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# THE BEST INTERESTS OF REFUGEE GIRLS VICTIMS OF FORCED MARRIAGE IN THE EUROPEAN JUSTICE: FAMILY REUNIFICATION AND PRIVATE LIFE



## 1. *Introduction*

This contribution presents an analysis of two European cases-law on the right to family reunification and the right to private and family life of girls who are victims of gender-based violence through child marriages. It addresses, as a research problem, the dilemma between combating child marriages and recognizing the private lives of refugee girls. It poses the question of whether, according to the Individual Child Model approach, it might be advisable in some cases to acknowledge child marriage in the best interests of minors, allowing them to exercise their right to privacy and family life.

The starting point being the phenomenon of child marriages, a legal perspective will be offered from the main international and regional European instruments to fight against this form of violence. In addition, it provides the view of part of the doctrine in relation to overcoming the cultural component imbricated in this type of gender-specific violence against girls in order to avoid xenophobic narratives.

The second section presents the method of analysis consisting of the Model of individual child (MIC), which will guide the analysis of the jurisprudence.

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Thirdly, it analyzes two European cases-law, on the one hand, the pronouncement of the Court of Justice of the European Union on the interpretation of the Family Reunification Directive, in a case of a minor refugee victim of child marriage whose mother wanted to join her in Belgium. The question referred for a preliminary ruling revolved around the concept of family in cases where the applicant is a married minor. On the other hand, a case was brought before the European Court of Human Rights concerning a possible violation of Article 8 by Switzerland, having expelled an asylum seeker married to a minor, who is recognized as a refugee in Switzerland. The analysis of the jurisprudential cases uses a MIC approach based on the specific needs of the two minors involved.

Finally, some reflections are presented that revolve around the idea of family that is protected in the European context and how these limits or not the exercise of the right to family reunification and the right to private and family life of refugee girls who are victims of child marriage located in Europe.

## 2. *Forced child marriage: a multilevel human right issue*

Child marriage represents a persistent human rights challenge that has been repeatedly discussed. Despite existing international agreements and theoretical reflections on the subject, unfortunately, this practice continues to prevail globally. In 2021, the United Nations Children's Fund (UNICEF) estimated that around 650 million of the world's girls were married before the age of 18[1].

### 2.1. *Legal framework of child marriage as human right violation*

The UN Convention on the Rights of the Child urges States Parties to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children[2]. The same prohibition is contained in Article 23 of the International Covenant on Civil and Political Rights[3] and of the International Covenant on Economic, Social and Cultural Rights in article 10, paragraphs 1 and 3, read together [4].

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[1] UNICEF, *Towards ending child marriage: global trends and profiles of progress*, New York, 2021, p. 12. Available at: https://data.unicef.org/resources/towards-ending-child-marriage/.

[2] UNGA Resolution 44/25, *Convention on the Rights of the Child*, 20 November 1989.

[3] UNGA Resolution 2200 A (XXI), *International Covenant on Civil and Political Rights*, 16 December 1966. Article 23, fourth paragraph, provides: «States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children».

[4] UNGA Resolution 2200 A (XXI), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. Article 10 is reproduced here: «The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.; 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits; 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or

The United Nations General Assembly, in its Resolution 75/167 in December 2020, recalled that child, early and forced marriage constitutes a transgression of fundamental rights that stems from gender disparities and discriminatory cultural and social norms that subjugate women and girls to men. Ancient traditions are often invoked to legitimize these harmful practices, overlooking the discrimination and violence they engender, which in themselves represent serious human rights violations and manifestations of gender-based violence[5]. The United Nations Human Rights Council, in its Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, focused on forced child marriage as a form of slavery[6]. The exploitation and coercive control characteristic of both child marriage and modern slavery transcend religions, cultures, regions, and borders, as stated in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of September 7, 1956[7]. In addition, the 2030 Agenda developed by the United Nations, has marked as one of the targets of the fifth goal «Achieve gender equality and empower all women and girls», to eliminate all harmful practices such as child, early and forced marriage and female genital mutilation[8].

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Article 16.2 stablishes that the child marriage «shall have no legal effect»[9]. It warns States to take all necessary measures, including legislative measures, to set a minimum age for marriage and to make the registration of marriages in an official registry compulsory[10]. CEDAW refers to the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[11]. In its General Recommendation 21 on equality in marriage and family relations, the CEDAW Committee considers that the minimum age of marriage should be 18 years[12]. The CEDAW Committee, together with the Committee on the Rights

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dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law».

[5] UNGA, Resolution 75/167, *Child, early and forced marriage*, 16 December 2020, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/457/05/PDF/N2245705.pdf?OpenElement.

[6] Human Rights Council, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, 10 July 2012, A/HRC/21/41, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-41-Corr1_en.pdf.

[7] United Nations Economic and Social Council, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Resolution 608 (XXI) of 30 April 1956. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/supplementary-convention-abolition-slavery-slave-trade-and.

[8] Target 5.3.

[9] *Convention on the Elimination of All Forms of Discrimination against Women,* New York, 18 December 1979, article 16.2.

[10] The CEDAW uses the word "child" not "early". In this sense, the European Institute for Gender Equiality defines "child marriage" as «Legal or customary union between two people where at least one of the parties is below the age of 18»; and "early marriage" as «Marriage of individuals whose level of physical, emotional, sexual and psychosocial development makes them unable to freely and fully consent to marriage». Other texts such as the Report of the Office of the United Nations High Commissioner for Human Rights, Prevention and Elimination of Child, Early and Forced Marriage, examine the prohibition of both child and early marriages. See Human Rights Council, *Preventing and eliminating child, early and forced marriage. Report of the Office of the United Nations High Commissioner for Human Rights*, 2 April 2014, A/HRC/26/22, available at: https://www.ohchr.org/en/calls-for-input/2014/report-child-early-and-forced-marriage.

[11] UNGA resolution 1763 A (XVII), *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 07 November 1962. Available at: https://www.ohchr.org/es/instruments-mechanisms/instruments/convention-consent-marriage-minimum-age-marriage-and.

[12] Cedaw Committee, *General Recommendation 21 on equality in marriage and family relations*, 4 February 1994, available at: https://www.refworld.org.es/docid/5d7fc3885.html.

of the Child, determined in their Joint Recommendation No. 31 that child marriages are a form of forced marriage since at least one of the two parties has not expressed free and informed consent[13]. This Joint general Recommendation recommend that:

> « […] the States parties to the Conventions adopt or amend legislation with a view to effectively addressing and eliminating harmful practices. In doing so, they should ensure (f) That a minimum legal age of marriage for girls and boys, with or without parental consent, is established at 18 years»[14].

In the same sense, the Resolution of the United Nations General Assembly of December 23, 2020 about «Child, early and forced marriage» stablishes:

> «Calls upon States to enact, enforce and uphold laws concerning a minimum age of marriage, to monitor their application and to progressively amend laws with lower minimum ages of marriage and/or ages of majority to 18 and engage all relevant authorities to ensure that these laws are well known»[15].

Child marriage is always forced, and so far violates, among other rights, the right to life, liberty and security (art. 3 UDHR); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 5 UDHR); the principle of equality before the law and the right to equal protection of the law (art. 7 UDHR); the right to recourse to an impartial tribunal (arts. 8 and 10 UDHR); the right to freedom of movement (art. 13 UDHR), freedom of assembly and association (art. 20 UDHR), health (art. 25 UDHR), the right to education (art. 26 UDHR). Forced marriage is a violation of the human rights contained in the UDHR as well as in other international human rights conventions[16]. This violation of girl's rights reaches a level of severity such that it constitutes persecution within the meaning of International Refugee Law.

