

**THE INTERNAL DISPLACEMENT CRISIS IN AFRICA: IMPLEMENTATION OF NATIONAL  
AND INTERNATIONAL LAW ON THE CHILD MARRIAGE PHENOMENON IN UGANDA**

**A DESSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF  
PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF  
MASTERS OF LAW (LLM IN HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

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## DECLARATION

I, **PATRICIA ACHAN – OKIRIA**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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## **DEDICATION**

This Dissertation is dedicated to my dear parents, David Aliobe and Winnie Agabo – Aliobe. For all the sacrifice, encouragement and support through out my life and career. May God richly bless you.

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## TABLE OF CONTENTS

TITLE PAGE	1
DECLARATION	2
DEDICATION	3
ACKNOWLEDGEMENTS	4
TABLE OF CONTENTS	5
LIST OF ABBREVIATIONS	8
CHAPTER 1: INTRODUCTION	9
1.1 Introductory remarks	9
1.2 Object and purpose of the study	11
1.3 Significance and scope of the study	11
1.4 Hypotheses	12
1.4 Methodology	12
1.5 Literature review	12
1.6 Overview of Chapters	14
1.7 Conclusion	14
CHAPTER 2: INTERNALLY DISPLACED PEOPLE AND THE EARLY CHILD MARRIAGE PHENOMENON	15
2.1 Introduction	15
2.2 Definition for IDPs	16
2.3 Causes for internal displacement in Africa	17
2.4 The early child marriage phenomenon	18
2.5 Causes of early child marriage	19
2.5.1 Socio- Economic factors	20
2.5.2 Protecting girls	22
2.5.3 Socio- Cultural factors	23
2.5.4 Sexual Harassment and peer pressure	24
2.5.5 Child marriage and contemporary pressures	25
2.6 The impact of child marriage	25

2.6.1 Physical, social and psychological consequences of Child marriage	25
2.7 Conclusion	27
CHAPTER 3: EMERGING TRENDS TOWARDS THE IPLEMENTATION OF INTERNATIONAL LAW TO CURB CHILD MARRIAGE	28
3.1 Introduction	28
3.2 Human Rights Conventions	28
3.2.1 Universal Declaration of Human Rights	28
3.2.2 Convention on the Rights of the Child	29
3.2.3 Optional Protocol to the Convention on the Rights of the Rights of the Child on the Involvement of Children in Armed Conflict	31
3.2.4 Convention on Consent to marriage, minimum age for Marriage and registration of marriages	31
3.2.5 Convention on the Elimination of all forms of Discrimination Against Women	33
3.2.6 Child Labour Convention	34
3.2.7 Convention against Torture	35
3.2.8 Statute of the International Criminal Court	37
3.3 Regional Human Rights Instruments	38
3.3.1 African Charter on the Rights and Welfare of the Child	38
3.4 International Humanitarian Law and IDP children	39
3.5 Guiding Principles on Internal Displacement	40
3.6 Gaps filled by the IDP guiding principles	41
3.7 International Monitoring Mechanism for IDP protection	43
3.7.1 Security Council Resolutions 1261 and 1314	43
3.8 Conclusion	44
CHAPTER 4: DOMESTIC LEGAL REGIME AND THE PROTECTION OF IDP CHILDREN AGAINST CHILD MARRIAGE IN UGANDA	45
4.1 Introduction	45
4.2 Causes of Displacement in Uganda	46
4.2.1 Patterns of Internal Displacement in Uganda	48
4.3 Initiatives by Government on IDPs in Uganda	48
4.3.1 2006/2007 Peace Talks	48
4.3.2 Creation of Protected villages	49

4.3.3 National Policy on Internal Displacement	49
4.4 Early marriage in Uganda	51
4.4.1 Legal Implementation of Early Marriage in Uganda	52
4.4.2 Measures to combat child marriage	53
4.6 Conclusion	54
CHAPTER 5: RECOMMENDATIONS AND CONCLUSION	55
5.1 Introduction	55
5.2 Recommendations	55
5.2.1 Enforcement of national laws	55
5.2.2 Attitudinal Change	56
5.2.3 Education and Awareness programmes	56
5.2.4 Reporting to treaty bodies and African Commission	56
5.3 Conclusion	56
BIBLIOGRAPHY	
ANNEX	

## LIST OF ABBREVIATIONS

ADF	Allied Democratic Forces
ASEAN	Association of Southeast Asians Nations
AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
ICC	International Criminal Court
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Persons
ILO	International Labour Convention
LAS	League of Arab States
LRA	Lords Resistance Army
LRA	Lords Resistance Army
NHRI	National Human Rights Institutions
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	Office of the High Commissioner for Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
SPLA	Sudan People's Liberation Army
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Emergency Fund
UPDF	Uganda People's Democratic Forces



## CHAPTER 1: INTRODUCTION

### 1.1 Background to the study

This research focuses on the role that International Human Rights Law, policy and legislation should play in the protection of the rights of internally displaced children against child marriage. This thesis examines international treaties and domestic laws that purport to prohibit the practice of child marriage with particular attention to laws relating to the protection of internally displaced children (IDPs).

