

# Child marriage and family reunification: an analysis under the European Convention on Human Rights of the Dutch Forced Marriage Prevention Act

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**Anne Wijffelman**

University of Amsterdam, Amsterdam, Netherlands

## Abstract

The Dutch Forced Marriage Prevention Act aims to prevent family reunification of so-called child brides with their husbands in the territory of the Netherlands by no longer recognizing child marriages concluded abroad as legal marriages. Although it can be argued that the Netherlands has an obligation not to recognise a child marriage concluded abroad, it is disputable whether the Forced Marriage Prevention Act is in line with other human rights obligations. This article analyses whether the rights of child brides are violated under Articles 8 and 3 of the European Convention on Human Rights, if their family reunification application is denied. Although the minor spouse is most likely residing outside the territory of the Netherlands, a family reunification procedure brings her nevertheless within its jurisdiction, and as such within the sphere of the European Convention on Human Rights.

## Keywords

child marriage, family reunification, European Convention on Human Rights, the right to respect for family life, the prohibition of ill-treatment, Forced Marriage Prevention Act

## Introduction

The Netherlands is increasingly confronted with refugees, primarily Syrian girls, who are legally married in their country of origin, but are below the Dutch age of consent. Between July 2014 and February 2016, the Dutch Immigration and Naturalisation Service registered approximately 210

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### Corresponding author:

Anne Wijffelman, University of Amsterdam, Amsterdam, 3905, Netherlands.

E-mail: [annewijffelman@gmail.com](mailto:annewijffelman@gmail.com)

cases of so-called Syrian ‘child brides’.<sup>1</sup> In the period between September 2015 and January 2016, 60 child brides arrived in the Netherlands, with the youngest being 14 years of age.<sup>2</sup> Another ten family reunification applications involving a minor spouse were submitted.<sup>3</sup>

This trend, observed throughout Europe, has triggered in a range of European States a discussion as to the question whether host States should facilitate family reunification in cases of child marriage. As a result, there has been a rise in initiatives and measures taken by European policy makers. The influence of the European Union is significant in this area, especially because of the European Family Reunification Directive.<sup>4</sup> The Family Reunification Directive offers Member States the discretion to impose an age requirement for family reunification – which can be 21 years at the highest – for both spouses, ‘in order to ensure better integration and to prevent forced marriages’.<sup>5</sup>

In the Netherlands the practice of family reunification of minor girls with their (adult) husbands inflamed a heated debate, with some arguing that it is condoning paedophilia. Attje Kuiken, a Dutch labour parliamentarian, stated: ‘A 12-year-old girl with a 40-year-old man - that is not marriage, that is abuse’.<sup>6</sup> In response to these concerns, the Netherlands has lately changed the applicable law. Until recently, the Dutch law allowed child brides to be reunited with their husbands, as long as their marriage was officially registered in their country of origin, unless the recognition of the marriage would be incompatible with the Dutch public order. In practice the public order clause was exercised with great restraint.<sup>7</sup> In December 2015 new legislation, the Forced Marriage Prevention Act (*de Wet tegengaan huwelijksdwang*), came into force.<sup>8</sup> From that moment on, Article 10:32 paragraph C of the Dutch Civil Code proclaims that a marriage concluded abroad while one of the spouses is below the age of 18 will not be recognised in the Netherlands, unless both spouses have reached the age of 18 in the meanwhile.<sup>9</sup> Consequently, family reunification applications will only acknowledge marriages if both partners are above the Dutch age of consent. Likewise excluded from family reunification are (unmarried) partners below the 18 years of age.<sup>10</sup> As a result, child brides are not able to come to the Netherlands on family reunification grounds. Presumptively, they remain in a situation of war in Syria or in a refugee camp in a neighbouring country, without their husbands, who are likely to be their primary caretakers. In other words, they remain in a particularly vulnerable situation.

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1. Nationaal Rapporteur Mensenhandel en Seksueel Geweld tegen Kinderen, ‘Zicht op Kwetsbaarheid: een Verkennde Onderzoek naar Kwetsbaarheid van Kinderen voor Mensenhandel’ (2016) 47.

2. *ibid.*

3. *ibid.*

4. Council Directive 2003/86/EC on the Right to Family Reunification (22 September 2003) OJ L251/12 (Family Reunification Directive).

5. *ibid* art 4 (5).

6. A Kuiken quoted in A Holligan, ‘Migrant Crisis: Dutch Alarm over Child Brides from Syria’ *BBC News* (The Hague, 20 October 2015).

7. Tweede kamer (2010 – 2011) 32 175, No 17.

8. De Wet Tegengaan Huwelijksdwang (adopted 6 October 2015, entered into force 5 December 2015) *Staatsblad* (2015) 354.

9. *Staatsblad* (2015) 373.

10. Eligible for a Regular Provisional Residence Permit under the scope of family reunification with an asylum seeker, are besides spouses, also unmarried partners who are ‘dependent on the alien [...] to such an extent that he belongs for this reason to the family of this alien’, on basis of Article 29 paragraph 2 sub b of the Aliens Act 2000. Unmarried partners below the age of 18 years are, however, excluded from this family reunification ground, on basis of paragraph C2/4.1 of the Aliens Circular 2000.

This article aims to provide a legal response to this new empirical reality. The article addresses the question whether the Forced Marriage Prevention Act, with its various consequences, is compatible with international human rights standards. The persons in focus of this article are the minor children, chiefly girls, residing outside the territory of the Netherlands, who are not allowed to come over on family reunification grounds. This article does not deal with a potential infringement of the rights of their (adult) spouses.

The article is organised in the following manner. Section II sets out the international legal framework regarding child marriage. The first part of the section explores the definition, causes and consequences of the practice of child marriage. The second part of the section maps the rules of international law addressing child marriage. Thereafter, part three discusses the question whether States have an obligation under international law not to recognise child marriages concluded abroad. Section III focuses on the human rights obligations of States with regard to child brides, once they are within the jurisdiction of a State through an asylum procedure. The first section explores whether the Forced Marriage Prevention Act is in line with the right to respect for family life, as enshrined in Article 8 of the European Convention on Human Rights (1950) (ECHR).<sup>11</sup> The second section discusses if the amendment and its implications are compatible with the prohibition of ill-treatment, as set out in Article 3 of the ECHR.

