existing practice in IHL absolutely prohibits the use of sexual violence, particularly rape as a weapon of war. Therefore, it would be legitimate to say child marriage, which is a severe form of sexual violence due to its effects, is also prohibited.

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320 While the prohibition is not contested, there is no agreement on whether this renders a weapon illegal or whether a weapon is illegal only if a specific treaty or customary rule prohibits its use.
321 id [n.305] Rule 70
324 Susan Brownmiller, ‘Against our will: Men, women and rape’, (1975), Simon and Schuster, pp.13-14
ii. Child Marriage as Causing Superfluous and Unnecessary Suffering

The use of methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering amounts to a war crime.\textsuperscript{328} Child marriage, even when there is no consummation, affects girls physically and psychologically. The institution of marriage entails responsibilities far greater than a child can bear. It creates a burden that leads to the psychological pressure of girls. The physical violence that the men perpetrate against the girls is also devastating to a level where it sometimes leads to permanent injuries and even death. Furthermore, the sexual component both by itself and due to its result, such as pregnancy can ruin the lives of girls at a very young age. Moreover, child marriages affect societies at large. Does that meet the standard of unnecessary suffering?

There is no agreement on how a weapon’s superfluous injury or unnecessary suffering effect on armed forces can be determined.\textsuperscript{329} Harm greater than what can be avoided to achieve legitimate military objectives is an unnecessary suffering.\textsuperscript{330} A balance between military necessity, on the one hand, and expected injury or suffering inflicted on a person, on the other hand has been the practice for measuring unnecessary suffering for most states.\textsuperscript{331} In such a test, a suffering that has no military purpose would amount to superfluous injury or unnecessary suffering. Other states refer to the availability of alternative means as an element.\textsuperscript{332} The inevitability of serious permanent disability is a relevant factor in establishing whether superfluous injury or unnecessary suffering would be caused.\textsuperscript{333} Rendering death inevitable is another consideration which also contradicts with the principles of humanity.\textsuperscript{334} The effects of child marriage have both an immediate and long-lasting effects. A military necessity can never outweigh the effects of child marriage which are witnessed throughout a girl’s life span, hence can be considered superfluous injury or unnecessary suffering both in the test of military purpose or availability of alternative means. They also cause disabilities and death in some instances, hence breaching the principle of necessity.

\textsuperscript{328} \textit{id} [n.30] art.8(2)(b)(xx)
\textsuperscript{329} \textit{id} [n.305] Rule 70
\textsuperscript{330} \textit{id} [n.27] para.238
\textsuperscript{331} \textit{id} [n.305] Rule 70
\textsuperscript{332} \textit{id}
\textsuperscript{333} \textit{id}
\textsuperscript{334} \textit{id} This is a ground behind the prohibition of exploding bullets and dumdum bullets, for example.
3.2.1.3. Principle of Proportionality

IHL provides for the principle of proportionality whereby incidental IHL prohibits attacks whose effects are likely to be indiscriminate.\footnote{id [n.290] art.51(5(b))} Hence, the principle of proportionality requires consideration of the undesired but foreseeable effect of military actions, positively.\footnote{id [n.307] p.49} This is required both at the planning and execution stage of an attack.\footnote{id [n.307] p.49} In order to achieve this, it is important to take precautions.\footnote{id [n.290] art.57(2), 57(2(c)), 57(3), and 57(4);} These requirements are to verify that the target is a military objective; take all feasible precautions in the choice of means and methods of attack to avoiding, and in any event minimize, the expected incidental damage; refrain from launching an attack that may be expected to violate the rule on proportionality; and cancelling or suspending an attack if it becomes apparent that the target is not a military objective or is subject to special protection, alternatively, that the attack may be expected to violate the rule on proportionality.\footnote{id [n.290] art.57(2(a(i))), 57(2(a(ii)), 57(2(a(iii))), and art.57(2(b)); id [n.305] Rules 15, 16, 17, 18, and 19} In the case of child marriage, it is unnecessary to assess proportionality because of the illegality of child marriage as a means of warfare and its impact on civilians that is tremendous and life-long. As a result, child marriage would not even qualify to be put into the test of proportionality.

3.2.1.4. Principle of Humanity

The ‘principles of humanity’ and the ‘dictates of public conscience’ referred to in the Martens clause form part of the founding principles of IHL.\footnote{id [n.288]} The Martens clause is a normative principle that stresses the importance of customary norms in the regulation of armed conflicts.\footnote{id [n.27] para.84} The clause is not a binding legal text but it is considered as a customary international law.\footnote{id [n.290] art.36} Moreover, Additional Protocol I has a provision that incorporates the clause’s language and principles.\footnote{id [n.290] art.36} The International Court of Justice
has also referred to ‘elementary considerations of humanity’ in the Corfu Channel Case. Accordingly, it is important to analyse child marriage from this principle.

