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The Regulation of Child Marriages in International Humanitarian Law

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Contents

Acknowledgement.....	4
Introduction.....	7
Chapter One: Elements of Child Marriages	12
1.1. Understanding Child Marriages.....	12
1.2. Underlying Causes of Child Marriage	13
1.2.1. Culture.....	14
1.2.2. Economic Instability and Value	16
1.2.3. Social Stigma and Protection	18
1.2.4. Independence	18
1.2.5. Failure of Structures.....	20
1.2.6. Lenient and Inconsistent Legal Rules	21
1.3. The Negative Impacts of Child Marriage	22
1.3.1. Pregnancy and Child Birth	23
1.3.2. Diseases	26
1.3.3. Domestic Violence.....	27
1.3.4. Psychological	28
1.3.5. Impact on Society.....	29
Chapter Two: The Illusion of ‘Marriage’ with Children.....	31
2.1. Consent: The Missing Element in Child Marriage	31
2.1.1. Consent.....	33
2.1.2. Consent in Child Marriage	34
Chapter Three: Child Marriage and the Law.....	41
3.1. Child Marriages: Sugar-coating Sexual Violence.....	41
3.2. The Regulation of Child Marriage in Armed Conflicts.....	43
3.2.1. Principles of IHL.....	44
3.2.2. Specific Regulation of Sexual Violence in IHL.....	50
3.2.3. Sexual Violence and Personal Safety	53
Chapter Four: Conclusion and Recommendations	55
4.1. Conclusion	55
4.2. Recommendations	55
References	57
Primary Sources	57
a. Laws	57

b. Cases	58
c. Others.....	59
Secondary Sources.....	61
a. Books	61
b. Journal Articles/Articles	63
c. Others.....	67

Introduction

The Sustainable Development Goals¹ (SDGs), adopted in 2015, laid the blueprint for a world that leaves no one behind.² In order to achieve its aim, the document set out 17 integrated, indivisible, global in nature and universally applicable goals.³ 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.⁴ 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.⁵ 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.⁶ They have the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children.⁷ Child marriage - one of the multiple hurdles girls face in their life – is a harmful practice.⁸ The calls made, over the years, by multiple organs contributed to the inclusion of child marriages as a harmful traditional practice in the SDGs.⁹ The Convention on the Elimination of All Forms of Discrimination against Women¹⁰ (CEDAW), for example, provided “the betrothal and the marriage of a child shall have no legal effect”, in its document from 1979.¹¹

Yet, 12 million girls are still getting married every year, before reaching their 18th birthdays.¹² Without further progress, 150,000,000 additional girls will be married by 2030.¹³ 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

¹ *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1

² Helen Clark, ‘What Will It Take to Achieve the Sustainable Development Goals?’, (2017), *Journal of International Affairs*, 53-59, p.53

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*

⁸ *Beijing Declaration and Platform of Action*, (adopted at the Fourth World Conference on Women), 27 October 1995, para.39

⁹ *id* [n.1] Target 5.3

¹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979

¹¹ *id*, art.16(2)

¹² ‘*Child marriage around the world*’, (2019), United Nations International Children's Emergency Fund, available at <https://www.unicef.org/stories/child-marriage-around-world> (Accessed 20 August 2019)

¹³ *id*

47% of its population under the age of 18.¹⁴ The African Charter on the Rights and Welfare of the Child¹⁵ (ACRWC) tries to protect these children from different harms, including child marriage.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.¹⁷ The prevalence of child marriage remains high compared to the growing child population in the continent.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.¹⁹ The limited documents that have explored the topic in situations of armed conflicts have addressed areas such as gender-based violence.²⁰ Gender-based violence is any harmful act directed against individuals or groups of individuals because of their gender.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.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

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

¹⁵ *African Charter on the Rights and Welfare of the Child*, 11 July 1990

¹⁶ *id* art.21(2)

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.

¹⁸ 'A Profile of Child Marriage in Africa', (2015), United Nations International Children's Emergency Fund, p.2

¹⁹ The first search results that come for the phrase 'Child Marriages and the Law' on Google, Google Scholar and JSTOR are 1. Quentin Wodon, Paula Tavares, Oliver Fiala, Alexis Le Nestour, and Lisa Wise, 'Ending Child Marriage: Child Marriage Laws and their Limitations', (2017) – an article that analyses the lack of legal protection from child marriages for girls; 2. Nawal M.Nour, 'Health Consequences of Child Marriage in Africa', (2006) 12(11), 1644-1649 – an article on the effect of child marriages on girls from a health rights perspective; and 3. Pallavi Gupta, 'Child Marriages and the Law: Contemporary Concerns', (2012), 47(43), Economic and Political Weekly – an article on marriages with a focus on India, respectively.

²⁰ A good example can be Jolena Zabel, 'Untying the Knot: Child Marriage in Situations of Armed Conflict', (2016), Political Science Honors Projects

²¹ 'Sexual and gender-based violence in the context of transitional justice', United Nations Human Rights Office of the High Commissioner, available at https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf (Accessed 30 August 2019)

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 Appended to judgment Pursuant to Rule 88(c), SCSL-2004-16-T, Special Court for Sierra Leone, 19 July 2007, para.11

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.²³ 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.²⁴ IHL does not preclude the applicability of IHRL.²⁵ 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 Rights²⁶ (ICCPR) continues even during armed conflicts, unless suspended due to public emergency.²⁷ The Court has also ruled that some rights might be matters of both IHL and IHRL.²⁸ The ICJ further strengthened this by holding Uganda responsible for the violation of both IHL and IHRL violations committed by its armed forces.²⁹ 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 Statute³⁰ are made with the recognition of the mental element that is required for all crimes under the International Criminal Court (ICC) as the

²³ *Preventing and eliminating child, early and forced marriage, 2 April 2014, A/HRC/26/22*, Report of the Office of the United Nations High Commissioner for Human Rights, para.3

²⁴ Louise Doswald-Beck and Sylvain Vite, '*International Humanitarian Law and Human Rights Law*', (1993) 293, *International Review of the Red Cross*, 94-119, p.112

²⁵ Emily Crawford, "*Convergence of Norms across the Spectrum of Armed Conflicts: International Humanitarian and Human Rights Law*", (2016), in Gregory Rose and Bruce Oswald (eds.), '*Detention of Non-State Actors Engaged in Hostilities the Future Law*', Koninklijke Brill, 7-22, p.15

²⁶ *International Covenant on Civil and Political Rights*, 16 December 1966

²⁷ *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996], ICJ. Rep. 226, Advisory Opinion of 8 July 1996, International Court of Justice para.25

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

²⁹ *Armed Activities in the Territory of the Congo (Congo v. Uganda)*, [2005], ICJ Rep. 168, Decision of 19 December 2005, International Court of Justice, para.3

³⁰ *Rome Statute of the International Criminal Court*, 17 July 1998

intention of the person to engage in a conduct and at least being aware that the consequences will occur in ordinary course of events.³¹ 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.³² 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 is 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

³¹ *id* art.30(2)

³² *Elements of Crimes*, 2011, International Criminal Court, p.1, para.3

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.³³ The age cap is derived from the Convention on the Rights of the Child³⁴ (CRC). The Convention recognizes that every human being under the age of 18 is a child, unless majority is attained earlier under domestic jurisdictions.³⁵

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.³⁶ 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.³⁷ 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.³⁸ 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.³⁹ However, they may not necessarily be forced on one or both intending spouse(s).⁴⁰ 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