## Child marriage in the current international legal framework

### *Definition, causes and consequences of child marriage*

A child marriage, also referred to as an early marriage, is defined by treaty bodies and international organisations as '[...] any marriage where at least one of the parties is under 18 years of age'.<sup>12</sup> The overwhelming majority of child marriages involve minor girls, although at times their spouses are below the age of 18 as well.<sup>13</sup> In 2012, the United Nations Children's Fund (UNICEF) reported that almost 400 million women between 20 and 49 years of age have been married before reaching the age of 18.<sup>14</sup> The United Nations Fund for Population Analysis estimates that 100 million girls below the age of 18 will be married in the next decade.<sup>15</sup>

There are various reasons underpinning early marriage, of which poverty and traditional perspectives on gender roles are the most dominant. The UNICEF Innocenti Research Centre claims that poverty is one of the major factors contributing to child marriage, as impoverished families may regard a young girl as an economic burden.<sup>16</sup> Securing her marriage enables the family to transfer the (economic) responsibility for her to others.<sup>17</sup> Child marriages have consequently also

11. Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (European Convention on Human Rights).

12. 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, 7.

13. *ibid.*

14. UNICEF, 'Committing to Child Survival: A Promise Renewed—Progress Report 2012' (2012) 23.

15. UNFPA, 'State of the World Population 2005: The Promise of Equality' (2005) 53.

16. UNICEF Innocenti Research Centre, 'Early Marriage Child Spouses' (2001) Innocenti Digest No 7, 6.

17. R Gaffney-Rhys, 'International Law as an Instrument to Combat Child Marriage' (2011) 15 *The International Journal of Human Rights* 359, 360.

been described as a ‘strategy for economic survival’.<sup>18</sup> Another reason to marry off young girls is the value placed on a girl’s virginity in traditional societies and the perceived need to protect girls from sexual exposure.<sup>19</sup> Moreover, in conflict torn areas parents have also been known to marry off their daughters to members of the militia, in order to ensure protection for the family.<sup>20</sup>

A child marriage generally expects of young girls to enter simultaneously into a sexual relationship, which can be physically and psychologically damaging.<sup>21</sup> Child marriages are often accompanied by early and frequent pregnancies and childbirths, due to the pressure to demonstrate fertility as soon as possible.<sup>22</sup> Early motherhood can affect a girl’s fertility because of medical complications.<sup>23</sup> These early pregnancies result in higher than average maternal morbidity and mortality rates.<sup>24</sup> Pregnancy-related deaths are even the leading cause of mortality for girls between the ages of 15 and 19 around the world.<sup>25</sup> In addition, child marriage generally terminates a girl’s education – thereby bringing into play the right to education –, which potentially creates a power imbalance between spouses, especially in combination with a significant age gap between the partners.<sup>26</sup>

### *The prohibition of child marriage*

In the current international legal framework there are multiple human rights instruments that impose direct or indirect obligations on States where child marriages still occur to ensure the eradication of the practice.

Of special importance with respect to the practice of child marriage are the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)<sup>27</sup> and the Convention on the Rights of the Child (1989) (CRC).<sup>28</sup> Both Conventions belong to the world’s most ratified or acceded human rights treaties.<sup>29</sup> The only global human rights instrument that explicitly prohibits child marriages is the CEDAW.<sup>30</sup> Article 16 paragraph 2 of the Convention proclaims that ‘the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the

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18. *ibid.*

19. *ibid.*

20. *ibid.*

21. *ibid* 361.

22. *ibid.*

23. *ibid* 362.

24. 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, 7.

25. *ibid.*

26. UN High Commissioner for Human Rights, ‘Preventing and eliminating child, early and forced marriage’ (2014) UN-Doc A/HRC/26/22, 9.

27. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 November 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

28. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

29. All countries, with the exception of the United States, Iran, Nauru, Somalia, Sudan and Tonga, have ratified the CEDAW. Only the United States and Somalia have not ratified the CRC.

30. CEDAW art 16 (2).

registration of marriages in an official registry compulsory'.<sup>31</sup> Although the Convention itself does not specify a minimum age for marriage, the treaty-monitoring Committee for the women's Convention calls on countries to legislate a minimum marriageable age of 18 years, for both men and women.<sup>32</sup> Although only the CEDAW expressly prohibits child marriages, the practice is also covered by obligations in other provisions of both the CEDAW and the CRC, as well as in general comments of both treaty-monitoring committees.<sup>33</sup> The CRC defines a child as 'every human being below the age of 18 years'.<sup>34</sup> As a result, adolescents up to 18 years old fall within the scope of the Convention and are the holders of all rights enshrined in it. The 'best interest of the child' principle outlined in the CRC provides an important basis for evaluating the laws and practices of the States Parties with respect to the protection of children.<sup>35</sup> In 2014, the Committee of the CRC together with the Committee of the CEDAW published a joint general comment on harmful practices.<sup>36</sup> The Committees stressed that States are required to establish national legislation with the aim of eliminating harmful practices such as, *inter alia*, child marriages.<sup>37</sup>

Besides the CEDAW and the CRC, early marriages are the subject of various other international human rights treaties.<sup>38</sup> Interesting in the context of this article are the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1957)<sup>39</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).<sup>40</sup>

The UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery implicitly prohibits early marriage, as the Convention

31. *ibid.*

32. UN Committee on the Elimination of Discrimination against Women, 'General Comment No 21: Equality in Marriage and Family Relations' (1994) UN-Doc A/39/38, para 36.

33. CEDAW art 2 and 3; CRC art 2 (2) and 3 (1); 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; Committee on the Rights of the Child, 'General Comment No 13: The Right of the Child to Freedom From all Forms of Violence' (2011) UN-Doc CRC/GC/2011/13 [29]; Committee on the Rights of the Child, 'General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2003) UN-Doc CRC/GC/2003/4, paras 6, 16, 20, 27 and 35.

34. CRC art 1.

35. CRC art 3 (1).

36. 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.

37. *ibid* 7.

38. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) 521 UNTS 231, art 1; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) art 16 (2); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 10 (1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 23 (3); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR) art 17 (3); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 33.

39. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (adopted 30 April 1956, entered into force 30 April 1957) 3822 UNTS 266.

40. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

requires State Parties to abolish certain practices associated with child marriages. For example, under Article 1 paragraph c, the abolition of any institution or practice whereby ‘a women [ . . . ] is promised or given in marriage on payment [ . . . ] to her parents, guardian, family or other person or group’.<sup>41</sup> The payment of a bride price or a dowry is a common characteristic of an early marriage. In addition, Article 2 of the Convention requires States, *inter alia*, to specify a ‘suitable minimum age of marriage’ with a view to eradicate the practice mentioned in Article 1 paragraph c.<sup>42</sup> According to Ruth Gaffney-Rhys, it can be held that the inclusion of a provision relating to a marriageable age in this particular Convention suggests that the UN considers child marriage as a practice similar to slavery.<sup>43</sup> The principle of free, full and informed consent also provides critical insight into the conceptual links that may exist between slavery and child marriage.<sup>44</sup> This is especially so when analysing early marriage from the perspective of sexual abuse and exploitation, considering that both violations may be construed as forms of slavery.<sup>45</sup> The UN High Commissioner for Human Rights states explicitly that forced marriage can under certain circumstances amount to slavery and slavery-like practices.<sup>46</sup> Additionally, the Special Rapporteur on contemporary forms of slavery has drawn links between early marriage and slavery, recalling that Contracting States are obliged to undertake legislative measures to specify the minimum age for marriage.<sup>47</sup>

The Committee against Torture, which interprets and monitors the compliance of State Parties with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has specifically criticised laws that permit child marriage, since this amounts to violence against child brides as well as inhuman and degrading treatment.<sup>48</sup> The Committee has identified child marriage as a harmful practice which leads to the infliction of physical, mental or sexual harm or suffering and negatively affects the capacity of victims to realise the full range of their rights.<sup>49</sup> According to the Special Rapporteur on torture and other cruel or inhuman or degrading treatment or punishment in a recent report, child marriage constitutes torture or ill-treatment, especially where governments fail to establish a minimum age for marriage that complies with international standards or allow child marriage despite the existence of such laws.<sup>50</sup> The Special Rapporteur highlights the obligation of States to implement and enforce uniform laws that prohibit marriage before the age of 18.<sup>51</sup>

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41. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (adopted 30 April 1956, entered into force 30 April 1957) 3822 UNTS 266, art 1 (c).

42. *ibid* art 2.

43. R Gaffney-Rhys (n 17) 363.

44. ER Chaudhuri, ‘Thematic Report: Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage’ (2015) 18.

45. *ibid*.

46. UN High Commissioner for Human Rights, ‘Preventing and Eliminating Child, Early and Forced Marriage’ (2014) UN-Doc A/HRC/26/22, 3.

47. *ibid* 5.

48. Centre for Reproductive Rights, ‘Fact Sheet: Accountability for Child Marriage’ (2013) 27.

49. UN High Commissioner for Human Rights, ‘Preventing and Eliminating Child, Early and Forced Marriage’ (2014) UN-Doc A/HRC/26/22, 5; UN Committee Against Torture, ‘Concluding Observations on Bulgaria’ (2011) CAT/C/BGR/CO/4-5.

50. UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2016) UN-Doc A/HRC/31/57, 18.

51. *ibid* 23.

On the regional level States are also encouraged to ensure the eradication of the practice of child marriage. The Parliamentary Assembly of the Council of Europe is deeply concerned with the widespread practice of early marriage.<sup>52</sup> Accordingly, the Assembly urges the national parliaments of the Council of Europe Member States to adapt their domestic legislation so as to fix at or raise to 18 years the minimum statutory age of marriage.<sup>53</sup> Moreover, the Assembly encourages States to refrain from recognising forced marriages and child marriages contracted abroad.<sup>54</sup> Although, interestingly, it highlights that this refrainment of recognition has to be in the 'victims' best interest with regard to the effects of the marriage, particularly for the purpose of securing rights which they could not claim otherwise'.<sup>55</sup>

### *An obligation of non-recognition of child marriages concluded abroad?*

While the prohibition of child marriages under international law is undisputed, the extent of the obligations of third States with regard to child marriages concluded abroad is less straightforward.

As discussed above, Article 16 paragraph 2 of the CEDAW imposes on Member States an obligation not to give legal effect to child marriages. This legally binding State obligation can be interpreted as an obligation of non-recognition of child marriages concluded abroad. In addition, as set out in the previous section, the Parliamentary Assembly of the Council of Europe adopted a resolution on forced marriages and child marriages in which it urges the national parliaments of the Council of Europe Member States to adapt their domestic legislation so as to refrain from recognising child marriages concluded abroad.<sup>56</sup> Although the resolution as such is not binding, the significance lies in the political impact of the Assembly's resolutions.

Outside the context of third State obligations specifically relating to child marriage, it could be argued that the general principle of non-recognition of breaches of peremptory norms as laid down in Article 41 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles on State Responsibility)<sup>57</sup> comes into play when a State is confronted with a child marriage. Article 41 of the ILC Articles on State Responsibility provides that States are under a duty to cooperate to bring an end to any serious breach of a peremptory norm of general international interest and not to recognise the situation created by such a breach as lawful. The obligation of non-recognition, enshrined in Article 41 of the ILC Articles, reflects existing customary international law.<sup>58</sup> It is based on the principle that legal rights cannot derive from an illegal situation; *ex injuria jus non oritur*.<sup>59</sup>

For the obligation to be triggered, two conditions must be fulfilled. First, a breach must concern an obligation arising from a peremptory norm of general interest. In accordance with Article 53 of

52. Council of Europe: Parliamentary Assembly, 'Resolution on Forced Marriages and Child Marriages' (2005) 1468, para 1.

53. *ibid* para 14.

54. *ibid*.

55. *ibid*.

56. *ibid*.

57. ILC Articles on Responsibility of States for Internationally Wrongful Acts (adopted 10 August 2001) UN-Doc A/56/10 (Articles on State Responsibility) art 41.

58. M Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in J Crawford et al, *The Law of International Responsibility* (Oxford University Press 2010) 678.

59. MN Shaw, *International Law* (Cambridge University Press 2014) 338.

the Vienna Convention on the Law of Treaties<sup>60</sup>, a peremptory norm is one which is ‘accepted and recognized by the internationally community of States as a whole as a norm from which no derogation is permitted’. Peremptory norms concern practices that have been prohibited in widely ratified international treaties and conventions and admitting of no exception.<sup>61</sup> The International Law Commission has identified the prohibition of aggression and the illegal use of force, the prohibitions against slavery and slave trade, genocide, racial discrimination and apartheid, the prohibition against torture and the basic rules of humanitarian law and the right to self-determination as *jus cogens* norms.<sup>62</sup> As held in the Commentary of Article 41, such an obligation is owed *erga omnes*.<sup>63</sup> The prohibition of child marriage is as such not recognised as a peremptory norm, and the applicability of the obligation laid down in Article 41 of the ILC Articles to the situation at hand is hence not immediately clear. It could, however, as set out in Section 2.2, be argued that child marriages regularly lead to violations of the prohibitions of slavery and torture, which both *are* recognised as peremptory norms.<sup>64</sup> Although the relation is not one-to-one, it could well be argued that in some cases a child marriage violates the peremptory norms to be free from slavery and torture.