At least 25 million people in over 52 countries are displaced by violence and persecution but remain within the borders of their own countries.<sup>1</sup> While the primary responsibility for protecting and assisting Internally Displaced Persons/People (IDPs) rests with States, the scope and complexity of this contemporary phenomenon requires the concerted action of a wide range of humanitarian, development and political actors.<sup>2</sup> Broadly, International Human Rights Law provides for those rights that should be enjoyed by every individual necessary for a decent life. These rights provisions according to international law entitles all persons to equal protection of the law in all situations regardless of gender, race, nationality, language, religion, political or other opinion, birth or other status.<sup>3</sup>

Despite the continuous cycles of conflict in Uganda,<sup>4</sup> the war in northern is still on going<sup>5</sup> and the plight of IDPs in the region has remained largely ignored relative to the scale of the crisis and the response at both national and international has remained sporadic and inadequate.<sup>6</sup> The displaced have continued to live in appalling conditions and the girls are exposed to acts of sexual abuse and early child marriage. As a result of the war, over 10,000 children have been

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<sup>1</sup> UN OCHA: Internal Displacement Unit. Available at <<http://www.reliefweb.int/idp/>> (accessed on the 19th August 2007), See also, Magdalena. S 'Human Rights Concepts, Ideas and Fora' (2004) Human Rights Education Project.

<sup>2</sup> UN OCHA: Internal Displacement Unit. Available at <<http://www.reliefweb.int/idp/>> (accessed on 19th August, 2007).

<sup>3</sup> International Covenant on Civil and Political Rights, art.26. Adopted and opened for signature, ratification by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>4</sup> Amnesty Commission Report 2000 – 2003 (noting that since President Museveni took power in 1986, in total 22 known groups have taken up arms to fight the government).

<sup>5</sup> Killing of Peacekeeping soldiers has reinforced the international dimension of the conflict. See BBC, 23 January, 2006, available at <<http://news.bbc.co.uk/2/hi/africa/4639610.stm>> (accessed on 9th April, 2007).

<sup>6</sup> Neu J, Briefing on the Conflict in Uganda: Hope for a negotiated solution,(2005) Joan B Kroc Institute for Peace and Justice, June 2005. (in a briefing to the US Senate , noting that the situation bears not just attention, but action)

abducted by the LRA,<sup>7</sup> and the abducted girls have been forced to become wives of the commanders.<sup>8</sup>

The tragedy of internal displacement reflects a breakdown within a society, in which both fundamental human rights and freedoms, and economic and social development are gravely compromised. Both the communities left behind by the displaced and the areas where the displaced find refuge are severely disrupted, with long-term political and economic consequences.<sup>9</sup> Child marriage is one of the human rights abuses which violates children's rights is a common practice among the IDP's.<sup>10</sup>

This study will attempt to propose recommendations to states on how to end child marriage: a practice in which the parents of a child arrange a marriage with another child or an adult. In most cases young girls get married off to significantly older men. Child marriage is viewed within a context of force and coercion, involving pressure and emotional blackmail, and children who lack choice or capacity to give their full consent. Poverty in the IDP camps is one of the significant factors in determining a girl child's risk of becoming married as a child. Statistics show that child marriage is most common among the poorest groups in society.<sup>11</sup>

In Uganda, early child marriages in the IDP settings just like refugee settings are arranged as a hasty response to sexual relationships and many girls end up getting married at a significantly younger age than it was traditionally the norm.<sup>12</sup> Given the nature of displacement, extreme poverty, harassment and threats of sexual violence often prevents girls from attending schools, causing them to be increasingly vulnerable to sexual violence in the camps where they live.<sup>13</sup>

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<sup>7</sup> Africa: Africa's Child Soldier, Fight Well, Eat Little, Children of war ( News Letter on Child Soldiers from Radda Barren) October 1999, 5.

<sup>8</sup> Abduction and Killing of Children by Ugandan Rebel Groups, Report of the Secretary General, UN Economic and Social Council, (1999) Commission on Human Rights, 55<sup>th</sup> Sess, Provisional agenda item 13, at paragraph 4, U.N.Doc. E/CN.4/1999/69.

<sup>9</sup> Cohen R and Deng F.M. (eds.): The Forsaken People: Case Studies of the Internally Displaced (1998), Brookings Institution Press, Washington, D.C., Chapter One, pp.1-2. Available at <<http://brookings.nap.edu/books/0815715137/html/1.html#pagetop>> (accessed on 15th May 2007).

<sup>10</sup> UNITED NATIONS CHILDREN'S FUND, INNOCENT RESEARCH CENTRE, EARLY MARRIAGE; CHILD SPOUSES, 7 INNOCENT DIGEST (Mar.2001) [Herein after CHILD SPOUSES], available at: <<http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>> (accessed on the 15th 09,2007).

<sup>11</sup> n 10. above.

<sup>12</sup> Refugee Law Project work paper No. 20 "GIVING OUT THEIR DAUGHTERS FOR THEIR SURVIVAL REFUGEE SELF-RELIANCE, 'VULNERABILITY', AND THE PARADOX OF EARLY MARRIAGE," April 2007. Available at <<http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.wp20.pdf>> (accessed on the 26<sup>th</sup> 09, 2007).

<sup>13</sup> n 12 above page 13.

Under Ugandan law, sexual intercourse both consensual and non-consensual with a girl under the age of 18 is a crime of defilement regardless of the age of the male involved.<sup>14</sup> The Constitution of Uganda also provides that men and women of 18 years and above have the right to marry.<sup>15</sup> However, the years of conflict in Uganda have weakened the rule of law and victims of early marriage have few opportunities to access appropriate legal services for redress.