Within the Council of Europe, the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[17] devotes several articles to the condemnation of forced marriages. The Istanbul Convention urges States to ensure that forced marriages can be annulled, or dissolved without imposing excessive financial or administrative burdens on the victim (Article 32); to make it a criminal offense in national legal systems (Article 37); urges that States recognize forced marriages as a form of gender-based violence that can be classified as a form of persecution within the meaning of Article 1, A (2) of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary or subsidiary protection (Article 60). The Parliamentary

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[13] Cedaw Committee, Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices*, available at: https://www.ohchr.org/en/documents/general-comments-and-recommendations/joint-general-recommendation-no-31-committee.

[14] *Ibid.* para 55, letter f.

15 UNGA resolution A/RES/75/167, *Child, early and forced marriage*, 23 Dec. 2020, available at: https://digitallibrary.un.org/record/3896027?v=pdf&ln=en.

[16] E. DÍEZ PERALTA, *El matrimonio infantil y forzado en el Derecho internacional*, Tirant lo Blanch, 2019; S. MORÁN BLANCO, *Una cuestión de derechos humanos: las prácticas nocivas descritas en la meta 5.3. de la Agenda 2030: el matrimonio infantil, precoz y forzado, y la mutilación genital femenina*, in *Anuario Español de Derecho Internacional*, 2022

[17] Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, Istanbul 2011. available at: https://rm.coe.int/168008482e.

Assembly of the Council of Europe in its Resolution 2233 (2018)[18], urges States again to recognize forced marriage as a ground for protection (7.8.); as well as to refrain from recognizing forced marriages contracted abroad, but, where it is in the best interests of the victim, to recognize the effects of the marriage to the extent that this enables the victim to secure rights that they would not otherwise be able to claim (7.9). Forced marriages of girls always constitute gender-based violence in accordance with the CEDAW and the Istanbul Convention, as it is a violation of human rights that women and girls suffer disproportionately more.

### 2.2. *Empirical bases of child marriage as human right violation*

Due to the Taliban takeover of Kabul in August 2021, and the state of extreme violation of human rights in the genocidal sense in the Palestinian territory, forced marriages of Afghan and Palestinian girls are taking place. According to NGO Girls not Brides, 28% of Afghan girls are married before the age of 18 and 4% are married before their 15th birthday[19]. On the other hand, prior to the latest aggressions by the State of Israel against the population of Gaza, especially against the youth,[20] which continue since October 2023, child marriages rates were worrisome. Girls not Brides pointed out a rate of 13% of Palestinian girls are married before the age of 18 and 1% are married before their 15th birthday[21]. Those two countries are mentioned and developed because the paper is going to deal with two law cases, one related to a Palestinian girl and another one related to an Afghan girl.

Afghanistan and Palestine are not the only territories where this phenomenon is occurring: India, Bangladesh, Nepal, Nigeria, Ethiopia, Democratic Republic of Congo and Mali legitimize the celebration of forced marriages[22]. As of January 2019, 170 states had enacted laws setting the minimum age of marriage at 18, but only 34 of them did not include exceptions to this rule[23]. Moreover, there are significant influences that complicate the implementation of such legislation. For example, unions with minors may be authorized with parental consent or through judicial approval. In addition, customary or religious laws persist that permit marriage to persons under the age of 18, and there is social acceptance of informal unions[24].

This contribution will not dwell on the reasons why forced marriages occur around the world. Forced marriages occur because of a combination of economic and social elements[25]. To sum it up, a forced marriage may be imposed by a cultural tradition, or it may

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[18] Parliamentary Assembly of the Council of Europe, *Resolution 2233 (2018) Forced marriage in Europe*, 2018, available at: PACE website (coe.int).

[19] Girls not Brides, *Child marriage Atlas, Afghanistan,* available at: https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/afghanistan/.

[20] Special Rapporteur on the situation of human rights in the Palestinian territories, 55th session of the UN Human Rights Council in Geneva, available at: https://news.un.org/es/story/2024/03/1528636.

[21] Girls not Brides, *Child marriage Atlas, Palestine,* available at: https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/palestine/.

[22] Women for Afghan Women, *Atlas of forced marriages in the world*: https://atlas.girlsnotbrides.org/map/

[23] WORLD Policy Analysis Center, *Child Marriage*, WORLD database, available at: www.worldpolicycenter.org/topics/child-marriage/policies.

[24] Save the Children, *Preventing Responding to Child, Early, and Forced Marriage and Unions*, Technical Guidance, 2021.

[25] Committee on Equality and Non-Discrimination, *Gender Equality and Chiald Maintanance*, Doc. 14499, November 2015 (2017 second part), available at: https://pace.coe.int/en/files/24279/html.

be the result of a family's economic survival strategy[26]. The purpose of this gender-based violence against girls is to ensure that they retain their virginity before marriage and a long period of fertility in order to produce offspring. This leads to forced pregnancies on the part of girls, thus decreasing their life expectancy. In case the girl opposes this situation, she will be the victim of physical and psychological violence[27].

From the literature, a relevant point Cisneros Avila alludes to is, in condemning forced marriages, the aim is to avoid the category "tradition" to frame the practice of forced marriages because this develops a narrative in which gender violence is attributed to "backward cultures" and, therefore, can either divert attention from other, more specific factors or feed a racist narrative that treats cultures as monolithic and immutable, and establishes a hierarchy between cultures[28]. In the same vein, Anitha and Gill point out the dangers of approaching the phenomenon of forced marriage from essentialist approaches that may: (i) associate the problem of forced marriage with family reunification processes, which links the control of these marriages with migration control; (ii) perceive forced marriage as a cultural issue and link it to the idea of problematic cultures; (iii) confuse forced marriage with arranged marriage; (iv) reject any form of marriage that does not conform to the socially constructed model of romantic love; and (v) increase hostile attitudes towards minorities, while fostering the invisibility of similar forms of violence perpetrated by members of the dominant culture[29].

The connection between various forms of gender-based violence and migration status is best understood through a complex and multifaceted relationship that operates at several

[26] It is very common that in countries where forced marriage is still practiced, the cost of living associated with raising a girl child is higher than that of a boy child. In northern Ghana, the 1992 Republican Constitution of Ghana does not expressly prohibit the forced marriages (it refers to some human rights, women's rights and children's rights and it considers. Instead, some national legislation (The Children's Act and the Criminal Code) emphasizes the right of the children against to the unlawful act of forced married. Forced marriages are a way for some families to escape poverty and to ensure their daughters a certain level of education. On this subject, see: E. ALHASSAN, *Early marriage of young females: a panacea to poverty in the northern region of Ghana*, in *Research on humanities and social sciences* 3, 2013, pp. 18-30: «Early marriage before the age of 18 years in Ghana is a violation of a constitution of Ghana and a number of international human rights conventions». Alhassan is supposed to affirm that the customary practice of forced married in Ghana is not consistent with the text and spirit of the Constitution/national legislation. The EUAA warns in its 2022 Report on the situation of refugees in the EU that displaced families sometimes sell their daughters to other families to secure a better future. Among IDPs and refugees, forced and child marriages are practiced as a way to reduce the family's economic hardship. There are also reports of cases where girls are forced into "temporary marriage", practiced as a tool to facilitate prostitution. See EUAA, Guide 2022, available at: Foreword | European Union Agency for Asylum (europa.eu). On the non-legal factors contributing to the ineffectiveness in the condemnation and prosecution of forced marriages: S. DARAKHSHAN KISHWAR, *The persisting menace of child marriage: an account of non-legal factors contributing to ineffectiveness of legal frameworks*, in *The Age of Human Rights Journal, 19* (December 2022), pp. 93-199.

[27] It was recently reported that Anisa and Uruj Abbas, two Pakistani national sisters aged 21 and 24, were tortured to death for their refusal to enter into a forced marriage with two relatives. The sisters were lured to Pakistan from Spain, where they were living. In Pakistan, their male relatives strangled them and shot them twice to death. News source: EL CORREO, *Tortured to death for breaking off their marriages: Terrasa sisters traveled to Pakistan under false pretenses*, May 25, 2022, available at: https://www.elcorreo.com/sociedad/sucesos/hermanas-terrasa-estranguladas-20220524170004-nt.html.