The second condition concerns the ‘seriousness’ of the breach itself.<sup>65</sup> A breach is serious if it ‘involves a gross or systematic failure by the responsible State to fulfil the obligation’.<sup>66</sup> To be regarded as ‘systematic’, the violation should be carried out in an organised and deliberate manner. The term ‘gross’ refers to the intensity of the violation or its effects.<sup>67</sup> There is no procedure in place to determine whether or not a serious breach has been committed.<sup>68</sup> In the context of child marriages concluded abroad, it can be argued that States systematically violate the peremptory norms to be free from slavery and torture, by means of legally recognising child marriages contracted abroad, and subsequently accepting the family reunification applications arising from them.

If both conditions are fulfilled, Article 41 of the ILC Articles describes the particular consequences of these breaches of peremptory norms. Pursuant to Article 41 paragraph 1, States are under a positive duty to make a joint and coordinated effort to counteract the consequences thereof.<sup>69</sup> According to Article 41 paragraph 2, States are under a duty of abstention, which consists of two obligations, namely: i) the obligation not to recognise as lawful situations created by serious breaches and; ii) the obligation not to render aid and assistance in maintaining the

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60. Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 12 January 1980) 1155 UNTS 331, art 53.

61. International Law Commission, ‘Report of the International Law Commission on the Work of its fifty-third Session’ (23 April – 1 June; 2 July – 10 August 2001) UN-Doc A/56/10, 112.

62. International Law Commission, ‘Report of the International Law Commission on the Work of its fifty-third Session’ (23 April – 1 June; 2 July – 10 August 2001) Supplement No 10 UN-Doc A/56/10, 283-284.

63. International Law Commission, ‘Report of the International Law Commission on the Work of its fifty-third Session’ (23 April – 1 June; 2 July – 10 August 2001) UN-Doc A/56/10, 115.

64. *ibid* 113.

65. *ibid* 112.

66. ILC Articles on Responsibility of States for Internationally Wrongful Acts (adopted 10 August 2001) UN-Doc A/56/10 (Articles on State Responsibility) art 40 (2).

67. International Law Commission, ‘Report of the International Law Commission on the Work of its fifty-third Session’ (23 April – 1 June; 2 July – 10 August 2001) UN-Doc A/56/10, 113.

68. *ibid*.

69. *ibid* 114.

situation.<sup>70</sup> The first obligation refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations created or resulting directly from a serious breach.<sup>71</sup> It does not only refer to the formal recognition of such a situation, but also prohibits acts that would indirectly recognise the acts as lawful.<sup>72</sup> The second obligation in paragraph 2 prohibits States from rendering aid or assistance in maintaining an unlawful situation. It extends beyond rendering aid and assistance in the commission of the serious breach itself to the maintenance of the situation created by that breach.<sup>73</sup>

To conclude, since child marriages frequently violates the peremptory norms to be free from slavery and torture it may be arguable that the Netherlands has an obligation of non-recognition of the unlawful situation created and is not allowed to render aid or assistance in maintaining it. However, this argument is tenuous since it relies on the prohibitions of slavery and torture, which are not always involved in child marriages.

## Conflicting human rights obligations

Although it can be argued that the Netherlands has an obligation of non-recognition of child marriages concluded abroad, it is disputable whether the Forced Marriage Prevention Act is in line with other human rights obligations.<sup>74</sup> Of all rights enumerated in treaties, this article will focus on the rights enshrined in the ECHR. The ECHR can be regarded as the prime human rights Convention for the Netherlands. The ECHR system is the strongest of all human rights regimes in its ability to effectively secure compliance and have direct impact on State policies, since the jurisprudence of the European Court of Human Rights (ECtHR) is binding.<sup>75</sup> Alastair Mowbray describes the ECHR adequately as '[...] the most developed and successful system of international legal protection for fundamental human rights in existence'.<sup>76</sup> Section 3.1. will first address the extraterritorial applicability of the ECHR. Subsequently, Section 3.2. explores whether the Forced Marriage Prevention Act is in line with the right to respect for family life as set out in Article 8 of the ECHR. Then, Section 3.3. addresses the possible friction that may arise between the Forced Marriage Prevention Act and the prohibition of ill-treatment enshrined in Article 3 of the Convention.

### *Extraterritorial applicability of the European Convention on Human Rights*

Under general international law, the concept of jurisdiction concerns the power of the State to regulate people, property and circumstances and reflects the basic principles of State sovereignty, equality of States and non-interference in domestic affairs. However, in human rights law the term

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70. *ibid.*

71. *ibid.*

72. *ibid.*

73. *ibid.* 115.

74. However, there will be no conflict between human rights obligations in the strict sense of the definition, since both obligations serve the same purpose: the protection of child brides.

75. ECHR art 46 (2); M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Hart Publishing 2011) 4.

76. A Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (Oxford University Press 2012).

is used to define the pool of persons to which a State ought to secure human rights.<sup>77</sup> Although State jurisdiction is primarily territorial, it may arise extraterritorially as well. The circumstances in which jurisdiction can subsist extraterritorially are, however, less clear and dependent on the specific treaty.<sup>78</sup>

The ECHR contains a prototype jurisdictional clause, providing that the Contracting States shall secure the rights and freedoms defined in the Convention 'to everyone within their jurisdiction'.<sup>79</sup> The case law of the ECtHR distinguishes between two types of situations in which a State has extraterritorial jurisdiction. First, when a State has effective control over foreign territory, it has the obligation to secure the entire range of substantive rights and freedoms of the Convention to the individuals within that area.<sup>80</sup> Second, whenever the State, through its agents, exercises control and authority over an individual residing outside its own territory, the State is under an obligation to secure the rights and freedoms of the Convention that are relevant to the situation of that individual.<sup>81</sup> This is most likely to include the protection offered by Articles 2, 3 and 5 of the ECHR.<sup>82</sup> However, the protection may also extend beyond those provisions, '[ . . . ] perhaps to include some elements of Article 8 depending upon the circumstances of the situation in question'.<sup>83</sup> The second category is of particular relevance within the context of this article. There are various cases in which the ECtHR accepted that the Convention applied to executive or adjudicative measures that were specifically directed at individuals residing abroad.<sup>84</sup> Among others, in *Haydarie and Others v. the Netherlands* the Court expressly discarded the argument that the Convention could not apply because the applicant was outside the jurisdiction of the State refusing to issue the visa.<sup>85</sup> Another interesting case is *Kovaëiè and others v. Slovenia*.<sup>86</sup> The reasoning of the Court indicates that legislative measures that extend to persons residing abroad brings them within the authority and control, and hence jurisdiction, of the State. It is, moreover, noteworthy that the ECtHR has regularly found a violation of a Convention provision in respect of persons residing abroad, without touching upon the issue of jurisdiction.<sup>87</sup> Most of these cases concern measures taken by a Contracting State within its own territory but which produce extraterritorial effects with regard to persons who are at the material time living abroad.<sup>88</sup>

The acceptance or denial of a family reunification application of a minor spouse living abroad seems to be a clear example of a measure that creates a 'jurisdictional link'. Although in the case of a child marriage the minor spouse will most likely be outside the territory of the Netherlands, one could be inclined to conclude that an immigration procedure nevertheless brings him or her within

77. MN Shaw (n 59) 469; M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 32.

78. R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties Special Issue: Parallel Applicability of International Humanitarian Law and International Human Rights Law' (2007) 40 *Israel Law Review* 503, 506.