Child marriage is an entry into a lifetime of agony to girls. Especially in armed conflicts, it will put them in double suffering. Girl brides will not only accept the challenges of the conflict in general but also its particular impact in their individual lives. It is impossible to consider that this would be in line with public conscience and principles of humanity. Besides, The Martens clause is important because, through its reference to customary law, it stresses the importance of customary norms in the regulation of armed conflicts. The prohibition of sexual violence, particularly rape has already attained the status of customary international law. Hence, it is within the recognised international customary norm not to sexually violate women. Accordingly, it would be against this principle of IHL to involve children in child marriages during armed conflicts.

3.2.2. Specific Regulation of Sexual Violence in IHL

The post-Second World War codification of IHL witnessed the signing of the four Geneva Conventions and their additional protocols. The Geneva Conventions failed to make explicit reference to sexual violence and specifically rape, except in one instance. The Fourth Geneva Convention which provides for the special protection to women in Occupied Territories from attacks on their honour, particularly rape. The First Geneva Convention, Second Geneva Convention and Third Geneva Convention only stated that ‘women shall be treated with all consideration due to their sex’. Common Article 3 to the Geneva Conventions, which only applies to NIACs, uses the phrase ‘outrages upon personal dignity, in particular humiliating and degrading treatment’.

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344 Corfu Channel Case (United Kingdom v. Albania) (Merits), International Court of Justice, 9 April 1949, para.22
345 id [n.341]
346 id [n.305] Rule 93
347 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949
348 id art.27
349 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949,
350 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949
351 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949,
352 id [n.349] art.12, id [n.350] art.12 and id [n.351] art.14
353 id [n.341]
dignity” and “any form of indecent assault” refer to any form of sexual violence.\textsuperscript{354} The Additional Protocols expanded the references with the introduction of that specifically addressed the prohibition of, among others, rape.\textsuperscript{355} The Protocols also include the phrase ‘outrages upon personal dignity’.\textsuperscript{356} The prohibition of indecent assault is also included in the Protocols.\textsuperscript{357} However, the specific reference to rape put the legislatures’ intent in clear light.

Sexual violence can constitute crimes against humanity.\textsuperscript{358} This has also been incorporated in other international courts.\textsuperscript{359} It is further strengthened through case law. In the Akayesu case, the International Criminal Tribunal for Rwanda (ICTR) found that an act can constitute a crime against humanity when committed on a person under coercive circumstances as part of a wide spread or systematic attack on civilian population on discriminatory grounds.\textsuperscript{360} The prohibition of sexual violence, under customary international law, has crystallized.\textsuperscript{361} This violation, when committed against children, forms part of the six grave violations.\textsuperscript{362} In line with this argument, child marriages can also constitute crimes against humanity when the components of the law – commission as part of widespread or systematic attack, against civilians, with knowledge of the attack.

Sexual violence, especially rape, can also amount to torture. The Convention against Torture\textsuperscript{363} (CAT) defines torture as an intentionally inflicted act that causes severe pain or suffering of different forms as a means of obtaining information, punishment, intimidation or coercion or for any reason based on discrimination.\textsuperscript{364} The act must be either committed by, instigated by or consented to by a public official or other person acting in an official capacity.\textsuperscript{365} In the Akayesu case, it has been found that rape can constitute torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a

\textsuperscript{354} id [n.305] Rule 93
\textsuperscript{355} id [n.290] art.76(1); id [n.294] art.4
\textsuperscript{356} id [n.290] art.75(2(b)); id [n.294] art.4(2(e))
\textsuperscript{357} id [n.290] art.75(2(b)), 76(1), and.77(1); id [n.294] art.4(2(e))
\textsuperscript{358} id [n.30] art.7(1(g))
\textsuperscript{359} Statute of the Special Court for Sierra Leone, 16 January 2002, art.2(g); Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, art.3(g); Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, art.5(g)
\textsuperscript{360} id [n.261] para.598
\textsuperscript{361} id [n.276] para.168
\textsuperscript{363} Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1948
\textsuperscript{364} id art.1(1)
\textsuperscript{365} id
public official or other person acting in an official capacity.\textsuperscript{366} This has been reiterated by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) which found Hazim Delic guilty of torture for the rapes he committed against Ms. Cecez.\textsuperscript{367} In the Foca case, ICTY has held that the definition provided under CAT is nothing more than an interpretative tool in the understanding of the definition of torture in customary international law.\textsuperscript{368} It noted that the need for the involvement of a public official, among others, remains contentious.\textsuperscript{369} Torture is one of the most atrocious violations against human dignity whose result destroys the dignity and impairs the capability of victims to continue their lives and their activities.\textsuperscript{370} The effects of child marriage are tremendous and adversely life changing. Hence, the infliction of pain is evident. The only missing element that might sometimes be missing is the contentious one – involvement of a public official.