[28] F. CISNEROS ÁVILA, *Violencia de género y diversidad cultural el ejemplo de los matrimonios forzados*, in *Revista Penal*, 2018, pp. 43-55.

[29] S. ANITHA, A. GILL, *A moral panic? The problematization of Forced Marriage in Brithis newspapers*, in *Violence Against Women,* 2015, p. 1123-1144.

interconnected levels[30]. Nussbaum, for her part, in relation to the rights of women and girls, argues strongly that brutal and oppressive discrimination based on race is considered unacceptable in the global community; but brutal and oppressive discrimination on the basis of sex is often seen as a legitimate expression of cultural differences[31]. According to Thiara, the practice of forced marriage constitutes an extreme abuse of rights that must be understood as a phenomenon influenced by the intersections of various systems of domination: race, ethnicity, social class, culture or nationality[32]. For this reason, the intersectional approach emerges as a framework that seeks to ensure that culture and religion do not assume a monopolistic role, although without denying their influence as determinants of this form of gender-based violence[33]. In the intersectional approach, the minority age of girls who are victims of forced marriage is a vulnerability element to be considered, which is why the Model of Individual Child will be presented below in its application to cases of forced marriages.

## 3. *Model of individual child in child marriages cases*

The concept of MIC is useful for the analysis of this research because through it this research intends to avoid the risk of automatically categorizing as negative any aspect considered "traditional". Instead, the MIC allows focusing the analysis of the dilemma posed in this paper (prohibition of forced marriages vs. recognition of refugee girls' family life) through the social and legal contexts that tolerate child marriages. The MIC approach seeks to understand the specific circumstances of each child, recognizing that practices considered traditional may vary in their impact according to the social, cultural, and legal context in which they take place.

The notion of vulnerability on which the protection of girls from child marriage hinges contains a crucial element of accountability, which connotes special responsibilities of public authorities. This implies that public decision-making must reflect a child-centred position to care for the needs and rights of children whose lives are affected by our actions. This responsibility must be exercised under the ICM paradigm to identify the best interests of child victims of forced marriage in the protection of their right to reunification and to private and family life.

MIC is a methodological approach developed by Krutzinna that focuses on the child as the study centre[34]. This method was developed in order to ensure that any action or decision taken is in line with the best interests of the child in question, it is crucial to overcome the limitation of a comprehensive understanding of exactly who "the child" is. She argues that from the principle of the best interests of the child as promulgated in Article 3 of the

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[30] S. PARELLA, B. GÜELL, P. CONTRERAS, *Los matrimonios forzados como una forma de violencia de género desde un enfoque interseccional*, in *Revista CIDOB d'Afers Internacionals*, 2023, p. 137-159.

[31] M. C. NUSSBAUM, *Frontiers of Justice. Disability, Nationality, Species Membership,* Belknap Press, 2007, p. 260.

[32] R. THIARA, S. CONDON, M. SCHRÖTTLE (eds.). *Violence against Women and Ethnicity: Commonalities and Differences across Europe.* Leverkusen-Opladen: Verlag Barbara Budrich, 2011; A. DI STASI, R. CADIN, A. IERMANO, V. ZAMBRANO (eds.), *Migrant women and gender-based violence in the international and European legal framework/donne migranti e violenza di genere nel contesto giuridico internazionale ed europeo*, Napoli, 2023.

[33] T. BRADLEY, *Women, Violence and Tradition: Taking FGM and Other Practices to a Secular State,* London, 2011.

[34] J. KRUTZINNA, *Who is "The Child"? Best Interests and Individuality of Children in Discretionary Decision-Making*, in *The International Journal of Children's Rights*, 2022, pp. 120-145.

Convention on the Rights of the Child [35], is well supported and doctrinally developed in terms of the meaning of "best interests" and "paramount consideration", but not the third element: "child"[36]. This shortcoming leads us to make generalizations and assumptions based on categories to assess what is best for each child. Addressing this challenge involves making sure that we make appropriate and personalized decisions for each child. We do not have a comprehensive understanding of who each child is when we refer to "the child". The concept of a "child" is based on a distinction related to age, developmental status, or assessments of "maturity". This perspective, commonly used in the law, is, according to Krutzina, a simplistic approach to conceptualize a highly complex issue. It can be overly pragmatic, overlooking the individuality and uniqueness of each child. The legal logic of defining the "child" by age, as done by the Convention on the Rights of the Child, aims to attribute universal rights to children as a group. However, the disconnect between the child as an "abstract social construct" and the real-life experience of the child has significant implications for determining the best interests of a specific child.

This leads to the fact that, despite our sincere intention to assess each child as a unique individual, with individual needs, characteristics, and preferences, we still make many generalizations and category-based assumptions in defining what constitutes the best interests of the child. By neglecting important intragroup differences such as capacities, traits, interests, needs, and preferences, we risk overlooking the individuality of children in favour of efficient and rationalized administrative decision-making. An imminent risk of this approach is that the well-being of children may be compromised by not considering that, no matter how similar two children may seem based on a specific metric, their needs are likely not identical.

In response to this growing unawareness, Krutzinna proposes a method of assessment that truly focuses on the child as an individual. This approach is based on a fundamental understanding of each child as a unique individual, which is related to the determination of his, her or their best interests and moves away from formulating a list of concrete and universal needs.

The MIC reflects the different theoretical perspectives, which can be adopted when conceptualizing a child, a triple dimension to define and evaluate the best interests of the child in each specific case. Each dimension helps to delineate the conditions to be protected in each specific case to ensure the best interests of the child. Krutzinna identifies three spheres: a) the universal child; b) the categorical child; c) the individual child.

In this regard, Krutzinna points out that[37]:

a) The universal child: This first dimension addresses the fundamental characteristics of children as human beings, an aspect that is relatively easy to identify. An authoritative voice in detailing these characteristics is UNICEF. It encompasses essential physiological needs, such as access to food, water, shelter, and the expression and receipt of love and affection, needs that are shared by all people. Also included is the need for protection against

[35] Convention on the Rights of the Child, Adopted and opened for signature and ratification by General Assembly Resolution 44/25 of 20 November 1989. Entry into force: September 2, 1990, in accordance with Article 49. Artícle 3.1: «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».

[36] J. KRUTZINNA, *Who is "The Child"? Best Interests and Individuality of Children in Discretionary Decision-Making*, cit. p. 121.

[37] *Ibid,* p. 123.

physical and psychological harm or threats. From a legal perspective, these needs are recognized and protected through international human rights instruments, such as the Universal Declaration of Human Rights and the European Convention on Human Rights. In the specific case of children, their additional needs as minors are addressed by the Convention on the Rights of the Child (CRC). Although the CRC sets out the general rights of children, its application is often tailored more specifically to particular groups of children, such as indigenous children or those with disabilities, through other conventions which, according to Krutzinna, are addressed in sphere b).

b) The categorical minor: groups children according to some social characteristics, which vary according to the sociocultural context. Some of the categories Krutzinna points out include: gender, young age, minority ethnic origin, poverty and disability.

The second dimension addresses the specific characteristics of the group to which the child belongs, i.e., the qualities that the child shares with other children who are part of a particular group. The above examples of vulnerability-based categories are just some of the possible groups that could be relevant in assessing the best interests of the child. According to Krutzinna, the existence and relevance of these categories depend to some extent on the context and may vary between jurisdictions, as a specific characteristic may not be considered a vulnerability in all situations. She refers to the example of an ethnic minority in one country being the majority ethnicity in another.