79. ECHR art 1.

80. *Loizidou v Turkey* app no 15318/89 (ECtHR, 18 December 1996) para 52.

81. *Al-Skeini and Others v the United Kingdom* app no 55721/07 (ECtHR, 7 July 2011) para 137.

82. B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (Oxford University Press 2014) 94.

83. *ibid.*

84. M den Heijer (n 77) 47.

85. *Haydarie and Others v The Netherlands* (decision on admissibility) app no 8876/04 (ECtHR, 20 October 2005) 12.

86. *Kovaëiè and others v Slovenia* (decision on admissibility) app nos 44574/98, 45133/98 and 48316/99 (ECtHR, 9 October 2003) para 5.

87. M den Heijer (n 77) 47.

88. *ibid.*

the jurisdiction of the Netherlands. As a result, the Netherlands is bound by its human rights obligations under the ECHR with respect to minor spouses residing abroad, once it has jurisdiction over them through an asylum procedure.

### *The right to respect for family life*

*‘For immigrants family reunification is a necessity for making family life possible’.*<sup>89</sup>

The protection of family life under the ECHR operates within the framework of Article 8 and Article 12 of the Convention, of which Article 8 of the ECHR occupies the centre ground.<sup>90</sup> Article 8 of the ECHR guarantees the right to respect for private life, family life, home and correspondence. Respect for family life requires a definition of what constitutes a family.<sup>91</sup> The notion of family life used by the Court has developed over time in line with the changing attitudes and customs of European societies.<sup>92</sup> The Court has, *inter alia*, found that a relationship created between two spouses by a lawful and genuine marriage has to be regarded as family life.<sup>93</sup> However, ‘the notion of “family life” in Article 8 is not confined solely to families based on marriage and may encompass other *de facto* relationships’.<sup>94</sup> A *de facto* family life encompasses situations where the applicant shows a degree of personal dependence with relatives which amounts to *de facto* family ties.<sup>95</sup> Relevant factors for the Court when deciding whether a relationship amounts to *de facto* family life are, *inter alia*: ‘whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means’.<sup>96</sup> In considering whether there exists family life it is essential to depend upon the real existence in practice of close personal ties. *De facto* family life receives the same recognition under the Convention as formally established family ties. The Court decides on the existing of family life on a case-by-case basis, which means that it is not possible to enumerate all the *de facto* relationships which constitute family life.<sup>97</sup>

So, while the Netherlands may have an obligation not to recognise child marriages concluded abroad, this does not absolve it from its obligation to assess whether a rejection of a family reunification application is a proportionate interference with family life, where that *de facto* exists. This point was in fact put forward convincingly by Judge Nicolaou in his concurring opinion in *Z.H. and R.H. v. Switzerland*.<sup>98</sup> The case relates to two Afghan applicants who contracted a religious marriage at the time one of them was 14 years old.<sup>99</sup> The Court held that ‘Article 8 of

89. European Commission, Green Paper on the Right to Family Reunification of Third-Country Nationals Living in the European Union (Directive 2003/86/EC) (COM 735 final, 2011) 1.

90. ECHR art 8; art 12.

91. B Rainey, E Wicks and C Ovey (n 82) 335.

92. I Roagna, ‘Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights’ Council of Europe human rights handbooks (2012) 27.

93. *Berrehab v The Netherlands* app no 10730/84 (ECtHR, 21 June 1988) para 21.

94. *Al-Nashif v Bulgaria* app no 50963/99 (ECtHR, 20 June 2002) para 112.

95. D Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57 *International and Comparative Law Quarterly* 87, 92.

96. *X, Y and Z v the United Kingdom* app no 21830/93 (ECtHR, 22 April 1997) para 36.

97. I Roagna (n 92) 27.

98. *ZH and RH v Switzerland* app no 60119/12 (ECtHR, 8 December 2015).

99. *ibid* para 6.

the ECHR could not be interpreted as imposing on a Member State an obligation to recognize a marriage, religious or otherwise, contracted by a 14 year old child'.<sup>100</sup> Although Judge Nicolaou is in agreement with the Court's decision that there has been no violation of Article 8 of the ECHR in the present case, he argues that '[...] the non-recognition of the purported marriage could not exhaust the question of whether the applicants did or did not have a family life together'.<sup>101</sup> In other words, an invalid marriage does not automatically mean that there is no family life for the purpose of Article 8 of the Convention. To substantiate his claim he refers to *Şerife Yiğit v. Turkey*, in which the Court held that the notion of family life is not 'confined solely to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside of marriage'.<sup>102</sup> The concept of family life is, according to Judge Nicolaou, both broader and more open-ended than the Court sets out in *Z.H. and R.H. v. Switzerland*. Consequently, he concludes 'that the relationship between the applicants constituted "family life" within the meaning of Article 8 of the Convention'.<sup>103</sup>

It might very well be the case that certain relationships between two spouses of which at least one is below the age of 18 years enjoy the protection of Article 8 of the ECHR. In particular, when there exists a high level of dependence between the spouses. Such a high degree of dependence of minor girls on their husbands is conceivable in some societies in the Middle East. Marriage is considered in certain societies as a transfer of responsibility from a girl's father to her husband and his family.<sup>104</sup> 'In these systems, the woman is released from the control of the men of her own family upon marriage and becomes subject to the control of her husband'.<sup>105</sup> So construed – although the diversity of reality is of course elusive – the Netherlands can be obliged to recognise a *de facto* relationship between two spouses. That the Netherlands no longer recognises a child marriage concluded abroad as a legal marriage for the purpose of family life does not change the fact that there might exist a *de facto* family life, which enjoys the protection of Article 8 of the Convention.