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*

³⁸ Eliana Riggio Chaudhuri, *Thematic Report: Unrecognized Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage*, (2015), ECPAT International and Plan International, p.10

³⁹ Jodi O'Brien (ed), *Encyclopedia of Gender and Society*, (2009) 1, SAGE, p.40

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.⁴¹ 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.⁴² 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.⁴³ Due to the evolving capacities and autonomy of children, there is recognition for child marriages that are consensually entered.⁴⁴ 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.⁴⁵

1.2. Underlying Causes of Child Marriage

Harmful practices are deeply rooted in stereotyped roles based social attitudes.⁴⁶ Sex and gender-based labels, power imbalances, inequalities and discrimination perpetuate the widespread existence of these practices that often involve violence or coercion.⁴⁷ A system of social structures and practices in which men dominate, oppress and exploit women, patriarchy is the reality of our current world.⁴⁸ All agents of socialization process - family, religion, the legal, economic and political systems, educational

⁴¹ *id* [n.6] para.23; *id* [n.23] para.6

⁴² *id*

⁴³ Chris Coulter, '*Female Fighters in Sierra Leone War: Challenging the Assumptions?*', (2008) 88, *Feminist Review*, 54-73, p.55

⁴⁴ *id* [n.6] para.20

⁴⁵ The different types of marriages can also intersect with each other.

⁴⁶ *id* [n.6] para.6

⁴⁷ *id*

⁴⁸ Goran Therborn, '*Between sex and power – Family in the World, 1900-2000*', (2004), Routledge, p.17

institutions and the media - are pillars of the system and structure.⁴⁹ 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.⁵⁰

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.⁵¹ 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.⁵² It is an elusive concept with no precise bounds.⁵³ 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.⁵⁴ It is a way of life of members of a society. Africa, as a continent composed of over 50 States, has diverse cultures.⁵⁵ 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.

⁴⁹ Abeda Sultana, '*Patriarchy and Women's Subordination: A Theoretical Analysis*', (2012) 4, The Arts Faculty Journal, 1-18, pp.8-9

⁵⁰ Sylvia Walby, '*Theorizing Patriarchy*', (1990), Basil Blackwell, p.20

⁵¹ *id* [n.20] p.23

⁵² Helen Spencer-Oatey, '*What is Culture? A Compilation of Quotations*', (2012), GlobalPAD Core Concepts, p.1

⁵³ Abbott Lawrence Lowell, '*Culture*', (1915) 202(719), The North American Review, 553-559, p.553

⁵⁴ William Little, '*Introduction to Sociology: 2nd Canadian Edition*', (2016), p.98

⁵⁵ Gabriel E. Idang, '*African Culture and Values*', (2015), 16(2), Phronimon, 97-111, p.97

Most traditional African religions acknowledge that the Creator created both women and men equally.⁵⁶ They also enjoy a flourishing female imagery on all levels of the supernatural.⁵⁷ However, the introduction of Christianity and Islam, which have embedded patriarchy within them, diminished the practice of traditional religions.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶²

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.⁶³ Accordingly, most Africans generally recognize and enforce obligations.⁶⁴ The obligation bearers in African communities are individuals of all ages; hence, girls also have obligations

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.

⁵⁷ Charles Eberé, '*Beating the Masculinity Game Evidence from African Tradition*', (2011) 61(4), CrossCurrents, 480-495, p.481

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

⁶¹ John S. Mbiti, '*African religions and philosophy*', (2nd edn Heinemann 1989), p.1

⁶² Louise Wetheridge and Laetitia Antonowicz, '*Child Marriage in West Africa and Cameroon: A Desk Review*', (2014), Plan International, p.21

⁶³ Christopher Agulanna, '*Community and Human Well-being in an African Culture*', (2010) 14(64/59) 3, Trames: Journal of the Humanities and Social Sciences, 282-298, p.288

⁶⁴ Agnes C.L. Donohugh, '*Essentials of African Culture*', (1935) 8(3), Africa: Journal of the International African Institute, 329-339, p.332

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

⁶⁵ Paul Kyalo, 'A Reflection on the African Traditional Values of Marriage and Sexuality', (2012) 1(2), International Journal of Academic Research in Progressive Education and Development, 211-219, p.214

⁶⁶ Rebecca J. Cook, Bernard M. Dickens and Mahmoud F. Fathalla, 'Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law', (2003), Oxford University Press, p.15

⁶⁷ Robert Jensen and Rebecca Thornton, 'Early female marriage in the developing world', (2003) 11(2), Gender & Development, 9-19, p.18

⁶⁸ Mirkka Henttonen, Charlotte Watts, Bayard Roberts, Felix Kaducu & Matthias Borchert, 'Health Services for Survivors of Gender-Based Violence in Northern Uganda: A Qualitative Study', (2008), 16(31), Reproductive Health Matters, 122-131, p.127

⁶⁹ 'New Insights on Preventing Child Marriage A Global Analysis of Factors and Programs', (2007), International Center for Research on Women, p.9

⁷⁰ *id* [n.67] p.17

⁷¹ 'Gender Equality in Education', available at <http://uis.unesco.org/en/topic/gender-equality-education> (Accessed 2 September 2019)

burdens who would be leaving their parents household eventually.⁷² 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.⁷³ Armed conflicts affect all aspects of life, including the economy.⁷⁴ 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.⁷⁵ These payments can be substantial enough to affect the life of the girls' family lives and a society's distribution of wealth.⁷⁶ 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.⁷⁷ 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.⁷⁸ In most parts of Africa, the practice of offering bride price is very common.⁷⁹ In some communities, the bride price gets higher when the age of the girl is younger.⁸⁰ 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.⁸¹ Thus, girls would be married off at an early age.

⁷² Nawal M. Nour, '*Health Consequences of Child Marriage in Africa*', (2006) 12(11), *Emerging Infectious Diseases*, 1644-1649, p.1645

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.

⁷⁴ Thomas Plumper and Eric Neumayer, '*The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy*', 2006 60(3), *International Organization*, 723-754, p.729

⁷⁵ *id* [n.6] para.24

⁷⁶ Siwan Anderson, '*The economics of Dowry and Bride Price*', *Journal of Economic Perspectives*, (2007) 21(4), 151-174, p.151

⁷⁷ *id* [n.72]

⁷⁸ *id* [n.76] p.158

⁷⁹ *id*

⁸⁰ Nava Ashraf, Natalie Bau, Nathan Nunn and Alessandra Voena, '*Bride Price and Female Education*', (2016), NBER Working Paper Series 22417, National Bureau of Economic Research, p.26

⁸¹ '*Child Marriage in Humanitarian Crises*', (2016), Girls Not Brides, available at <https://www.girlsnotbrides.org/wp-content/uploads/2016/05/Child-marriage-and-humanitarian-crises-June-2016.pdf> (Accessed 25 September 2019)

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

⁸³ Brett D. Nelson, Lisa Collins, Michael J. Van Rooyen, Nina Joyce, Denis Mukwege and Susan Bartels, 'Impact of sexual violence on children in the Eastern Democratic Republic of Congo', (2011) 27(4), *Medicine, Conflict, and Survival*, 211-225, p.220

⁸⁴ *id* [n.68]

⁸⁵ *id* [n.37] p.1

⁸⁶ Ted Alcorn, 'Responding to sexual violence in armed conflict', (2014) 383, *The LANCET*, 2034-2037, p.2037; Inger Skjelsbaek, "Sexual Violence in Times of War: A New Challenge for Peace Operations?", (2001) in Louise Olsson and Torunn L. Tryggstad (eds.), 'Women and International Peacekeeping', Routledge, 69-84, p.69