In this second sphere, Krutzinna draws connections with Kimberlé Crenshaw's theory of intersectionality, which holds that each individual experiences oppression or privilege as a function of his or her membership in multiple social categories[38]. The interaction of these categories with the context determines whether we can speak of an element of vulnerability, according to the MIC theory, or an element of oppression, according to intersectionality theory. The combination of being a child and belonging to one or more categories potentially increases vulnerability, which requires considering the child's position from an intersectionality perspective.

From a legal perspective, the UN Committee on the Rights of the Child has attempted to address the challenge of intersectionality with some of its General Comments (2006, 2009, 2009, 2014, 2017). However, the approach remains fragmented and does not reach the area (c). As a specific instrument for children, the Convention on the Rights of the Child also highlights the need for special protection for certain categories of children, referred to as "children in vulnerable situations". Categories based on vulnerability are often the subject of specific legal and policy instruments, thus recognizing the need for protection of interests and against discrimination. An example of this is the United Nations Convention on the Rights of Persons with Disabilities (CRPD, 2007), as well as the United Nations Declarations on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and on the Rights of Indigenous Peoples (2007), which, although not legally binding, also address this issue. In relation to the current research, UN General Assembly Resolution 75/167 (2020), mentioned above, highlights that child, early and forced marriage constitutes a violation of fundamental rights, as does the Convention on the Elimination of All Forms of Discrimination against Women (1979).

c) The individual minor: it goes a step further by conceptualizing the whole person as a unique individual[39].

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[38] K. W. CRENSHAW, *On Intersectionality: Essential Writings* 2017, Columbia Law School, Faculty Books, p. 255.
[39] *Ibid.*

The third dimension encompasses characteristics that are unique to each child as an individual. In this sphere, Krutzinna includes both vulnerabilities that are not captured by typical categorizations and any child-specific characteristics or qualities. This encompasses the particular preferences and interests of each child. Krutzinna stresses the importance of distinguishing between determining what a child is and who the child is, the latter being the fundamental goal of the third sphere. This has significant practical implications in terms of the actions and decisions to be taken in relation to a specific child in a given situation.

In contrast to sphere b) of the categorical child, where what benefits a group of children is determined, sphere c) seeks to identify what benefits each child as a holistic and unique entity. It is essential to balance possible tensions between needs and preferences within spheres b) and/or c). Krutzinna illustrates this point with an example: «A child from an ethnic minority may have a need both to integrate into the predominant culture around him and to maintain his association with his own culture. This may give rise to practical problems, where legal recognition of rights can only extend so far to ensure adequate protection of all interests»[40]. The key lies in the need to strike a practical balance, which will be an integral part of the deliberations in area c) during the decision-making process in relation to a specific child, where the MIC can play a useful role.

## 4. *Refugee girls victims of forced marriage located in Europe*

Although this paper deals with forced marriages taking place outside of European territory, it is interesting to note that according to the EU Agency for Fundamental Rights, there is little information on the persistence of forced marriage and the circumstances under which it is practiced in EU countries[41]. This gap is partly due to the limitations of the available data[42]. Forced marriage, particularly involving girls in Afghanistan and Palestine, is unfortunately common. If someone refuses to enter into a forced or child marriage, they may face violence based on honour, often due to their affiliation with a specific social group and their refusal to conform to traditional practices. This may also relate to the fundamental right to choose one's spouse, which is deeply tied to a person's identity and conscience. In these contexts, such women and girls could be seen as bringing dishonour upon their families. In Gaza, communities facing economic hardship in Access Restricted Areas (ARA), as well as refugees and internally displaced individuals, are identified as particularly vulnerable to high rates of child, early, and forced marriage. As a result of these circumstances, Afghan and Palestinian girls who are victims of forced marriage may be eligible for recognition as refugees, given the grave risks they face in their home communities.

The following are two case laws from European courts that illustrate the dilemma between the fight against forced marriage and the exercise of the right to family reunification and the right to privacy. Firstly, a preliminary ruling before the CJEU on the right to family

[40] *Ibid.*

[41] On the asylum procedure in light of gender-based violence by forced marriage in Germany, see: R. FRIEDERY, *Migrant women in Germany: challenges and protection,* in A. DI STASI, R. CADIN, A. IERMANO, V. ZAMBRANO (eds.), *Migrant women and gender-based violence in the international and European legal framework/ donne migranti e violenza di genere nel contesto giuridico internazionale ed europeo*, cit., p. 553-570.

[42] European Union Agency for Fundamental Rights, *Addressing forced marriage in the EU: legal provisions and promising practices,* 2014, pp. 11-12.

reunification of a minor Palestinian refugee victim of forced marriage in Lebanon. The scope of the analysis of this contribution aims to highlight how the prohibition of forced marriages in the EU is a crucial element in the categorization of a refugee minor to be entitled to the right to family reunification under the Directive. Secondly, a case before the ECtHR in which two Afghan applicants, who have contracted a religious marriage in Iran when the girl was a minor, claim that Switzerland violated their right to private and family life by enforcing an expulsion of the boy. In this second case, the analysis of this paper aims to show how the prohibition of forced marriages constitutes a limitation on the exercise of private and family life.

In both cases, the ultimate goal of the analysis is to apply the Model of Individual Child in each case in order to check how different the judicial pronouncement would have been in both cases. To this end, first, the main elements of each case law will be presented; then, the application of the relevant legislation in relation to the specific case of two minors victims of forced marriage will be presented: the Family Reunification Directive and the right to private and family life; finally, the application of the MIC to each of the cases will be considered.

### 4.1. *Family reunification of a refugee victim of forced marriage. Case study Court of Justice of the EU: 230/21*

The case under consideration is a reference for a preliminary ruling from the Belgian Administrative Court for Immigration before the CJEU [43]. Two questions have been submitted by the National Court of Belgium to CJEU: First, the National Court asks whether an unaccompanied minor refugee must be unmarried to be entitled to family reunification with her parents. And secondly, should the Court find that she must indeed be unmarried to be entitled to such a right, is it possible for her to continue to be classified as an unaccompanied minor in view of the fact that her marriage is not recognized in the Belgian state for reasons of public policy?

#### 4.1.1. *Bullet affairs in the case*

The claimant in the case is a Palestinian national, Hanan, whose minor daughter, Mayada, was subject of a forced marriage in Lebanon to a man, Y.B., who had a residence permit in Belgium[44]. The Belgian administration classified Mayada as an unaccompanied minor and appointed a guardian for her, on the understanding that child marriage in Belgium is against the law[45]. Mayada applies for international protection and Belgian authorities grant the refugee status[46]. Her mother, Hanan, applied to the Belgian authorities for a visa for family reunification purposes to join Mayada, as well as visas for humanitarian reasons for her other two children (Y and Z).[47]. In the meantime, Mayada, at 17, gave birth to a Belgian baby girl[48].

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[43] Judgment of the Court of Justice of the European Union of 17 November 2022, Case C-230/21, *X v Belgische Staat*, ECLI:EU:C:2022:887.
[44] *Ibid,* par. 12, 13.
[45] *Ibid,* par. 14, 16.
[46] *Ibid,* par. 17.
[47] *Ibid,* par. 18.
[48] Opinion of Advocate General Maciej Szpunar, delivered on 16 June 2022, Case C-320/21, ECLI:EU:C:2022:88, par. 15.

Visas were denied in first and second instance by the Belgian Ministry of Social Affairs, Public Health, Asylum and Immigration[49]. The delegate argued that according to the Belgian Aliens Act and Article 4(1) of Directive 2003/86 on family reunification, the family nucleus to which the right of reunification applies consists of the spouses and unmarried minor children[50] and that, consequently, Mayada, whose marriage is valid in her country of origin, no longer belongs to the family nucleus of her parents[51]. Specifically, Article 4, paragraph 1, second subparagraph, provides that: «The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married»[52].