Although the essential object of Article 8 of the Convention is to protect individuals against arbitrary interference by public authorities, 'there may in addition be positive obligations inherent in an effective "respect" for family life'.<sup>106</sup> The issue in the 'positive obligation approach' is not whether the State has interfered without justification in the family sphere, but whether the State has failed to take the required action to secure the rights of the individual to respect his or her family life.<sup>107</sup> With regard to family reunification under Article 8 of the ECHR, this means that States may have a positive obligation to enable family ties to develop and to take the appropriate measures to reunite the family.<sup>108</sup> The ECtHR treats negative and positive obligations in practice much in the same manner. Hence, States must at all times strike a fair balance between the competing interests

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100. *ibid* para 44.

101. *ibid* 15.

102. *Şerife Yiğit v Turkey* app no 3976/05 (ECtHR, 2 November 2010 ) para 94.

103. *ZH and RH v Switzerland* app no 60119/12 (ECtHR, 8 December 2015) 16.

104. L Holy, *Kinship, Honour and Solidarity: Cousin Marriage in the Middle East* (Manchester University Press 1989) 121; A Abdul-Rahim, 'Palestinian Refugee Children and Caregivers in Syria' in D Chatty et al, *Children of Palestine: Experiencing Forced Migration in the Middle East* (Berghahn Books 2005) 80.

105. L Holy (n 104) 121.

106. *Abdulaziz, Cabales and Balkandali v The United Kingdom* app nos 9214/80, 9473/81 and 9474/81 (ECtHR, 28 May 1985) para 67.

107. G Kleijkamp, *Family Life and Family Interests* (Kluwer Law International 1999) 45.

108. P Boeles et al, *European Migration Law* (Intersentia 2014) 202.

of the community as a whole and the individual.<sup>109</sup> In this respect, a fair balance between, on the one hand, the State's legitimate interest in protecting the public order and the rights and freedoms of others, in this instance of minor spouses, and on the other hand, the interest of the family to reunite on the Contracting State's territory.<sup>110</sup> Although the basic principle is that a State has the primary right to control the entry of non-nationals into its territory<sup>111</sup>, this does not, however, mean that the refusal of a family reunification application can never breach the rights guaranteed in Article 8 of the ECHR.

The State's obligation to admit to its territory relatives of refugee status holders will depend on the particular circumstances of the persons involved.<sup>112</sup> Factors that have to be taken into account, in this context, are 'the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law)'.<sup>113</sup> In *Tuquabo-Tekle and Others v. The Netherlands*, the Court considers that admittance of the foreigner to the territory of the Netherlands was the most adequate way of developing family life of the persons concerned.<sup>114</sup> As a result, by not taking such a decision to admit, the national authorities had failed to meet the positive obligations that Article 8 of the ECHR placed on them. This judgment contains significant similarities with *Şen v. The Netherlands*.<sup>115</sup> In both cases, the Court did not apply the test whether it would be *impossible* for the family to be reunited elsewhere, but it examined whether family reunification on the territory of Contracting State would be the *most adequate means* to develop family life.<sup>116</sup> Although the case law of the Court is not consistent with regard to this issue, it is nonetheless clear that the ECtHR made some considerable steps in the direction of recognising a positive right to family reunification under the Convention.<sup>117</sup>

The denial of a family reunification application, based on the Forced Marriage Prevention Act, has to be necessary in a democratic society, which requires of the Contracting State to show the action is justified by a pressing social need and is proportionate to the aim pursued.<sup>118</sup> The principle of proportionality requires Member States to choose a measure that is suitable to achieve the legitimate aim pursued.<sup>119</sup> The Forced Marriage Prevention Act has the aim 'to prevent forced marriages'.<sup>120</sup> However, the claim that setting a minimum age for marriage, and hence for family reunification of spouses and partners, helps to prevent forced marriages has not been substantiated to date.<sup>121</sup> This is especially true since the Dutch amendment allows child brides to be reunited on family reunification grounds with their husbands once they reach the age of 18 years.

109. *Rodrigues Da Silva v The Netherlands* app no 50435/99 (ECtHR, 31 January 2005) para 39.

110. Tweede Kamer (2012 – 2013) 33 488, No 3.

111. *Tuquabo-Tekle and Others v The Netherlands* app no 60665/00 (ECtHR, 1 March 2006) para 43.

112. *Gül v Switzerland* app no 23218/94 (ECtHR, 1 February 1996) para 38.

113. *Rodrigues Da Silva v The Netherlands* app no 50435/99 (ECtHR, 31 January 2005) para 39.

114. *Tuquabo-Tekle and Others v The Netherlands* app no 60665/00 (ECtHR, 1 March 2006).

115. *Şen v The Netherlands* app no 31465/96 (ECtHR, 21 December 2001).

116. P Boeles et al (n 108) 228.

117. *ibid* 229.

118. *Mehemi v France* app no 25017/94 (ECtHR, 26 September 1997).

119. A Kaczorowska-Ireland, *European Union Law* (Routledge 2016) 648.

120. Government of the Netherlands, 'Tackling Forced Marriage' <<https://www.government.nl/topics/forced-marriage/contents/tackling-forced-marriage>> accessed 9 April 2017.

121. P Boeles et al (n 108) 134.

Consequently, it remains indistinct whether the amendment is truly suitable to attain the aim of *preventing* forced marriages. Rather, it seems as though the amendment is in particular suitable to prevent the consummation of a child marriage on Dutch territory. Interesting in this respect is the judgment of the Supreme Court of the United Kingdom that ruled that the British government's ban on granting marriage visas to non-EU spouses under 21 years of age, with the aim of preventing forced marriages, is an infringement of family life under Article 8 of the ECHR. This is because the amendment fails to demonstrate that it is a proportionate response to a pressing social need.<sup>122</sup> Moreover, the European Commission, too, posed questions about the alleged relation between forced marriages and the rules on family reunification, in particular the age requirement.<sup>123</sup>

Assuming for a moment that the Forced Marriage Prevention Act is nevertheless suitable to achieve the given object, the ECtHR has developed a balancing test, weighing the State's interests against the family's interest in family unity.<sup>124</sup> It has been argued that the balancing test should in the case of refugees by definition be weighed in favour of refugee status holders and their families.<sup>125</sup> A decisive consideration of the balancing test is whether there are insurmountable obstacles to enjoy family life in the country of origin. Since a refugee is by definition involuntarily removed from his or her country of origin – 'there are no voluntary refugees' – it is evident that there are in his or her country of origin significant difficulties to enjoy family life.<sup>126</sup> Although the Convention does not guarantee the right to family life in a particular country, it seems to guarantee an effective family life as such, no matter where.<sup>127</sup> However, in the refugee context the host country is often the only country in which the enjoyment of family life is possible. In *Boultif v. Switzerland*, the Court decided there had been a serious impediment to family life, 'since it is practically impossible for him [the applicant] to live his family life outside Switzerland'.<sup>128</sup> This is especially true when someone has been granted refugee status under the Convention Relating to the Status of Refugees<sup>129</sup>, since this *ipso facto* means that the applicant is legally recognised as not having a safe country of origin. As Mark Rohan conveniently summarises: 'The refugee fulfils this balancing test, given the necessary implications of refugee under the Convention Relating to the Status of Refugees and factors upon which the European Court of Human Rights has put weight in family reunification cases'.<sup>130</sup>

If the interests of the individuals outweigh those of the State, this results in a positive obligation on the Netherlands to allow, in certain situations, a child bride on its territory on family reunification grounds for the purpose of Article 8 of the ECHR. Consequently, the denial

122. *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 (SCUK, 11 October 2011).