## **1.2 Object and Purpose of the Study**

Consequently, this study aims at addressing three issues. First it seeks to investigate causes of the increase in the practice of child marriages among IDPs in Africa and the effects of this practice on children.

Secondly, the study seeks to analyse the approach to solve the child marriage problem using international human rights treaties and other relevant instruments. It will provide basic understanding of the internal displacement issue, and highlight some of the causes and effects of early child marriage in the IDP settlements. The study will discuss existing gaps in international law implementation and the ability of states to use the available legal mechanisms in a way that can optimally protect IDP children against early child marriage.

At a more specific level, the case study is narrowed down to Uganda in addressing the plight of IDPs in Africa, with emphasis on child marriage as a violation of the rights of children in Uganda an area not given much attention in implementation by both International legal instruments and domestic law.

## **1.3 Significance and Scope of the Study**

This study is based on the IDP situation in Uganda and specific examples have been drawn from Northern Uganda in Gulu the most affected area within the country. It is envisaged that the findings of this thesis will provide information to institutions that are engaged in IDP issues. It will also provide information and contribute literature to academia engaged in the study of IDPs, thus adding data to the already existing wealth of knowledge on the protection of rights of IDP children in relation to child marriages. This thesis will also serve as a reminder for governments,

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<sup>14</sup> Ugandan Penal Code Act, Cap 106, Section 123.

<sup>15</sup> The 1995 Constitution of the Republic of Uganda, Article 31(1).

in particular the Government of Uganda (GoU), of its obligations under existing international laws that pertain to IDP Children protection especially against child marriage. For the IDPs, the findings should serve as an advocacy tool against actions by their governments and non-state actors.

#### **1.4 Hypotheses**

This paper deals with the following contentious questions:

- (a) What are causes and effects of the increased cases of early child marriage in IDP settings?
- (b) Whether international treaties adequately address the child marriage phenomenon and what are the gaps in implementation of international treaties?
- (c) Whether the domestic legal regime in Uganda adequately addresses the early child marriage phenomenon in IDP settlements?

#### **1.5 Methodology**

The methodology of this thesis will consist in the analysis of already existing bibliography and documentation on IDPs and web resources available at the Pretoria University Law Library and the American University Law Library in Cairo. Therefore, the main research will include intensive archival research and Internet research.

#### **1.6 Literature Review**

There has been lack of research and studies carried out and particularly published works, on the problem of early child marriage in the IDP settlements, what does exist are general surveys and reports like the Global Overview report.<sup>16</sup> Much has been written on marriage tackling it as an institution with little emphasis on early child marriage especially in Uganda.

Unfortunately, no exhaustive study has been done on this area though it is actually a continent wide problem.<sup>17</sup> Much work has been written on the girl child raising issues of sexual abuse and defilement in particular. However no much emphasis has been made regarding the problem of early marriage of the child mother.

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<sup>16</sup> INTERNAL DISPLACEMENT: Global Overview of Trends and Developments in 2006, \Published by the Internal Displacement Monitoring Centre, Norwegian Refugee Council, April 2007. available at <<http://www.internal-displacement.org>> (accessed on 09 October, 2007).

<sup>17</sup> n 1 above.

It is for this reason that even the term “child marriage” was not fully defined, writers simply give simplified definitions to various other aspects. For instance John Mbiti<sup>18</sup> classifies child marriages as ‘forced’. He explains that these type of marriages are forced upon the individual by other people or circumstances like marriage due to pregnancy, pressure or arranged marriages by parents, elopement to mention but a few. According to Mbiti, all this are likely to spring from traditional customs and ideas about marriage but does not amount to full marriage since it lacks many dimensions of marriage. Hence to be freed from such a situation is clearly not an act of Divorce on the girl or boy’s side, since no marriage has ever been affected.<sup>19</sup> Debbie Taylor considers child marriage and defines it as including “very young marriage”, as well as one in which daughters are sold as wives or concubines “in exchange for favours or release from debt”.<sup>20</sup> This definition best suits the situation in the IDP settlements in Africa today where young girls are forced by parents to get married in order for the family to meet its economic demands.

In this research, it will be argued that the existing international legal framework provides sufficient protection to children against child marriage but lacks effective implementation by the state parties. The research will also bring out the fact that many states have failed to enact laws necessary or to create institutions that give effect to the International Human Rights Protection regime since people who are uninformed about their rights and impoverished and are thus amenable to manipulation mainly populate them. In addition to the above, child marriage will be discussed as a form of sexual exploitation, and some of the empirical material discussing the causes and effects of child marriage will be derived from UNICEF Child Spouses, Innocent Digest and child survey reports.<sup>21</sup>

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<sup>18</sup> Mbiti J: African Religion and Philosophy, Heinemann, London, 1977.

<sup>19</sup> n 18 above

<sup>20</sup> Debbie Taylor: Servile Forms of Marriage, 1997. Discussed on ‘ Girl Child Marriage Discussion of May 13,1997. Available at <<http://www.h-net.org/~women/threads/disc-girlmarriage>> (accessed on the 25th October 2007).