The claimant appealed to the Belgian Immigration Litigation Court. It is interesting to note two points in her appeal[53]:

- First, Hanan argues that neither the Belgian Aliens Act nor Directive 2003/86 on family reunification require that a minor refugee who is reuniting be unmarried in order to exercise the right of reunification with his or her parents.
- And, secondly, since Belgium does not recognize Mayada's marriage, it has no legal effect in its legal system. In this regard, the applicant argues that, in order to benefit from the right to family reunification, her daughter Mayada need only meet the two conditions set out in Article 2(f) of Directive 2003/86 on family reunification, namely: she is a minor and she is unaccompanied. Hanan, the applicant, asserts that both requirements are met by her daughter.

Article 2. f) defines unaccompanied minor as: «third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States»[54].

The Belgian Litigation Court discerns that the Family Reunification Directive does not contain any indication regarding the marital status of the "unaccompanied minor", however, the family reunification regime set out in Articles 8 and 9 of the Dublin III Regulation requires the minor refugee be unmarried for the Member State in which she resides to be responsible for the examination of her parents' application for international protection[55].

In this context, the Contentious Court raises the first question which can be summarized in the following question: Does the fact that a minor refugee residing in a Member State is married prevent her from being considered an "unaccompanied minor" - within the meaning of Article 2(f) of Directive 2003/86 on family reunification - and from benefiting from the

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[49] Case C-230/21, cit., par. 19.

[50] Council Directive 2003/86/EC of 22 September 2003 *on the right to family reunification*, Official Journal L 251 of 03/10/2003 p. 0012 – 0018, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32003L0086.

[51] Case C-230/21, cit., par. 20.

[52] Directive 2003/86/EC *on family reunification,* cit., art. 4.1.

[53] Case C-230/21, cit., par. 22.

[54] Directive 2003/86/EC *on family reunification*, *cit*., article 2, f).

[55] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (Dublin III Regulation), Official Journal of the European Union, L 180/31 available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0604.

right to family reunification with her ascendant, in accordance with the provisions of the Directive on family reunification - Article 10(3)(a)?[56]

4.1.2. *Application of the reunification directive in the best interests of the minor?*

The Family Reunification Directive is intended, in any case, to be applied to the nuclear family, which is defined as: the spouse and minor children[57]. Article 4, paragraph 5, expressly states, in relation to forced marriages, that «In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her»[58].

Article 2(f) of this Directive defines "unaccompanied minor" as mentioned above[59]. And in its Article 10, paragraph 3, letter a) in relation to family reunification of an unaccompanied minor refugee, it urges Member States to authorize the entry and residence, for the purpose of reunification, of their direct and first-degree relatives in the ascending line[60].

Therefore, the systematic interpretation of the Family Reunification Directive with regard to the reunification of an unaccompanied minor refugee does not impose as a requirement that she must not be married.[61]. Moreover, as the CJEU points out, the Reunification Directive itself does require in other provisions that the minor must not be married in order to benefit from family reunification (Article 4(1) and (5)). Therefore, by not expressly requiring the requirement of not being married in the case of unaccompanied refugee minors, it must be interpreted that it is not a requirement for family reunification.[62].

The Dublin III Regulation, in defining "family members" in relation to the reunification of persons enjoying international protection, makes a note for unmarried minors, as follows: «insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States: […] when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present»[63]. And Article 8, in its first paragraph, establishes: «Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present»[64].

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[56] Judgment of the Court of Justice of the European Union of 17 November 2022, Case C-230/21, cit., § 1 and 25.
[57] Directive 2003/86/EC *on family reunification*, *cit.*
[58] *Ibid,* article 4, paragraph 5.
[59] *Ibid,* article 2.
[60] *Ibid,* article 10, paragraph 3, letter a).
[61] On this issue, see S. DE VIDO, *Against a Girl's Will: Child Marriages, Immigration and the Directive on Family Reunification*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, p. 115–38, Bruxelles, 2019, p. 126.
[62] Case C-230/21, cit., par. 35.
[63] Dublin III Regulation No. 604/2013, cit., art. 2, let. g).
[64] *Ibid,* article 8, paragraph 1.

The doubt raised by the delegate of the Belgian Ministry of Social Affairs, Public Health, Asylum and Immigration lies in Article 8, paragraph 1 of the Dublin Regulation, which refers to married minors. This must be a mistake, as he understands that this Regulation applies to unaccompanied minors. The Advocate General makes an excellent clarification by explaining that the situation of a minor who is reunited with her reuniting parent or spouse is very different from an objective point of view from that of an unaccompanied minor who is on the territory of a Member State where her parent may join her. In both cases, Szpunar points out, the child is vulnerable, but certainly in the second case, the unaccompanied minor is in a situation of particular vulnerability[65]. In the same vein, the CJEU ruled that an unaccompanied minor refugee residing alone in the territory of a State other than her State of origin is in a situation of particular vulnerability which justifies favouring family reunification with her first-degree relatives in the direct ascending line who are outside the Union[66]. In this case, both the CJEU and the Advocate General, attend to the categorical child of the MIC model by taking into account the situation of unaccompanied and refugee status.

The CJEU interpreted Articles 2(f) and 10(3a) of the Family Reunification Directive to mean that unaccompanied minors do not have to be unmarried to be reunited with their parents in a family reunification procedure. In accordance with the Advocate General's opinion, the court noted that the vulnerability of minors is not mitigated by marriage and may, on the contrary, indicate exposure to child or forced marriage[67].

#### 4.1.3. *Mayada's best interest according to the mic approach*

As an introduction, I would recall the elements of the MIC approach: the universal child, the categorical child, and the individual child. In application of the MIC to case C-230-21, the minor, Mayada, as a universal minor, is characterized as a child in need of protection, a space of well-being in which to develop. She is in a position of vulnerability as a minor that makes her more susceptible to specific types of violence.

As a categorical minor, Mayada, a national of Palestine, at the age of 15 experienced a situation of subjugation and violation of her human rights that continues to this day: she was the victim of a forced marriage. Mayada was born in Palestine, where marriage regulations are defined by Article 5 of the Egyptian Family Rights Law No. 303/1954 in Gaza Strip[68], and Article 5 of the Palestinian Personal Status Code No. 61/1976 (which is based on Jordanian law) in the West Bank and East Jerusalem. In the West Bank, the legal age for marriage is set at 15 for girls and 16 for boys. In the Gaza Strip, the legal age is 17 for girls and 18 for boys[69]. In October 2019, an amendment to Article 5 of the Personal Status Law was introduced, raising the minimum marriage age to 18 for both boys and girls. However, this amendment allows for sharia courts and other religious authorities to grant exceptions to this rule. Reports suggest that it will be possible to marry before the age of 18 by obtaining

[65] Opinion of Advocate General Maciej Szpunar, Case C-320/21, cit., par. 37.
[66] Case C-230/21, cit., par. 35.
[67] Opinion of Advocate General Maciej Szpunar, Case C-320/21, cit., par. 49.
[68] Canada, *Immigration and Refugee Board of Canada, Jordan: Copy of the Law of Personal Status: Temporary Law No. 61 of 1976*, 1 September 1995, JOR21984.E, available at: https://www.refworld.org/docid/3ae6aaeaa4.html.
[69] The Palestinian Childhood Law No. 7/2004 defines a child as anyone below 18 years of age, but it does not explicitly prohibit child marriage. Article 44(8) only outlaws forced marriage but not child marriage.

an exemption from a religious court and the Palestinian Authority's Sharia judge[70]. Child marriage rates in Palestine tend to rise during periods of heightened political tension[71]. In 2017, the UN Special Rapporteur on Violence against Women underscored the increased societal pressure on Palestinian girls to enter marriage, particularly within the context of the occupation. UN Women reports that in occupied East Jerusalem, child marriage is often linked with poverty, persistent displacement, and the subjugation of girls[72]. Mayada was married in Lebanon, according to NGO Girls not Brides, there is a growing trend of Palestinian and Syrian refugee girls entering into child marriages, particularly in areas like Bekaa Valley and Akkar in northern Lebanon. Unlike many countries, Lebanon lacks a unified "Personal Status Law" that applies to all its citizens, which would establish regulations on matters such as the legal age for marriage, divorce, inheritance, and child custody. Instead, each of the 18 officially recognized religious groups in Lebanon has its own set of rules regarding the legal age for marriage. This lack of uniformity in domestic child marriage regulations means that, under certain circumstances, children can be legally married as young as 14 years old. This situation is not in line with international legal standards[73].

