MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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'Child brides' in Europe – Third State Obligations in the Recognition of Child Marriages Concluded Abroad and the Conflicting Norms

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After the so-called refugee crises that began in 2015 in Europe, the number of child marriages within European borders have increased significantly. Even if it is undisputed that marriages concluded without a full, free and informed consent are prohibited in international law, child marriages, where the young child brides may not fully understand the nature and consequences of the union unfortunately do happen all over the world and many jurisdictions still accept the practice. Therefore, it is not uncommon that young refugee girls migrating to Europe are married. The migrating child brides have given rise to heated debates about the extent of EU States' obligations towards the recognition of such marriages. The question is, in what circumstances should a child marriage concluded abroad be recognized in EU Member States and when is it acceptable under international law to refuse to recognize the legal validity such marriage?

There is no absolute obligation of non-recognition of a child marriage concluded abroad in international instruments but during the recent decade, there has been a trend in Europe towards a total ban on such marriages; already five States have enacted laws prohibiting entirely the recognition of foreign child marriages and thus automatically limiting the child brides' right to family life and at times exposing the child to the risk of torture or ill-treatment. States that have refused to recognize foreign child marriages have become subjects of debate on whether they are conforming their international obligations by automatically limiting the rights of the child brides but on the contrary, the recognition of a child marriage may mean that the recognizing State tolerates severe human rights violations within its State borders.

This thesis is a doctrinal study that analyses the extent of EU States' obligations with respect to foreign child marriages by analysing the situations where limitations on the child brides' right to family life and prohibition of torture under the European Convention on Human Rights may be justified. The conclusion that is drawn is that limitations on the right to family life are allowed within the limits of the principle of proportionality and margin of appreciation and that under the principle of *ordre public* States do not have to enforce a foreign marriage if it is against the public policy and morals of that State. Nevertheless, derogation from prohibition of torture is not possible. In situations where both the child marriage as well as its non-recognition would expose the child to torture or ill-treatment, the States must exercise *due diligence* in preventing and addressing the possible violations and the decisions concerning the marriage shall be made according to the standard of the best interests of the child.

There is no straightforward answer to the primary question of this thesis, but this study argues that a total ban on the recognition of foreign child marriages violates the States' obligations under international human rights law. Each child marriage should be considered on an individual basis taking into consideration the interests of the State and the child, with the best interests of the child as the primary consideration.

Key words: child brides, child marriage in Europe, peremptory norms of international law, the right to private and family life, proportionality test, margin of appreciation, the standard of the best interests of a child, international human rights law, the European Convention on Human Rights

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BIBLIOGRAPHY

ABBREVIATIONS

CAT	UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	UN Committee Against Torture
CEDAW	UN Convention on the Elimination of all forms of Discrimination against Women
CEDAW Committee	UN Committee on the Elimination of Discrimination against Women
CRC	UN Convention on the Rights of the Child
CRC Committee	UN Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
ICJ	International Court of Justice
ILC	International Law Commission
ILC Articles	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
Istanbul Convention	Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence

Slavery Convention	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	UN General Assembly

1. Introduction

1.1. Background

The untypically high refugee flows since 2015 have brought a new type of problem on the doorstep of European States, namely migrating 'child brides'.[1] Child marriage is a common practice in the developing world because of false believes regarding the best interest of children, traditions and economic needs,[2] but it has also become more and more common among populations living in conflict zones and refugee camps where young girls and their families are in need of protection from sexual harassment and violence committed by men who see vulnerable families as easy targets.[3] Consequently, there has been a significant increase in the number of child marriages in Europe because it is not unusual that the young girls who migrate to Europe are married at young age.[4] Even if child marriages are often concluded according to the laws of the home countries of the child brides,[5] European countries have faced dilemmas as to the recognition of the marriages concluded abroad because according to international law, child marriage is a fundamental human rights violation.[6] It affects both directly and indirectly several human rights of the girls and may even lead to death or lifetime suffering. Child marriage is addressed in several human rights instruments but yet, it is estimated that by 2030, an additional 150 million adolescent girls will get married before they reach the age of 18.[7] The increasing number of child brides crossing into Europe has triggered a heated debate in European States on whether child marriages concluded abroad should be tolerated in Europe or not.

[1] UN General Assembly, Human Rights Council, Thirty-first session, Agenda item 3, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development', Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57 (2016), para. 64.
[2] UNFPA's Action for Adolescent Girls, 'Building the health, social and economic assets of adolescent girls, especially those at risk of child marriage', Programme Document, 2014, p. 3, see also United Nations Population Fund, topics – 'Child marriage'. Available from: https://www.unfpa.org/child-marriage (8.11.2019).
[3] El Arab, R., and Sagbakken, M., 'Child marriage of female Syrian refugees in Jordan and Lebanon: a literature review', Global Health Action 2019, Vol 12, 1585709, 2018, p. 1 and pp. 5-6.
[4] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UNGA A/HRC/31/57 (2016), para. 64, see also Plan International: 'Child marriages creeping into Europe'. Available from: https://www.plan.ie/stories/child-marriage-europe/ (17.11.2019).
[5] Girls Not Brides: 'Where does it happen?' Available from: https://www.girlsnotbrides.org/where-does-it-happen/atlas (25.3.2020).
[6] See chapter 2.2.
[7] UNICEF Data: 'Child marriage', October 2019. Available from: https://data.unicef.org/topic/child-protection/child-marriage/ (29.2.2020).

Child marriage is a widespread problem affecting all regions of the world in one way or another.[8] Even if most child marriages are concluded in developing States or within conflict zones, they do happen all over the world, including Europe.[9] As the rest of the international community, European States have made a lot of efforts to abolish the harmful practice but based on the debates around the issue in Europe, it can be assumed that the European States have certainly not been prepared for the current situation where the issue affects the entire continent as significantly as it now does.[10] They have been forced to confront a major legal dilemma; if they accept child marriages concluded in third States, they simultaneously accept human rights violations within their State borders. On the other hand, separating these children from their husbands who may be the only family the children have left violates several other rights, like the child brides' right to respect for family life. Furthermore, being married affects the child brides' possibility to permanent residence within European borders while a married child is not entitled to the protection of refugee children as their husbands are assumed to have responsibility for them. Again on the other hand, being married can in some situations ease the child brides' access to Europe on grounds of family reunification.[11]

So, the question is, which rights should prevail? If States separate the child brides from their husbands, are they protecting the rights of the girl, or violating the married couples' right to family life? There is no straightforward answer to whether child marriages should be recognized in Europe or not. Moreover, not much has been written of the topic as it is a rather recent problem. However, during the past few years, European States have been forced to re-examine their legislation and policies and a few States have already taken steps towards combatting the problem by banning child marriages completely within their State borders. The measures taken within these States have led to heated discussions of the legal dilemmas arising from the non-recognition of child marriages and it can arguably be said that the dilemma of the migrating child brides remains as a 'grey zone' in international law, making it an important topic for research.

[8] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UNGA A/HRC/31/57 (2016) para. 63.
[9] Girls Not Brides: 'Child Marriages Around the World' Available from: https://www.girlsnotbrides.org/where-does-it-happen/ (29.2.2020).
[10] See chapter 2.5.
[11] European Commission, Migration and Home Affairs: 'Family Reunification', available from: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/family-reunification_en (04.05.2020), see also chapter 2.3.

1.2. Aim and Methodology

This thesis is a doctrinal study of the migrating child brides whose status, when arriving within the European borders is a debated issue in EU States. The main issue is the fact that there are no explicit international or regional provisions on how child marriages concluded abroad should be addressed in Europe. While marriages concluded without a full, free and informed consent are prohibited in Europe *per se*,[12] a married child arriving to the continent brings about several legal dilemmas where the rights of the child are at stake. There have been differences in how EU States have responded to the migrating child brides but no simple answer on how they should respond. The primary aim of this thesis is to provide a legal analysis of the extent of EU States' obligations towards the recognition of child marriages concluded abroad. The primary question to which this thesis seeks an answer is the following:

In what circumstances should a child marriage concluded abroad be recognized in EU Member States and when is it acceptable under international law to refuse to recognize the legal validity of such marriage?

In order to achieve this aim, it is important to first briefly discuss the issue of child marriage in general and how international law prohibits the practice. An analysis of the international normative framework conceptualizes the States' obligations regarding child marriages in general and thus brings legal weight to the further analysis of child marriages concluded abroad. Thereafter, the focus will be put on child marriages in the context of migration and on the responses of EU States with regard to the problem. Thereafter, this thesis will provide an analysis of the international instruments addressing the recognition of child marriages. Is there an explicit obligation not to recognize a child marriage concluded abroad in the current international normative framework?

The thesis will next move on to the legal dilemmas caused by the recognition - as well as the non-recognition of child marriages by discussing the fundamental rights a child marriage in the context of migration affects with a focus on peremptory norms of international law and the right to respect for private and family life. Firstly, peremptory norms of international law are discussed in general and the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) and its application on child marriages is analysed. Next, the focus will

[12] See chapter 2.2.

be put on the prohibition of torture and ill-treatment and on how both the recognition, as well as the non-recognition of a foreign child marriage may lead to violations of Article 3. The positive obligation of States to secure the rights enshrined in the European Convention on Human Rights (ECHR) to everyone within their jurisdiction and the principle of *due diligence* will as well be discussed in conjunction with the prohibition of torture and ill-treatment. Finally, the chapter will discuss how the non-recognition of a foreign child marriage affects the child brides' right to respect for family life and how States positive obligations with respect to human rights may impose an obligation on States to recognize a child marriage concluded abroad.

In order to answer the primary question of this study, in the last chapter of this thesis, the scenarios deriving from both the recognition and the non-recognition of child marriages will be balanced with principles of international law allowing and limiting restrictions to the rights enshrined in the ECHR. In sum, the author aims to provide a legal analysis of a key legal aspect of migrating child brides, as specified in the research question.

1.3. Limitations

Child marriage is a serious and widespread problem. A lot needs to be done to end the practice completely and it is therefore a topic worth studying from many aspects, but this thesis will consider the issue of the migrating, married children only. It is also understood that child marriage affects several human rights of the victims. However, this thesis will be limited to the rights affected directly in child marriages in the context of migration only with a focus on the prohibition of slavery and the prohibition of torture and ill-treatment, giving more weight to the latter, and the right to respect for private and family life, with focus on family life only.

It is also recognized that in addition to adolescent girls, child marriage affects young boys as well. Boys should be entitled to the same protection and rights as girls, but because it is generally accepted that child marriage is a form of gender-based violence as it disproportionately affects young women and girls[13] and because child marriage is regulated in several international instruments concerning the rights of women, this thesis will be limited to the so-called child brides only and only to the marriages that have been concluded according to the laws of the concluding State and *should* thus be

[13] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UNGA A/HRC/31/57 (2016) para. 58.

enforced abroad as well.[14] Nevertheless, whenever this thesis addresses the issues arising from family reunification applications where the child bride seeks asylum or a residence permit on family reunification grounds, the focus will be put only on the child brides residing outside European borders at the time the application is lodged. The possible violations on the rights of the husband, or the interests of any children born within the marriage are not discussed in this thesis.

This thesis provides a brief overview of the international legal framework concerning child marriage but is this further limited to Member States of the EU only and to the ECHR as the main Convention.

1.4. Sources

As a doctrinal study, the main sources of this thesis will be legal doctrines and case law. While the focus is in the EU, the main sources throughout the study are the ECHR and case law of the European Court of Human Rights (ECtHR). Even if court decisions are only secondary sources of international law and do not have a binding effect,[15] they are a significant source in this thesis while the recognition of foreign child marriages is not explicitly regulated in any international instruments. Therefore, the analysis this thesis contains will mostly be based on case law of the ECtHR as well as on national case law. Furthermore, legal literature, other research and soft law relating to the issue of this study are also used to support the analysis of the ECHR and case law.

As all EU Member States are also members of the Council of Europe, resolutions by the Parliamentary Assembly of the Council of Europe concerning child marriage will as well be addressed for presenting the viewpoint of the Council of Europe on child marriages. Even if the resolutions are not binding on Member States, they do have a significant political and moral effect and can thus be regarded as important tools for analysing the extent of obligations EU States have towards the recognition of foreign child marriages. Moreover, some national legislation of EU States will as well be analysed and compared with each other for achieving an understanding on how EU States have addressed the issue of the migrating child brides within their State borders.

[14] UN Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, para. 3-4, see also Murphy, Kent, 'The Traditional View of Public Policy and *Ordre Public* in Private International law', Georgia Journal of International and Comparative Law, Vol. 11, No. 3 (1981) p. 591.
[15] The Statue of the International Court of Justice (1945) Art. 38d, see also Art. 59.

In the ECHR, the two main articles discussed as the conflicting norms in the context of migrating child brides will be the prohibition of torture (Article 3) and the right to respect for private and family life (Article 8). The prohibition of slavery and forced labour (Article 4) will as well briefly be analysed in conjunction with peremptory norms of international law, which in turn will be analysed with the help of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).

Even if the focus is in the EU, with the aim of presenting the international legal framework addressing child marriage, multiple UN instruments, resolutions and recommendations prohibiting or condemning the practice will briefly be discussed and later used throughout the study to fill in the gaps, or to support EU legislation. Among the UN conventions, the Convention on the Rights of the Child (CRC), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are the most relevant conventions in the context of child marriages and especially the general comments and recommendations by the CEDAW Committee, the CAT Committee and by the CRC Committee are important sources in defining a child marriage and in analysing the legal effect of such marriage.

Furthermore, several internet sources including news articles and statistics by UNICEF and the UN Population Fund will as well be used to demonstrate the scope of the issue of this study and to discuss child marriage in general.

2. Child Brides Crossing into Europe – Causes, Responses and Obligations

2.1. Child Marriage in General – Causes and Consequences

A child marriage is defined as "marriage where at least one of the parties is under 18 years of age"[16] and most commonly, it is a union between an adolescent girl and an older man.[17] A child marriage *can* be based on consent of the child bride, but it is often arranged by the family of the girl against her will for exchange of dowries, for protection for the girl and the family against violence and sexual

[16] Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[17] Global Citizen, 'Child Marriage: What you need to know and how you can help end it', by Daniele Selby and Carmen Singer, 2019, available from: https://www.globalcitizen.org/en/content/child-marriage-brides-india-niger-syria/ (20.4.2020).

harassment by third-parties or simply because of culture and traditions.[18] For example in Turkey, almost half of all child marriages are concluded because of a decision made by the child brides' family.[19] While the child brides have often not expressed their consent to the marriage, or because of their young age cannot be seen as capable of giving "a full, free and informed consent",[20] child marriages are regarded as one type of forced marriage.[21]

Nevertheless, even if consent has been given, the young brides may not fully understand the nature and impact of the union, or may not have the courage to refuse or question the authority of their family.[22] Therefore, young girls are particularly vulnerable for the harmful consequences of a child marriage and even a consent to the union by a child bride may be questionable.[23] Although there are arguments that all child marriages are inherently forced marriages while children cannot validly consent,[24] international instruments and national legislation of many States provide exceptions to the marriageable age of 18[25] and it can therefore be argued that some children may be mature enough for an informed consent. Consequently, all marriages categorized as child marriages are necessarily not forced marriages. However, a consent to the marriage does not exclude the fact that the union may be harmful for the child.[26]

There are several reasons for child marriage but above all, it is deeply rooted in traditional gender-roles where women and girls are seen as being less valuable than men and boys.[27] Child marriage evolves from inequality between men and women and is often a consequence of poverty and desperation. Many parents in poor areas believe that marriage can safeguard their daughter's future while the parents have not the capacity to take care of their children by themselves. They transfer the responsibility to others; older men who are assumed to take care of the adolescent girls. Consequently,

[18] European Parliamentary Research Service, 'Child marriage: Still too many', PE 623.526-June 2018. pp.1-2, see also El-Arab (2018), pp. 5-6.
[19] Council of Europe, GREVIO, Baseline Evaluation Report: Turkey, Strasbourg 2018, para. 237.
[20] Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[21] The illegality of forced marriages will be discussed further in the next sub-chapter. See also UN Human Rights Office of the High Commissioner, 'Child, early and forced marriage, including in humanitarian settings', available from: https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx (25.3.2020).
[22] Turner, Catherine, 'Out of the Shadows – Child marriage and slavery', Anti-Slavery International, April 2013, p. 17.
[23] GREVIO, Baseline Evaluation Report: Turkey 2018, para. 238, see also Turner (2013) p. 17.
[24] See for example Actionaid: 'Child Marriage', available from: https://www.actionaid.org.uk/about-us/what-we-do/violence-against-women-and-girls/child-marriage (23.4.2020).
[25] See chapter 2.2.
[26] UN Human Rights Office of the High Commissioner 'Child, early and forced marriage, including in humanitarian settings', available from: https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx (25.3.2020).
[27] Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 6.