Rape can also form part as a war crime.\textsuperscript{371} The elements of the crime of rape necessitates the perpetrator to invade the body of the victim through penetration, even if slightly, with a sexual organ or any object if the penetration is to the anal or genital opening of a victim that has not consented.\textsuperscript{372} However, it must be committed as part of a plan, policy or as part of a large-scale commission of such crimes.\textsuperscript{373} Coercion and awareness of the factual circumstances are necessary element.\textsuperscript{374} Similarly, the commission of sexual violence and rape could constitute genocide when it fulfils the specific conditions of genocide.\textsuperscript{375} Child marriage can accordingly, form part of rape and genocide when the other elements required by law are missing.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{366} \textit{id} [n.261] para.597
\item \textsuperscript{367} \textit{The Prosecutor v. Zenjnil Delalic and Hazim Delic}, (Trial Judgment), IT-96-21-T, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 16 November 1998, para.943
\item \textsuperscript{368} \textit{Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic}, (Trial Judgement), IT-96-23-T&IT-96-23/1-T, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 22 February 2001, para.482
\item \textsuperscript{369} \textit{id} para.484
\item \textsuperscript{370} \textit{Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993}, para.55-56
\item \textsuperscript{371} \textit{id} [n.30] art.8(2(b(xxii))), 8(2(c(ii))), 8(2(e(vi)))
\item \textsuperscript{372} \textit{id} [n.32] p.28
\item \textsuperscript{373} \textit{id} [n.30] art.8(1)
\item \textsuperscript{374} \textit{id} [n.32] p.28
\item \textsuperscript{375} \textit{id} [n.261] para.731
\end{itemize}
\end{footnotesize}
3.2.3. Sexual Violence and Personal Safety

The Geneva Conventions provide for the treatment of women with all considerations due to their sex.\(^{376}\) Spheres traditionally considered as private, such as the home, are also under the legal coverage.\(^{377}\) Girls have specific needs and vulnerabilities that expose them to sexual violence – in the form of child marriages, among others. Recognizing their specific needs and vulnerabilities, IHL provides they shall be the object of special respect in IACs.\(^{378}\) They are entitled to protection from among others torture and outrages upon personal dignity by anyone.\(^{379}\) Girls also enjoy protection as children as objects of special respect.\(^{380}\) NIAC does not have a special provision that considers women, separately. However, there is a general requirement to the prohibition of violence to life and person and outrages upon personal dignity.\(^{381}\) Additional Protocol II explicitly recognizes the protection of children in times of NIACs.\(^{382}\) The double-layered protections that girls have: due to their sex and age, includes protection against all forms of sexual violence.\(^{383}\)

Child marriage is in direct contradiction to the personal safety of the girls. It is a way of exploiting children in ways that relate to their reproductive responsibilities or gendered expectations of womanhood. It has a systematic and pervasive aspect that intensifies the gender inequality that exists in the society by ensuring the continuance of men’s dominance on women. It is also a threat to both the life and person of girls who will endure the health and societal consequences both at a young age and throughout their lives. The respect to the specific protection, health and assistance needs of women has attained the status of customary international law.\(^{384}\) Women suffer more severely from the damage to the health and other infrastructure.\(^{385}\) The health aspect is also especially relevant to child marriages considering the direct impact such acts have on the health of girls. The CRC recognizes adolescents as rights holders with capacities that evolve with age and maturity, and explicitly includes rights related to sexual

\(^{376}\) \textit{id} [n.349] art.12, \textit{id} [n.350] art.12(4); \textit{id} [n.351] art.14(2); \textit{id} [n.347] art.27(2)
\(^{377}\) \textit{id} [n.305] Rule 134
\(^{378}\) \textit{id} [n.290] art.76(1)
\(^{379}\) \textit{id} art.75(2(a(ii))) and 75(2(b))
\(^{380}\) \textit{id} art.77(1)
\(^{381}\) \textit{id} [n.292] Common art.3(1(a)) and 3(1(c)); \textit{id} [n.293] art.4(2(a)) and 4(2(e))
\(^{382}\) \textit{id} [n.294] art.4(3)
\(^{383}\) \textit{id} [n.305] Rule 135
\(^{384}\) \textit{id} [n.305] Rule 134
activity and the right for adolescents to be informed about their sexual and reproductive health. The right to health has four important elements: availability, accessibility, acceptability and quality. Availability refers to the presence of sufficient functioning facilities. Accessibility deals with the viable reachability of the goods and services in terms of awareness, establishment and affordability, without discrimination. Acceptability is about the cultural consideration. Quality denotes the scientifically and medically appropriate and of good quality.