EUAA warned in 2017 that several organizations report abductions, arrests and detentions of Palestinian refugees, including women, girls, as well as torture of Palestinians in government prisons, often for unknown reasons[74]. Furthermore, it is relevant for the categorization of Mayada that the recognition of the Palestinian population as stateless varies from one EU country to another. According to the European Network on Statelessness, several EU countries do not recognize Palestinians as stateless during the asylum procedure[75].

As an individual child: Mayada has also lived through a process of forced human mobility, she is a daughter, a sister and a mother as a result of rape. In addition, she is in a State of which she is not a national without a family network, although with a degree of protection since she has been granted refugee status. Therefore, in accordance with Mayada's genuine best interests as an individual minor, the CJEU's interpretation of the family reunification of unaccompanied minor refugees to join their ascendants, without giving effect to the marriage, would be valid. However, it is important to draw attention to the fact that not in all cases, the best interests of the minor will be to reunite her family as it may be the family itself that has forced the minor to marry.

In view of this paper, the argumentation of the delegate of the Belgian Ministry of Social Affairs, denying reunification and interpreting Article 4.1 of the Family Reunification Directive in the sense that the minor, being married, does not belong to the mother's family

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[70] Protection Cluster, Gender Based Violence Sub-Cluster occupied Palestinian territory, *Child marriage in the occupied Palestinian territory*, November 2016, available at: https://palestine.unfpa.org/sites/default/files/pub-pdf/Early%20Marriage%20Advocacy%20Paper%20-%2029%2011%202016.pdf.

[71] United Nation Population Fund, *State of Palestina*, February 2020, available at: https://palestine.unfpa.org/en/publications/strategy-addressing-child-earlyforced-marriage-special-forcus-girls.

[72] Palestinian Central Bureau of Statistics, Ministry of Health and UNICEF, *Palestinian Multiple Indicator Cluster Survey* 2019 – 2020. Available at: https://mics-surveys-prod.s3.amazonaws.com/MICS6/Middle%20East%20and%20North%20Africa/State%20of%20Palestine/2019-2020/Survey%20findings/State%20of%20Palestine%202019-20%20Survey%20Findings%20Report_v2_English.pdf?la=en&vs=509.

[73] Girls not Brides, *Child marriage Atlas: Lebanon,* available at: https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/lebanon/.

[74] EUAA, Country Guidance Syria; Refugee status for Ethno-religious groups (4.10).

[75] European Network on Statelessness, *Briefing: Palestinians and the search for protection as refugees and stateless persons in Europe,* 14 July 2022.

nucleus, equals a validation of child marriage. It is detected that it analyses the same from a cultural and/or religious perspective. As Alston argues «just as culture is not a factor which should be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights»[76]. It is paradoxical that the scenario imagined by the Ministry of Social Affairs, by allowing the validation of marriage, contributes another violation of the rights of children[77]. This paper considers the position of the delegate of the Ministry of Social Affairs disregards the categorical child: unaccompanied minor refugee. The delegate's argument would run counter to UNGA Resolution 65/167, which specifically urges States to ensure access to justice and accountability mechanisms and remedies for the effective implementation and enforcement of laws to prevent and eliminate child, early and forced marriage, including informing women and children of their rights under relevant laws[78]. The Ministry's delegate also failed to take into account Directive 2012/29 on minimum standards on the rights, support and protection of victims of crime, which expressly states that forced marriages are a form of gender-based violence and that victims and their children often require special support and protection due to the high risk of secondary victimization. Protecting the autonomy and free will of minors is paramount, in addition to combating forced marriage[79]. And finally, the delegate's position also is not in line with the spirit and interpretation of the Parliamentary Assembly of the Council of Europe in its Resolution 2233, which calls for the recognition of only the beneficial effects in terms of rights for the minor of the performance of a child marriage.

### 4.2. *Protection of the family life of a refugee victim of forced marriage: Case study European Court of Human Right Z.H. and R.H. v. Switzerland*

#### 4.2.1. *Bullet affairs in the case*

In the case before the ECtHR, the applicants are two Afghan nationals, cousins, who had contracted a religious marriage in Iran in 2010 when Z.H. was 14 years old and R.H. was 18 years old. It is established facts of the case that the marriage is not recorded in any formal registry in Iran[80]. The petitioners arrived in Switzerland via Italy and filed an asylum application in September 2011. In the first instance, the Federal Office of Migration (the "FOM") denied them asylum because, in compliance with the Dublin III Regulation, the country responsible for analyzing their application for international protection was Italy[81].

The girl Z.H. was assigned a guardian by the Guardianship Administrative Authority. R.H appeals against the FOM's before the Federal Administrative Court (the "FAC"). The FAC noted several issues:

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[76] P. ALSTON, *The best interest principle towards a reconciliation of culture and human rights*, in *International Journal of Law, Policy and the Family,* 1994, pp. 1- 25, p. 8.

[77] M. JÄNTERÄ-JAREBORG, *Non-Recognition of Child Marriages: Sacrificing the Global for the Local in the Aft Ermath of the 2015 'Refugee Crisis*, in G. DOUGLAS, M. MURCH, V. STEPHENS (eds.), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe*, 2018, Bruxelles, p. 267-82, p. 270.

[78] UNGA, Resolution 75/167 de 16 December 2020, cit., par. 20.

[79] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 14 November 2012, Official Journal of the European Union núm. 315.

[80] European Court of Human Rights, sentence of 8 December 2015, application no. 60119/12, *case Z.H. and R.H. v. Switzerland*, parr. 5-6.

[81] *Ibid,* par. 8.

- The applicants had not presented a marriage certificate;
- In any event, their religious marriage could not be validly recognized in Switzerland, since Article 45 of the Federal Act on Civil International Law, determines that, according to the law applicable in this case: the Afghan Civil Code (nationality of the applicants), contains an absolute prohibition of marriage for girls under 15 years of age;
- Furthermore, irrespective of Afghan law, the marriage is incompatible with Swiss public policy since, under Article 187-1 of the Criminal Code, it is an offence to have sexual intercourse with a minor under the age of 16.

Therefore, the FAC understood the child ZH could not be considered a member of R.H.'s family under the Dublin Regulation and, consequently, could not claim a right to family life under Article 8 of the Convention[82].

R.H. was expelled to Italy, however, he returned a few days later to Switzerland and was able to have contact with Z.H. intermittently. Having returned to Switzerland, R.H. requested the re-examination of his asylum application, which was again rejected, due to a procedural issue: he did not pay the required advance judicial fee.[83].

In September 2018, the applicants filed a complaint with the c. In 2013, the claimants applied for recognition of their religious marriage in Switzerland, when the girl was 16 years and 11 months old. The following asylum petition requested by the couple from the Swiss government was granted[84].

Even so, the applicants decided to maintain their claim before the ECtHR, complaining about their right to respect for private and family life under Article 8 ECHR. The applicants argue that, during the days ZH was in Italy, their article 8 right to private and family life was violated and that this past violation of their right to respect for family life had neither been acknowledged nor remedied and that they had not lost victim status even if they had now obtained asylum in Switzerland[85].

### 4.2.2. *Operation of article 8 on private and family life in the case*

The ECtHR ruled that the decision to expel Mr. R.H. to Italy did not result in a violation of Article 8 ECHR. Article 8 states: Right to respect for private and family life:
«1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is 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 or morals, or for the protection of the rights and freedoms of others»[86].