child marriage is strongly affected by culture, religion and false believes on the best interests of the children making it a difficult issue to eliminate.[28] In many regions of the world, it is a practice governed not only by national law, but also by religious laws and practices discriminating women and girls.[29]

A great amount of effort and progress has been made to combat the practice but nevertheless, child marriage rates are decreasing slowly. Because of the population growth in the developing countries, the total number of child marriages will actually be expected to grow instead of the targeted decrease. A lot of international, regional and national instruments concerning child marriage already exists, but because of the scope and complexity of the issue, a lot more needs to be done.[30] According to the Sustainable Development Goals by the UN, child marriage shall be ended by year 2030[31] and most importantly, the victims of child marriage must be supported and protected; children who are in risk of ending up married under the age of 18 and the ones who already have been victimized.[32]

Child marriage is a widespread problem that touches every region of the world in one way or another[33] and affects tens of millions of children each year.[34] It is considered as a fundamental human rights violation that violates the children's right to choose who to marry,[35] exposes them to both physical and psychological violence[36] and endangers the lives and health of them through early pregnancy and sexually transmitting diseases like HIV. Because young girls are often not ready for pregnancy, complications leading to death during pregnancy or childbirth are the most common causes of death among young girls in developing countries.[37] Child marriage affects also fundamentally to the futures

[28] United Nations Population Fund, topics – 'Child marriage', available from: https://www.unfpa.org/child-marriage (8.11.2019).
[29] Committee on the Elimination of Discrimination against Women, 'General recommendation on Article 16 of the Convention on the Elimination of all forms of Discrimination against Women', CEDAW/C/GC/29, February 2013, para. 2.
[30] United Nations Population Fund, topics – 'Child marriage', available from: https://www.unfpa.org/child-marriage (8.11.2019).
[31] UN Sustainable Development Goals Knowledge Platform, 'Sustainable Development Goal 5: Achieve gender equality and empower all women and girls', available from: https://sustainabledevelopment.un.org/sdg5 (9.11.2019).
[32] United Nations Population Fund, topics – 'Child marriage'. available from: https://www.unfpa.org/child-marriage (8.11.2019).
[33] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UNGA A/HRC/31/57 (2016) para. 63.
[34] UNFPA's Action for Adolescent Girls, 'Building the health, social and economic assets of adolescent girls, especially those at risk of child marriage', Programme Document, 2014, p. 3.
[35] United Nations Population Fund, topics – 'Child marriage', available from: https://www.unfpa.org/child-marriage (8.11.2019) .
[36] Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 22.
[37] United Nations Population Fund, topics – 'Child marriage'. Available from: https://www.unfpa.org/child-marriage (8.11.2019).

of the children; while the decision-making capacities of the young girls is often very limited, their freedom of movement is generally restricted and their right to education denied. Girls drop out of school and start taking care of their households at a very young age which affects both the social and the intellectual development of the child.[38] Therefore, even if child marriage is often a consequence of poverty and inequality, it also keeps producing it.[39]

The severe and gross nature of child marriage is also reflected in the fact that child marriage may amount to a breach of two fundamental principles of customary international law; the prohibition of torture and the prohibition of slavery.[40] The UN High Commissioner for Human Rights has held that "women and girls in situations of child and forced marriage may experience conditions inside a marriage which meet "international legal definitions of slavery and slavery-like practices"".[41] Furthermore, Anti-Slavery International likens child marriage to slavery in situations where the girl is abducted as a wife or in situations where the child's parents hand over the child as a wife for gaining protection for the family.[42] When the husband exercises full control over the child and an informed and full consent does not exist, the relationship of the child bride and the husband may constitute as "ownership" rather than a marital union and thus amount to slavery.[43] Child marriage is also addressed in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery where child marriage is categorized as an institution or practice "similar to slavery".[44]

When it comes to torture and ill-treatment, the former UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment and Punishment Juan Mendez has identified child marriage as a form of torture and ill-treatment while such marriages are "strongly linked to violence against women and inflict long-term physical and psychological harm on victims."[45] Moreover, the UN

[38] Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 22.
[39] United Nations Population Fund, topics – 'Child marriage', available from: https://www.unfpa.org/child-marriage (8.11.2019).
[40] Report of the Office of the United Nations High Commissioner for Human Rights, 'Preventing and eliminating child, early and forced marriage', Human Rights Council, Twenty-sixth session, Agenda items 2 and 3, A/HRC/26/22, April 2014, para. 24, see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UNGA A/HRC/31/57 (2016) para. 58.
[41] Report of the Office of the United Nations High Commissioner for Human Rights, 'Preventing and eliminating child, early and forced marriage', Human Rights Council, Twenty-sixth session, Agenda items 2 and 3, A/HRC/26/22, April 2014, para. 21.
[42] Turner (2013) p. 16.
[43] *Ibid.,* p. 17.
[44] the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Art. 1.C, see also Chapter 2.2.
[45] UNGA A/HRC/31/57 (2016) para. 63.

Committee on the Elimination of Discrimination against Women (CEDAW Committee) have held that child marriage is "a harmful practice which leads to the infliction of physical, mental or sexual harm or suffering, with both short-and long-term consequences, and negatively impacts on the capacity of victims to realize the full range of their rights" and may thus constitute torture or ill-treatment.[46] Accordingly, a child marriage may lead to a breach of an internationally recognized peremptory norm.[47]

This thesis will next briefly discuss the international legal framework protecting against child marriage and then continue with the focus on the migrating child brides.

2.2. International Legal Framework Concerning Child Marriage

Child marriage is prohibited either directly, or indirectly in multiple international legal instruments. Already the Universal Declaration of Human Rights (UDHR) listed the right to marry as a fundamental right to which all *adults* are entitled to. The Declaration says that "men and women of *full age*...have the right to marry and found a family" and promotes the importance of consent in marriage.[48] The marital rights protected in the Declaration were later elaborated in the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[49] which imposes an obligation on State Parties to take all appropriate measures for eliminating both forced marriage and child marriage completely.[50] It obliges all State Parties to set a minimum age of marriage in their legislation and to ensure that all marriages under this age have no legal effect except in special circumstances where the marriage is in the best interest of both parties.[51] The Convention came into force in 1964 and is ratified by 56 States from which 24 are European.[52]

Today, the most important international treaties in the context of child marriage are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[53] and the UN

[46] UN General Assembly, Human Rights Council, Twenty-Sixth Session, Report of the Office of the United Nations High Commissioner for Human Rights, Preventing and eliminating child, early and forced marriage, A/HRC/26/22, para. 10.
[47] See chapter 3.1.
[48] Universal Declaration of Human Rights, adopted in December 1948, Art. 16.
[49] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, opened for signature and ratification by General Assembly in November 1962, entry into force in December 1964.
[50] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, preamble.
[51] *Ibid.,* Art. 2.
[52] United Nations Treaty Collections, 'Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages', status as at: 15-12-2019, available from: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&lang=en (15.12.2019).
[53] Convention on the Elimination of All Forms of Discrimination Against Women, adopted by General Assembly in December 1979, entry into force in September 1981.

Convention on the Rights of the Child (CRC).[54] The CEDAW, the Convention promoting the equal rights of men and women[55] expressly prohibits child marriage in Article 16. The Article imposes a positive obligation on State Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."[56] Even if the Article deals with the marital rights of women in general, its second paragraph prohibits child marriage completely by stating that "the marriage of a child shall have no legal effect."[57] CEDAW does not provide age limits for a child marriage, but the CRC defines children as humans "below the age of eighteen years."[58] The CEDAW Committee and the Committee on the Rights of the Child (CRC Committee) have also issued a joint general comment on harmful practices[59] where the committees describe child marriage as marriage "where at least one of the parties is under 18 years of age."[60] Accordingly, it can be argued that a marriage that shall have no legal effect according to the CEDAW is a marriage concluded before the age of 18.

The CRC does not explicitly discuss the issue of child marriage, but the CRC Committee recommends State parties to set a minimum age of marriage to 18 years of age.[61] The CRC Committee has also recognized that Article 24(3) of the CRC imposing an obligation on States to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children" should be applicable on child marriage.[62] The CRC also imposes an obligation on parents to make decisions concerning their children taking into consideration the best interests of their child.[63] The best interests standard is a fundamental principle of international law that should guide the decisions of all authorities, States, as well as parents in decisions concerning children. It can be argued that in situations where parents marry off their daughters for the exchange of dowries, the best

[54] Convention on the Rights of the Child, adopted by General Assembly in November 1989, entry into force in September 1990.
[55] CEDAW, preamble.
[56] *Ibid.,* Art. 16.1.
[57] *Ibid.,* Art. 16.2.
[58] CRC, Art. 1.
[59] UN Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[60] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[61] UN Committee on the Rights of the Child (CRC), 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. 5.
[62] Report of the Office of the United Nations High Commissioner for Human Rights, 'Preventing and eliminating child, early and forced marriage', Human Rights Council, Twenty-sixth session, Agenda items 2 and 3, A/HRC/26/22, April 2014, para. 10.
[63] CRC, Art. 18.

interests of the child may not be the primary consideration. Nevertheless, the standard of the best interests of a child will be discussed further in chapter 4.

Additional interesting instruments in the context of child marriage are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[64] and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Slavery Convention).[65] As this thesis already argued, child marriage is acknowledged, at least in certain situations as a form of torture or ill-treatment or may constitute slavery.[66] Accordingly, it can be argued that child marriage may fall within the scope of the two particular Conventions.[67] The CAT does not explicitly refer to child marriages but it obliges all State Parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"[68] and to "ensure that all acts of torture are offences under its criminal law"[69] and thus suggests that all States should criminalize child marriages that constitute torture or ill-treatment in their national legislation. The Slavery Convention urges Member States to abolish practices where "a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group."[70] While child marriages are often arranged by families for the exchange of dowries,[71] and while Article 2 of the Convention obliges States to set "suitable minimum ages of marriage",[72] it can be argued that the Slavery Convention likens child marriage to an institution "similar to slavery."[73]

Even if many States continue having laws discriminating women and girls and justify child marriages in light of religious laws and cultural practices,[74] it can arguably be said that child marriage is prohibited in international law which imposes both positive and negative obligations on States to ensure the elimination of the practice. The importance of abolishing child marriage has also been

[64] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly in December 1984, entry into force in June 1987.
[65] The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, adopted by Economic and Social Council in September 1956, entry into force in April 1957.
[66] See chapter 2.1.
[67] See chapter 2.1.
[68] CAT, Art. 2.1.
[69] CAT, Art. 4.
[70] *Ibid.,* Art. 1C.
[71] UNFPA: 'Child Marriage', Available from: https://www.unfpa.org/child-marriage (30.03.2020).
[72] The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery*.,* Art. 2.
[73] *Ibid.,* Section 1.
[74] CEDAW General Recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/29 (2013) para. 10.

recognized in Europe and hence, in European legislation. The most important articles in the ECHR in the context of child marriage are Article 3 prohibiting torture[75] and Article 12 which protects the right to marry of all "men and women of marriageable age…according to national laws"[76] which, according to the multiple international instruments and recommendations should be set to the age of 18.[77] Article 8 of the Convention protects the "right to respect for private and family life" and does not explicitly prohibit child marriage, but for a marriage to fall within the scope of the Article, the marriage must either be a legal marriage or must constitute a *de facto* relationship.[78]

The Parliamentary Assembly of the Council of Europe has also expressed its concerns of child marriage by noting that "the Parliamentary Assembly is deeply concerned about the serious and recurrent violations of human rights and the rights of the child, which are constituted by forced marriages and child marriages."[79] Even if the resolutions by the Assembly are not binding,[80] they do have a significant "moral and political impact."[81] The Assembly recommends States to ratify all the important international instruments in the context of child marriage and urges States to "set a minimum age of marriage for both women and men to 18" in their legislation.[82] Later in 2018, in a resolution concerning forced marriage, the Assembly recognized child marriage as a type of forced marriage due to the fact that a child rarely can express her consent to marriage[83] and urges State Parties to criminalize all forms of forced marriage.[84] As child marriage can often be likened to forced marriage, the practice is also prohibited in the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, the so-called 'Istanbul Convention', which affords protection to all child victims of violence covered in the Convention[85] and urges States to take all necessary steps to criminalize forced marriage of both adults and children.[86]

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[75] The European Convention on Human Rights, entry into force in September 1953, Art. 3.
[76] ECHR, Art. 12.
[77] CRC/GC/2003/4 (2003) para. 5.
[78] ECHR, Art. 8, European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights, Right to Respect for private and family life, home and correspondence', Council of Europe, 2019, p. 56, para. 258, see also chapter 3.4.
[79] The Parliamentary Assembly of the Council of Europe, 'Forced marriages and child marriages', Resolution 1468 (2005), para. 1.
[80] Schwebel, Stephen M., 'The Effect of Resolutions of the U.N General Assembly on Customary International Law', Proceedings of the Annual Meeting (American Society of International Law) Vol. 73 (April 26-28, 1979), Cambridge University Press, p. 301.
[81] *Ibid.,* p. 305.
[82] Parliamentary Assembly Resolution 1468 (2005) para. 13-14.
[83] Parliamentary Assembly Resolution 2233 (2018) para. 3.
[84] *Ibid.,* para. 7.5.
[85] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 'Istanbul Convention', Istanbul 2011, Art. 26.
[86] Istanbul Convention, Art. 37.

All in all, child marriage should not be tolerated in any legal framework. It is prohibited in several international and regional legal instruments and should be prohibited in all national legislation as well. The prohibition of child marriage in general seems to be an undisputed issue in Europe because in fact there are only a few States who have not regulated a minimum age for marriage in their legislation.[87] Nevertheless, only a few States within the EU have fixed an *absolute* minimum age for marriage to the age of 18; many States have exceptions to this rule. Most EU States allow marriage under the age of 18 with the consent of parents or/and public authorities[88] as acknowledged in several international instruments. The joint general comment of CEDAW Committee and CRC Committee states:

> A marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without defence to culture and tradition.[89]

Moreover, the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages allows exceptions to the rule of minimum age of 18 "where competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses."[90] So, the exceptions should be based exclusively on the maturity of the child, not on defence of culture or tradition and the marriage must be in the best interests of the spouses.[91] The joint general comment of the CEDAW Committee and the CRC Committee also suggests that marriages concluded under the age of 16 are never allowed.

On the other hand, the Parliamentary Assembly of the Council of Europe urges member States to set 18 years as the *absolute* minimum age for marriage and stresses out that persons under the age of 18 would thus not be able to get married lawfully.[92] As for now, only Denmark, Germany, the

[87] European Union Agency for Fundamental Rights: 'Marriage with consent of a public authority and/or public figure'. Available from: https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/marriage-age (12.11.2019).
[88] *Ibid.*
[89] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[90] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Art. 2.
[91] See chapter 4.6.
[92] Assembly Resolution 1468 (2005), para, 14.2.1 and para. 12.

Netherlands, Sweden, Ireland and since 2019 also Finland have regulated an absolute minimum age for marriage as recommended by the Parliamentary Assembly.[93]

Furthermore, during the ongoing migration situation in the EU, a new issue in the context of child marriage has emerged; as an estimated 700 million young girls around the world are married before the age of 18[94] and many of the child marriages are concluded during humanitarian crises within refugee camps, many girls migrating to Europe are married. While the prohibition of child marriage under international law seems uncontested, the flow of migrants to Europe have brought up the issue of the extent of State obligations with respect to the recognition of child marriages concluded outside the EU.

2.3. Child Marriage in the Context of Migration

In 2015, EU encountered a significant increase in migration flows.[95] The ongoing refugee-crises has brought millions of asylum seekers and migrants across European borders and because of the endless crises situations, the movement of persons around the world is not at least expected to decrease.[96] Regardless of the so-called refugee-crises, most migrants are moving across State borders because of the constantly globalizing world, not because of unsafe conditions in their home countries.[97] However, unfortunately, many of them arrive from conflict zones and harsh conditions and are in an urgent need of international protection.