⁸⁷ Jeannie Annan and Moriah Brier, 'The risk of return: Intimate partner violence in Northern Uganda's armed conflict', (2010) 70, *Social Science & Medicine*, 152-159, p.155

⁸⁸ Arun Raj GR, Shailaja Uppinakudru and Prasanna Narasimha Rao, 'Growth and Development in Children: An Ayurvedic Perspective', (2013) 3(5), *International Journal of Ayurvedic and Herbal Medicine*, p.1337-1342, p.1337; Baruch Fischhoff, Nancy A. Crowell and Michele Kipke, 'Adolescent Decision Making: Implications for Prevention Programs: Summary of a Workshop', (1999), National Academies Press, p.6

contribute as well, it develops extensively over adolescence.⁸⁹ Adolescence is a time where children consider occasional and/or experimental involvements in health threatening-activities as less dangerous.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵ They use the financial assistance they get from their (new) husband to help themselves and their

⁸⁹ Julia A. Graber and Lisa M. Sontag, *'Puberty and girls' sexuality: Why hormones are not the complete answer'*, (2006) 112, *New Directions for Child and Adolescent Development*, 22-38, p.26

⁹⁰ Baruch Fischhoff, Nancy A. Crowell and Michele Kipke, *'Adolescent Decision Making: Implications for Prevention Programs: Summary of a Workshop'*, (1999), National Academies Press, p.6

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

⁹⁴ 'One in five Children, Adolescents and Youth is Out of School', (2018), United Nations Educational, Scientific and Cultural Organization, Fact Sheet No. 48, UIS/FS/2018/ED/48, pp.9-10

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

⁹⁶ Myriam Denov, 'Girls in Fighting Forces: Moving Beyond Victimhood', available at https://www.gdnonline.org/resources/CIDA_Beyond_forces.pdf (Accessed 1 September 2019), p.12

⁹⁷ Aisha Hutchinson, Philippa Waterhouse, Jane March-McDonald, Sarah Neal and Roger Ingham, 'Understanding Early Marriage and Transactional Sex in the Context of Armed Conflict: Protection at a Price', (2016) 42(1), *International Perspectives on Sexual and Reproductive Health*, 45-49, p.45

⁹⁸ 'International Legal Protection of Human Rights in Armed Conflict', (2011), United Nations, HR/PUB/11/01, p.14

⁹⁹ 'Regional Economic Outlook: Sub-Saharan Africa: recovery amid elevated uncertainty', (2019), International Monetary Fund, p.25

¹⁰⁰ *id*

¹⁰¹ 'The Hidden Crisis: Armed Conflict and Education', (2011), United Nations Educational, Scientific and Cultural Organization, p.145

¹⁰² *id* [n.73] p.724

atmosphere and a vacuum of stable societal structures is created, previously unacceptable acts become tolerable.¹⁰³ This has been the case in Northern Uganda whereby traditional social institutions that influence behaviour and regulate sex were rendered dysfunctional by conflict.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.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 Ethiopia¹⁰⁶, 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.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%.¹⁰⁸ This is an indicator to the prevalence of the practice; and it can only be aggravated with government lenience. Moreover, the absence of 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.¹⁰⁹ This may

¹⁰³ Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict," (2007) 18(2), *The European Journal of International Law*, 253-276, p.267

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

¹⁰⁵ *id* [n.96] p.46

¹⁰⁶ *The Revised Family Code*, Federal Negarit Gazetta Extra Ordinary Issue No. 1/2000 The Revised Family Code Proclamation No. 213/2000, 4 July 2000

¹⁰⁷ *id* art.7(2)

¹⁰⁸ '*Ethiopia Demographic and Health Survey 2016*', (2017), Central Statistical Agency [Ethiopia] and ICF, p.67

¹⁰⁹ Suzanne Petroni, Madhumita Das, and Susan M. Sawyer, '*Protection versus rights: age of marriage versus age of sexual consent*', (2019) 3(4), *The Lancet Child & Adolescent Health*, 274-280, p.275

be in line with the sexuality of girls that develops between their 12 and 18 years, two years earlier than boys do.¹¹⁰ However, they do not fully mature until the age of 18, not even until their mid-twenties.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.¹¹² Tanzania's family code allowed for girls as young as 14 to get married.¹¹³ In 2016, the High Court of Tanzania took steps to end this by deeming Section 13 of the Law of Marriage Act unconstitutional.¹¹⁴ However, the government has, instead of passing laws in accordance with the ruling, appealed against the High Court's Judgment.¹¹⁵ It has been two years since the Court of Appeals has still not passed a decision.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.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

¹¹⁰*id* [n.88]

¹¹¹ Sara B. Johnson, Robert W. Blum and Jay N. Giedd, '*Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research on Adolescent Health Policy*', (2009) 45(3), *The Journal of Adolescent Health*, 216-221, p.216

¹¹² The full list can be seen at Minimum age of Marriage in Africa, African Child Policy Forum, (2013) <https://www.girlsnotbrides.org/wp-content/uploads/2013/04/Minimum-age-of-marriage-in-Africa-March-2013.pdf>

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)

¹¹⁴ *Rebecca Z. Gyumi vs. The Attorney General*, Judgment, The High Court of Tanzania, 8 July 2016, pp.26-27

¹¹⁵ Ismail Akwei, '*Tanzania's AG appeals against court ruling raising marriage age for girls to 18*', (2017), africanews, available at <https://www.africanews.com/2017/09/29/tanzania-s-ag-appeals-against-court-ruling-raising-marriage-age-for-girls-to-18/> (Accessed 1 September 2019)

¹¹⁶ Daniele Selby, '*Tanzania Rules Child Marriage Illegal 3 Years Ago. Now It's Trying to Reinstate It.*', (2019), Global Citizen, available at <https://www.globalcitizen.org/en/content/tanzania-child-marriage-ban-appeal/> (Accessed 1 September 2019)

¹¹⁷ *Report of the Committee on the Elimination of Discrimination against Women*, 1 February 1992, A/47/38, p.2, para.11

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

¹²¹ 'Defining sexual health: report of a technical consultation on sexual health, 28-31 January 2002, Geneva', (2006), World Health Organization, p.6

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

¹²⁴ 'WHA Global Nutrition Targets 2025: Anaemia Policy Brief', (2014), World Health Organization, p.1

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.¹²⁶ 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 child birth, including high blood pressure, blood loss, and anaemia are also experienced by girls.¹²⁷ 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.¹²⁸ The root cause of obstetric fistula is poverty that underlies malnutrition.¹²⁹ Malnutrition causes the underdevelopment of the skeleton including pelvis leading to obstructed labour.¹³⁰

The African continent has the highest total fertility rate in the world, at an estimated 4.6 children per a woman.¹³¹ Societies value marriages, primarily, for their procreative roles.¹³² Hence, consummation 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.¹³³ 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.¹³⁴ 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.¹³⁵

¹²⁶ Marge Koblinsky, Mahbub Elhai Chowdhury, Allisyn Moran and Carine Ronsmans, 'Maternal Morbidity and Disability and Their Consequences: Neglected Agenda in Maternal Health', (2012) 30(2), *Journal of Health, Population and Nutrition*, 124-130, p.125

¹²⁷ 'Pregnancy Complications', Centers for Disease Control and Prevention, available at <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html> (Accessed 31 August 2019)

¹²⁸ *The girl child - Report of the Secretary-General*, 3 August 2011, A/66/257, para.36