It is relevant to point out the main lines on which the ECtHR based its position. The Court points out Article 8 of the ECHR does not cover the obligation that States must allow

[82] *Ibid,* par 10. The Dublin Regulation is applicable to Switzerland under the terms of the association agreement of 26 October 2004 between the Swiss Confederation and the European Community regarding criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 53 of 27 February 2008).
[83] *Ibid,* par. 12-15.
[84] *Ibid,* par. 16-20.
[85] *Ibid,* par. 21.
[86] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950.

a foreigner, including an asylum seeker, to be permitted to reside in their country for presenting family life as a *fait accompli*[87]. Furthermore, the Court notes the case concerns not only family life but also immigration *lato sensu*. As such, the factors to be considered in this context are the extent to which family life would actually be disrupted, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of the foreign national in question, and whether there are immigration control factors[88]. The concept of family life is interpreted according to the Court's jurisprudence in a broad sense. It encompasses factors such as whether the couple lives together, the duration of their relationship, and whether they have demonstrated their commitment to each other by having children together.[89] The Court indicates Article 8 of the Convention cannot be interpreted as imposing on any State party to the Convention an obligation to recognize a marriage, religious or otherwise, contracted by a 14-year-old child. Nor can such an obligation be derived from Article 12 of the ECHR. Article 12 expressly provides for the regulation of marriage by national law and, given the delicate moral choices involved and the importance to be attached to the protection of children and the promotion of safe family environments. In this respect, the domestic authorities acted justifiably in expelling Mr. R.H. to Italy, considering that the applicants were not married[90]. In addition, for the ECtHR the timing of the non-recognition is crucial. According to the Court, when the second applicant was deported to Italy, the national authorities were justified in «considering that the applicants were not married, all the more so, given the fact that the applicants had not yet taken any steps to seek recognition of their religious marriage in Switzerland». In any event, due to the short period that the applicant R.H was in Italy and given that the Swiss authorities, once he returned, did not prevent him from meeting the minor Z.H. The ECtHR understands that the State properly balanced the interests at stake: the personal interests of the applicants to remain together in Switzerland while awaiting the outcome of the first applicant's asylum application on the one hand and, on the other hand, the public policy interests of the respondent government in immigration control[91].

In this judgment, for what is of interest in this paper, the ECtHR interprets the right to family life in Article 8, bearing in mind the limitations on the exercise of Article 12[92]. The ECtHR's jurisprudence is consistent in understanding that marriages that do not comply with national laws do not *per se* represent an impediment to the exercise of the right to family life[93]. A couple entering into a purely religious marriage that is not recognized by domestic law may be considered within the scope of the exercise of the right to family life under Article 8. However, Article 8 cannot, in any case, be interpreted as obliging the State to recognize a religious marriage entered into by a minor.

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[87] European Court of Human Rights, *Case of Z.H. and R.H. v. Switzerland*, cit., par. 38.
[88] *Ibid,* par. 41.
[89] *Ibid,* par. 42.
[90] *Ibid,* par. 43-44.
[91] *Ibid,* par. 45.
[92] 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*, 31 August 2022, available at: https://www.echr.coe.int/documents/d/echr/guide_art_8_eng.
[93] European Court of Human Rights, sentence 28 May 1985, application no. 9214/80; 9473/81; 9474/81, *case Abdulaziz, Cabales And Balkandali v. The United Kingdom*, par. 63.

The right set forth in Article 12 is subject to domestic laws regulating its exercise[94]. Unlike Article 8 of the Convention, the right "to marry and found a family" in Article 12 does not specify acceptable grounds for State intervention, such as those contemplated in Article 8(2). Therefore, in examining a case under Article 12, the Court does not apply the criteria of "necessity" or "pressing social need" used in the context of Article 8, but must determine whether, taking into account the State's margin of appreciation, the challenged interference is arbitrary or disproportionate[95]. In relation to Article 12 of the ECHR, the European Commission of Human Rights, in 1986, already determined that since the right to marry, protected by Article 12 of the Convention, is subject to domestic regulations supervising its exercise, the requirement to reach the legal age of marriage does not imply a denial of the right to marry. This applies even if the individual's religious beliefs permit marriage at an earlier age[96].

### 4.2.3. *The best interests of child Z.H. from a mic perspective*

When applying the MIC perspective on the plaintiff Z.H. in this case, as was done with Mayada, as a universal child, she needs protection and a space free of violence where she can develop her dignity as a person.

As a categorical girl, her Afghan nationality is very relevant. Forced marriage in Afghanistan includes: betrothal of girls, especially under *Pashtunwali*; polygamy; exchange of unmarried daughters between families; *baad*, (whereby girls from several families are exchanged in order to settle debts or family disputes). *Baad* is practiced especially among the *Pashtune* community and in rural areas[97]. In 2009, the Afghan government passed the Elimination of Violence against Women Law (EVAW), which lists 22 crimes, including forced marriage and rape[98]. In addition, according to Afghan civil law, as well as Islamic law, consent to marriage is required. Afghan civil law stipulates that the minimum age for marriage is 16 years. However, this rule has not been effectively implemented in practice[99]. In the context of the Taliban occupation, the EVAW is no longer in force. Thus, in the midst of this country in armed conflict, the sale of women and girls for forced marriages is a daily reality, as was the case during the previous Taliban occupation, denounced by Afghan feminist activists and UN Women[100]. As a categorical girl, it is also important to note that

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[94] European Court of Human Rights, *Guide on Article 12 of the European Convention on Human Rights: Right to marry*, 31 August 2022, available at: https://www.echr.coe.int/documents/d/echr/Guide_Art_12_ENG.

[95] European Court of Human Rights, sentence of 5 January 2010, application no. 22933/02, *case Frasik V. Poland*, par. 90.

[96] European Commission of Human Right, 7 July 1966, *Janis Khan v. The United Kingdom*, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-76850%22]}.

[97] EASO, Country of Origin Information Report: Afghanistan Individuals targeted under societal and legal norms, December 2017, pp. 39.

[98] Ministry of Foreign Affairs, Directorate of Human Rights and Women's International Affairs, Afghanistan's National Action Plan on UNSCR 1325-Women, Peace, and Security: 2015-2022, June 2015, http://pwnap1.tetra.in/wp-content/uploads/2020/10/NAP-Afghanistan.pdf.

[99] According to a 2015 survey, 45% of Afghan women are married before the age of 18, Afghanistan, CSO and MoPH, Demographic and Health Survey 2015, January 2017, https://www.rhsupplies.org/uploads/tx_rhscpublications/Afghanistan_-_2017.pdf, pp. 63.

[100] Parwana Malik, 9-year-old girl sold into marriage: https://cnnespanol.cnn.com/2021/11/02/afganistan-venta-ninas-esposas-familia-comer-trax/; In a letter, Afghan women have called on the international community to intervene to stop the oppression of women and girls in areas already occupied by the Taliban, denouncing that the Taliban force them to marry fighters in forced marriages, something the Taliban deny and

she contracted child marriage in Iran. According to Iranian law based on Sharia, the official legal age for marriage is 13 for girls and 15 for boys. However, marriages can be conducted at younger ages with the consent of fathers and approval from court judges. This has contributed to a cultural acceptance of child marriage to some extent. The Iranian Civil Code announces in its article 1041 that: «Marriage before the age, of majority is prohibited», but with the note that «Marriage before puberty by the permission of the Guardian and on condition of taking into consideration the ward's interest is proper»[101]. According to the NGO Girls not Brides, the age of maturity in Iran is reached at 9 lunar years (equivalent to 8 years and 9 months) for girls and 15 lunar years for boys. Child marriage in Iran manifests in various forms. In some tribal areas, there are reports of blood marriages, where a girl is married off to settle a dispute between two tribes. There is also the practice of naval string marriages, where a girl is symbolically "pledged" to marry a cousin or distant relative at birth through a symbolic cutting of the umbilical cord. Additionally, temporary marriages, known as *Sigheh*[102], are employed to bypass Islamic restrictions on sexual relations outside of wedlock, often involving minors[103].