<sup>21</sup> THE FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS, EARLY MARRIAGE: SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS (Nov.2001) [ herein after SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS], available at <[http://www.crin.org/docs/resources/publications/1367Early Marriage.pdf](http://www.crin.org/docs/resources/publications/1367Early%20Marriage.pdf)> ( accessed on the 19<sup>th</sup> 09, 2007); THE FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS, EARLY MARRIAGE: WHOSE RIGHT TO CHOOSE? (May 2000) [ herein after WHOSE RIGHT TO CHOOSE?], available at <<http://www.crin.org/docs/resouces/publications/pdf/digest7e.pdf>> (accessed on the 23rd 09, 2007); UNITED NATIONS CHILDREN’S FUND, INNOCENT RESEARCH CENTRE, EARLY MARRIAGE; CHILD SPOUSES, 7 INNOCENT DIGEST (Mar.2001) [Herein after CHILD SPOUSES], available at; <<http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>> (accessed on the 15th 09,2007).

## 1.6 Overview of Chapters

Chapter one will set out the content of the research, identify the problems and outline the methodology. Chapter two will discuss the child marriage phenomenon among IDP's and examines the reasons why child marriage is prevalent despite the growing international criticism and highlights the consequences of child marriages. Chapter three will deal with how various international instruments and treaties have addressed the problems of child marriages. Chapter four will narrow down on the response of the National legal system in Uganda on the child marriage in IDP settlements with focus on the implementation of the National IDP policy in Uganda.<sup>22</sup> Finally, chapter five will draw a conclusion and recommendations.

## 1.7 Conclusion

Child marriages in IDP camps are most commonly a result of prevalent poverty in the settlements. Under Ugandan law, sexual intercourse both consensual and non consensual with a girl under 18 is a criminal act regardless of the age of the male involved.<sup>23</sup> This clearly reflects a fact that the national laws and measures that exist to protect girl children against child marriages are inadequate.

Internally displaced persons do not forfeit their inherent rights because they are displaced; they can invoke various provisions of human rights and humanitarian law to protect their rights. At the same time, existing international law does not contain guarantees that explicitly mention internally displaced persons. It is often difficult for governments, international organisations, NGOs and the internally displaced to determine clearly which guarantees are applicable to IDPs in a specific situation.<sup>24</sup>

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<sup>22</sup> National Policy on Internally Displaced Persons in Uganda, 2004.

<sup>23</sup> n 14 above, section 123.

<sup>24</sup> n 9 above.

## CHAPTER 2: INTERNALLY DISPLACED PEOPLE AND THE EARLY CHILD MARRIAGE PHENOMENON

### 2.1 Introduction

This chapter will address the causes and effects of child marriages by highlighting the paradox of early child marriages as a survival strategy<sup>25</sup> in the IDP camps and protected villages in Africa. Child marriage is a major factor for the violations of human rights of girl children to the right to education<sup>26</sup> and the right to life, liberty, and security of person.<sup>27</sup> The chapter will explain that the majority of early child marriages in IDP are typically arranged as a response to sexual relationships between young people, at least one of whom is a minor, that have resulted in pregnancy.<sup>28</sup>

The situation of IDPs typifies vividly the crisis of displacement in Africa today. Notwithstanding the magnitude of the problem, no single organization has a specific and comprehensive mandate to respond to the protection and assistance needs of displaced persons as a whole.<sup>29</sup> At present, the regional initiatives remain at a rudimentary stage of development. Regional bodies such as the Organisation of African Unity (OAU) reborn as the African Union (AU)<sup>30</sup> are not accustomed to dealing with humanitarian emergencies and massive displacement. The AU

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<sup>25</sup> Much of the empirical material in this chapter is derived from the following three sources: THE FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS, EARLY MARRIAGE: SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS (Nov.2001) [ herein after SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS], available at <[http://www.crin.org/docs/resources/publications/1367\\_Early\\_Marriage.pdf](http://www.crin.org/docs/resources/publications/1367_Early_Marriage.pdf)> ( accessed on the 19<sup>th</sup> 09, 2007); THE FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS, EARLY MARRIAGE: WHOSE RIGHT TO CHOOSE? (May 2000) [ herein after WHOSE RIGHT TO CHOOSE?], available at <<http://www.crin.org/docs/resouces/publications/pdf/digest7e.pdf>> (accessed on the 23rd 09, 2007); UNITED NATIONS CHILDREN'S FUND, INNOCENT RESEARCH CENTRE, EARLY MARRIAGE; CHILD SPOUSES, 7 INNOCENT DIGEST (Mar.2001) [Herein after CHILD SPOUSES], available at; <<http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>> (accessed on the 15th 09,2007).

<sup>26</sup> International Covenant on Economic, Social and Cultural Rights, Article 13 and Convention on the Rights of the Child, Article 28.

<sup>27</sup> International Covenant on Civil and Political Rights, Article 6(1) and Article 9(1), respectively.

<sup>28</sup> Uganda: Early Marriage as a form of sexual violence, Noah Gottschalk "Research and Advocate Associate at the Refugee Law Project (RLP) Kampala, Uganda. Available <<http://fmreview.org>> (accessed on 25<sup>th</sup> September 2007).

<sup>29</sup> The Addis Ababa Document, Refugees and Forced Population Displacements in Africa. Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, 8-10 September 1994, Addis Ababa, Ethiopia. (Held in Commemoration of the twenty-fifth anniversary of the adoption of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the twentieth year of its entry into force), A/AC.96/839 Recommendation V: Internally Displaced Persons Para 18 pp. 11-12.