The ongoing humanitarian crises and war in the Middle East has not only lead to an increase in the migration flows, but it has also raised significantly the number of child marriages. It is generally recognized that in conflict zones and within refugee camps, child marriages, as well as forced marriages increases for multiple reasons.[98] Since 2015, the practice has been common in the Middle East[99] and for example in Syria, child marriage rates of Syrian children have increased from 15

[93] European Union Agency for Fundamental Rights: 'Marriage with consent of a public authority and/or public figure', available from: https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/marriage-age (12.11.2019).
[94] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Brazil, UNGA A/HRC/31/57 (2016) para. 63.
[95] European Parliament: 'Asylum and Migration in the EU: facts and figures, July 2019. Available from: https://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures (15.12.2019).
[96] Chetail, Vincent, International Migration Law, Oxford University Press, 2019. p. 2.
[97] *Ibid.,* p. 3.
[98] GREVIO, Turkey, 2018, para 239.
[99] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Brazil, UNGA A/HRC/31/57, (2016) para. 64.

percent to 36 percent during war even if child marriage in the contemporary Arab region is not a common practice.[100]

Child marriage during conflict is common for many reasons but most commonly, girl children get married in conflict zones and refugee camps because of the need of protection against sexual harassment and violence committed by unknown men and because of economic needs.[101] As elsewhere child marriage is usually carried out because of inequality, economic needs as well as culture and tradition, during conflict families marry off their daughters because they tend to think that if their girls get married at young age, their families are more protected and because marriage is seen as an opportunity to escape poverty after conflict.[102] Child marriage may also occur during conflict for ensuring documents for migration and is thus seen as a possibility to escape conflict areas.[103]

Since 2015, millions of refugees have migrated to Europe, most of them from Syria. The Syrian child brides cross into Europe in hope of a new life and a refugee status, but the European States have faced difficulties in the determination of the legal status of the child bride; children travelling without their parents would be entitled to an unaccompanied minor status and thus enjoy special protection, but because they are married, they are not eligible for such status.[104] The child brides could also seek asylum or a residence permit for family reunification purposes in case their husband already has a permanent residence in an EU State,[105] but because the young brides are children, their marriage should not be valid. Eventually, the non-recognition of a child marriage leads to several other dilemmas concerning the enjoyment of other human rights, for example the child brides' right to family life. This dilemma has lead to the point where EU States have been forced to re-examine their legislation in the context of child marriage.[106] A lot of efforts have already been made for combatting child marriage in States where the practice is common, but the European States have certainly not been prepared to combat the problem within their State borders.

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[100] Aljazeera: 'Married at 14: Syria's Refugee Child Brides', June 2018, available from: https://www.aljazeera.com/programmes/talktojazeera/inthefield/2018/06/married-14-syria-refugee-child-brides-180630102118158.html (15.11.2019) , See also El Arab (2018) p. 1.

[101] El Arab (2018) pp. 5-6.

[102] El Arab (2018) p. 1, Aljazeera: 'Married at 14: Syria's Refugee Child Brides', June 2018, available from: https://www.aljazeera.com/programmes/talktojazeera/inthefield/2018/06/married-14-syria-refugee-child-brides-180630102118158.html (15.11.2019), UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 23.

[103] UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 23.

[104] The European Commission, 'Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway, Synthesis Report for the EMN Study, July 2018, pp. 5-6.

[105] The European Commission, 'Migration and Home Affairs: Family Reunification', available from: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/family-reunification_en (30.03.2020).

[106] Reuters: 'Child bride refugees spur Sweden to tighten marriage law', October 2018, available from: https://www.reuters.com/article/us-sweden-childmarriage-law/child-bride-refugees-spur-sweden-to-tighten-marriage-law-idUSKCN1MY01J (15.11.2019).

2.4. Applicability of the ECHR to Child Brides

When migrants from outside the EU arrive to an EU State, they may seek protection from the country they arrive to and thus become asylum seekers.[107] During their asylum-process, they, like all human beings, are protected by international human rights law while all UN Member States have committed themselves to "protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times."[108] Within EU borders, migrants are also protected under the ECHR which obliges all State Parties to "secure to everyone within their jurisdiction the rights and freedoms" in the Convention.[109] The jurisdiction of the ECHR is primarily territorial.[110] However, during a family reunification application, the child bride is most likely yet outside the boundaries of EU and the extraterritorial applicability of the ECHR must be assessed.

The ECtHR has recognized two circumstances in which jurisdiction of States may be extended beyond State borders. Firstly, in *Loizidou v. Turkey*, the Court held that State Parties may be responsible of "acts and omissions of their authorities which produce effects outside their own territory"[111] such as in situations where a State "exercises effective control of an area outside its national territory"[112] and secondly, in *Al-Skeini and others v. the United Kingdom* the ECHR held that:

> Whenever a State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.[113]

The Court thus suggests that the ECHR can be applied abroad when "executive and judicial functions" are applied by authorities beyond the States' borders.[114] In *Kuric and others v. Slovenia* the Court found that the ECHR is applicable to legislative measures directly affecting persons living

[107] European Parliament: 'Asylum and Migration in the EU: facts and figures, July 2019, available from: https://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures (15.12.2019).
[108] Chetail (2019), pp. 68-70, orig. statement UNGA Res 71/1 (19 September 2016) para 5 and 41.
[109] ECHR, Art. 1.
[110] European Court of Human Rights, 'Guide on Article 1 of the European Convention on Human Rights', 2019, para. 2.
[111] *Loizidou v. Turkey*, app. no. 15318/89 (ECtHR 23/03/1995) para. 52.
[112] *Loizidou,* para. 52.
[113] *Al-Skeini and others v. the United Kingdom*, app. no. 55721/07, (ECtHR 07/07/2011) para. 137.
[114] ECHR: 'Guide on Article 1 of the European Convention on Human Rights – Obligation to respect human rights – Concepts of "jurisdiction" and imputability', 2019, para. 34.

abroad[115] whereas in *Haydarie v. the Netherlands*, where an Afghan mother living in the Netherlands requested a "provisional residence visa" for family reunification purposes for her three children living currently in Pakistan, the Court found that because of the ongoing asylum process and the family life at stake, the three children in Pakistan should fall within the jurisdiction of Netherlands like their mother does.[116]

In situations where a child bride requests asylum or a residence permit for family reunification purposes while her husband already has a permanent residence in an EU State, the child bride most likely is yet outside the boundaries of the EU. However, based on ECtHR case law, a family reunification application would bring the child bride within the jurisdiction of the ECHR while there is family life at stake and the receiving State exercises "executive and judicial functions" beyond its State borders during the process.[117] Therefore, when discussing the human rights of the child brides in this study, the Convention that will be applied on the children will be the ECHR regardless of the State where they reside at the time their family reunification application is lodged.

2.5. European Responses to the Issue of the Migrating Child Brides

The current situation of the migrating child brides has awakened EU States into discussions of whether child marriages concluded abroad should be recognized within third-State borders or not. There are currently thousands of child brides living in Europe[118] and therefore, both EU policy makers, as well as EU States have been forced to respond to the situation. This has led to an increase in initiatives and new laws concerning child marriage in Europe.

Already in 2003, before the significant increase in the refugee flows to Europe, EU issued a Directive on the Right to Family Reunification which establishes rules for determining the conditions under which the right to family reunification shall be exercised in EU. During the past two decades, family reunification has been one of the most common reasons for migration to Europe.[119] As the right to family reunification is an entry channel to an EU State for third-state nationals whose family members

[115] Heijer (2012) p. 48.
[116] *Haydarie v. the Netherlands,* decision as to the admissibility of app.no. 8876/04 (ECtHR 20/10/2005), Council of Europe: European Court of Human Rights, 20 October 2005.
[117] ECHR: 'Guide on Article 1 of the European Convention on Human Rights – Obligation to respect human rights – Concepts of "jurisdiction" and imputability', 2019, para. 34.
[118] Plan International: 'Child marriages creeping into Europe', available from: https://www.plan.ie/stories/child-marriage-europe/ (17.11.2019).
[119] European Commission, Migration and Home Affairs, 'Family reunification', available from: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/family-reunification_en (17.11.2019).

are already legally residing within the EU,[120] the right can be misused as an access to Europe. Family reunification may therefore be a motive for concluding child marriages abroad within conflict zones or during the journey to Europe. The Family Reunification Directive is supposed to hamper the misuse of the right[121] by authorizing EU Member States to fix a minimum age for marriage accepted for family reunification.[122] Most Member States have taken advantage of the power granted to them in the Directive by regulating minimum age limits for family reunification and five States have fixed the age limit to the highest possible the Directive offers, 21 years.[123]

In addition to the restrictions to the right to family reunification imposed by most EU Member States, some States have during the recent years began to ban the recognition of child marriages concluded abroad entirely within their State borders. Already in 2005, the Parliamentary Assembly of the Council of Europe recommended that child marriages concluded abroad should not be recognized within its Member States "except where recognition would be in the victims' best interest."[124] Netherlands was the first EU State banning child marriage completely in 2015, when they adopted a new legislation for the prevention of forced marriage and child marriage; the Forced Marriage Prevention Act. The Act not only set an absolute minimum age of marriage in Netherlands to the age of 18, but it also put an entire ban on the recognition of child marriages concluded abroad. According to the Act, no marriage concluded abroad at the time either of the spouses was a minor will be recognized in Netherlands until both partners have reached the age of 18.[125]

In 2017, new laws for combatting child marriage went into effect both in Germany and in Denmark.[126] Both of the laws set an absolute minimum age for marriage to 18 and in Germany, it also nullifies all marriages that were concluded before either of the spouses had reached the age of 16 and gives domestic courts the power to annul marriages where either of the partners was under the age of 18 at the time the marriage was concluded.[127] In Denmark, marriages concluded abroad before the age of

[120] The Directive on the Right to Family Reunification, Council Directive 2003/86/EC of 22 September 2003, Art. 2d.
[121] European Commission, Migration and Home Affairs, 'Family reunification', available from: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/family-reunification_en (17.11.2019).
[122] The Directive on the Right to Family Reunification, Art. 4.5.
[123] Commission for the European Communities, Report from the Commission to the European Parliament and the Council, On the Application of Directive 2003/86/EC on the right to family reunification, Brussels, October 2008, p. 5.
[124] Parliamentary Assembly Resolution 1468 (2005) para. 14.2.4.
[125] Government of the Netherlands: 'Tackling Forced Marriage', available from: https://www.government.nl/topics/forced-marriage/tackling-forced-marriage (21.11.2019).
[126] Girls Not Brides: 'Germany', available from: https://www.girlsnotbrides.org/child-marriage/germany/ (21.11.2019), The Local: 'Denmark bans marriage for under.18s', January 2017, available from: https://www.thelocal.dk/20170119/denmark-bans-marriage-for-under-18s (21.11.2019).
[127] DW: 'German cabinet proposes national ban on child marriages', available from: https://www.dw.com/en/german-cabinet-proposes-national-ban-on-child-marriages/a-38306852 (21.11.2019), DW: 'Child marriages in Germany present

18 will not be recognized except if the "married couple can provide a 'compelling argument' for their marriage."[128] The aim of these laws is to combat child marriages concluded mainly abroad and the protection of the victims of child marriage. In Germany, authorities are granted the power to take minor, married girls into State custody and separate them from their older husbands if necessary.[129] Later in 2019, a new law banning the recognition of all child marriages concluded abroad went into effect in Sweden as well.[130]

In 2019, Finland changed the legislation in the context of child marriage by removing the possibility of marriage under the age of 18 with the consent of public authorities and fixed an absolute minimum age for marriage to 18.[131] However, the initiative did not propose any changes to the current policy of recognition of child marriages concluded abroad in Finland, but the issue was discussed during the drafting process. A child marriage concluded abroad is in principle legal in Finland, but authorities have been given a wide discretion in assessing the best interests of the child in each case individually. According to the current legal framework in Finland, a marriage concluded abroad shall not be recognized if it is against the Finnish public policy[132] and therefore, child marriages concluded abroad are rarely recognized in Finland. There was seen no need to amend the legislation in the context of the recognition of marriages concluded abroad because the current national legal framework in Finland allows the possibility that all marriages concluded abroad will in future also be evaluated on a case-by-case basis, taking into consideration the best interests of the child.[133] While the current Finnish legislation does no longer allow exceptions to the marriageable age of 18, underage marriages concluded abroad are even more often against the Finnish public policy and therefore, the practice in Finland with regard foreign child marriages appears similar to the practices in States that have banned entirely the recognition of such marriages in their legislation.[134] Nevertheless, after the new law was put into effect, the Finnish minister of justice of the time, Antti Häkkänen, expressed his concerns of child marriages concluded abroad and proclaimed that the next step will be the assessment of the recognition of marriages concluded abroad as minors. According to Häkkänen, a complete ban on

a challenge for authorities', available from: https://www.dw.com/en/child-marriages-in-germany-present-a-challenge-for-authorities/a-50540043 (21.11.2019).

[128] The Local: 'Denmark bans marriage for under.18s', January 2017, available from: https://www.thelocal.dk/20170119/denmark-bans-marriage-for-under-18s (21.11.2019).

[129] Girls Not Brides: 'Germany', available from: https://www.girlsnotbrides.org/child-marriage/germany/ (21.11.2019).

[130] Sweden: Parliament limits Recognition of Child Marriages, available from: https://www.loc.gov/law/foreign-news/article/sweden-parliament-limits-recognition-of-child-marriages/ (21.11.2019), *Hallituksen Esitys* HE 211/2018 vp.

[131] *Hallituksen Esitys* HE 211/2018 vp.

[132] See chapter 4.5.

[133] *Hallituksen Esitys* HE 211/2018 vp.

[134] *Ibid.*

child marriages would give an international signal that Finland does not approve child marriage and would as well promote the rights of women.[135]

The recognition, or the non-recognition of child marriages concluded abroad is a debated issue in Europe. The restricting of the right to family reunification has been seen by the European Parliament as a violation of the right to respect for family life and of the prohibition of discrimination and the European Court of Justice has therefore held that the restrictions must be applied in a manner consistent with the fundamental rights and freedoms protected in the ECHR.[136] All States that have completely banned child marriage within their State borders have ended up as subjects of a heated debate on the non-recognition of child marriage concluded abroad and the legal dilemmas arising from the ban. The non-recognition of child marriages will be balanced later in this paper with the conflicting norms, but first it is appropriate to analyse the international instruments addressing the extent of obligations EU States have regarding the recognition of foreign child marriages.

2.6. Is there an Obligation of Non-Recognition in International Instruments?

As discussed, a few EU States have imposed a total ban on the recognition of child marriages concluded abroad and thus ended up as subjects of debate on whether they are conforming their international obligations or not and whether a total ban on child marriage is compatible with other human rights norms. The non-recognition of foreign child marriages is not very much addressed in international instruments, but a few exceptions exist.

CEDAW, one of the most important instruments in the context of child marriage not only obliges States to set a minimum age for marriage in their legislation, but its Article 16 also states that "marriage of a child shall have no legal effect"[137] which could be understood as an obligation of non-recognition of child marriages, namely marriages concluded "below the age of eighteen years."[138] Even if the prohibition seems very strict and straightforward, the CEDAW Committee has not issued any general comments or interpretations on the matter. However, CEDAW has proclaimed that reservations on Article 16 are not compatible with the principles set forth in the Convention and the

[135] Turun Sanomat: 'Lapsiavioliitot kielletään Suomessa – Oikeusministeri: "Lapsien tulee saada olla lapsia täysi-ikäisyyteen asti", February 2019, available from: https://www.ts.fi/uutiset/kotimaa/4487764/Lapsiavioliitot+kielletaan+Suomessa+Oikeusministeri+Lapsien+tulee+saada+olla+lapsia+taysiikaisyyteen+asti (21.11.2019).
[136] Commission for the European Communities, Report from the Commission to the European Parliament and the Council, On the Application of Directive 2003/86/EC on the right to family reunification, Brussels, October 2008, p. 3.
[137] CEDAW, Art. 16.2.
[138] CRC, Art. 1.

Article should therefore be binding on all Member States.[139] Even if the wording of the Article is very absolute and does not give any possibilities for exceptions, the joint general comment of CEDAW and CRC mitigates the impact of the absolute wording of Article 16 by providing exceptions to the marriageable age of 18.[140] So even if there seems to be an absolute obligation of non-recognition of child marriages in the CEDAW, the Convention allows exceptions to marriageable age and should therefore not be understood in its actual wording. However, exceptions should be based exclusively on the maturity of the child, not on defence of culture or tradition.