¹²⁹ Gwyneth Lewis and Luc de Bernis (eds.), 'Obstetric Fistula: Guiding Principles for Clinical Management and Programme Development', (2006), World Health Organization, p.6

¹³⁰ *id*

¹³¹ 'Total Fertility Rate Population', (2019), available at <http://worldpopulationreview.com/countries/total-fertility-rate/> (Accessed 25 August 2019)

¹³² Paul Kyalo, 'A Reflection on the African Traditional Values of Marriage and Sexuality', (2012) 1(2), *International Journal of Academic Research in Progressive Education and Development*, 211-219, p.212

¹³³ 'World Economic Situation and Prospects', (2019), United Nations, p.87

¹³⁴ *Hamlin Fistula Ethiopia*, available at <https://hamlinfistula.org/> (Accessed 31 August 2019)

¹³⁵ *Our Patients*, available at <https://hamlinfistula.org/our-patients/> (Accessed 31 August 2019)

Maternal mortality is death that results from pregnancy or childbirth-related complications.¹³⁶ Complications from pregnancy and childbirth are the leading causes of death amongst adolescent children.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.¹³⁸ 99% of maternal deaths occur in developing countries.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.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 36.¹⁴¹ This is an indicator to the role that resource constraints play.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.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.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

¹³⁶ Leontine Alkema, Doris Chou, Daniel Hogan, Sanqian Zhang, Ann-Beth Moller, Alison Gemmill, Doris Ma Fat, Ties Boerma, Marleen Teemerman, Colin Mathers, Lale Say (on behalf of the United Nations Maternal Mortality Estimation Inter-Agency Group collaborators and technical advisory group), *'Global, regional, and national level and trends in maternal mortality between 1900 and 201, with scenario-based projections to 2030: a systematic analysis by the UN Maternal Mortality Estimation Inter-Agency Group'*, (2016) 387, *Lancet*, 462-474, p.463

¹³⁷ *id* [n.127]

¹³⁸ Tricia B. Bent-Goodley, *'Health Disparities and Violence Against Women: Why and How Cultural and Societal Influences Matter'*, (2007) 6(2), *Trauma, Violence & Abuse*, 90-104, p.92

¹³⁹ *Maternal Mortality* (2018), World Health Organization, available at <https://www.who.int/news-room/fact-sheets/detail/maternal-mortality> (Accessed 30 August 2019)

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

¹⁴¹ *Maternal Mortality* (2017), United Nations International Children's Emergency Fund, available at <https://data.unicef.org/topic/maternal-health/maternal-mortality/> (Accessed 30 August 2019)

¹⁴² *id*

¹⁴³ Anouka van Eerdewijk, Mariam Kamunyu, Laura Nyirinkindi, Rainatou Sow, Marlies Visser and Elsbet Lodenstein *'The State of African Women report'*, (2018), *Right by Her*, p.221

¹⁴⁴ *Maternal Health*, World Health Organization, available at <https://www.afro.who.int/health-topics/maternal-health> (Accessed 30 August 2019)

conditions for increased morbidity and mortality and weakens the capacity for dealing with the increase in adverse health conditions.¹⁴⁵

1.3.2. Diseases

Marriage, assumed safe, marks the sexual debut of many adolescent girls.¹⁴⁶ However, sexually transmitted diseases (STDs), particularly human immune deficiency virus (HIV) and human papilloma virus (HPV) affect married girls more.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.¹⁴⁸ Child marriages also contribute to reproductive health risks.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.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.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.¹⁵² Moreover, husbands are substantially older and 30% more likely to have HIV.¹⁵³ Polygynous marriages, a widely practiced culture around the continent, also contributes a great deal in the spread of the diseases.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.¹⁵⁵ During the trial at the Special Court for Sierra Leone, Mrs. Zainab Hawa Bangura – the expert witness for the

¹⁴⁵ William H. Foege, "Arms and Public Health: A Global Perspective", (1997), in Berry S. Levy and Victor W. Sidel (eds.), *War and Public Health*, Oxford University Press, 3-11, p.4

¹⁴⁶ Shelley Clark, 'Early Marriage and HIV Risks in Sub-Saharan Africa', (2004) 35(3), *Studies in Family Planning*, 149-160, p.149

¹⁴⁷ *id* [n.65]

¹⁴⁸ *id* [n.145] p.154

¹⁴⁹ *General recommendation No. 36 (2017) on the right of girls and women to education*, 16 November 2017, CEDAW/C/GC/36, para 52

¹⁵⁰ *id* [n.65] p.17

¹⁵¹ *id* [n.71]

¹⁵² *id*

¹⁵³ *id* [n.145] p.156

¹⁵⁴ *id* [n.145] p.158

¹⁵⁵ '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)

prosecution – provided that some of the ‘bush wives’ were still experiencing diverse medical problems including stomach pains years after they experienced the sexual acts.¹⁵⁶

Armed conflicts also change the access to and benefit from structures that promote sexual and reproductive health and rights.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.¹⁵⁸ They damage public and private medical and health care infrastructures.¹⁵⁹ During armed conflicts, funding diverts towards the conflicts because military expenditures rise; as a result, health services become underfunded and/or underprovided.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.¹⁶¹ It encompasses abuse by any member of a household but is mostly perpetuated by intimate partners.¹⁶² Intimate partner violence (IPV) is any behaviour within an intimate relationship that causes physical, psychological or sexual harm to those in the relationship.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.¹⁶⁴

¹⁵⁶ *id* [n.22] para.15

¹⁵⁷ *id* [n.96]

¹⁵⁸ *id*

¹⁵⁹ *id* [n.73]

¹⁶⁰ *id*

¹⁶¹ ‘*Domestic Violence, A Priority Public Health Issue in the Western Pacific Region*’, (1998), World Health Organization, p.7

¹⁶² ‘*Understanding and addressing violence against women*’, (2012), World Health Organization, p.1

¹⁶³ *id*

¹⁶⁴ *id*

Power and control underlie IPV.¹⁶⁵ These are reflected through the personality traits, institutional roles, and culture that affect the balance of power in intimate relationships.¹⁶⁶ Girls are often married to substantially older men.¹⁶⁷ 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.¹⁶⁸

Domestic violence has a profound impact on the physical and mental health of those who experience it.¹⁶⁹ It carries a high burden of morbidity and ill health.¹⁷⁰ Furthermore, it places adolescents on a lifelong trajectory of violence, either as victims or perpetrators.¹⁷¹ Elements of their new relationships mirror that of their former marriages where they endured physical violence and inability to leave or escape these relationships.¹⁷² 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.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ 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

¹⁶⁶ Anastasia J. Gage, and Paul L. Hutchinson, ‘*Power, control, and intimate partner sexual violence in Haiti*’, (2006) 35(1), *Archives of Sexual Behavior*, 11–24, p.13

¹⁶⁷ *id* [n.17]

¹⁶⁸ *id* [n.148]

¹⁶⁹ ‘*Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence*’, (2013), World Health Organization, p.5

¹⁷⁰ ‘*World Health Statistic 2019 Overview: Monitoring Health for the SDGs, sustainable development goals*’, (2019), WHO, WHO/DAD/2019.1, p.9

¹⁷¹ Rebecka Lundgren and Avni Amin, ‘*Addressing Intimate Partner Violence and Sexual Violence Among Adolescents: Emerging Evidence of Effectiveness*’, (2015), *Journal of Adolescent Health*, 42-50, p.42

¹⁷² *id* [n.86] p.158

¹⁷³ *id*

¹⁷⁴ Lenore E. Auerbach Walker and Angela Browne, ‘*Gender and Victimization by Intimates*’, (1985) 53(2), *Journal of Personality*, 179-195, p.188