Child marriages during armed conflicts affect this right. Marriages between civilian girls and combatant men, hors de combat girls and combatant men, combatant girls from the adversary and combatant men from the adversary have different layers of coercion. The already strict hierarchal relation that is attributed to culture and societal values becomes strained due to the position of power men with arms have. As a result, girls in marriages rarely access health services. The discussion above has highlighted the prevalence of lack of education. This would have a direct impact on the information they would have about their health and available services. The mobility restriction put upon them by their husbands further limits their access to health facilities. In Egypt and Morocco, men control a woman’s ability to move freely within and outside of the household. Moreover, girls will rarely have economic capabilities to access health facilities. In intense armed conflicts, the damages caused to the facilities further reduces the accessibility of the health service. Even when there are facilities, the qualities would be extremely low due to the limited availability of medical personnel, equipment and drugs. There are also impediments to girls in reaching health care due to active fighting in the streets. By going on the streets to get to health centres, they might be risking their (and sometimes their children’s, as well) lives in order to save their lives.

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388 id para.12(a)
389 id para.12(b)
390 id para.12(c)
391 id para.12(d)
392 id [n.73] p.13
393 Attacking medical facilities is a violation of IHL, by itself. It has not been discussed in this paper due the broad discussion it would require. If done, it would divert the focus of the discussion into medical facilities instead of the effect of child marriages on girls in armed conflicts.
Chapter Four: Conclusion and Recommendations

4.1. Conclusion

IHL does not explicitly prohibit child marriages. Considering the strides that it has taken over the years, however slow, in the recognition of affairs that highly affect girls and women, it is disappointing to see that the prohibition of all forms of child marriage has fallen through the cracks. However, the recognition of sexual violence creates a possibility whereby child marriage can also be considered. Until better days come, I believe this relatively better developed legal ground can be used to protect girls from child marriages during armed conflicts.

4.2. Recommendations

The elimination of child marriages has been advocated for over the years.\textsuperscript{395} There has even been a call for countries to create a socio-economic environment conducive to eliminate child marriages.\textsuperscript{396} But it is time to take actions that are stronger than mere recommendations that States put in the back shelves and only agree with for the political statement.

The law plays a tremendous role in setting a standard. Having a concrete legal rule is the best mechanism that reflects the commitment of actors for two reasons. Firstly, legal rules can create trends that the society will follow. Hence, communities around the world can potentially be influenced with strong legal rules. Secondly, a law will also provide girls the legal protection that they can make use of to seek justice when their rights are violated. Hence, I recommend the explicit prohibition of child marriages in situations of armed conflicts, in IHL. While I understand it is difficult to come up with laws at this age where political interests have a major role on the decision of States, I believe it is not impossible considering the evidences surrounding the prevalence of child marriages in situations of armed conflicts and their effect. However, it would require the international community to come together to realize this duty that is owed not only to the girls that are put into this inhuman act, but also to generations to come. Multi-sector approach is important. Hence, it is the responsibility of States, courts,

\textsuperscript{395} Report of the International Conference on Population and Development, 5-13 September 1994, a/conf.171/13/Rev.1, para.5.5
\textsuperscript{396} id para.6.11
civil societies and the media, among others to work together to ensure the legal prohibition becomes a reality.

Particularly, African countries should understand the root causes of child marriage in order to devise mechanisms that can effectively address child marriage, from its roots, in their specific context. Considering the absolute prohibition of child marriages under the ACRWC, it is mostly the implementation of the existing rules that the States should work on. It is important to provide more than lip service to girls whose basic human rights should be recognized. It is also in the interest of the countries as girls are fundamental in creating a better Africa and world in the coming years. However, they can only do so when they are provided with the necessary tools that can help them to utilize their full potential. The failure to implement the laws that prohibit child marriages will only limit them. The involvement of non-State armed groups is important so that the protection is effective on the ground. The countries that have set age of marriage lower than 18 should work on aligning their domestic laws with the regional expectation and the few countries that have not yet ratified the Charter should do so to better protect girls.

Child marriage is a violation of human rights of girls. Most importantly for IHL, it is a violation to the already existing rules and principles in the law. However, social attitudes that compromise on girls’ rights are obstacles from stretching them wide enough to incorporate all child marriages. Hence, its explicit legal prohibition and elimination through implementation is the only way forward.
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