Whereas the CEDAW expressly prohibits child marriages and apart from exceptional situations obliges State Parties not to give any legal effect to such marriages, the Istanbul Convention addresses the issue of forced marriage by stating in Article 32 that "parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim"[141] and by imposing an obligation on State parties to "take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised."[142] While child marriage is recognized as a form of forced marriage, these particular articles should prevail in situations where a child is forcibly married off to her husband. With respect to Article 32, the explanatory report of the Convention defines an "annulled" marriage as a marriage that is "deprived of its legal consequences, whether challenged by a party or not"[143] and thus suggests that a forced marriage can be left unrecognized even if the child bride did not request for non-recognition. However, the report also indicates that the annulment of a forced marriage "should not affect the rights of the victim of forced marriage"[144] and thus indicates that all forced marriages should be considered individually taking into consideration the other rights of the victim as well.[145] Nevertheless, Article 37 obliges State parties to criminalise forced marriage but does not speak out on the matter of forced marriages already concluded abroad and the recognition of such marriages.[146]

[139] UN Women: 'Convention on the Elimination on All Forms of Discrimination Against Women', reservations to CEDAW, available from: https://www.un.org/womenwatch/daw/cedaw/reservations.htm (28.03.2020).
[140] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20, see also chapter 2.2.
[141] Istanbul Convention, Art. 32.
[142] *Ibid.,* Art. 37.
[143] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series, Istanbul, 11.V.2011, para. 177.
[144] *Ibid.,* para. 178.
[145] See chapter 4.6.
[146] Istanbul Convention, Art. 37.

All in all, there are two international instruments imposing obligations on State Parties on the non-recognition of child marriages to some extent. However, after reading the interpretations of the strict and absolute articles in question, they all allow exceptions to situations and therefore, it cannot be argued that according to these two Conventions, an absolute obligation of non-recognition exists.

Furthermore, the Parliamentary Assembly of the Council of Europe Resolution from 2005 is very strict and clear regarding child marriages. In addition to urging States to set an absolute minimum age for marriage,[147] it also urges States to:

> Refrain from recognizing forced marriages and child marriages contracted abroad except where recognition would be in the victims' best interests with regard to the effects of the marriage, particularly for the purpose of securing rights which they could not claim otherwise.[148]

Later in 2018, in its "forced marriage" Resolution, the Assembly urged States to:

> Refrain from recognizing forced marriages contracted abroad but, where it would be in the victim's best interests, recognize the effects of the marriage insofar as this would enable the victim to secure rights which they could not otherwise claim.[149]

In addition to the fact that the resolutions of the Assembly are not binding, they too mitigate the absoluteness of the prohibitions by pleading on the best interests of the child.[150] After all, all the international instruments cited above give States a discretion to assess each situation on a case-by-case basis without an absolute obligation of non-recognition. However, even if the obligation of non-recognition is not expressly stated in international instruments, it does not necessarily mean that such an obligation could not exist. The international community is after all bound to respect the fundamental human rights of all individuals and besides respecting the rights, they may as well have a positive obligation to protect individuals against human rights violations conducted by private actors.[151] The issue of foreign child marriages give rise to several legal dilemmas and no matter how

[147] Parliamentary Assembly Resolution 1468 (2005) para. 14.2.1.
[148] *Ibid.,* para. 14.2.4.
[149] Parliamentary Assembly Resolution 2233 (2018) para. 7.9.
[150] See chapter 4.6.
[151] Lane, Lottie, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and the Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' European Journal of Comparative Law and Governance 5 (2018) 5-88. pp. 6-7, see also chapter 3.

States decide to act with respect to such marriage, the human rights of the child bride may be violated. This thesis has now provided a brief overview on the legal framework prohibiting or condemning child marriages and on the extent of obligations States have with respect to foreign child marriages. The focus will now be put on the legal dilemmas arising from the foreign child marriage itself and its non-recognition.

3. Child-Brides in Europe and the Conflicting Norms

3.1. Child Marriage and Peremptory Norms of International Law

One interesting aspect in the context of child marriage is its contrasting with peremptory norms of international law. Peremptory norms, or the so-called *jus cogens* norms are general rules of international law that are "mandatory and imperative in all circumstances"[152] and should therefore prevail over all other norms. The 1969 Vienna Convention defines peremptory norms as norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[153] and declares all treaties conflicting with such norms void.[154] They constitute obligations *erga omnes* on States,[155] obligations States have "towards the international community as a whole."[156] In *Barcelona Traction* case, the International Court of Justice (ICJ) defined peremptory norms as a "concern of all States" and noted that all States have a "legal interest in their protection."[157] Among the peremptory norms recognized by the International Law Commission (ILC), the prohibition of torture and ill-treatment and the prohibition of slavery and forced labour[158] are the relevant prohibitions to be discussed in the context of child marriage as it has been internationally recognized that child marriage *may* constitute either torture or slavery.[159] In

[152] Orakhelashvili, Alexander, 'Peremptory Norms in International Law', Oxford Monographs in International Law, 2006. p. 8. Orig. the Special Rapporteur of the UN International Law Commission Fitzmaurice, Third Report on the Law of Treaties, 2 YbILC 1958, p. 40.
[153] Vienna Convention on the Law of Treaties, signed at Vienna in May 1969, entry into force in January 1980, Art. 53.
[154] Vienna Convention, Art. 64.
[155] Prence, Mirgen, 'Torture as Jus Cogens norm', Acta Universitatis Danubius, Juridica, Vol. 7, No. 2 (2011) p. 88, International Law Commission, 'Peremptory norms of general international law', A/73/10, Draft Conclusion 18.
[156] *Barcelona Traction Case (Belgium v. Spain),* International Court of Justice, Second Phase, February 1970, para. 33.
[157] *Ibid.*
[158] International Law Commission, fifty-third session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, on Article 26, para. 5.
[159] Concluding Observations of the Committee against Torture – Sierra Leone, U.N. Doc. CAT/C/SLE/CO/1, 16, 20 June 2014; Concluding Observations of the Committee against Torture – Yemen, U.N. Doc. CAT/C/YEM/CO/2/Rev.1, 31, 25 May 2010, UN Doc. A/HRC/31/57 (2016) para. 63., the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, Section 1.

addition to being internationally recognized peremptory norms, the prohibitions of torture and slavery are also listed as non-derogable rights in the ECHR.[160]

As torture and slavery are recognized as peremptory norms of international law, they both may be applicable to the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), the instrument providing general rules for international responsibility of States. The ILC Articles applies only for "serious breaches" of peremptory norms and Article 40 lays down consequences for such breaches.[161] For a breach of international law to fall within the scope of a "serious breach", two conditions must be met. Firstly, the breach involved must concern an internationally recognized peremptory norm and secondly, it must attain a certain level of seriousness.[162] For a breach to be serious enough to fall within the scope the ILC Articles, it must involve "a gross or systematic failure by the responsible State to fulfill…an obligation arising under a peremptory norm of general international law."[163] Moreover, for a breach to fall within the meaning of a "gross or systematic failure", the breach shall be "carried out in an organized and deliberate way" with a level of intensity.[164]

So, for a child marriage to fall within the scope of the ILC Articles, it must meet the two conditions of a "serious breach." As it already has been argued, child marriage may constitute torture and ill-treatment or slavery, both peremptory norms of international law.[165] Whether "the intensity of the breach" in child marriages is serious enough for fulfilling the conditions of a "serious breach" is disputable while the Article does not present any procedures on how the seriousness of a breach is assessed.[166] However, the International Law Commission suggests that when assessing whether a breach falls within the scope of Article 40, factors that should be considered are: "the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims."[167] While child marriages are prohibited in multiple international instruments and are

[160] ECHR, Art. 3,4,15.
[161] Responsibility of States for Internationally Wrongful Acts, annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, part 2 chapter 3.
[162] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (A/56/10) 2001, on chapter 3, para 1.
[163] ILC Articles, Art. 40.2.
[164] Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, Extract from the Yearbook of the International Law Commission, 2001, vol. 2, Commentary on Art. 40(7) p. 113.
[165] Report of the Office of the United Nations High Commissioner for Human Rights, 'Preventing and eliminating child, early and forced marriage', Human Rights Council, Twenty-sixth session, Agenda items 2 and 3, A/HRC/26/22, April 2014, para. 24, UNGA A/HRC/31/57 (2016) para. 58.
[166] Report of the International Law Commission (2001) Commentary on Art. 40(1), pp. 112-113.
[167] *Ibid.,* p. 113.

condemned by several UN bodies, it can be argued that States that allow underage marriages in their legislation[168] do not violate human rights law unwittingly. The same assumption could apply to the recognition of child marriages; child marriage is a fundamental human rights violation and the recognition of a foreign child marriage could suggest that the recognizing State intently tolerates human rights violations within its State borders. When it comes to the scope and number of the violations, as well as on the consequences to the victims, it can be argued that as child marriage affects hundreds of millions of girls and leads to severe consequences on the victims, child marriage could be categorized as a "serious breach" of a peremptory norm and thus fall within the scope of the ILC Articles.

If a child marriage falls within the scope of the ILC Articles, Article 41 is applied on the marriage. According to Article 41, "no State shall recognize as lawful a situation created by a serious breach…nor render aid or assistance in maintaining that situation."[169] In situations where child marriage as a breach of a peremptory norm attains the level of seriousness and therefore falls within the scope of the ILC Articles, it can be argued that States have an obligation not to recognize such child marriage even if it was concluded abroad.

However, it must be kept in mind that not all child marriages constitute slavery or torture and even if they do, they necessarily do not fall within the scope of the ILC Articles. A marriage concluded with consent of a 17-year-old child bride and a marriage concluded during a humanitarian crises between a 14-year-old girl and an older husband certainly fall in different categories and only the latter could potentially fall within the protection of the ILC Articles. Therefore, it cannot be argued that all situations of child marriages concluded abroad would fall within the scope of protection of serious breaches of peremptory norms of international law and should thus not be recognized by States. Each marriage should be considered on a case-by-case basis keeping in mind the intensity of the possible breach.

3.2. Recognition of a Child Marriage and the Prohibition of Torture

Only the most serious breaches of peremptory norms of international law fall within the scope of the ILC Articles. However, this does not mean that the less serious breaches would somehow be justified; States may nevertheless be liable for breaches of peremptory norms of international law if not

[168] A marriage that is concluded under the age of 18, or 16 in exceptional situations. See 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[169] ILC Articles, Art. 41.2.

appropriately preventing such violations, even if the breach would not fulfil the requirements of a "serious breach" discussed in the previous chapter.[170]

This thesis has argued that a child marriage may lead to violations of the prohibition of slavery as well as the prohibition of torture, both peremptory norms of international law. However, the focus will now be put on the latter. Article 3 of the ECHR in all its simplicity reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[171] The Article does not provide any definitions to torture, nor inhuman or degrading punishment, but it becomes clear from the preparatory work of Article 3 that the Article was left intentionally broad. The simple and absolute Article is meant to "announce to the whole world that torture is wholly evil and absolutely to be condemned and no cause whatever…can justify its use or existence."[172] It simply states that "all torture is prohibited", leaving no room for interpretation of whether some forms of torture could be legitimate. The preparatory work of the Article includes an exhaustive sentence describing the simple Article saying: "When this is stated in a legal document and in a diplomatic Convention, everything has been said. It is dangerous to want to say more, since the effect of the Convention is thereby limited"[173] and thus suggests that the Article is drafted to cover multiple forms of torture, inhumane and degrading treatment.[174]

The definitions to torture, inhuman and degrading treatment have evolved through time in European judicial bodies.[175] The ECtHR has taken advantage of the broad wording and applied the Article to several different situations but in *M.S.S v. Belgium and Greece*, the ECtHR concluded the requirements for an act to fall within the scope of Article 3 and held that:

> To fall within the scope of Article 3 the ill-treatment must attain *a minimum level of severity*. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical and mental effects and, in some instances, the sex, age and state of health of the victim…Court considers treatment to be "inhuman" when it was premeditated, was applied for hours at a stretch

[170] Report of the International Law Commission (2001) Commentary on Art. 40(7), p. 113.
[171] ECHR Art. 3.
[172] European Commission of Human Rights, Preparatory Work on Article 3 of the European Convention of Human Rights, by the Secretariat of the Commission, Strasbourg 1956 prep. work p. 5.
[173] prep. work on Art. 3 of the ECHR, p. 8.
[174] Long, Debra, 'Guide to Jurisprudence on Torture and Ill-Treatment', Article 3 of the European Convention for the Protection of Human Rights, Geneva, June 2002. p. 9.
[175] *Ibid.,* p. 9.

> and caused either actual bodily injury or intense physical or mental suffering…and degrading when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance...It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.[176]

International human rights law has traditionally imposed only negative obligations on States, that is to say, individuals have been protected against violations conducted by States. However, the obligations of States have developed during recent decades and it is today widely accepted that human rights law may as well give rise to positive obligations on States and the States are not only obliged to refrain from violating the rights, they must as well take all appropriate steps for protecting individuals against human rights violations conducted by third-parties, including violations of the prohibition of torture.[177] The CAT Committee has held that:

> Where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise *due diligence* to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility.[178]

The principle of *due diligence* the CAT Committee refers to is a guiding principle of international law[179] that is relevant in the context of States' positive obligations towards human rights law.[180] According to the principle, States must "exercise *due diligence*"[181] in addressing human rights violations committed by third-parties, that is to say, they must take all necessary steps in preventing and investigating such violations and in prosecuting and punishing the perpetrators and if they fail to do so, they may be held responsible for the violations.[182] The

[176] *M.S.S v. Belgium and Greece*, app. no. 30696/09 (ECtHR 21/01/2011), para. 219-220.
[177] Lane, Lottie, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and the Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' European Journal of Comparative Law and Governance 5 (2018) 5-88. pp. 6-7.
[178] Committee Against Torture: 'Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', General Comment No. 2, January 2008, UN Doc. CAT/C/GC/2, para. 18.
[179] Bonnitcha Jonathan, McCorquodale Robert, The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights, The European Journal of International Law Vol. 28 no. 3, Oxford University Press, 2017, p. 900.
[180] Bonnitcha and McCorquodale (2017) p. 916.
[181] Committee Against Torture: 'Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', General Comment No. 2, January 2008, UN Doc. CAT/C/GC/2, para. 18.
[182] Bonnitcha and McCorquodale (2017) pp. 899-900.

principle has also been addressed by the CEDAW Committee in *A.T v. Hungary* where it held that "States may be responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation"[183] and in *Fatima Yilidrim v. Austria*, where it held that a State may be held responsible for human rights violations committed by third-parties if the authorities "knew or should have known" of the violation in question.[184] In *Osman v. UK*, the ECtHR held that there must be a "known risk of real, direct and immediate threat" for a positive obligation to be implied on a State[185] and in *A v. the United Kingdom*, the ECHR applied the principle of *due diligence* to Article 3 of the ECHR and held:

> The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.[186]

The Court continued by noting that "children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."[187] As the ECtHR, the CAT Committee has also referred to the special need of protection of vulnerable groups of individuals and listed asylum-seekers and refugees as vulnerable groups of individuals in need of special protection.[188] While discussing the vulnerable groups and their protection, the CAT Committee noted that:

> State parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse

[183] *A.T v. Hungary*, views of CEDAW Committee under Article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Communication no. 2/2003 para. 9.2.
[184] *Fatma Yildirim v. Austria*, views of CEDAW Committee under Article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Communication no. 6/2005, para. 12.1.4.
[185] *Osman v. the United Kingdom*, app. no. 87/1997/871/1083 (ECtHR 28/10/1998) para. 107.
[186] *A v. The United Kingdom*, app. no. 35373/97 (ECtHR 17/12/2002) para. 22.
[187] *Ibid.*
[188] *A v. The United Kingdom* (2002) para. 21.

against these individuals and ensuring implementation of other positive measures of prevention and protection.[189]

Both the case law of the ECtHR, as well as the commentary of the CAT Committee refer that migrating child brides, as children, refugees and asylum-seekers, are a particularly vulnerable group and thus in need of special protection against torture and ill-treatment. The CAT Committee has also referred to the principle of *due diligence* in the context of gender-based violence by noting that the principle has been applied "to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking."[190] As child marriage is a form of gender-based violence,[191] it can be argued that while States have an obligation to exercise *due diligence* in preventing gender-based violence, they must take all appropriate measures in preventing child marriage as well. In *Opuz v. Turkey*, Turkey had failed to protect victims of domestic violence against women by not taking all necessary measures to prevent the violence from happening even if there was a "real and imminent risk of assault they knew or ought to have know about."[192] Because of Turkey's "inaction" and "ineffectiveness", they had failed to protect the applicant "against serious breaches of the applicant's personal integrity by her husband"[193] and was therefore held liable for violating Article 3 of the ECHR.[194]

All in all, the principle of *due diligence* is important in the context of child marriages as child marriage is a human rights violation conducted by private actors and a violation of which State parties know about at the time the child bride seeks asylum or a residence permit. Child marriage causes "real, direct and immediate threats"[195] of both physical and psychological violence[196] and would thus fall within the scope of the obligation to exercise *due diligence* in protecting the child against torture and ill-treatment. According to the principle, States are obliged to diligently prevent child marriages from occurring, investigate such marriages and to prosecute and punish perpetrators. The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) that monitors the implementation of the Istanbul Convention held in their report from 2018 that while Turkey has not

[189] Committee Against Torture: 'Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', General Comment No. 2, January 2008, UN Doc. CAT/C/GC/2, para. 21.
[190] *Ibid.,* para. 18.
[191] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UNGA A/HRC/31/57 (2016) para. 58.
[192] *Opuz v. Turkey*, app. no. 33401/02 (ECtHR 09/06/2009) para. 129.
[193] *Ibid.*, para. 173, 174, 176.
[194] *Ibid.,* para. 129.
[195] *Osman v. the United Kingdom*, app. no. 87/1997/871/1083 (ECtHR 28/10/1998) para. 107.
[196] UNGA A/HRC/31/57 (2016) para. 63.

criminalized forced marriages, they have failed to act diligently in preventing such marriages from occurring.[197] Therefore, it can be argued that all States should properly criminalize child marriages that may expose the children to torture and ill-treatment and refuse to recognize such marriages and if a State fails to do so, that State could be held liable for violating Article 3 of the ECHR.