¹⁷⁵ Mara Steinhaus and Neetu John, ‘*A Life Not Chosen: Early Marriage and Mental Health*’, (2016), International Center for Research on Women, p.2

disorder, suicidal ideation, loss of self-efficacy, and substance abuse are all mental health issues that compound and correspond to physical health issues.¹⁷⁶ For example, women affected by obstetric fistula suffer as their husbands abandon and the community stigmatizes, even blames, them for their condition.¹⁷⁷ The social isolation and abandonment lead to low self-esteem, depression and prolonged emotional trauma.¹⁷⁸ The experience of violence is also associated with mental health problems such as depression, anxiety and post-traumatic stress disorder.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.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.¹⁸¹ The children that are born from children are adversely affected as they are at a greater risk of perinatal infant mortality and morbidity.¹⁸² Stillbirths and new born deaths are very common in child marriages.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.¹⁸⁴

Moreover, child marriages impose very significant social and economic cost. It reinforces existing inequalities between men and women.¹⁸⁵ They help to maintain women in subordinate roles and contribute to their lower level of education, skills and work opportunities.¹⁸⁶ A World Bank study has

¹⁷⁶ Claudia Garcia-Moreno and Heidi Stockl, *Protection of sexual and reproductive health rights: Addressing violence against women*, (2009)106, International Journal of Gynecology and Obstetrics, 144-147, p.145

¹⁷⁷ '10 facts on obstetric fistula', (2018), World Health Organization, available at https://www.who.int/features/factfiles/obstetric_fistula/en/ (Accessed 30 August 2019)

¹⁷⁸ Asrat Atsedeweyn Andargie and Abebe Debu, 'Determinants of obstetric fistula in Ethiopia', (2017) 17(3), African Health Sciences, 671-680, p.672

¹⁷⁹ Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano (eds.), *World report on violence and health*, (2002), World Health Organization, p.8

¹⁸⁰ *id* [n.170]

¹⁸¹ Sreerupa Sengupta, Balbir Singh, Kalpana Srivastava, *Right to consent: Lado Campaign in Madhya Pradesh*, (2016) 45(2), Administrative Staff College of India (ASCI) Journal of Management, 42-55, p.42

¹⁸² 'Child Marriage Has Devastating Consequences on a Girl's Health', available at <https://www.girlsnotbrides.org/themes/health/> (Accessed 30 August 2019)

¹⁸³ *Motherhood in Childhood Facing the Challenge of adolescent pregnancy*, (2013), United Nations Fund for Population Activities, p.22

¹⁸⁴ *id*

¹⁸⁵ *id* [n.180] p.44

¹⁸⁶ *id* [n.117]

also shown that child marriages could cost developing countries trillions of dollars by 2030.¹⁸⁷ 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.¹⁸⁸

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.

¹⁸⁷ Quentin Wodon and Suzanne Petroni, *'The rippling economic impacts of child marriage'*, (2017), available at <https://blogs.worldbank.org/education/rippling-economic-impacts-child-marriage> (Accessed 25 September 2019)

¹⁸⁸ *'Growing up too early'*, (2018), The Economist, available at <https://www.economist.com/middle-east-and-africa/2018/09/22/child-marriage-in-africa> (Accessed 20 August 2019)

Chapter Two: The Illusion of 'Marriage' with Children

2.1. Consent: The Missing Element in Child Marriage

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.¹⁸⁹ This institution can have a concrete foundation only when there is consent.¹⁹⁰ The Latin legal maxim *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.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.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.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.¹⁹⁴ It influences the societal structures while it is also responsive to such settings in which it operates.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.¹⁹⁶

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.

¹⁹⁰ *id* p.3

¹⁹¹ Marius Jonaitis and Elena Kosaitė-Čypienė, *'Conception of Roman Marriage: Historical Experience in the Context of National Family Policy Concept'*, (2009) 2(116), *Jurisprudencija*, 295-316, p.303

¹⁹² Andrew Forsyth, *'Defining Marriage'*, (2014) 97(3), *Soundings: An Interdisciplinary Journal*, 297-322, P.315

¹⁹³ *id*

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)

¹⁹⁵ Floyd Mansfield Martinson, *'Family in Society'*, (1970), Dodd, Mead & Company, Inc. p.v

¹⁹⁶ John Witte Jr., *'Honor Thy Father and Thy Mother? Child Marriage and Parental Consent in Calvin's Geneva'*, (2006) 86(4), *The Journal of Religion*, 580-605, p.581

Recognizing its relevance, international instruments have incorporated consent as a requirement to marriage. The Universal Declaration of Human Rights¹⁹⁷ (UDHR) provides the institution of marriage should only be entered with consent of intending spouses.¹⁹⁸ The declaration is supported by legally binding conventions as well.¹⁹⁹ The ICCPR states that no marriage shall be entered in the absence of consent.²⁰⁰ The International Covenant on Economic, Social and Cultural Rights²⁰¹ (ICESCR) also provides that consent is required for marriage.²⁰² CEDAW further reinforces the recognition given to consent in the Covenants.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.²⁰⁴ Similarly, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages²⁰⁵ (The Convention on Consent) requires consent of both parties as a requirement to enter into marriage.²⁰⁶ The Recommendation to this Convention²⁰⁷ also sets the same requirement.²⁰⁸ Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²⁰⁹ (The Maputo Protocol), the regional equivalent of CEDAW in Africa, recognizes this fundamental component of a marriage.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

¹⁹⁷ *Universal Declaration of Human Rights*, 10 December 1948

¹⁹⁸ *id* art.16(2)

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.

²⁰⁰ *id* [n.197] art.23(3)

²⁰¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966

²⁰² *id* art.10(1)

²⁰³ *id* [n.10] art.16(1(b))

²⁰⁴ *General Recommendation No.21: Equality in marriage and family relations*, 1994, contained in document A/49/38, para.16

²⁰⁵ *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962

²⁰⁶ *id* art.1

²⁰⁷ *Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, General Assembly resolution 2018 (XX), 1 November 1965

²⁰⁸ *id* principle (1(A))

²⁰⁹ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003

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.

²¹¹ Bryan A. Garner (ed.), *'Black's Law Dictionary'*, (8th edn West 2004), p.323

²¹² Jenny M. Jochens, *'Consent in Marriage: Old Norse Law, Life and Literature'*, (1986) 58(2), *Scandinavian Studies*, 142-176, p.144

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)

²¹⁴ Harry Lesser, *'Obligation and Consent'*, (1989) 15(4), *Journal of Medical Ethics*, 195-196, p.195

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 Marriage²¹⁹

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.²²⁰ This is a rule unless the domestic law of a State provides otherwise.²²¹ 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.²²² 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 18.²²³ 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

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.

²²⁰ Trevor Buck, *'International Child Law'*, (3rdedn Routledge, 2014), p.126

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

²²³ Laura Stark, *'Poverty, Consent, and Choice in Early Marriage: Ethnographic Perspectives from Urban Tanzania'*, (2018) 54(6), *Marriage and Family Review*, 565-581, p.565

Discrimination against Women has called for 18 as minimum age of marriage.²²⁴ The Committee noted that marriage entails responsibilities, hence should not be entered without full maturity and capacity to act.²²⁵ The Committee on the Rights of the Child followed up on this by strongly recommending 18 as the minimum age of marriage.²²⁶ In this recommendation, the Committee specifically focused on the harmful consequences of marriage to the health of girls.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.²²⁸ African regional instruments have also specified 18 as the minimum age of marriage.²²⁹ The documents further require the registration of marriage in official registry.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.²³¹ Between 2012 and 2017, 15 countries have increased the minimum age of marriage to 18 or removed exceptions.²³² Only three of the countries - Chad, Malawi and Zimbabwe - were from Africa.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.