<sup>30</sup> African Union was launched in Durban, South Africa, 9 July 2002. In general, The African Union objectives are different and more comprehensive than those of the OAU. The OAU served its mission and was due for replacement by a structure geared towards addressing the current needs of the continent. For more information, see the aims of the OAU and the objectives of the African Union, as contained in the Constitutive Act.

lacks experience and expertise in addressing emergencies such as conflict prevention and the problem of mass displacement and it has resulted in an increase in cases of child marriages.<sup>31</sup>

## 2.2 Why a definition for IDPs?

Although the displaced are frequently forced to flee their homes for the same reason as refugees, the fact that they remain within national territory means that they do not qualify as *bonafide* “refugees”, entitled to the protection regime accorded to refugees under international law.<sup>32</sup> Moreover, their presence within national territory means that their own government bears primary responsibility for meeting their protection.<sup>33</sup> In other words, it is the responsibility of governments to provide protection for IDP children against early child marriages among the internally displaced people.

Internally displaced persons refer to those forcibly uprooted from their homes by armed conflict, internal strife, and human made national disasters, but who remain within the borders of their own countries.<sup>34</sup> The prevalence of internal displacement cuts across many countries in Africa that are facing challenges of meeting the protection and basic needs of the IDPs. This is elaborated by a study, entitled *Compilation and Analysis of Legal Norms*<sup>35</sup> Although governments commitment towards IDPs constitute an important step in acknowledging state responsibility towards the IDP indicators from the global overview shows that most governments are far from fulfilling their obligations.<sup>36</sup> For example in Uganda, lack of adequate protection is still a major problem facing the IDPs because of the poor institutional oversight for IDP protection.<sup>37</sup> This is contrary to the fact that they governments have primary responsibility for the security and well being of the IDPs defined by the Guiding Principles on Internal Displacement and the set of relevant international standards.<sup>38</sup>

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<sup>31</sup> n 16 above page 11.

<sup>32</sup> n 16 above page 9.

<sup>33</sup> n 32 above.

<sup>34</sup> n 32 above.

<sup>35</sup> Deng F M, Representative of the Secretary-General on Internally Displaced Persons: *Compilation and Analysis of Legal Norms*, (1998) United Nations, New York and Geneva.

<sup>36</sup> Wyndham J, *A Developing Trend: Laws and Policies on Internal Displacement* (2006), Winter Human Rights Brief.

<sup>37</sup> *ONLY PEACE CAN RESTORE THE CONFIDENCE IN THE DISPLACED*” Update of the Implementation of the Recommendations made by the UN Secretary General’s Representative on the Internally Displaced Persons in Uganda. (2nd Edition)October 2006.By IDMC & Refugee Law Project Kampala available at <<http://www.refugeelawproject.org>>. ( accessed on the 9<sup>th</sup> October, 2007).

<sup>38</sup> *Guiding Principles on Internal Displacement E/CN.4/1998/53/Add 2*, Principles 3, 9, and 25. Dated February 11, 1998, available at <<http://www.ohchr.un.org>> (accessed on October 04, 2007).



### 2.3 Causes of Internal Displacement in Africa

The African continent has more IDPs than the rest of the world put together with a total of just approximately 13 million by the end of 2006.<sup>39</sup> For example, according to the global overview, Sudan had 5 million IDPs, followed by Northern Uganda with 1.5 million and the DRC with 1.1 million.<sup>40</sup> This implies that in 2006, a number of African countries experienced significant deterioration of their human rights situations in comparison to 2002 due to the magnitude of displacement caused by armed conflicts. There are many factors which fuel internal displacement in Africa.

A common factor prolonging these and many other wars in Africa and thereby exacerbating situations of internal displacement is the exceedingly high availability of small arms and light weapons. The mass displacement in Africa has been as a result of the conflicts. For example in Uganda, the displacement has been fuelled by internal conflicts. However, government response to the conflict in some cases has exacerbated the plight of IDPs, for example moving populations into 'protected villages' in some cases made IDPs even more vulnerable to rebel attacks.<sup>41</sup>

However, there is a ray of hope for the IDPs since some success has been anticipated at a regional level, in terms of raising awareness of state responsibility towards their own displaced citizens. The African Union (AU) is currently in the process of developing an IDP Convention. In addition, the member states of the international conference on the Great Lakes region, which includes the major IDP hosting countries in December 2006 signed a Pact on Security, Stability and Development of the Great Lakes Region, which includes a protocol on protection and assistance of IDPs.<sup>42</sup>

As a result of the displacement, cases of child marriage and sexual exploitation has been common in Central African Republic, Sudan, Chad, Cote d'Ivoire, DRC, Liberia and Uganda as reported by the Norwegian Refugee Council.<sup>43</sup> Girl children particularly suffer as victims of war

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<sup>39</sup> n 16 above page 9.

<sup>40</sup> n 16 above page 12.

<sup>41</sup> Lomo Z A, *The Struggle for Protection of the Rights of Refugee and IDP in Africa: Making the Existing International Legal Frame Work*, (2000)18 Berkeley J. Int'l L. 268.

<sup>42</sup> n 16 above page 31.

<sup>43</sup> n 16 above page 67.

in conflict situations since many of them are often abducted by the rebels and sexually exploited resulting into early marriage.