123. European Commission, Green Paper on the Right to Family Reunification of Third-Country Nationals Living in the European Union (Directive 2003/86/EC) (COM 735 final, 2011) 3.

124. M Rohan, 'Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence' (2014) 15 *Chicago Journal of International Law* 347, 347.

125. *ibid* 350.

126. Unaccredited but quoted in K Röhl, 'New issues in Refugee Research' Working Paper No 111 Evaluation and Policy Analysis Unit United Nations High Commissioner for Refugees (2005) 2.

127. B Rainey, E Wicks and C Ovey (n 82) 355.

128. *Boultif v Switzerland* app no 5427/00 (ECHR, 2 August 2001) para 55.

129. Convention Relating to the Status of Refugees (adopted 14 December 1950, entered into force 22 April 1954) 189 UNTS 137.

130. M Rohan (n 124) 347.

of a family reunification application in those circumstances violates the right to respect for family life.

### *The prohibition of ill-Treatment*

Article 3 of the ECHR proclaims the prohibition of ill-treatment in absolute terms, stating that ‘no one shall be subjected to torture or inhuman or degrading treatment or punishment’.<sup>131</sup> It is, however, particularly difficult to pinpoint the precise scope and meaning of the prohibitions enshrined in the article.<sup>132</sup> From the preparatory works can be inferred that Article 3 of the ECHR was conceived ‘so broad as to embrace all forms of torture or inhuman treatment’.<sup>133</sup> Nowadays, the prohibition covers a plethora of different forms of treatment, and can even encompass certain circumstances such as detention conditions.<sup>134</sup> The threshold for application ‘depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim’.<sup>135</sup>

Although the prohibition of ill-treatment is primarily a negative obligation, States should in addition take positive measures to ensure the effective enjoyment of the Convention’s rights and freedoms.<sup>136</sup> As a consequence, States are obliged to take appropriate steps to safeguard the people within their jurisdiction against ill-treatment.<sup>137</sup> For example, by way of adopting preventive measures and mechanisms which protect individuals – in particular children and other vulnerable persons – from inhuman treatment.<sup>138</sup> Under the positive obligation doctrine, States are obliged to undertake reasonable steps to prevent ill-treatment of identifiable individuals of which the authorities had or ought to have had knowledge of.<sup>139</sup> This requirement is irrespective of whether ill-treatment stems from private persons, State organs or from naturally occurring illnesses.<sup>140</sup> In addition, this duty to protect is apt to apply regardless of territorial boundaries, as long as an individual is within the jurisdiction of a Contracting State.<sup>141</sup> For engaging a State’s protective duty, neither the form or manner in which the risk materialises is decisive, nor the manner in which a State can negate this risk. The conclusive criterion is whether a State has taken the appropriate steps and preventive measures to remove the risk of ill-treatment, or at least alleviate that risk to such a level that it is no longer ‘real’ or ‘immediate’.<sup>142</sup> However, what the exact limits of the positive obligations are remain unclear.<sup>143</sup> It is not excluded that the restricted practical and legal

131. ECHR art 3.

132. A Cassese, ‘Prohibition of Torture and Inhuman or Degrading Treatment or Punishment’ in A Cassese et al (ed), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008) 295.

133. *ibid* 297.

134. *MS v The United Kingdom* app no 24527/08 (ECtHR, 3 May 2012) para 45; *Güveç v Turkey* app no 70337/01 (ECtHR, 20 January 2009) para 98; *Peers v Greece* app no 28524/95 (ECtHR, 19 April 2001) para 75.

135. *Kudła v Poland* app no 30210/96 (ECtHR, 26 October 2000) para 91.

136. *Moldovan and Others v Romania* app nos 41138/98 and 64320/01 (ECtHR, 12 July 2015) para 98.

137. *ibid*.

138. *Z and Others v The United Kingdom* app no 29392/95 (ECtHR, 10 May 2001) para 73.

139. *Dordević v Croatia* app no 41526/10 (ECtHR, 24 July 2012) para 138.

140. *Z and Others v The United Kingdom* app no 29392/95 (ECtHR, 10 May 2001) para 73; M den Heijer (n 77) 148.

141. M den Heijer (n 77) 149.

142. *ibid*.

143. NS Rodley, ‘Integrity of the Person’ in D Moeckli et al (ed), *International Human Rights Law* (Oxford University Press 2014) 183.

capabilities of States in certain foreign situations may '[...] inform (or displace) the substance (or material scope) of a State's protective duties'.<sup>144</sup>

Since Article 3 of the ECHR is designed to secure a life in dignity, it is not ruled out that it is possible to apply the provision to cases concerning severe social and economic conditions.<sup>145</sup> This can result from, *inter alia*, a lack of shelter, a proper diet, adequate medicine and medical care as well as the absence of social support.<sup>146</sup> In the *V.M. and others v. Belgium*, the Court also took into account that the applicant's situation aroused in them feelings of fear, anguish or inferiority capable of inducing desperation.<sup>147</sup> Important in this respect is *M.S.S. v. Belgium and Greece*, where the ECtHR found a violation of Article 3 of the Convention concerning the living conditions of an Afghan asylum applicant in Greece.<sup>148</sup> The Court observed in the case that Article 3 of the Convention obliges Member States under positive law 'to provide accommodation and decent material conditions to impoverished asylum-seekers'.<sup>149</sup> The Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, 'a member of a particularly underprivileged and vulnerable population group in need of special protection'.<sup>150</sup> In *Tarakhel v. Switzerland*, the Court added that the requirement of 'special protection' of asylum seekers is even more compelling when the persons concerned are children.<sup>151</sup> The Court considers in *M.S.S. v. Belgium and Greece* that the applicant's situation is particularly severe; living months in a state of extreme poverty, unable to cater for his most basic needs such as food, hygiene and a place to live, an ever-present fear of being attacked and a total lack of likelihood of his situation improving.<sup>152</sup> As a result thereof, the Court considers that the asylum applicant has been 'the victim of humiliating treatment showing a lack of respect for his dignity'.<sup>153</sup> Consequently, the ECtHR ruled that the living conditions attained such a level of severity to fall within the scope of Article 3 of the ECHR.<sup>154</sup> In the light of the above, it could well be argued that the attained level of severity required to fall within the scope of the Convention might be reached in situations of severe living conditions.