²²⁴ *id* [n.204] para.36

²²⁵ *id*

²²⁶ *General Comment No.4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, para.20

²²⁷ *id*

²²⁸ *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.

²²⁹ *id* [n.209] art.6(b); *id* [n.15] art.21(2)

²³⁰ *id* [n.209] Art.6(d); *id* [n.15] Art.21(2)

²³¹ For full list of countries with legal age of marriage and practice, see '*Marriage Laws Around the World*', (2016), Pew Research Center, available at

https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf (Accessed 20 August 2019)

²³² '*The Case for a Minimum Age of Marriage of 18*', (2017), Girls Not Brides, p.1 available at <https://www.girlsnotbrides.org/wp-content/uploads/2017/12/Why-a-minimum-age-of-marriage-of-18.pdf> (Accessed 20 August 2019)

²³³ *id*

Group 2, on the other hand, considers 18 as an arbitrary cut-off point, with historical roots in Western society.²³⁴ It undermines the agency of the individual under 18 which is shaped by complex structural dependencies.²³⁵ Class, gender and racialized positioning contribute to the outcomes significantly.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.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.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.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.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 20th century.²⁴¹ The

²³⁴ *id* [n.223] p.566

²³⁵ Geetanjali Gangoli, Khatidja Chantler, Marianne Hester and Ann Singleston, "*Understanding forced marriages: Definitions and realities*", (2011) in Aisha K. Gill & Sundari Anitha (eds.), *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, Zed Books, 25-45, p.34

²³⁶ *id*

²³⁷ Annie Bunting, 'Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue', (2005) 14(1), *Social and Legal Studies*, 17-38, p.32

²³⁸ *id* [n.223] p.566

²³⁹ Quentin Wodon, Paula Tavares, Oliver Fiala, Alexis Le Nestour, and Lisa Wise, '*Ending Child Marriage: Child Marriage Laws and their Limitations*', (2017), p.2 available at <http://pubdocs.worldbank.org/en/134161519943385981/WBL2017-Child-Marriage-Laws.pdf> (Accessed 30 August 2019)

²⁴⁰ *id* [n.6] para.22

²⁴¹ Kate Cregan and Denise Cuthbert, '*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.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.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.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.²⁴⁵ Concepts like marriage, family and reproduction are often used without their specification in local cultural and historical contexts.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.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.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

²⁴² *id* [n.237] p.18

²⁴³ *id* [n.237] art.2

²⁴⁴ *id* [n.6] para.20

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

²⁴⁶ Chandra Talpade Mohanty, '*Under Western eyes: Feminist scholarship and colonial discourses*', (1988) 30(1), *Feminist Review*, 61-88, p.75

²⁴⁷ *id* [n.123] p.93

²⁴⁸ Heidi Viterbo, '*Childhood Trials: Law, Rights and Childhood in Israel/Palestine*', (forthcoming), Chapter 4, pp.16-17

agency.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.²⁵⁰ The majority of them know little or nothing about sex before they are married, therefore frequently fear it.²⁵¹ They rarely give informed consent that their first sexual encounters are often forced.²⁵² After all, the need to protect children emanates from the conception of children as the most vulnerable individuals.²⁵³ Innocence, dependence and helplessness are their hallmarks, hence, they deserve legally recognized right to childhood.²⁵⁴

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.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.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.²⁵⁷ The two principles - respect for the views of the child and the best interest of the child - have complementary roles.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

²⁴⁹ *id* [n.97] p.47

²⁵⁰ Geraldine Van Bueren, *'The International Law on the Rights of the Child'*, (1995), Martinus Nijhoff, p.52

²⁵¹ *id* [n.179] p.156

²⁵² *id* [n.223] p.566

²⁵³ Howard Cohen, *'Equal Rights for Children'*, (1980), Littlefield, Adams & Co., p.1

²⁵⁴ *id* [n.248] p.9

²⁵⁵ Gus Waschefort, *'Implications of Children's Rights for Military Justice in the Context of Members of the Armed Forces Younger than the Age of Eighteen'*, (2016) 20, *Journal of International Peacekeeping*, 275-301, pp.275-276

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)

²⁵⁷ *id* para.13(b)

²⁵⁸ *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para.74

preferences are just one factor, amongst many to consider for decision makers, not necessarily given any particular priority.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.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.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 fulfill 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.

²⁵⁹ Aoife Daly, 'No Weight for 'Due Weight'? A Children's Autonomy Principle in Best Interest Proceedings', (2018) 26, International Journal of Children's Right, 61-92, p.62

²⁶⁰ *id* [n.112]

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.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.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.

²⁶² *id* [n.255] pp.275-276

²⁶³ *id* [n.248] pp.8-9; Gus Waschefort, '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.²⁶⁴ There is direct linkage between militarization and patriarchy.²⁶⁵ The use of violence - including IPV - increases during conflicts due to the level of frustration that is taken out on the weak.²⁶⁶ Women are overall more negatively affected by the indirect and long-term consequences of armed conflict than men.²⁶⁷ Among others, the incidence and risk of the marriage of a girl child is highly exacerbated in humanitarian settings.²⁶⁸

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.

3.1. Child Marriages: Sugar-coating 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'.²⁶⁹ 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.²⁷⁰ Coercion includes physical force, psychological

²⁶⁴ *id* [n.50] p.134

²⁶⁵ Colleen Burke, 'Women and Militarism', (1994), WILPF Essays, pp.4-5

²⁶⁶ Inger Skjelsbaek, "Sexual Violence in Times of War: A New Challenge for Peace Operations?", (2001) in Louise Olsson and Torunn L. Tryggstad (eds.), 'Women and International Peacekeeping', Routledge, 69-84, p.69

²⁶⁷ Thomas Plumper and Eric Neumayer, 'The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy', 2006 60(3), International Organization, 723-754, p.725

²⁶⁸ Resolution adopted by the Human Rights Council on 22 June 2017 Child, early and forced marriage in humanitarian settings, 12 July 2017, A/HRC/RES/35/16, Preamble

²⁶⁹ *id* [n.179] p.149

²⁷⁰ Kelly M. Amburgey Richardson, "Understanding Sexual Violence", (2013) in Dennis Yule and Laura Jones (eds.), 'Sexual Offense Bench Guide for Judges, Washington State Supreme Court Gender and Justice Commission', 1-25, p.2

intimidation, blackmail or other threats; when a person is unable to give consent.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.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.²⁷³ It requires neither penetration nor physical contact.²⁷⁴ Rape is a ‘physical invasion of sexual nature’ that forms part of sexual violence.²⁷⁵ In the *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.²⁷⁶ The *Foca* case reaffirmed the same understanding of rape.²⁷⁷ Coercion has remained a required element in the act of sexual violence, particularly rape.²⁷⁸ It does not necessitate physical force as different forms of duress that prey on fear or desperation may constitute coercion.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.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.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

²⁷¹ *id* [n.178] p.149

²⁷² *id*

²⁷³ *id* [n.261]

²⁷⁴ *id*

²⁷⁵ *id*

²⁷⁶ *Prosecutor v. Anto Furundzija*, (Trial Judgment), IT-95-17/1-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, 10 December 1998, para.185(i)