Even if the recognition of a child marriage may violate Article 3 of the ECHR if the child is exposed to torture or ill-treatment in the marriage, it must again be kept in mind that not all child marriages lead to torture or ill-treatment; only the ones which, in the words of Juan Mendez, "inflict long-term physical and psychological harm on victims."[198] The principle of *due diligence* obliges States to appropriately protect the girls against violations of Article 3, but can a total ban on the recognition of child marriages concluded abroad protect child brides from torture and ill-treatment deriving from such marriages? The non-recognition of a child marriage arguably protects the child from violations of Article 3 caused by the marriage *if* the child is exposed to such treatment in the marriage. However, while not all child marriages expose the child brides to torture or ill-treatment, is a total ban on the non-recognition of child marriages concluded abroad a reasonable mean for protecting children from violations of Article 3? Does non-recognition of child marriages deter such marriages or rather prevent them from landing within the borders of the non-recognizing State? These questions will further be discussed in Chapter 4 but at this point, it can be concluded that *some* child marriages may constitute torture and ill-treatment and if so, States are under an obligation to protect the child bride from such treatment. If they fail to do so, they may be held liable for violations under Article 3. However, how does the *non-recognition* of a foreign child marriage affect the protection under Article 3 of the ECHR?

3.3. Non-Recognition of a Child Marriage and the Prohibition of Torture

The recognition of a child marriage may expose the child directly to torture and ill-treatment if the child is left to the harmful union. However, child brides who apply asylum or a permanent residence for family reunification purposes are most likely outside EU in their States of origin where they often live in the middle of war, humanitarian crises or may otherwise be exposed to human rights violations, some even to torture or ill-treatment. The non-recognition of a child marriage where the husband already has a permanent residence within EU would mean that the family reunification application is denied and that the child bride is left to her State of origin, at least while a possible asylum on

[197] GREVIO, Turkey (2018) para. 240.
[198] UNGA A/HRC/31/57 (2016) para. 63.

individual grounds is accepted. Because of the positive obligation of States to secure human rights of everyone within their jurisdiction and because an asylum-, or a permanent residence application would bring the child bride under the jurisdiction of the ECHR, it is appropriate to analyse whether the non-recognition of a child marriage leading to a denied family reunification or asylum application could lead to violations of Article 3 of the ECHR.

ECtHR does not delimit any forms of treatment from the scope of Article 3 as long as a minimum level of severity is attained and suggests that all situations should be considered on a case-by-case basis taking into consideration all facts of the case.[199] The Court also indicates that a pure humiliating treatment could fall within the scope of the Article. In *M.S.S case*, the ECtHR applied Article 3 on poor living conditions of an asylum seeker and held that:

> Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.[200]

In *M.S.S* case, ECtHR found a violation of Article 3 while the States had not properly ensured the well-being of the asylum seeker and because the living conditions caused the applicant mental suffering and arose "feelings of humiliation and debasement."[201] It also gave weight to the fact that the applicant, as an asylum seeker, was in a particularly vulnerable situation and was thus "in need of special protection."[202] In *Tarakhel v. Switzerland*, the Court gave even more weight on the vulnerability of the applicant while he was not only an asylum seeker, but also a child[203] and found that "extreme material poverty can raise an issue under Article 3."[204] In *V.M. and others v. Belgium*, which also concerned living conditions incompatible with Article 3, in addition to giving particular importance on the fact that the applicants where asylum seekers, the Court held that the applicants were "victims of treatment which failed to respect their dignity" and that the poor living-conditions on the streets aroused in them "feelings of fear, anguish or inferiority capable of inducing

[199] See chapter 3.2.
[200] *M.S.S v. Belgium and Greece*, app. no. 30696/09 (ECtHR 21/01/2011), para. 221.
[201] *Ibid*., para. 219-220.
[202] *Ibid.*, para. 251.
[203] *Tarakhel v. Switzerland*, app. no. 29217/12 (ECtHR 04/11/2014) para. 99.
[204] *Tarakhel v. Switzerland* (2014) para. 252.

desperation" and as degrading treatment fell within the scope of Article 3 of ECHR.[205] In *Z and Others v. The United Kingdom*, the Court held that authorities had breached their positive obligation to protect children from ill-treatment by their parents by not taking appropriate measures to end the ill-treatment[206] and found that States "should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[207]

The particularly vulnerable child brides, whose family reunification applications are denied because of an annulled marriage may be left to conflict zones, or to poor and unsecure living conditions in refugee camps. While they are during the asylum- or family reunification process under the jurisdiction of the EU State concerned, it can be argued that the non-recognition of a child marriage which leads to a denied application may as well lead to a breach of Article 3 of the ECHR if the applicant will thus be left in poor living conditions causing fear and desperation, failing to respect the human dignity of the child bride. Because of the positive obligation of State Parties to protect individuals against violations of Article 3, it can be argued that States may be held responsible for the ill-treatment the child brides are exposed to if they are left to their countries of origin because of a denied family reunification application and if the State has failed to inform the child bride about the possibility to apply for asylum on individual grounds. States are obliged to exercise *due diligence* in addressing possible human rights violations within their jurisdiction and are thus obliged to take all necessary steps to protect the child brides from ill-treatment in their States during an asylum-, or a permanent residence application process.

At this point of this thesis, it seems clear that while a denial of a family reunification application on grounds of a non-recognized marriage may lead to a breach of the prohibition of torture and ill-treatment, all situations concerning a foreign child marriage should be considered on a case-by-case basis and therefore, it can be argued that a total ban on the recognition of child marriages concluded abroad is not compatible with States' obligations under international human rights law.

[205] *V.M. and others v. Belgium*, app. no. 60125/11 (ECtHR 07/07/2015) para 162.
[206] *Z and Others v. the United Kingdom*, app. no. 29392/95 (ECtHR 10/05/2001) para. 70.
[207] *Ibid.*, para 73.

3.4. Right to Respect for Private and Family Life

The right to respect for private and family life is protected in Article 8 of the ECHR which reads as follows: "Everyone has the right to respect for his private and family life, his home and correspondence"[208] and thus protects individuals against arbitrary interference by public officials in their "family life", "private life", "home" or "correspondence."[209] In situations where a marriage is not recognized, it can be argued that the non-recognition of the marriage interferes with the couples' right to family life; the married couple is deprived their right to be a wife and a husband.

For falling within the protection of Article 8, the protected right must amount to "family life" and for assessing whether such life exists, the term "family" must be given a definition. The definition of a "family" has evolved in the ECtHR through time and there is no straightforward answer to what constitutes as "family life"; it is decided in the Court on a case-by-case basis.[210] The Court has held that a "lawful and genuine marriage…has to be regarded as "family life""[211] but while child marriages are necessarily not regarded as "lawful and genuine" marriages in Europe even if they had been concluded abroad,[212] marriages regarded as child marriages may not fall within the protection of Article 8 purely because of the existing union. However, a marriage is not always required when assessing whether "family life" exists; the Court must also take into consideration the existence of "close personal ties." A child born to a marriage is automatically part of family life but when it comes to couples, the Court has held that in addition to a legal and valid marriage, family life may as well be based on "*de facto* relationships."[213]

So, in addition to a lawful and genuine marriage, the Court should also consider several other factors in the relationship.[214] Factors, which ECtHR has taken into consideration when it has assessed whether a relationship between a couple amounts to a *de facto* relationship are "whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means."[215] The ECtHR has also taken into

[208] ECHR Art. 8.1.
[209] *Ibid.*
[210] Roagna, Ivana, 'Protecting the right to respect for private and family life under the European Convention on Human Rights', Council of Europe human rights handbooks, Strasbourg, 2012, pp. 27-28.
[211] *Berrehab v. The Netherlands*, app. no 10730/84 (ECtHR 21/06/1988) para. 21.
[212] *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, app. no. 9214/80; 9473/81; 9474/81 (ECtHR 28/05/1985), para. 63.
[213] *Al-Nashif v. Bulgaria*, app. no. 50963/99 (ECtHR 20/06/2002), para. 112.
[214] *Ibid.*
[215] *X, Y and Z v. the United Kingdom*, app. no. 75/1995/581/1997 (ECtHR 22/04/667) para. 36.

consideration whether alleged family members have been "dependent members" of a family.[216] Even if the Court has held that Article 8 does not impose an obligation to recognize purely religious marriages[217] or marriages concluded by a child *per se*,[218] it has found family life from a religious marriage as well. In *Serife Yigit v. Turkey*, a case concerning a religious marriage, the Court held that family life should not be "confined solely to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside of marriage."[219] In *Z.H and R.H v. Switzerland*, an Iranian couple seeking asylum from Switzerland had concluded a religious marriage when the bride was only 14 years old. In this particular case, the Court held that Article 8 does not impose an obligation on State Parties to recognize a marriage concluded at the time one of the parties was 14 years old.[220] However, judge Nicolau questioned the fact that the Court did not take into consideration that despite of the void child marriage, some other form of *de facto* relationship could exist between the applicants. Judge Nicolau held that the fact that there was no legal marriage "could not exhaust the question of whether the applicants did or did not have a family life together."[221]

Accordingly, religious marriages and child marriages can fall within the protection of Article 8 if a *de facto* relationship exists.[222] When courts consider whether a child marriage falls under the scope of Article 8, they should consider the nature of the relationship between the bride and the husband. As dependency and the means by which the couple is committed to each other are relevant factors to be considered in possible *de facto* relationships, it can be argued that for a child marriage to fall within the scope of Article 8, the marriage shall be concluded with a full, free and informed consent of the child bride. In situations where the child is forcibly married off to her husband, the husband often exercises full control over the child whose several rights are violated through the marriage. In such marriages, the relationship constitutes rather as "ownership"[223] than a marriage involving "close personal ties"[224] required in a *de facto* relationship. When considering if a *de facto* relationship exists, it is also important to take the child brides' own views into account within the limits of her age and maturity.[225] The child bride has the right to be heard in all matters concerning her, including her family life. Her own views are important as long as she can express the views *freely*,[226] that is to say,

[216] *Slivenko v. Latvia*, app. no. 48321/99 (ECtHR 09/10/2003) para. 97.
[217] *Serife Yigit v. Turkey*, app. no. 3976/05 (ECtHR 02/11/2010), para. 102.
[218] *Z.H and R.H v. Switzerland*, app. no. 60119/12 (ECtHR 08/12/2015), para. 44.
[219] *Serife Yigit v. Turkey* (2010) para. 94.
[220] *Z.H and R.H v. Switzerland* (2015) para. 44.
[221] *Ibid.,* concurring opinion.
[222] *Serife Yigit v. Turkey* (2010) para. 98.
[223] Turner (2013) p. 17.
[224] *Al-Nashif v. Bulgaria*, app. no. 50963/99 (ECtHR 20/06/2002), para. 112.
[225] CRC, Art. 12, see also Chapter 4.6.
[226] *Ibid.,* Art. 12.

if the marriage is concluded with a free consent of the child bride and if her opinions are not manipulated by the husband.

All in all, States may be obliged to recognize *some* child marriages concluded abroad as *de facto* relationships and therefore, a total ban on the recognition of child marriages may constitute a violation of Article 8 of the ECHR. However, the right to family life is not an absolute right and it can therefore be limited in certain situations by the State. The limitations on the right to family life will be discussed further in the next chapter.

Nevertheless, the primary purpose of Article 8 of the Convention is to protect individuals against arbitrary interference by authorities.[227] However, because it is generally recognized that States may as well have positive obligations towards securing the rights set in the Convention, the State Parties are not only obliged to refrain from violating Article 8, they may as well be obliged to secure the right to family life by enabling family ties and by reuniting families by admitting non-nationals into their territories through family reunification applications. The ECtHR has held that "in order to establish the scope of State's obligations, the facts of the case must be considered."[228] The Court must consider whether it would be possible for the family to live safely in their country of origin as well as the factors that could have a negative impact on the receiving State if accepting the family reunification application.[229] It must then "strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other."[230] It must also take into consideration the timing on which the family life was created; if it is clear that the family life was created for making use of the immigration status of one of the spouses, the refusal of a family reunification application will most likely not violate Article 8 of the Convention.[231]

Both in *Sen v. Netherland* and in *Tuquabo-Tekle and others v. the Netherlands*, the Court held that the States were obliged to secure the right to family life by allowing the entry of an alien to their territories because it was the "most adequate mean" for developing family life together[232] and therefore, the States had failed "to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other."[233] In *Mehemi v. France*, ECtHR

[227] *Tuquabo-Tekle and Others v. the Netherlands,* app. no. 60665/00 (ECtHR 01/12/2005), para. 42.
[228] *Ibid.*, para. 43.
[229] *Rodrigues Da Silva and Hoogkamer v. The Netherlands,* app no. 50435/99 (ECtHR 31/01/2006) para. 39.
[230] *Tuquabo-Tekle and Others v. The Netherlands* (2005) para. 52.
[231] *Rodrigues Da Silva and Hoogkamer v. The Netherlands* (2006) para. 39.
[232] *Tuquabo-Tekle and Others v. The Netherlands* (2005) para. 47.
[233] *Tuquabo-Tekle and Others v. The Netherlands* (2005) para. 52.

held that "where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable the family to be reunited."[234] So even if state sovereignty allows States to control who they let into their territories,[235] States may as well have a positive obligation to secure the right to family life by admitting aliens into their territories if it is the "most adequate mean" to develop *existing* family life together[236] and if the access of the non-national within State borders does not endanger the public order of the State.[237] Therefore, it can be argued that a State may have an obligation to reunite child brides with their husbands when family reunification is applied if it is the "most adequate mean"[238] for them to develop their family life together if such family life exists through a *de facto* relationship concluded with mutual consent of the spouses.

4. Balancing Child Marriage and the Conflicting Norms

4.1. Limiting the Rights Enshrined in the ECHR

It has now been argued that both the non-recognition, as well as the recognition of foreign child marriages in EU States may violate fundamental rights of the child bride. However, not all ECHR rights are absolute and may be limited in certain circumstances. So, even if an EU State violates the rights of a child bride by refusing to recognize the marriage or by recognizing it and thus exposing the child to human rights violations caused by the union, sometimes a violation on a right enshrined in the ECHR may be justified.

According to Article 15 of the Convention, derogation of the rights in the Convention is allowed "in time of war or other public emergency threatening the life of the nation" but only "to the extent strictly required."[239] However, the Article also states that derogation from articles 2, 4, 7 and 3 is never permitted.[240] The previous chapter discussed the prohibition of torture and ill-treatment in the context of child marriage and reached to a conclusion that sometimes both the recognition, as well as the non-recognition of child marriages may constitute a violation of Article 3. While derogation from the Article is not permitted, how can a situation where both scenarios violate the rights of the child bride be solved? This scenario will be discussed further in the last sub-chapter addressing the standard of

[234] *Mehemi v. France*, app. no. 53470/99 (ECtHR 10/04/2003) para. 45.
[235] *Ibid.,* para. 43.
[236] *Ibid.,* para. 47.
[237] *Rodrigues Da Silva and Hoogkamer v. The Netherlands* (2006) para. 39.
[238] *Mehemi v. France*, app. no. 53470/99 (ECtHR 10/04/2003, para. 47.
[239] ECHR, Art. 15.1.
[240] *Ibid.,* Art. 15.2.

the best interests of a child and the focus will now be put on the rights from which derogation is permitted.