In the light of the previous section, it is questionable whether the Netherlands complies with its positive obligations under Article 3 of the Convention, with respect to child brides whose family reunification application has been rejected. Of course, the living conditions of the child brides to whom the Dutch legislation may apply differ from case to case. However, there are three conceivable problematic scenarios. First, the child bride remains in a situation of war in Syria. Second, she lives in a refugee camp in a neighbouring country where living conditions have attained such a level of severity to fall within the scope of Article 3 of the ECHR. Third, although the living conditions in the refugee camp are generally of a sufficient level, she may stay at the refugee camp without protection of her family, since a marriage is considered in certain societies in the Middle

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144. *M den Heijer* (n 77) 150.

145. *K Röhl* (n 126) 21.

146. *ibid* 22.

147. *VM and others v Belgium* (Chamber) app no 60125/11 (ECtHR, 7 July 2015) para 162.

148. *MSS v Belgium and Greece* app no 30696/09 (ECtHR, 21 January 2011).

149. *ibid* para 250.

150. *ibid*.

151. *Tarakhel v Switzerland* app no 29217/12 (ECtHR, 4 November 2014) para 119.

152. *MSS v Belgium and Greece* app no 30696/09 (ECtHR, 21 January 2011) para 254.

153. *ibid* para 263.

154. *ibid*.

East as a transfer of responsibility from the girl's family to her husband. For example, in the *Za'atari* refugee camp in Jordan the majority of Syrian girls feel unsafe.<sup>155</sup> One-fifth of the households even reported that girls never went outside the house at all due to security concerns.<sup>156</sup>

In sum, whether the situation of the child brides is incompatible with Article 3 of the ECHR depends on various factors. Therefore, it is impossible to infer a general claim that all situations of child brides who are not allowed to come over to the Netherlands on family reunification grounds reach the attained level of severity. It is, however, not inconceivable that some situations do. It is in this context that it can be argued that the Netherlands violates the rights of child brides under Article 3 of the ECHR, since it does not adequately protect these minor girls against the severe consequences of the denial of their family reunification application. Interestingly, the Dutch State Secretary of Security and Justice acknowledged this potential danger for minor spouses. The State Secretary stated that the minimum age for a Regular Provisional Residence Permit in the context of family reunification with an asylum seeker was not raised to 21 years of age for an unmarried partner, which is the case in a regular family reunification procedure, since the unmarried partner in the refugee context may find oneself in an unsafe situation in the country of origin.<sup>157</sup> The State Secretary thereby recognised the potential hazard for child brides whose family reunification application has been rejected.

## Conclusions

While it is arguable that the Netherlands has a duty not to recognise a child marriage concluded abroad, it is disputable whether the Forced Marriage Prevention Act is in line with other human rights obligations. This article analysed whether in certain situations the rights of child brides are violated under Articles 8 and 3 of the ECHR, if their family reunification application is denied. Although the child bride is most likely residing outside the territory of the Netherlands, a family reunification procedure brings her nevertheless within its jurisdiction, and as such within the sphere of the ECHR. Once the Netherlands is exercising extraterritorial jurisdiction over child brides, other human rights obligations may come into play.

First, Article 8 of the Convention: the right to respect for family life. Although the Netherlands no longer recognises child marriages concluded abroad as legal marriages, this does not change the fact that there might exist a *de facto* family life between the minor spouse and her husband, which enjoys protection under Article 8 of the Convention. If the relationship falls within the scope of Article 8 of the ECHR, this imposes on the Netherlands a mix of both negative and positive obligations. The Netherlands must at all times strike a fair balance between, on the one hand, its legitimate interest in protecting the public order and the rights and freedoms of others, and on the other hand, the interest of the family to reunite on the Contracting State's territory. A fulfilment of the balancing test in favour of the minor spouse may result in a positive obligation on the Netherlands to allow him or her on its territory on family reunification grounds. Consequently, the denial of a family reunification application, as a result of a consistent application of the Forced Marriage Prevention Act, could potentially establish a violation of the right to respect for family life.

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155. UN Women, *Inter-Agency Assessment: Gender-Based Violence and Child Protection among Syrian Refugees in Jordan, with a Focus on Early Marriage* (2013) 23.

156. *ibid.*

157. *Staatscourant* (2015) 19.

Second, Article 3 of the Convention: the prohibition of ill-treatment. The Netherlands is obliged under Article 3 of the ECHR to take positive steps to safeguard the people within its jurisdiction against ill-treatment. This duty to protect applies irrespective of whether the person is within the territorial boundaries of the Contracting State or not. It is in this context that an argument can be made that the Netherlands violates the rights of child brides under Article 3 of the ECHR, since it does not adequately protect these minor girls against the severe consequences of the denial of their family reunification application. Whether the living conditions of the child brides who are not allowed to come over to the Netherlands reach the level of severity for the purpose of Article 3 of the Convention, differs from case to case. However, it is arguable that in some situations that level is reached.

It goes without saying that this analysis and conclusion are not limited to the Dutch Forced Marriage Prevention Act, but are likewise applicable to the legislations of other Member states, containing an age requirement for family reunification. Of special interest in this context is the legislative draft that the German Government presented on 17 February 2017.<sup>158</sup> The centrepiece of the recent draft is the automatic and strict non-recognition of marriages concluded outside of Germany by persons under the age of 16 years, and marriages of minors between the ages of 16 and 18 years will only be recognised if severe negative consequences may otherwise occur.<sup>159</sup>

### **Author Notes**

LLM graduate and MA student Cultural and Social Anthropology, University of Amsterdam, the Netherlands. The article was originally written as a Master thesis but on advice of my supervisors, Rosanne van Alebeek and Yvonne Donders, reworked into this article. The author would especially like to thank Rosanne for her indispensable comments and suggestions for the article as well as the thesis.

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158. Bundesrat, 'Entwurf eines Gesetzes zur Bekämpfung von Kinderehen' <<http://dipbt.bundestag.de/dip21/brd/2017/0275-17.pdf>> accessed 9 April 2017.

159. J von Hein, 'Germany: Legal Consequences of the Draft Legislation on Child Marriages' <<http://conflictoflaws.net/2017/germany-legal-consequences-of-the-draft-legislation-on-child-marriage/>> accessed 9 April 2017.