## 2.4 Early Child Marriage Phenomenon

Marriage is a phenomenon modelled on the socio-cultural and economic environment of a given society.<sup>44</sup> According to Mair, marriage is a union between man and woman such that children born to the woman are recognized as legitimate off-spring of both parties.<sup>45</sup> According to Lord Penzance in the case of *Hyde V Hyde*, marriage as understood in Christendom may be defined as a voluntary union for life of one man and one woman to the exclusion of all others.<sup>46</sup> This definition involves four conditions for instance that marriage must be voluntary, for life, monogamous and between man and woman. However, early child marriage is seen as a survival strategy for the parents and caretakers but involves force and coercion of children who have not yet attained the required age of marriage especially among the IDPs where girl children are married as soon as they reach puberty and in some cases even earlier.<sup>47</sup>

The absence of an in-depth definition of early marriage in international conventions has resulted into some debate. Some activists and academic authors are of the view that instead of looking for a universal age of marriage, more attention should be given to the elimination of the effects of early marriage.<sup>48</sup> Some writers are of the view that the universal age of marriage is not appropriate because societies have different understanding of what it means to be a child and with different cultural and social realities.<sup>49</sup> According to Bunting,

“Governments should be allowed to set the age of marriage below 18 years and the onus is on them to demonstrate that it does not result into any discrimination or adverse consequences for women and that this approach would provide more accurate reading of international conventions than the approach which provides that 18 is the minimum age for marriage.”

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<sup>44</sup> n 28 above.

<sup>45</sup> Mair L P, *An African People in the 20<sup>th</sup> Century*. London, 1988. p. 91.

<sup>46</sup> *Hyde v Hyde* 1866 LRIP and D 130.

<sup>47</sup> n 28 above.

<sup>48</sup> Warner E, *Behind the Wedding Veil: Child Marriage as a form of Trafficking in Girls*. (2004) Available at Hein online 12 Am. U. J. Gender Soc. Pol'y & L. 233.

<sup>49</sup> Banting A, *Particularity of Rights, Diversity of Contexts: Women, International Human Rights and the Case of Early Marriage* (1999) Doctoral Thesis, University of Toronto, Faculty of Law.

However, Buntings argument would accelerate the child marriage practice further, Child marriage can be defined as marriage of a child below 18 years of age. Other terms applied to child marriage include “early marriage” and “child brides.” Early marriage is rather vague and does not necessarily refer to children since what is early for one culture may be late for another.<sup>50</sup> For the purposes of this research, the definition of “a child to be below 18 years” will be adopted. It will moreover focus specifically on child marriage because of its common prevalence especially among the IDPs yet so little attention is given to the phenomenon.<sup>51</sup>

More than 30% of girls are married by the age of 18 in several countries, mostly in Asia and Africa.<sup>52</sup> Up to 45% percent of girls are married before the age of 15 in Bangladesh.<sup>53</sup> Some of the factors in determining a girl’s risk of being married as a child include; poverty, protection of girls from premarital sex, fear of loss of virginity before marriage and related family honour, and the provision of stability during unstable social periods.<sup>54</sup> Statistics show that child marriage is most common among the poorest groups in society involving children that lack the choice or capacity to give their full consent.<sup>55</sup> Child marriage must therefore always be considered forced marriage because valid consent is absent and often considered unnecessary.

## **2.5 The Causes of Early Child Marriage**

It is important to know the root causes of this early child marriage before we examine its effects as a problem to the children who are victims of the practice in the IDP camps. The causes of early marriage of the girl-child include socio-economic and social-cultural factors, education, personal decision and external factors, defilement, lack of sex education and religious practices.<sup>56</sup>

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<sup>50</sup> WHOSE RIGHT TO CHOOSE, See n 25 above.

<sup>51</sup> SEXUAL EXPLOITATION & HUMAN RIGHTS OF GIRLS, See n 25 above, at 18.

<sup>52</sup> UNICEF, Early Marriage, a Harmful Traditional Practice. Statistical exploration, 2005.

<sup>53</sup>See UNESCO Case studies, Bangladesh: Demographic Characteristics of Adolescents, available at <<http://www.unescobkk.org/ips/arh-web/demographics/bangladesh2.cmf> >(accessed on the 26<sup>th</sup> 08,2007).

<sup>54</sup> WHOSE RIGHT TO CHOOSE? (‘For many communities the loss of virginity in girls before marriage is the worst shame that can be brought upon a family’); see also CHILD SPOUSES, see n 25 above at 6-7 (noting that many parents will go to great lengths to keep girls from interacting with men outside the family).

<sup>55</sup> WHOSE RIGHT TO CHOOSE n 25 above.

<sup>56</sup> n 25 above.

However, some researchers claim that the marriage age has increased worldwide.<sup>57</sup> But on close analysis, these claims are baseless because most marriages are not registered as required by legislations on marriage.<sup>58</sup> The possibility of rising marriage age is higher in the urban settings where laws are easily enforceable with the high educational levels compared to the rural settings, where, women have fewer opportunities in marriage due to cultural practices.<sup>59</sup> As a result, child marriage has retained its advantages for poor families in the rural settings and they include cultural, social, political and economic variables.

### 2.5.1 Socio-Economic Factors

Economic pressures and poverty have added a new angle to the problem of child marriage not only in the IDP camps, but all over Africa and the world at large. Early child marriages largely motivated by lack of economic resources have led to the increased vulnerability of the girl-child.<sup>60</sup>

Poverty and lack of other income generating activities do force internally displaced girls and women into prostitution and hence early marriage and trafficking. For example, in Uganda many girls and women in the IDP camps engage in 'survival sex' to obtain food or 'transactional sex' in exchange for spending money or small objects.<sup>61</sup> Displaced women and girls are often exposed to sexual and gender based violence in the course of obtaining basic resources like food, water and fuel for themselves and families as is the case in Dafur.<sup>62</sup> In the process, the perpetrators make them wives however young they might be.