In addition to situations of war and emergency, the Convention provides more explicit restrictions on certain rights in the Convention. Article 8 of the Convention, protecting the right to respect for private and family life, allows limitations to the right in certain circumstances. The Article protects individuals against arbitrary interference in their private and family life *per se*, but its second paragraph imposes possible limitations on the right by stating:

> There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.[241]

In other words, even if it already has been argued that the non-recognition of a child marriage may constitute a violation of Article 8, the non-recognition of the marriage may be justified if the interference is "in accordance with the law" and is "necessary in a democratic society" for achieving one or more of the legitimate aims listed in the second paragraph.[242]

So, when an interference occurs, the first thing the court has to consider is whether the interference has been "in accordance with the law."[243] The ECtHR has held that the interference occurred must be in accordance with domestic law, and the law in question must as well be "accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law."[244] The Court has held that by "law", the ECHR refers to "the law in force in a given legal system", referring to both written law and unwritten law and on case law as well as on international legislation.[245]

All in all, whether an interference on the right to family life has been 'in accordance with the law' depends on national, as well as on international legislation. In States where child marriages are banned in national legislation, an interference with the right is naturally in accordance with national law, but

[241] ECHR, Art. 8.2.
[242] *Kruslin v. France,* app. no. 11801/85 (ECtHR 24/04/1990) para. 26.
[243] ECHR, Art. 8.2.
[244] *Kruslin v. France* (1990) para. 27.
[245] *Ibid.,* para. 28-29.

whether it is in accordance with the international obligations of the State remains as a debated issue and naturally, as the issue of this study.

Imagine that the interference of the right to family life by not recognizing a child marriage was in accordance with the law. This is not enough. After this is proven, the State must as well prove that the interference to family life has been "necessary in a democratic society" for achieving the legitimate aim of the restriction.[246] The UK Supreme Court has held that the legitimate aim in the restriction to the right to family life by refusing to grant marriage visas for couples under the age of 21[247] was the "protection of the rights and freedoms or others", namely the right not to be forcibly married.[248] Nevertheless, when European States have enacted laws banning child marriages entirely within their State borders, their legitimate aim has most likely been the protection against forced marriage and child marriage. The lawfulness of an interference, or the existence of a legitimate aim is rarely contested in ECtHR.[249] However, for an interference on ECHR rights to be legal, the interference must also be "necessary in a democratic society."[250]

In *Silver* case, the ECtHR summarized principles governing the phrase 'necessary in a democratic society.' It emphasized two principles in assessing the necessity of an interference; the proportionality test and margin of appreciation.[251] These two principles will be analysed further in this chapter and applied on the recognition and non-recognition of foreign child marriages but at first, another fundamental principle that should be considered at all times when limiting, as well as fulfilling rights in the ECHR will be discussed: the prohibition of discrimination.

[246] *The Observer and The Guardian v. the United Kingdom*, app.no. 13585/88 (ECtHR 26/11/1991) para. 72.
[247] *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* app no UKSC 45, para. 7.
[248] *Ibid.,* para. 45.
[249] Arai-Takahashi, Yutaka, 'The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR', Intersentia, 2002, p. 62.
[250] ECHR Art. 8.2.
[251] *Silver and others v. the United Kingdom*, app. no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, (ECtHT Judgment 25/03/1983) para. 97.

4.2. Prohibition of Discrimination

Certain rights enshrined in the ECtHR may be limited within the limits of the principle of proportionality and margin of appreciation but when limiting rights, a principle that must be taken into account is the principle of non-discrimination. The principle of non-discrimination is a principle of international law which, together with equality, form a basis on international human rights law.[252] The principle is enshrined in almost every international treaty in one way or another and has become one of the fundamental principles of international human rights law.[253] The ECHR Article 14 reads as follows:

> The enjoyment of the rights and freedoms in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political opinion, national or social origin, association with a national minority, property, birth or other status.[254]

Article 14 guarantees that all human rights in the Convention are protected without discrimination and together with Article 1 of the ECHR, which obliges States to secure the rights in the Convention "to everyone within their jurisdiction",[255] it ensures that all Convention rights are applied to *everyone* within the State's jurisdiction.

The ECtHR has held that "discrimination means treating differently, without objective and reasonable justification, persons in relevantly similar situations"[256] referring to the ten grounds for discrimination explicitly listed in Article 14. Even if being a child bride is not explicitly listed as a ground for discrimination in the Article, the ECtHR has applied the ground "other status" on several other distinct groups of people in a similar situation explicitly not listed in the Article.[257] In *Bah v. The United Kingdom*, ECtHR held that immigrants fall in a group in a similar situation and can thus fall under the protection of the Articles' protected ground "other status"[258] whereas in *Serife Yigit v.*

[252] Vijapur, P. Abdulrahim, 'The principle of non-discrimination in international human rights law: the meaning and scope of the concept', Research Article published in July, 1993.
[253] Committee on Economic, Social and Cultural Rights, General Comment No. 20, 'Non-Discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) July, 2009, UN Doc. E/C.12/GC/2, para. 2.
[254] ECHR, Art. 14.
[255] ECHR, Art. 1.
[256] *Opuz v. Turkey* (2009) para 175.
[257] See for example *Bah v. the United Kingdom*, app. no. 56328/97 (ECtHR 27/09/2011) and *Serife Yigit v. Turkey*, app. no 3976/05 (ECtHR 02/11/2010.
[258] *Bah v. the United Kingdom*, app. no. 56328/97 (ECtHR 27/09/2011) para 45.

Turkey, the ECtHR applied "other status" on marital status as a ground for discrimination.[259] While, according to the ECtHR case-law, both immigrants and married persons compose groups of people in a similar situation and should thus not be treated differently, it can be argued that also child brides are a group of people in a similar situation and should not be treated differently without a justification. Moreover, as ECtHR has held that marital status can amount to a ground for discrimination,[260] it can be argued that child brides, as married persons, should be treated in a similar manner than others who are married *per se*.

Whenever a State treats differently persons in a similar situation, there must be an "objective and reasonable justification", it has to "pursue a legitimate aim" and there has to be a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."[261] In other words, the principle of proportionality, discussed further in the next sub-chapter, must be applied not only when States limit rights of a person, but also when they treat groups of people differently. So, when States set minimum age limits for spouses seeking asylum or residence permit for family reunification purpose,[262] allow exceptions to the marriageable age of 18 for their nationals but refuse to recognize foreign child marriages,[263] or simply violate a child brides' right to family life by not recognizing the union and at the same time allow other married couples enjoy their family life without interference by authorities, the States must be able to justify their actions. Limitations on the rights in the ECHR should not expose persons to discrimination without a reasonable objective which is assessed with the help of the proportionality test discussed next.

4.3. Principle of Proportionality

The principle of proportionality is a fundamental principle that requires that restrictions to human rights must be reasonable. Even if the States are offered a certain margin of appreciation[264] in assessing the reasonableness of a restriction, the ECtHR must ensure that the rights enshrined in the Convention are not unnecessarily restricted. In other words, there must be a balance between the undertaken restrictions to the right and the aim pursued. The proportionality test used by the ECtHR in case law appears to have different versions depending on the context of the issue and the restricted

[259] *Serife Yigit v. Turkey*, app. no 3976/05 (ECtHR 02/11/2010) para. 72.
[260] *Ibid.*
[261] *Ibid.,* para. 67.
[262] Family Reunification Directive, Art. 4.5.
[263] European Union Agency for Fundamental Rights: 'Marriage with consent of a public authority and/or public figure'. Available from: https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/marriage-age (12.11.2019).
[264] The 'margin of appreciation' doctrine will be addressed further in the next sub-chapter.

right in question.[265] The Court has called for a "pressing social need" for the restriction and considered whether the reasons for the interference were "relevant and sufficient."[266] It has also found that a ""fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[267] In the UK Supreme Court, the Court has also considered the "adequacy" of the restriction, namely, whether the purported aim of the restriction was important enough for justifying a limitation on the right and whether the restriction was "rationally connected" to the aim.[268] In *Silver* case, where the ECtHR considered limitations on Article 8 of the ECHR, the Court summarized that for a restriction on a Convention right to be compatible with the Convention, the interference must correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" and thus referred to the principle of proportionality.[269]

Due to the large scale problem of child marriages, it can be argued that a legislative objective of preventing child marriages could be a sufficiently important aim "to justify limiting a fundamental right."[270] However, as the restriction must as well be reasonable, the costs and benefits of the restriction must be balanced.[271] In UK Supreme Court, Lord Wilson questioned the number of forced marriages an amendment denying marriage visas for couples under the age of 21deters and found that "the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters" and therefore, the amendment does not "strike a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages", and is not therefore necessary for achieving the purported aim of the amendment.[272]

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[265] Council of Europe: The Margin of Appreciation, available from: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (12.2.2020).
[266] *Handyside v. the United Kingdom*, app. no. 5493/72 (ECTHR 07/12/1976) para. 48.
[267] *James and others v. the United Kingdom*, app.no. 8793/79 (ECtHR 21/02/2986) para. 50.
[268] *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* app no UKSC 45, para. 45.
[269] *Silver and others v. the United Kingdom* (1983) para. 97.
[270] *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* app no UKSC 45, para. 45.
[271] Cianciardo, Juan, 'The Principle of Proportionality: The Challenge of Human Rights', Research Gate, Journal of Civil Law Studies, Vol. 3, January 2010, p. 180.
[272] *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* app no UKSC 45, para. 58.

The central question is, can a total ban on the recognition of foreign child marriages and thus a restriction on the right to family life deter child marriages? Lord Wilson did not find an amendment denying marriage visas for couples under the age of 21 as a reasonable restriction for the aim pursued, namely, the preventing of forced marriages. As all child marriages do not constitute human rights violations, it could be argued that a total ban on the recognition of such marriages is not suitable for preventing child marriages as it also obstructs the child marriages that are not harmful for the child bride. Nevertheless, as foreign child marriages are concluded abroad, a total ban on the recognition of such marriages in another State most likely does not deter child marriages in that State where they are concluded, rather prevents them from landing within the borders of the State refusing to recognize such marriages. A total ban on the recognition of foreign child marriages and thus an interference in the family life of the child brides cannot be seen as a proportionate response to preventing child marriages. Therefore, it can also be argued that a total ban on the recognition of child marriages and thus different treatment of foreign child brides and married national cannot be justified under the principle of non-discrimination. However, it can be argued that Article 8 could proportionally be restricted in individual circumstances "for the protection of the rights of others",[273] namely for the protection of the child bride. So, all in all, each case should be considered individually. A total ban on child marriages is not a proportionate response on deterring child marriages while it does not end child marriages. However, when a child bride is in need of protection and her rights are clearly violated because of ending up as a child bride, a State may limit the right to family life by refusing to recognize a foreign child marriage for the protection of the child bride because such a limitation is proportionate to the aim pursued.

4.4. Margin of Appreciation

Legal traditions, national values and cultures differ between States. Even if human rights are universal, after all, it is the national constitutions of each State that determine how and to what extent the rights are protected and therefore, there are differences in the protection of the rights between States.[274] While States share the same fundamental rights but do not necessarily share the same values, the ECtHR must find a way for an efficient protection of human rights while at the same time, respect the values and cultures of each State. For an effective human rights protection, the ECtHR has established a standard called the margin of appreciation.[275]

[273] ECHR, Art. 8.2.
[274] Gerards, Janneke, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights', Human Rights Law Review, 2018, 18, pp. 495–515, pp. 495-496.
[275] *Ibid.,* p. 497.

As previously discussed, some Convention rights may be limited under certain conditions if "necessary in a democratic society."[276] This is where the doctrine of margin of appreciation comes into play; it is considered that domestic courts and authorities are in the best place in assessing whether an interference to a right is necessary and reasonable for protecting the interests of that State.[277] While the principle of proportionality is all about balancing interests,[278] the margin of appreciation affords States a certain amount of discretion to determine whether a restriction to a right can be justified.[279] So, margin of appreciation is an important mean for finding balance when different legal values and cultures conflict with each other.

In *Handyside v. United Kingdom*, the ECtHR explained the extent to which the rights of the Convention could be limited by stating:

> This margin of appreciation is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force…The domestic margin of appreciation…goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it; even one given by an independent Court.[280]

All in all, even if States are primarily responsible for securing the rights in the Convention[281] and they have been given a discretion in limiting the rights, the ECtHR must ensure that the rights are effectively protected within national borders. After all, it is for the ECtHR to decide if domestic courts and authorities have used their margin of appreciation within the limits of the Convention.

The extent of margin of appreciation differs between rights. As the ECtHR has held, "the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background."[282] When assessing the scope of margin of appreciation States have, how States

[276] ECHR, Art. 8.2.
[277] Henrard, Kristin, 'A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision', The Yearbook of Polar Law IV (2012): 365–413, p. 370.
[278] *Ibid.,* p. 368.
[279] *Ibid.,* p. 367.
[280] *Handyside v. the United Kingdom* (1976) para. 48.
[281] *The Observer and The Guardian v. the United Kingdom* (1991) para. 73.
[282] Henrard (2012) p. 369.

generally regulate the issue at stake must be taken into account.[283] If States apparently share a practice regarding the issue at stake, the margin of appreciation States enjoy is narrow. If there are apparent diversities in the laws and practices between States, the margin of appreciation is wider and limitations in Convention rights are easier to justify.[284] For example in immigration control, States have the right, at least to some extent to decide who they let into their territories[285] and in the protection of children's rights and family life, States have been given a wide discretion in making decisions concerning families and children's welfare because there are so much diversities between cultures with respect to family life.[286]

Margin of appreciation applies on Article 8 protecting the right to family life, but it has also been applied even on the non-derogable right of the prohibition of torture protected in Article 3.[287] In *Valiuliene v. Lithuania*, the ECtHR found that:

> State's responsibility under Article 3 of the Convention…within the limits of the Convention, the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim.[288]

However, as the prohibition of torture and ill-treatment is a non-derogable right, States do not enjoy a margin of appreciation concerning possible limitations on Article 3. In *Valiuliene*, the State was left a discretion in the "*choice of means"* Article 3 is secured and therefore, it can be argued that margin of appreciation does not apply on Article 3 in the same manner as it does on Article 8.

When it comes to child marriages, margin of appreciation comes into play in several fields concerning the practice. States that have laws permitting marriages under the age of 18 have used their margin of appreciation in regulating the marriageable age. Different cultures and religions affect the concept of marriage and therefore, the legal age for marriage differ between States. For example, the Muslim

[283] Kilkelly, Ursula, 'The Child and the European Convention on Human Rights', Second Edition, Taylor and Francis, 2017, p. 7.
[284] *Ibid.*
[285] *Mehemi v. France*, app. no. 53470/99 (ECtHR 10/04/2003) para. 45.
[286] Kilkelly (2017) p. 7.
[287] McGoldrick, Dominik, 'A defence of the margin of appreciation and an argument for its application by the human rights committee', International and Comparative Law Quarterly 65(1):1-40, 2015, pp. 22-23.
[288] *Valiuliene v. Lithuania,* app. no. 33234/07 (ECtHR 26/03/2013) para. 85.

Marriage and Divorce Act of Sri Lanka sets 12 as a minimum age for marriage for girls[289] and Iran allows marriages for girls from 13 years.[290] However, both Acts can be seen controversial in the eyes of international law, regardless of the margin of appreciation. Even if exceptions to the marriageable age are allowed in certain situations, as it already was argued in chapter 2, all marriages under the age of 16 could be considered as illegal even if this is not explicitly stated in a legally binding instrument or by a judicial body.[291]

Margin of appreciation allows States to take cultural and traditional factors into consideration while limiting the rights in the Convention. However, the assumption that culture and traditions can affect the enjoyment of fundamental rights seems controversial. While all human rights are universal, all rights should be equal "regardless of the culture into which the individual happens to be born."[292] When it comes to the marriageable age and culture, the joint general comment of the CEDAW Committee and the CRC Committee that allows exceptions to the marriageable age of 18 holds that such exceptions shall not be defended with culture or religion.[293] When Finland finally in 2019 removed the possibility to conclude marriages under the age of 18 in exceptional situations, the Finnish former minister of Justice conformed the joint general comment by noting that culture and religion shall never overrule the protection of children.[294] So even if States enjoy a wide margin of appreciation concerning family life issues, different cultures and values should not affect the legal age for marriage.