²⁷⁷ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, (Appeals Chamber Judgement), IT-96-23/1-A, 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, 12 June 2002, paras.127-128

²⁷⁸ *id* [n.276] para.185(ii)

²⁷⁹ *id* [n.261]

²⁸⁰ Franziska Karpinski & Elysia Ruvinsky, “*Sexual Violence in the Nazi Genocide*”, (2016) in Ugur Umit Ungor (ed.), ‘*Genocide*’, 149-173, p.149

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.

ownership right over the victim.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.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.²⁸⁴ It also exposes them to other forms of sexual violence, as well.²⁸⁵ Child marriage creates a culture where victims are devalued, sexual violence is tolerated, and perpetrators are not held accountable.²⁸⁶

3.2. The Regulation of Child Marriage in Armed Conflicts

IHL regulates international armed conflicts (IACs) and non-international armed conflicts (NIACs).²⁸⁷ It provides for obligations of an absolute character whereby a violation by one party does not allow another to breach its responsibilities.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.²⁸⁹ Additional Protocol I²⁹⁰ 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.²⁹¹ There are two different thresholds for NIAC. Common Article 3 provides the lower threshold merely stating, 'conflict not of international character'.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

²⁸² *id* [n.261] para.13

²⁸³ *id* [n.179] p.156

²⁸⁴ *id* [n.38] p.3

²⁸⁵ *id*

²⁸⁶ *id* [n.270] p.2

²⁸⁷ A.P.V. Rogers, '*Law on the battlefield*', (3rd edn Manchester University Press 2012), p.3

²⁸⁸ Anthony E Cassimatis, '*International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*', (2007) 56, *International and Comparative Law Quarterly*, 623-640, p.628

²⁸⁹ *The Geneva Conventions of 12 August 1949*, Common Art.2

²⁹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977

²⁹¹ *id* art.1(4)

²⁹² *The Geneva Conventions of 12 August 1949*, Common Art.3

those between non-state armed forces.²⁹³ Additional Protocol II²⁹⁴ 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.²⁹⁵

The Geneva Conventions and their protocols, the major instruments in IHL, regulate the conduct of the two types of armed conflicts.²⁹⁶ They aim to address the shortcomings of the legal frameworks that could not prevent the atrocities of World War II.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰ The principle of distinction is fundamental in determining who States and non-State actors can target during an armed conflict.³⁰¹

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

²⁹⁷ Dieytich Schindler, 'Significance of the Geneva Conventions for the contemporary world', (1999) 81(836), *International Review of the Red Cross*, 715-729, p.715

²⁹⁸ Wade Mansell and Karen Openshaw, "The History and Status of the Geneva Conventions" (2010) in Sarah Perrigo & Jim Whitman, *The Geneva Conventions Under Assault*, Pluto Press, 18-41, p.23

²⁹⁹ For a detailed review of the general and specific protection of girls under IHL, see Charlotte Lindsey-Curtet, Florence Tercier Holst-Roness and Letitia Anderson, 'Annex to the Guidance Document Addressing the Needs of Women Affected by Armed Conflict, General and Specific Protection of Women under International Humanitarian Law', (2004), 168-207

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.³⁰² 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.³⁰³ 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.³⁰⁴ 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.³⁰⁵ It requires parties to a conflict to direct attack only against combatants and military objects as opposed to civilian persons and civilian objects.³⁰⁶ Civilians and *hors de combats* are not legitimate objects of attack.³⁰⁷ This is required under both IAC and NIAC.³⁰⁸ 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.³⁰⁹ IHL prohibits violence, act or threat, whose primary purpose of which is spreading terror amongst civilians.³¹⁰ The terms violence, acts and threats are much broader than 'attacks'.³¹¹ These acts are particularly reprehensible for they are frequent and inflict particularly cruel suffering upon the civilian population.³¹² They do not necessarily require attacks in which there is

³⁰² *id*

³⁰³ *id*

³⁰⁴ *id*

³⁰⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, '*Customary International Humanitarian Law*', (2009), Cambridge University Press, Rule 1

³⁰⁶ Jonathan Crowe and Kylie Weston-Scheuber, '*Principles of International Humanitarian Law*', (2013), Edward Elgar, p.70

³⁰⁷ Francoise Hamson, '*The Principle of Proportionality in the Law of Armed Conflict*', (2010) in Sarah Perrigo and Jim Whitman (eds), '*The Geneva Conventions Under Assault*', Pluto Press, 42-73, p.45

³⁰⁸ *id* [n.290] art.48; *id* [n.294] art.13(2)

³⁰⁹ *Prosecutor v. Stanilav Galic* (Trail Judgment and Opinion), IT-98-29-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 5 December 2003, para.45

³¹⁰ *id* [n.290] art.51(2), *id* [n.294] art.13(2); *id* [n.305] Rule 2

³¹¹ Laura Paredi, '*The War Crime of Terror: An Analysis of International Jurisprudence*', (2015), International Crimes Database, p.8

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.³¹³ Acts that constitute such violence include assault, rape, abuse and torture of women and children among others.³¹⁴

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.³¹⁵ There has also been a practice of abducting and marrying girls by different non-state armed groups.³¹⁶ 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.³¹⁷ Attacking forces are required to not use means and methods of warfare that are 'of a nature to cause superfluous injury or unnecessary suffering'.³¹⁸ This is one of the cardinal principles of IHL.³¹⁹ By limiting the means and methods of warfare, IHL tries to limit the

³¹³ *id* [n.311]

³¹⁴ *id* [n.305] Rule 2

³¹⁵ 'Child Marriage in Humanitarian Crises' (2016), Girls not Brides, p.1 <https://www.girlsnotbrides.org/wp-content/uploads/2016/05/Child-marriage-and-humanitarian-crises-June-2016.pdf>

³¹⁶ One example is the forced marriages of Chibok girls by Boko Haram militants. Sherrie Russell-Brown, 'Boko Haram's Violence Against Women and Girls Demands Justice', (2018) Council on Foreign Relations available at <https://www.cfr.org/blog/boko-harams-violence-against-women-and-girls-demands-justice> (Accessed 24 April 2019)

³¹⁷ 'Handbook on International Rules Governing Military Operations', (2013), International Committee of the Red Cross, pp.21-22

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.³²⁰ This prohibition has attained a status of customary international law.³²¹

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.³²² 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.³²³ Beyond 'sexual gratification', it generates fear and is part of an attack against the 'enemy'.³²⁴ It is used to achieve militaristic, masculinist and/or nationalist goals of destructing a community, among others.³²⁵ It has a systematic, pervasive, or officially orchestrated aspect.³²⁶ 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.³²⁷ 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.

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

³²² Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law', (2015) 96 (894), *International Review of the Red Cross*, 503-538, p.518

³²³ Doris E. Buss, 'Rethinking 'Rape as a Weapon of War'', (2009) 17, *Feminist Legal Studies*, 145-163, pp.145-146

³²⁴ Susan Brownmiller, 'Against our will: Men, women and rape', (1975), Simon and Schuster, pp.13-14

³²⁵ Catharine A. MacKinnon, "Turning rape into pornography: Postmodern genocide", (1994) in Alexandra Stigl Mayer (ed.), 'Mass rape: The war against women in Bosnia-Herzegovina', University of Nebraska Press, 73-81, p.75; Ruth Seifert, "War and rape: A preliminary analysis" (1994) in Alexandra Stigl Mayer (ed.), 'Mass rape: The war against women in Bosnia-Herzegovina', University of Nebraska Press, 54-72, p.62

³²⁶ Catherine N. Niarchos, 'Women, war, and rape: Challenges facing the International Tribunal for the Former Yugoslavia', (1995) 17, *Human Rights Quarterly*, 649-690, p.658

³²⁷ 'Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath', Human Rights Watch. September 1, 1996 cited in *id* [n.20] p.39

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.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.³²⁹ Harm greater than what can be avoided to achieve legitimate military objectives is an unnecessary suffering.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.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.³³² The inevitability of serious permanent disability is a relevant factor in establishing whether superfluous injury or unnecessary suffering would be caused.³³³ Rendering death inevitable is another consideration which also contradicts with the principles of humanity.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.