Poverty is one of the major causes of early child marriages in the IDP settlements in Africa. Where poverty is at its peak, young children especially the girls are regarded as an economic burden and end up being forced into marriage by their parents to older men. In traditional

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<sup>57</sup> Sohoni N, *The Burden of Girlhood: (1995) A Global Inquiry into the status of girls 9*; O'cornell H, *Women and the family* 16 (1994), Quoted in Ladan Askari, *The Convention on the Rights of the Child: The Necessity of adding a provision to ban child marriage.* 5 ILSA J. International Law and Comparative Law, 125 1998-1999.

<sup>58</sup> Shanti G, *Girl Child: A Lifetime of Deprivation and Discrimination*, (1991)52 INDIAN J.SOC. WORK, 25.

<sup>59</sup> Anderson J W, *Early to Wed*, Wash. Post, May 24, 1995, at A27; Report adopted by Committee at the Convention on the Rights of the Child, U.N. GAOR, Hum. Rts. Comm., 8<sup>th</sup> Sess., 20<sup>th</sup> mtg., quoted in Askari L, *The Convention on the Rights of the Child: The Necessity of adding a provision to ban child marriage* (1998). 5 ILSA J. International Law and Comparative Law, 125.

<sup>60</sup> n 25 above.

<sup>61</sup> UN Integrated Regional Information Networks, *Escaping rural violence and hardship; the reality of displacement*, 17<sup>th</sup> February 2006; See also Paul, Diane, *Fulfilling the Forgotten Promise*, January 2006.

<sup>62</sup> n 16 above page 67.

societies in Sub-Saharan Africa, the bride's family may receive cattle from the groom, or the groom's family, as the bride price for their daughter.<sup>63</sup> However, in IDP settlements where poverty is pronounced, payment of a small amount of money for the child marriage transaction is effected to enable her parents afford food.<sup>64</sup>

Evidence suggests that where socio economic situations exist like in the IDP settings, early marriage is on the rise. Families in refugee camps in Burundi, for example, protect their culture by marrying their daughters off as early as possible.<sup>65</sup> In addition to the above, reports from Iraq also indicate that early marriage is rising there in response to poverty inflicted by the post-Gulf War sanctions,<sup>66</sup> and in Afghanistan, war and militarization have led to an increased number of forced marriages of young girls.<sup>67</sup>

According to Refugee Law Project - Uganda, early marriage is an essential economic survival strategy for girls and their guardians. Besides the financial benefits of a relationship with an economically productive man, girls and more commonly their parents, relatives, or other guardians receive bride price which can be used to meet certain needs including starting businesses, paying debts, buying more land, or even pay for education.<sup>68</sup> As one UNHCR official explained, the desire for bride price is a major cause of early marriage; in fact, it is "the root cause actually, and what brings this up is poverty."<sup>69</sup> Poverty and the difficult economic situation in the camps remain a big challenge and cause of child marriage. Even mothers are willing to give out their young girls for survival as a displaced woman laments "If somebody comes with money that I can use to eat and feed the children, I will sell her."<sup>70</sup>

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<sup>63</sup> Rwezaura, B(1994), 'The Changing Context of Sub-Saharan Africa' in Philip Alston (ed.) *The Best Interests of the Child*, Clarendon Press, Oxford. See also Cynthia Price & Per Miljeteig – Olssen, status report: United Nations Convention on the Rights of the Child, 8 N.Y.L. SCH. J. HUM. RTS. 367 (1991); Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: A Feminist Land Mark*, 3 WM. & MARY J. WOMEN & L. 29, 29 (1997).

<sup>64</sup> n 12 above page 19.

<sup>65</sup> World Vision International (1996), 'The Effects of Armed Conflict on Girls', A Discussion Paper prepared for 'The Impact of Armed Conflict on Children', Report of Graça Macel, Expert of the Secretary-General of the United Nations. See also: Black, Maggie (1998) 'Girls and War: An Extra Vulnerability', in *People and the Planet*, vol 7, no 3, London.

<sup>66</sup> *Clearing a Path for Girls* (1998), NGOs Report from the Field on Progress since the fourth World Conference on Women, Beijing. NGO Working Group on Girls, New York and Geneva.

<sup>67</sup> Pourzand, Niloufar (2000), UNICEF Kabul, personal communication.

<sup>68</sup> n 12 above page 21.

<sup>69</sup> n 12 above page 19.

<sup>70</sup> n 12 above page 19.

Without financial support, IDPs have little choice but to arrange marriages for themselves or for their daughters. The bride price that a young girl fetches is needed to support her poor birth family to pay debts and a source of funds to purchase brides for her brothers.<sup>71</sup> This makes the girls family benefit greatly from her marriage at an earlier age.