When it comes to the non-recognition of child marriages concluded abroad, States may in certain circumstances limit the right to family life by refusing to recognize child marriages concluded abroad and control their immigration by refusing to accept family reunification applications from families compromised of a child marriage. Some European States have taken advantage of this discretion by enacting laws banning the recognition of foreign child marriages entirely within their State borders

[289] Marriage and Divorce (Muslim) Art. 23, Sri Lanka.
[290] Girls Not Brides: 'Iran', available from: https://www.girlsnotbrides.org/child-marriage/iran/ (27.03.2020).
[291] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20, see also chapter 2.
[292] Sweeney, James, A., 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold war era', The International and Comparative Law Quarterly, Vol. 54, No. 2 (Apr., 2005), pp. 459-474 (16 pages), Cambridge University press, p. 460.
[293] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[294] Turun Sanomat: 'Lapsiavioliitot kielletään Suomessa' – Oikeusministeri: "Lapsien tulee saada olla lapsia täysi-ikäisyyteen asti", 20.2.2019, available from: https://www.ts.fi/uutiset/kotimaa/4487764/Lapsiavioliitot+kielletaan+Suomessa+Oikeusministeri+Lapsien+tulee+saada+olla+lapsia+taysiikaisyyteen+asti (27.03.2020).

and thus limiting the child brides' right to family life. However, the ECtHR has held that "a general, automatic, indiscriminate restriction on a vitally important Convention right falls outside any acceptable margin of appreciation."[295] The ECtHR did not specify what these "vitally important" rights are.[296] The term can refer to only certain rights in the Convention which are considered vital, but the author interprets this as referring to all *fundamental* rights in the Convention.

A total ban on the recognition of foreign child marriages can without doubt be considered as an automatic and indiscriminate restriction while it automatically applies on all married couples were at least one of the spouses is under the age of 18 and affects the family life of immigrants only. Therefore, it can be argued that laws banning automatically all child marriages concluded abroad falls outside States' margin of appreciation and therefore, States that do not consider such marriages on an individual basis are not conforming their obligations under the Convention.

4.5. *Ordre Public* in Private International Law

Per se, States are committed to enforce foreign rights that are legally acquired abroad.[297] Foreign laws and rights give rise to obligations that should be enforced all over the world. Even if a right did not exist as such in the legislation of a State, "it is a principle of every civilized law that vested rights shall be protected."[298] When foreign rights are enforced in national courts, the fact that the right applied is necessarily not convergent with national law must basically be tolerated.[299] The legislation of each State differ and sometimes the forum State may not even have legislation concerning the particular right at issue; this does not mean that the particular right should not be enforced.[300] However, if the applied foreign law contradicts with national law of the forum State so significantly, that the enforcement of such law would violate the fundamental norms of that State and contradicts with the public policy of that State, the domestic court may invoke on the principle of *ordre public* in private international law and refuse to apply such law.[301] So, enforced rights are protected abroad as long as the nature of the right is not contrary to the public policy and morals of the forum State.[302]

[295] *Hirst v. the United Kingdom*, app. no. 74025/01 (ECtHR 06/10/2005) para. 82.
[296] *Ibid.,* para. 82.
[297] Murphy, Kent, 'The Traditional View of Public Policy and Ordre Public in Private International law', Georgia Journal of International and Comparative Law, Vol. 11, No. 3 (1981) p. 591.
[298] *Loucks et al. v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198, para. 4.
[299] Mikkola, Tuulikki, Vieraan valtion oikeuden soveltamisen torjuminen ja ordre public, Edilex 2016/12, p. 4.
[300] *Loucks et al. v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198, para. 5.
[301] Mikkola (2016) p. 4.
[302] *Loucks et al. v. Standard Oil Co. of New York,* 224 N.Y. 99, 120 N.E. 198, para. 4.

While choosing the applicable law and thus refusing to apply foreign legislation, the conflict with the public policy and morals of the forum State must be significant.[303] As Justice Cardozo has noted:

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[304]

However, *ordre public* is not defined in legislation[305] and while the limits of public order and morals differ between States,[306] the standards under which courts are allowed to reject foreign law remains unclear. An exhaustive definition for the concept of *ordre public* would not even be possible taking into consideration the nature of the principle.[307] For example in France, *ordre public* is applied "where the foreign rule is contrary to the morals of civilized society; or where the foreign law threatens the character of French civilization"[308] whereas under the German statue, *ordre public* is "directed toward non-German laws and excludes their application whenever they would be contrary to good morals or would work against the policy of German law."[309]

When assessing whether *ordre public* is applicable, the connection the issue and the parties have to the forum State shall be considered. If they are strongly linked to each other, the threshold for applying the principle is lower than in situations where the issue at stake is only weakly connected to the forum State.[310] However, in situations where a particular law clearly violates fundamental human rights or peremptory norms of international law, *ordre public* applies despite of the nature of the connection the particular issue have to the State; these norms always apply in situations where there is a conflict of laws.[311] All in all, each situation shall be considered on a case-by-case basis taking into consideration international norms, as well as the norms of the society and the changing values and interests.[312] Within Member States of the EU, *ordre public* principle is also always applicable in situations where a foreign norm conflicts with the ECHR and the Treaty of the European Union.[313]

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[303] Mikkola (2016) p. 4.
[304] *Loucks et al. v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 para. 6.
[305] Mikkola (2016) p. 4.
[306] Murphy (1981) p. 596.
[307] Mikkola (2016) p. 4.
[308] Murphy (1981) pp. 596-597.
[309] Murphy (1981) p. 598.
[310] Mikkola (2016) p. 5.
[311] *Ibid.,* p. 8.
[312] *Ibid.,* pp. 5-6.
[313] *Ibid.,* p. 13.

So the foreign right enforced must not only be in line with national public policies and morals but with the ECHR as well.[314]

ECHR refers to *ordre public* in two Articles in Section 1: Article 6 protecting the right to a fair trial[315] and in Article 9 protecting the freedom of thought, conscience and religion.[316] Even if Article 8(2) allows restrictions to the right to private and family life for legitimate purposes like Article 9 does, Article 8 does not explicitly allow restrictions to the right on grounds of public order.[317] Nevertheless, according to the case law of the ECtHR, *ordre public* can be applied on other Convention rights as well. In *S.A.S. v. France,* the ECtHR considered whether a ban on clothing covering one's face violated the right to private and family life and the freedom of thought, conscience and religion[318] and introduced an approach where it subsumed *ordre public* under the legitimate aim "for the protection of the rights and freedoms of others",[319] a legitimate aim explicitly mentioned in Article 8(2). The legitimate aim "the rights and freedoms of others"[320] has traditionally referred to other ECHR rights,[321] but in *S.A.S* case, the Court linked it to a French principle *vivre ensemble* ("living together")[322] by stating:

> The Court…can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.[323]

With its reasoning, the Court enabled the legitimate aim 'rights of others' to be applied on other rights outside the Convention rights as well, including living together easier and thus also allowed the

[314] Mikkola (2016) p. 14.
[315] ECHR, Art. 6.1.
[316] *Ibid.,* Art. 9.2.
[317] *Ibid.,* Art. 8.2.
[318] *S.A.S. v. France*, app. no. 43835/11 (ECtHR 01/07/2014) para. 3.
[319] *Ibid.,* para. 117, see also Erlings, Esther, 'The Government did not refer to it': *SAS v. France* and *ordre public* at the European Court of Human Rights, Melbourne Journal of International Law, vol. 16, (2015) p. 15 and ECHR, Art. 8.2.
[320] ECHR, Art. 8.2.
[321] Erlings (2015) p. 7.
[322] *S.A.S. v. France* (2014) para. 121, see also para. 17.
[323] *Ibid.,* para. 122

principle of *ordre public* to be applied on articles not explicitly listing public order as a ground for limitation, including Article 8 protecting the right to private and family life.

Nevertheless, there is not much case law concerning *ordre public*[324] while most cases with conflict of laws are settled using other principles of law.[325] However, in a Finnish Highest Administrative Court case,[326] the Court held that a marriage legally concluded in Syria between a husband and a 15-year girl currently living in Finland was against Finnish *ordre public*. Even if marriages legally concluded abroad are generally valid in Finland as well,[327] the Court referred to the Finnish Marriage Act[328] by stating: "a provision in the law of a foreign State shall be disregarded, if its application would have an outcome contrary to Finnish public policy (*ordre public*)"[329] and held that a marriage where at least one party was under the age of 16 at the time the marriage was concluded was a situation where the principle of *ordre public* should be applied even if Finnish law at that time allowed children under the age of 16 to marry in exceptional situations.[330]

When a child bride migrates to Europe, European States must consider whether the marriage legally concluded abroad is enforced in Europe as well or whether the marriage is contrary to the public policy and morals of the forum State and could thus not be recognized under the *ordre public* principle. As already discussed in this thesis, child marriages are strongly condemned in Europe. It is understood that a child marriage may violate several fundamental human rights norms and occasionally even peremptory norms of international law and while *ordre public* is applicable in situations where a foreign right conflicts with European norms and values, it could be argued that national courts in Europe have the power to refuse to enforce such marriages. Furthermore, the Family Reunification Directive addresses *ordre public* with respect to family reunification applications. According to Article 6 of the Directive, a family reunification application by a family member may be rejected "on grounds of public policy, public security or public health"[331] and therefore, the Article could justify denied family reunification applications on grounds of child marriage.

However, as discussed, *ordre public* is not defined in legislation and therefore, there is no clear standards under which the principle is applied. Each case is considered on a case-by-case basis in

[324] Mikkola (2016) p. 11, Murphy (1981) p. 599.
[325] Mikkola (2016) p. 11, Murphy (1981) p. 599.
[326] *5.12.2005/3219 KHO:2005:87.*
[327] The Finnish Marriage Act 234/1929, Amendments up to 1226/2001 incl. Art. 115.1.
[328] *5.12.2005/3219 KHO:2005:87.*
[329] The Finnish Marriage Act 234/1929, Amendments up to 1226/2001 incl. Art. 139.2.
[330] *5.12.2005/3219 KHO:2005:87, Hallituksen Esitys* HE 211/2018 vp.
[331] Family Reunification Directive, Art. 6.1.

domestic courts so it cannot be argued that States automatically have the right to apply *ordre public* on child marriages concluded abroad. However, it certainly is a principle to be considered with respect to child marriages while such marriages often are in conflict with European, as well as national public policies and morals.

4.6. Standard of the Best Interests of a Child

As discussed, sometimes even the most fundamental norms may conflict with each other. When it comes to child marriages concluded abroad, States may face a situation where they have to balance between immigration control and the right to family life, or assess whether a child marriage concluded abroad should be recognized or not while both scenarios could expose the child to torture or ill-treatment. When striking a balance between children's rights and conflicting norms and interests, there is one principle that should guide all decisions; the standard of the best interests of a child.[332] The standard of the best interests of a child is a fundamental principle of international law that guides all decisions concerning the welfare of a child.[333] The principle is included in Article 3 of the CRC which reads as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[334]

The best interests principle has since the CRC been applied in several international, regional and national provisions. It is included in the EU Charter of Fundamental Rights in the wording of the CRC[335] and in national provisions in different fields of law.[336] The principle can as well be found from Council of Europe Resolutions concerning child marriage; The Assembly Resolution from 2005 that prohibits States from recognizing forced marriages and child marriages concluded abroad sets exceptions on this matter by noting that a child marriage may be recognized "…where recognition would be *in the victims' best interests* with regard to the effects of the marriage, particularly for the purpose of securing rights which they could not claim otherwise"[337] and later in 2018, in its "forced marriage" Resolution, the Assembly urged again States to "refrain from recognizing forced marriages

[332] Freeman, Michael D. A, 'A Commentary on the United Nations Convention on the Rights of the Child', Article 3: The Best Interests of the Child, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 1.
[333] *Ibid.,* p.1, Been, Claire, 'The Standard of the Best Interest of the Child: A Western Tradition in International and Comparative Law,' International Studies in Human Rights vol. 72, Martinus Nijhoff Publishers, the Hague/London/New York, 2002. p. 1.
[334] CRC Art. 3.1.
[335] Charter of Fundamental Rights of the European Union (2000/C 364/01), Art. 24.2.
[336] See for example the Finnish Aliens Act 22.2.1991/378, sec. 1C.
[337] Parliamentary Assembly Resolution 1468 (2005) para. 14.2.4.

contracted abroad but, where it would be *in the victim's best interests*, recognize the effects of the marriage insofar as this would enable the victim to secure rights which they could not otherwise claim."[338]

In the ECtHR, the best interests principle is discussed often in matters relating to the protection of family life and especially in family reunification cases.[339] Generally, ECtHR considers the maintaining of family ties as being in the best interests of the child.[340] When it comes to family ties, family ties are often regarded as the relationship between the child and the parents.[341] The ECtHR has held that "everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family" and refers to the relationship between a child and his or her parents.[342] One possible interpretation of the reasoning of the Court could be that when considering the interests of the child bride with respect to the recognition or non-recognition of a child marriage, the primary consideration should be that the child should be returned to her parents "except in cases where the family has proven particularly unfit."[343] In *V.D* case, where the ECtHR assessed the interests of the child, as one important factor, it took into consideration the living conditions with the parents.[344] When a child bride seeks asylum or a residence permit from Europe, it most likely means that she would be better off in Europe than in her State of origin when considering the living environment and her safety. The child may not even have parents and it is possible that the husband is the only family the child has left. As this study has already previously proven, a *de facto* relationship between the child bride and her husband may fall within the protection of "family life" and thus should as well be considered as a family tie that should primarily be preserved when considering the interests of the child. Moreover, returning a child bride to parents who have married her off at a young age may also expose the child to the risk of human rights violations. It can be argued that in such situations the returning of the child to her parents is not in the best interests of the child.

How can it be assessed if it is in the child's best interests to be reunited, or to remain with her husband and stay married? How is best interests defined? The term "best interests" is not defined in any Convention. Academic John Eekelaar defines the term as "basic interests, for example to physical,

[338] Parliamentary Assembly Resolution 2233 (2018) para. 7.9.
[339] see *Berisha v. Switzerland*, app. no. 948/12 (ECtHR 30/07/2014), *Mugenzi v. France*, app. no. 52701/09 (ECtHR 10/07/2014).
[340] European Union Agency for Fundamental Rights: 'Handbook on European law relating to the rights of the child', Council of Europe, 2015, p. 103.
[341] *V.D. and others v. Russia*, app. no. 72931/10 (ECtHR 09/04/2019) para. 114.
[342] *Ibid.*
[343] *Ibid.*
[344] *Ibid.,* para. 118.

emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own."[345] When considering the definition of Eekelaar in the light of child marriages, the fact how a child marriage affects the basic interests, autonomy and "freedom to choose a lifestyle of their own" cannot be disregarded. It could be argued that a child marriage cannot be in the child's best interests as it strongly affects the basic rights of the child. However, The Parliamentary Assembly of the Council of Europe has held in its resolutions that a marriage shall not be recognized unless it is in the best interests of the child "with regards to the effects of the marriage particularly for the purpose of securing rights which they could not claim otherwise."[346] So a child marriage can be in the child's best interests if the child bride claims rights, like the right to family and thus the right to family reunification as a consequence of the marriage. A refugee child is particularly vulnerable and even if a child marriage can be regarded as a fundamental human rights violation, the marriage may actually provide the child economic help and security. Furthermore, the explanatory report of the Istanbul Convention addressing forced marriage suggests that a forced marriage should have no legal effect[347] but also indicates that the annulment of a forced marriage "should not affect the rights of the victim of forced marriage."[348]

The application of the standard within different jurisdictions depends eventually on several factors, like culture, time and religion[349] and interests of a child are seen differently between different families; for example a Christian parent rarely finds the circumcision of a boy for non-medical reasons as being for the child's best interests whereas Muslim parents act in the best interests of their child while they circumcise their sons.[350] When it comes to child marriages, the developed world rarely finds justifications for child marriages concluded at a very young age whereas in the developing world, child marriages are often a part of everyday life. Therefore, a debated question is; how far can cultural or religious norms affect the assessment of child's best interests?[351] How wide is the States margin of appreciation when it comes to child's best interests?