As an individual child, within the framework of the application of the MIC, it is also relevant to add that she is an asylum seeker in a foreign country, where the authorities have assigned her a guardian to protect her interests. And that she is in the process of processing her asylum application, which is finally recognized by the Swiss authorities, and is therefore a refugee. All this condenses the vulnerability profile of the applicant. This judgment serves as an example of how the Court defends that it is not necessary to validly recognize a marriage to exercise the right to private and family life of Article 8. This statement of the ECtHR serves to problematize those cases of recognition of marriages that have been, by definition, forced, as in this law-case.

In the case study, the applicants applied for the second time for recognition of their Iranian religious marriage in Switzerland, when Z.H was 16 years and 11 months old. Finally, on June 2, 2014, the Court of First Instance of the Canton of Geneva recognized the validity of the plaintiffs' religious marriage contracted in Iran[104].

At the age of 16, both his personal law - Afghan law - and the law of the host country, Switzerland, recognize the validity of consent. Now, does the girl's current consent invalidate her initial lack of consent to the marriage? Does it invalidate the initial violation of her human rights? Although when the validity was recognized, the child had already reached the minimum age for consent, this does not guarantee that the child was not obliged to maintain a relationship in which she did not want to be, for which she has not initially given her consent.

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call "false propaganda": https://www.publico.es/internacional/afganistan-restaura-regimen-taliban-mujeres-afganas-vuelven-casilla-cero.html; https://www.france24.com/es/medio-oriente/20210903-afganistan-protestas-mujeres-derechos-inclusion-gobierno; Women's Link Worldwide awarded Afghan rapper Sonita Alizadeh the prize for her work in the fight against child marriage in her country: https://www.womenslinkworldwide.org/premios/jurado/2625.

101 Civil Code of the Islamic Republic of Iran, 23 May 1928, available at: https://www.wipo.int/edocs/lexdocs/laws/en/ir/ir009en.pdf.

102 K. AHMADY, *A House on Water: A Comprehensive Study on Sigheh Mahramiat and Temporary Marriage in Iran*, Avaye Buf, 2020.

103 Girls not Brides, *Child marriage Atlas: Irán,* available at: https://www.girlsnotbrides.es/aprendizaje-recursos/child-marriage-atlas/regions-and-countries/iran/.

104 European Court of Human Rights, case *Z.H. and R.H. v. Switzerland*, cit., parr. 15 and 19.

From the point of view of this paper, it does not matter if she was already of the age of consent when she applied for recognition of the marriage, a child marriage leaves after-effects, it does not erase the violation of the girl's rights, it leaves an imprint on her that makes her more vulnerable. She continues to be a victim of child and gender violence – according to Istanbul Convention - as long as her relationship with her husband continues.

The question arises as to whether, in the specific case, it was in the best interest of the *individual girl* to have her marriage recognized and what kind of psychosocial support she received in the process of recognition. As an individual girl and, from an interdisciplinary approach, it is also interesting to question what the consequences in terms of social stigma are, for Z.H., an Afghan girl, married and recognized as married at the age of 16 in Switzerland. And even the social stigma in her country of origin in case the marriage was not recognized. These questions are an incitement to highlight how, in any case, being a victim of forced marriage puts girls at a disadvantage, whichever way you look at it.

## 5. *Reflections on the model of individual child in cases of refugee girls' victims of forced child marriage*

In the situation of forced marriage of girls, the United Nations Children's and Population Funds (UNICEF and UNFPA) recall that when minors, especially girls, marry and have offspring, their health is adversely affected, and their education is hindered. As a result, their economic autonomy is restricted. Their incomplete physical development exposes them to greater risks during pregnancy and childbirth, increasing the likelihood of maternal mortality. This damage has repercussions over generations, as a young mother whose own growth is limited will have difficulty ensuring the full development of her own offspring[105]. The UN Committee on Economic, Social and Cultural Rights has been recalling since 1999 that there is a direct relationship between the level of girls' enrolment in elementary school and a significant decrease in child marriages[106]. These references show how the celebration of a forced marriage has lasting consequences for the girls in time after its execution, even during their adulthood. Although there is some tendency to consider that some child marriages do not constitute gender-based violence against girls, for example, if two minors freely decide to marry[107]. This paper starts from the opposite position: all child marriages constitute a violation of children's rights. The consent of their parents or relatives, or even of a judge, is in no case sufficient to prevent child abuse[108].

As is well known, the best interest of the child is an indeterminate legal concept, a flexible rule that allows a certain margin of discretion in its determination to ensure the protection of minors in specific cases. In any case, it always requires legal motivation. According to Article 3 of the Declaration of the Rights of the Child, the best interest of the child is not

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[105] UNFPA and UNICEF, *Global program to accelerate action to end child marriage*, https://www.unicef.org/es/proteccion/programa-mundial-unfpa-unicef-para-acelerar-medidas-poner-fin-al-matrimonio-infantil.

[106] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 11: Plans of action for primary education (Article 14 of the International Covenant on Economic, Social and Cultural Rights), E/1992/23, 10 May 1999, http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain/opendocpdf.pdf?reldoc=y&docid=47ebcd1c2, paragraph 4.

[107] This is especially evident in the second case law analyzed, since the age difference was four years.

[108] C. BREEN, *Age Discrimination and Children's Rights. Ensuring Equality and Acknowledging Difference,* Boston, 2016.

mandatory but an element to be taken into account. In order to give substance to the best interests of the minors in the cases before the CJEU and the ECtHR, the MIC has been applied in this paper. Both girls share the universal child paradigm: they are minors and, as such, are exposed to a higher level of vulnerabilities. As categorical girls, both were victims of forced marriages in countries where these are protected by their legal system. Both girls also share the fact of having lived a situation of forced mobility. Mayada was a victim of rape and was classified as an unaccompanied minor. Z.H. was assigned a legal guardian. Both were granted refugee status. As individual children, Mayada is a daughter, sister and also a mother while still a minor; Z.H. is married to her own cousin, with whom she has an age difference of 4 years. It may be the case that the best interests of the individual child are different from the best interests of the categorical child, although it may be problematic for a more general best interests of children.

In the case under consideration before the CJEU, the right at issue is the right to family reunification of an unaccompanied refugee minor victim of forced marriage. The Belgian State, which considers that forced marriages are contrary to its public policy, would be inconsistent in granting validity to such a marriage only regarding the right to family reunification, precisely to give the unaccompanied refugee minor the option of being reunited with her mother. In the result of the analysis of this paper, such inconsistency can be sustained by application of the best interests of the minor from the MIC approach. On the other hand, in the case before the ECtHR, in whose interim the marriage was recognized[109], in the opinion of this paper, the application of the MIC approach by the Swiss Courts would have produced a different result: it would not have been necessary to recognize the marriage in order to respect the private and family life of two cousins arriving together in Europe and applying for asylum. But this approach requires a broader understanding of what we mean in the West by "family" and thus by "family life". These arguments are beyond the scope of this contribution.

It is worth noting that, as a political consideration, states in Europe must deal with the implications of the precedents that may be created. Forced child marriage would not be a viable way of using the mechanism of family reunification, nor of exercising the right to private and family life.

[109] Swiss law requires that, for a marriage to be valid, both parties must have reached the age of 18. Considering that there was no marriage that Switzerland could recognize as valid, first the Federal Office for Migration and then the Federal Administrative Court concluded that the applicants could not be considered to have a joint family life. Applicants cannot be considered to have a joint family life.