³²⁸ *id* [n.30] art.8(2)(b)(xx)

³²⁹ *id* [n.305] Rule 70

³³⁰ *id* [n.27] para.238

³³¹ *id* [n.305] Rule 70

³³² *id*

³³³ *id*

³³⁴ *id* This is a ground behind the prohibition of exploding bullets and dum dum 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.³³⁵ Hence, the principle of proportionality requires consideration of the undesired but foreseeable effect of military actions, positively.³³⁶ This is required both at the planning and execution stage of an attack.³³⁷ In order to achieve this, it is important to take precautions.³³⁸ 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.³³⁹ 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.³⁴⁰ The Martens clause is a normative principle that stresses the importance of customary norms in the regulation of armed conflicts.³⁴¹ The clause is not a binding legal text but it is considered as a customary international law.³⁴² Moreover, Additional Protocol I has a provision that incorporates the clause's language and principles.³⁴³ The International Court of Justice

³³⁵ *id* [n.290] art.51(5(b))

³³⁶ *id* [n.307] p.49

³³⁷ Emanuela-Chiara Gillard, '*Proportionality in the Conduct of Hostilities The Incidental Harm Side of the Assessment*', (2018), Chatham House, p.9

³³⁸ *id* [n.290] art.57(2), 57(2(c)), 57(3), and 57(4);

³³⁹ *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

³⁴⁰ *id* [n.288]

³⁴¹ Rupert Ticehurst, '*The Martens Clause and the Laws of Armed Conflict*', (1997) 317, International Review of the Red Cross, 125 – 134, p.129

³⁴² *id* [n.27] para.84

³⁴³ *id* [n.290] art.36

has also referred to 'elementary considerations of humanity' in the Corfu Channel Case.³⁴⁴ 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.³⁴⁵ The prohibition of sexual violence, particularly rape has already attained the status of customary international law.³⁴⁶ 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 Convention³⁴⁷ which provides for the special protection to women in Occupied Territories from attacks on their honour, particularly rape.³⁴⁸ The First Geneva Convention³⁴⁹, Second Geneva Convention³⁵⁰ and Third Geneva Convention³⁵¹ only stated that 'women shall be treated with all consideration due to their sex'.³⁵² 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'.³⁵³ Outrages upon personal

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.³⁵⁴ The Additional Protocols expanded the references with the introduction of that specifically addressed the prohibition of, among others, rape.³⁵⁵ The Protocols also include the phrase ‘outrages upon personal dignity’.³⁵⁶ The prohibition of indecent assault is also included in the Protocols.³⁵⁷ However, the specific reference to rape put the legislatures’ intent in clear light.

Sexual violence can constitute crimes against humanity.³⁵⁸ This has also been incorporated in other international courts.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.³⁶⁰ The prohibition of sexual violence, under customary international law, has crystallized.³⁶¹ This violation, when committed against children, forms part of the six grave violations.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 Torture³⁶³ (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.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.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

³⁵⁴ *id* [n.305] Rule 93

³⁵⁵ *id* [n.290] art.76(1); *id* [n.294] art.4

³⁵⁶ *id* [n.290] art.75(2(b)); *id* [n.294] art.4(2(e))

³⁵⁷ *id* [n.290] art.75(2(b)), 76(1), and.77(1); *id* [n.294] art.4(2(e))

³⁵⁸ *id* [n.30] art.7(1(g))

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)

³⁶⁰ *id* [n.261] para.598

³⁶¹ *id* [n.276] para.168

³⁶² *Security Council Resolution 1261 (1999) [on children in armed conflicts]*, 25 August 1999, S/RES/1261, para.2

³⁶³ *Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1948

³⁶⁴ *id* art.1(1)

³⁶⁵ *id*

public official or other person acting in an official capacity.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.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.³⁶⁸ It noted that the need for the involvement of a public official, among others, remains contentious.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.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.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.³⁷² However, it must be committed as part of a plan, policy or as part of a large-scale commission of such crimes.³⁷³ Coercion and awareness of the factual circumstances are necessary element.³⁷⁴ Similarly, the commission of sexual violence and rape could constitute genocide when it fulfils the specific conditions of genocide.³⁷⁵ Child marriage can accordingly, form part of rape and genocide when the other elements required by law are missing.

³⁶⁶ *id* [n.261] para.597

³⁶⁷ *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

³⁶⁸ *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

³⁶⁹ *id* para.484

³⁷⁰ *Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights*, 25 June 1993, para.55-56

³⁷¹ *id* [n.30] art.8(2(b(xxii))), 8(2(c(ii))), 8(2(e(vi)))

³⁷² *id* [n.32] p.28

³⁷³ *id* [n.30] art.8(1)

³⁷⁴ *id* [n.32] p.28

³⁷⁵ *id* [n.261] para.731

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 exposes 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 *id* [n.349] art.12, *id* [n.350] art.12(4); *id* [n.351] art.14(2); *id* [n.347] art.27(2)

³⁷⁷ *id* [n.305] Rule 134

³⁷⁸ *id* [n.290] art.76(1)

³⁷⁹ *id* art.75(2(a(ii))) and 75(2(b))

³⁸⁰ *id* art.77(1)

³⁸¹ *id* [n.292] Common art.3(1(a)) and 3(1(c)); *id* [n.293] art.4(2(a)) and 4(2(e))

³⁸² *id* [n.294] art.4(3)

³⁸³ *id* [n.305] Rule 135

³⁸⁴ *id* [n.305] Rule 134

³⁸⁵ Thomas Plumper and Eric Neumayer, 'The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy', 2006 60(3), International Organization, 723-754, p.724

activity and the right for adolescents to be informed about their sexual and reproductive health.³⁸⁶ The right to health has four important elements: availability, accessibility, acceptability and quality.³⁸⁷ Availability refers to the presence of sufficient functioning facilities.³⁸⁸ Accessibility deals with the viable reachability of the goods and services in terms of awareness, establishment and affordability, without discrimination.³⁸⁹ Acceptability is about the cultural consideration.³⁹⁰ Quality denotes the scientifically and medically appropriate and of good quality.³⁹¹

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.³⁹² 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.³⁹³ 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.³⁹⁴ 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.

³⁸⁶ *African Charter on Human and Peoples Rights*, 27 June 1981

³⁸⁷ *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000, E/C.12/2000/4, para.12

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 to the broad discussion it would require. If done, it would divert the focus off the discussion into medical facilities instead of the effect of child marriages on girls in armed conflicts.

³⁹⁴ Fiona Terry, 'Violence against Health Care: Insights from Afghanistan, Somalia, and the Democratic Republic of the Congo', (2013) 95, *International Review of the Red Cross*, 23-39, pp.31-34

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.³⁹⁵ There has even been a call for countries to create a socio-economic environment conducive to eliminate child marriages.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,

³⁹⁵ *Report of the International Conference on Population and Development*, 5-13 September 1994, a/conf.171/13/Rev.1, para.5.5

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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