[345] Freeman (2007) p. 27.
[346] Parliamentary Assembly Resolution 1468 (2005) para. 14.2.4.
[347] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series, Istanbul, 11.V.2011, para. 177.
[348] Explanatory report to the Istanbul Convention, para. 178.
[349] Freeman (2007) p. 17.
[350] Freeman (2007) p. 2.
[351] *Ibid.,* p. 5.

Article 3(1) of the CRC itself answers to this question. The Article says that "the best interests of the child shall be *a primary* consideration."[352] *Primary,* meaning the *first consideration.*[353] Child's best interests shall be the determining factor in only few situations; in adoption[354] and in situations where a child is separated from his or her parents.[355] In all other actions concerning children, child's best interests shall be the *primary* consideration which shall be balanced between all rights of the child.[356] Therefore, the assessment and determination of a child's best interests is not a simple process and the responsibility to ensure the fulfillment of the standard is on the States.[357] Each situation should be considered on a case-by-case basis. For example in *Sen v. Netherlands*, the ECtHR balanced with the rights of a child and "wider public policy interests" and while considering the interests of the child, took into consideration "the age of the children concerned, their situation in the country of origin and their degree of independence from their parents." It is important to consider the involvement of the child's parents in the child's life,[358] because if the husband is the only family the child has left, the dependency the Court considered in *Sen v. Netherlands* between the child and the parents could as well be the relationship between the husband and the child bride that ought to be considered.[359]

The States shall also ensure that the child has the right to participate in the process. According to CRC, every child "who is capable of forming his or her own views" has the right express his or her views in matters concerning the child[360] and therefore, it is important to give the child bride the possibility to express her views concerning the marriage and to make sure that all relevant experts are involved in the procedure of determining and assessing the best interests.[361] Decision-makers must balance between all relevant factors and rights for deciding the best option for the child[362] and in addition to the ECHR, all other international, as well as national legal norms must also be taken into account.[363]

There is no "check-list" on the terms that should be fulfilled when determining the best interests, but it is a principle that must be taken into consideration when implementing all other human rights.

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[352] CRC Art. 3.1.
[353] Freeman (2007) p. 61.
[354] CRC Art. 21.
[355] *Ibid.,* Art. 9.
[356] UNCHR Guidelines on Determining the Best Interests on the Child, May 2008, p.15.
[357] *Ibid.,* p. 23.
[358] *Ibid.,* p. 26.
[359] *Ibid.*
[360] CRC, Art. 12.
[361] UNCHR Guidelines on Determining the Best Interests on the Child (2008) p. 26.
[362] *Ibid.,* p. 23.
[363] *Ibid.,* p. 15.

The ECHR must be read in the light of the principle but on the other hand, it can also help in resolving matters that are not covered in the Convention. It is a principle that can assist in resolving conflicts between different rights of a child,[364] including the conflict arising from a situation where both the recognition, as well as the non-recognition of a marriage could expose the child to torture and ill-treatment. Cultural and religious norms affect the assessment of child's best interests, but according to the CEDAW and CRC Committees, marriages under the age of 18 should be based exclusively on the maturity of the child, not on culture or religion.[365] Therefore, it can be argued that when assessing the interests of a child bride in a marriage, the marriage is in the interests of the child only if the child is mature enough for understanding the consequences of the union and for giving a full, free and unformed consent to the marriage. However, the child bride has also the right to express her own views of the marriage.[366] Nevertheless, when giving weight to the views of the child bride, the maturity of the child is relevant too while the child must be mature enough for understanding the implications of the union.[367]

In Finland, there is no total ban on the recognition of child marriages concluded abroad. Each situation is considered on a case-by-case basis and under each case the best interests of the child is assessed. While both the CEDAW Committee and the CRC Committee accepts marriages below the age of 18 in "exceptional situations" as long as the child is at least 16 years old[368] and the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages allows exceptions to the rule of minimum age of 18 if it is in "the interests of the intending spouses",[369] the Finnish legislation allows these exceptions to be taken into account when authorities determine whether a marriage concluded abroad is to be recognized.[370]

Per se, according to Finnish Marriage Law, a marriage concluded abroad is valid in Finland if it is valid in the country where it was concluded. However, the Supreme Administrative Court of Finland found that a marriage concluded in Syria when one of the spouses was 15-years old was against the best interest of the child because despite of the cultural and religious background, migrant girls have also the right to freely choose their spouse. Therefore, the Court found that accepting the family

[364] Freeman (2007) p. 32.
[365] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20, see also chapter 2.2.
[366] CRC, Art. 12.
[367] Lansdown, Gerison, 'Every Child's Right to be Heard: a Resource Guide on the UN Committee on the Rights of the Child on General Comment No. 12. Unicef 2011, p. 23.
[368] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20.
[369] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Art. 2.
[370] *Hallituksen Esitys* HE 211/2018 vp.

reunification application by the husband living abroad was against the best interests of the 15-year girl living in Finland.[371]

As each situation should be considered on an individual basis and even if the first thought could be that a child marriage cannot be in the best interests of a child, a total ban on the recognition of foreign child marriages violates the best interests principle.

5. Conclusions

Child marriages are considerably addressed in both international, as well as in European legislation. However, even if the practice is prohibited per se, several jurisdictions unfortunately still allow it to happen. It is a widespread problem but affects mostly adolescent girls in the developing world as well as young girls within conflict zones and therefore, many refugee girls seeking asylum or a residence permit from Europe are married at a young age. Even if child marriages are prohibited in Europe with exceptions, there are no explicit international or regional provisions on how child marriages concluded abroad should be addressed within EU Member States. Therefore, a married child arriving to the continent brings about several legal dilemmas where the rights of the child are at stake.

There have been differences in how EU States have responded to the issue of the migrating child brides but no simple answer on how they should respond. States have been forced to re-examine their legislation after encountering the issue of the migrating child brides and therefore, during recent years, there has been a trend in Europe where States have enacted laws concerning underage marriages by raising the minimum age for marriage, removing exceptions to marriages under the age of 18 and most radically, some States have enacted laws banning entirely the recognition of foreign child marriages within their State borders. States that have refused to recognize child marriages concluded abroad have become subjects of debate on whether the non-recognition of child marriages is compatible with the States' obligations under international human rights law.

This thesis analysed the extent of obligations States have towards the recognition of child marriages concluded abroad by seeking an answer to the primary question of this study: In what circumstances should a child marriage concluded abroad be recognized in EU Member States and when is it acceptable under international law to refuse to recognize the legal validity of such marriage?

[371] *5.12.2005/3219 KHO:2005:87,* see also footnote 299.

There is no absolute obligation on States to refrain from recognizing child marriages to be found from international instruments. Even if the treaties and resolutions addressing the issue of foreign child marriages all condemn child marriages and urge States to refrain from recognizing such marriages, they all provide exceptions on the matter and accordingly, foreign child marriages can arguably be recognized in Europe if the child bride is at least 16 years old[372] and if the marriage, or its effects, is in the best interests of the child. After all, all the international instruments addressing the issue of foreign child marriages give States a discretion to assess each situation on a case-by-case basis without an absolute obligation of non-recognition. However, even if there is no explicit obligation of non-recognition, States are nevertheless under an obligation to protect the child brides from human rights violations.

Traditionally, human rights law has imposed only negative obligations on States. During the recent decades, the obligations of States have extended and today, it is widely accepted that States not only have to *respect* all the rights of individuals, they must as well ensure that the rights of individuals are not violated. Under the principle of *due diligence*, States are obliged to take all appropriate measures for protecting the rights of everyone within their jurisdiction and the obligation has also been extended to acts committed by private persons. Hence, States are under an obligation to protect the migrating child brides from the fundamental human rights violations the child marriage may expose them to. The positive obligation of States to protect the child brides from violations committed by third-parties and the principle of *due diligence* have most likely been the most important principles to be kept in mind throughout this thesis while without the State's obligation to protect, the migrating child brides would not cause the legal dilemmas they now cause.

The reason why the issue of foreign child marriages is not that straightforward is the fact that however a State decides to act with respect to a foreign child marriage, because of their positive obligation to protect, their acts may result to a violation of the rights enshrined in the ECHR. Even if a child bride was not within European borders, an asylum application may nevertheless bring the child bride within the jurisdiction of the European State concerned and therefore also under the protection of the ECHR. This study discussed primarily two rights enshrined in the ECHR that a foreign child marriage and its recognition or non-recognition affects: the prohibition of torture (Article 3) and the right to family life (Article 8) but took into consideration also the peremptory norms of international law in general within the scope of the ILC Articles.

[372] 'Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices' (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para. 20, see also *5.12.2005/3219 KHO:2005:87.*

A child marriage *may* fall within the scope of serious breaches of peremptory norms of international law regulated under the ILC Articles while child marriage may lead to either torture or slavery, both peremptory norms of international law. However, for falling under the scope of the Articles, the breach of the peremptory norm must reach a certain level of seriousness. A child marriage may reach the level if the breach is conducted with a level of intensity, intentionally and leads to severe consequences on the victim. However, each breach should be considered on a case-by-case basis while all child marriages are different in their nature and consequences and therefore, it cannot be argued that all child marriages would fall within the scope of the ILC Articles, even if they nevertheless may be harmful for the child. *If* a child marriage falls under the Article's scope, States are obliged to refrain from the recognition of the marriage. If they fail to do so, they may be held liable for a serious breach of an internationally recognized peremptory norm.

Even if a violation on a peremptory norm would not fall within the scope of the ILC Articles, it does not mean that the violation could somehow be justified; it nevertheless falls within the protection of the ECHR. ECHR Article 3 protects against torture. This thesis came to the conclusion that whether a foreign child marriage is recognized or not, the forum State may in both circumstances violate Article 3 of the Convention. While child marriage may in certain circumstances lead to torture or ill-treatment, recognition of such marriage could thus mean that the recognizing State fails to protect the child bride from violations under Article 3. On the other hand, the ECtHR has applied Article 3 in a very broad manner and applied it for example on poor living-conditions too. If a child brides' family reunification application is denied because of non-recognition of her marriage and the child is thus left in severe conditions in the middle of human rights violations that could fall within the protection of Article 3, the State that refused to recognize the marriage could be held liable for failing to protect the child from violations under Article 3. Whether a child marriage constitutes torture and its recognition could thus be regarded as a violation of Article 3, or whether the conditions where the child brides may be left because of a denied family reunification application are severe enough for falling within the protection of the Article must be considered on a case-by-case basis. It can be argued that in many child marriages the rights under Article 3 are at stake but while not all child marriages constitute torture or ill-treatment, an absolute line between the recognition and non-recognition of child marriages concluded abroad cannot be drawn on the grounds of possible violations under Article 3.

Article 8 protecting the right to respect for private and family life was the other conflicting norm discussed in this study through the protection it provides for "family life." For a marriage to fall

within the protection of Article 8, it must be a legal marriage, or the union must amount to a *de facto* relationship. While a child marriage is not a legal marriage in Europe *per se*, courts have to consider if the union between a child bride and the husband amounts to a *de facto relationship* by taking into consideration several factors in the union, like the length of the relationship and the level of dependency between the spouses. If a child marriage amounts to a *de facto relationship*, a child marriage falls within the protection of Article 8 even if the marriage was not legal and would thus be protected from arbitrary interference by State authorities; a non-recognition of a child marriage that constitutes a *de facto* relationship would violate Article 8 of the ECHR. Moreover, because of the positive obligations of States, Article 8 also imposes and obligation on States to secure family life and to develop *existing* family life together, namely, to take all necessary steps for reuniting families. The positive obligation may oblige States in certain situations to allow spouses of a child marriage on its territory if it is the most appropriate mean for developing their family life together. An accepted family reunification application would thus mean that the child marriage must be recognized. Therefore, according to States obligations under Article 8, a total ban on the non-recognition of child marriages would not be compatible with international human rights law. As with respect to Article 3, also the right to family life requires that each child marriage is considered on an individual basis.

Article 3 of the Convention is a peremptory norm of international law from which derogation is not permitted. However, Article 8 is not an absolute right and may be limited in certain circumstances. It can be limited in times of emergency and war, but the Article itself indicates an explicit limitation as well. The right to family life may be limited by State authorities when it is necessary in a democratic society for achieving a legitimate aim which, in this study has been regarded as being the prevention of child marriages. When assessing the necessity of a limitation to the right to family life, the interests of the State and the individual must be balanced and the relevant question at this point would be whether an absolute ban on the non-recognition of foreign child marriages is a reasonable mean for preventing child marriages. This thesis argued that a total ban on the recognition of child marriages is not a reasonable mean for preventing child marriages as it most likely obstructs also some underage marriages that are concluded with consent of the bride and are not violating the rights of the child. It must be reminded at this point that not all underage marriages are forced marriages or do not amount as human rights violations, they may as well be concluded in an acceptable manner as international law permits underage marriages in exceptional situations as long as the spouses are at least 16 years old. Nevertheless, when a child bride migrates to Europe, the marriage has already been concluded abroad and the receiving State cannot prevent it anymore, it can rather prevent it from landing within European borders.

Accordingly, an absolute ban on the non-recognition of child marriages cannot deter such marriages, so the right should not be limited for the interests of the State. However, the right to family life may be restricted "for the protection of the rights and freedoms of others",[373] namely, for the protection of the child brides. If the child bride is evidently in need of protection, the right to family life can be limited. However, the need for protection must be assessed on a case-by-case basis taking into consideration all facts of the case and therefore, a total ban on child marriages cannot be seen reasonable.

For assessing the necessity of a restriction to a right, States have also been given a margin of appreciation to assess what really is necessary in their society. Even if States enjoy a wide margin of appreciation with respect to family life and marriages, the margin of appreciation is not unlimited. A total ban on the recognition of child marriages cannot be defended with the margin of appreciation doctrine as "general, automatic and indiscriminate" restrictions fall outside States margin of appreciation.[374] A total ban on child marriages can without doubt be seen as an automatic and indiscriminate restriction while it automatically applies on all married couples where at least one of the spouses is under the age of 18 and affects the family life of immigrants only. Furthermore, whenever States treat persons in a similar situation differently, they must have a reasonable objective to justify such treatment. The principle of non-discrimination is therefore a principle that must be considered at all times when the rights of the child brides are at stake.

Yet another principle that may be used to legitimize actions regarding child marriages concluded abroad is the principle of *ordre public*. Even if foreign rights should primarily be enforced, *ordre public* constitutes and exception on this matter. A domestic court may refuse to enforce a foreign marriage if the marriage is contrary to the public morals and policies of the forum State. However, this principle is applied by domestic courts and thus cannot justify absolute bans on the recognition of child marriages. Courts consider each situation on a case-by-case basis and if the child marriage considered is in conflict with the forum States' public policy and morals, the principle can justify the non-recognition of a foreign child marriage.

While Article 8 of the Convention may be limited under the principles of proportionality, margin of appreciation or *ordre public*, limitations on Article 3 are never permitted. However, while both the recognition as well as the non-recognition of a foreign child marriage may expose the child to torture or ill-treatment, States can face a situation where they have to choose between the two bad scenarios.

[373] ECHR, Art. 8.
[374] *Hirst v. the United Kingdom* (2005) para. 82.

Where there is a conflict of laws concerning children, or a State has to balance between two fundamental norms, there is one principle that should guide all decisions concerning children: the standard of the best interests of a child. All instruments providing exceptions on matters concerning child marriages urge States to take into consideration the best interests of the child. In a situation where Article 3 is at stake, the State must seek for the best option for the child bride and give the child bride the possibility to express her own views. The child brides' own views are relevant as long as she is mature enough for understanding the issue at stake and can express her views freely. A child marriage, even if it is a fundamental human rights violation, may be for the best interests of the child if it enables other rights the child would not otherwise claim, or if the child is simply dependent of the husband and his economic support. Child marriages are rarely similar in their nature and consequences and all child brides come from different backgrounds, so each union should be considered with the best interests of the child bride in mind.

All in all, the recognition of child marriages concluded abroad is a complex issue and there is no straightforward answer to the question whether such marriages should be recognized in EU Member States or not. There is no absolute obligation of non-recognition and in fact, an absolute ban on foreign child marriages is not compatible with international human rights obligations of States while it violates the child brides' right to family life and may expose her to torture or ill-treatment. The conclusions of this thesis and thus the answer to the primary research question can be concluded as follows: All States are obliged to refrain from recognizing marriages that are concluded under the age of 16 and marriages that fall within the scope of the ILC Articles. All other marriages should be considered on a case-by-case basis taking into consideration the principle of proportionality, margin of appreciation, *ordre public* and most importantly, the best interests of the child.

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