### 2.5.2 Protection for Girls

Child marriage is also seen as a means of protection for the young girls against sexual harassment and promiscuity. Caldwell supports this argument that early child marriage is also used as protection for wife under male control which ensures that she is submissive to her husband and works hard for her in-laws' household; that the children she bears are 'legitimate'; and that bonds of affection between couples do not undermine the family unit.<sup>72</sup> There are instances where parents feel comfortable when their daughters are with a male guardian because they think they are safer while with a man. In conflict-torn Northern Uganda, for example, some families marry their young daughters to militia members in order to defend family honour or secure 'protection' for themselves and the girl.<sup>73</sup> This practice has also been happening in Somalia which has been in a conflict situation and has many people internally displaced.<sup>74</sup> For example in Uganda,

"It is clear also that there are categories of children who are especially vulnerable in situations of armed conflict, such as girls, refugee and internally displaced children, and child-headed households. The girl child is often the victim of sexual violence and exploitation, and, increasingly, girl children are being recruited into fighting forces."<sup>75</sup>

In the worst cases, during insecurity girls are abducted or kidnapped by armed militia rebels and forced into temporary marriages as Mikhail illustrates;

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<sup>71</sup> WHOSE RIGHT TO CHOOSE?, see n 25 above, at 11-12 ( describing the economic justification for child marriage; see also CHILD SPOUSES n 28, at 6 ( noting that a girl's parents are rewarded with money and material goods from the groom when their daughter is married).

<sup>72</sup> Caldwell, John C. and Pat C (1977), 'Role of Marital Sexual Abstinence in Determining Fertility: A Study of the Yoruba in Nigeria', *Journal of Population Studies*, Vol 31, 1.

<sup>73</sup> The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda (1997), A Human Rights Watch and Amnesty International Report.

<sup>74</sup> Stockman, Lorne and Catherine Barnes with Mohamed Hamus Sheikh Mohamed, (1997), *Minority Children of Somalia*, in *War: The Impact on Minority and Indigenous Children*, Minority Rights Group, UK.

<sup>75</sup> n 37 above page 26.

“Displaced populations living in camps may feel unable to protect their daughters from rape, and so marriage to a warlord or other authority figure may provide improved protection.”<sup>76</sup>

These practices are all intended to shield the girl from male sexual attention and rape especially within the IDP camps and in the eyes of concerned parents, marriage is therefore seen to offer the ultimate ‘protection’ measure. They go directly from being under their parent’s to their husbands at a very tender age.<sup>77</sup>

### **2.5.3 Social – Cultural Factors**

Customs surrounding marriage, including the desirable age for marriage and the method of selection of a spouse depends on a society’s view of the family’s role, structure, pattern of life, and the individual and collective responsibilities of its members. The idea and function of ‘family’ varies across the world and is in a state of constant evolution.<sup>78</sup> However, during armed conflict, the IDPs living in the camps usually experience a break down in culture and some practices too especially with regard to child marriage where all the traditional requirements are not complied with because of the massive abductions and harassment especially to the girl children.

Furthermore, in situations of conflict, armed groups engage in acts of sexual violence to attack the cultural norms and values of the community punish or terrorise communities and individuals accused of collaborating with enemy forces. For example in DRC, various armed groups have abducted and kept as sex slaves thousands of women and girls to provide sexual, domestic and agricultural services.<sup>79</sup> The practices of ethnic cleansing by the armed groups have also affected girls as the most vulnerable group in situations of conflict for example in Darfur;<sup>80</sup>

“Girls and women have been targeted in inter ethnic fighting both in a deliberate attempt to dishonour them and as a means of ethnic cleansing, particularly in areas inhabited by displacement populations.”

Socio-cultural factors have therefore greatly influenced early marriage of the girl-children in the African society especially in situations of armed conflict; early marriage is treated as the only means of ensuring the continuity of the family lineage through procreation and therefore girls

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<sup>76</sup> Mikhail, S.L. (2002) Child Marriage and Child Prostitution: two forms of sexual exploitation, *Gender and Development*, 10(1): 43-49 March.

<sup>77</sup> Malini K, *Invisibility of the Girl Child in India*, (1991) 52 *INDIAN J. SCO. WORK* 5,8.

<sup>78</sup> Boyden, Jo with UNESCO (1993), *Families: Celebration and Hope in a world of change*, Gaia Books, UK.

<sup>79</sup> n 16 above page 67.

<sup>80</sup> n 16 above page 67.

are considered less valuable than boys and particularly so as they get older.<sup>81</sup> In internally displaced communities where child marriage is common, there is social pressure on families to comply with cultural requirements.

The traditional payment of bride price and dowry in Africa leads to child marriage and the risks that accompany early pregnancy. Girls are therefore given in marriage as early as eight, nine or ten years, to much older men.<sup>82</sup> Cultural values are translated into 'local customs' in many different ways, but local customs in all parts of the world have a strong positive and negative impact on the lives of girl children and health. Plucknett<sup>83</sup> in his book; *Introduction to Jurisprudence*, 1979, defined customs as "Instruments for legal change rather than fossilized remains of a remote past". When applied to the IDP situations, the need for certainty about the age of consent, lead to early marriage and the risks that accompany early pregnancy.

In most traditions of third world cultures, a girl's marital and family status is paramount. It is what gives her social and cultural standing in society. For example, in Uganda among the iteso tribe, payment of cattle for dowry is very important, and is seen as a symbol of wealth and power because it is pride to the families. Culture is therefore an important trademark that must not be lost and should be protected even among the IDP much as it is not stagnant and shouldn't be oppressive. It should be developmental and empowering. Culture must embrace children's rights against child marriages even in the IDP settlements.

#### **2.5.4 Sexual Harassment, Peer Pressure, and Early Child Marriage**

Women and girls in situations of displacement also face gender based violence in most internal displacement situations which includes rape, forced impregnation, trafficking and sexual slavery.<sup>84</sup> For many girls in IDP settlements, incidents of gender-based violence occur while they are attempting to secure a livelihood, while collecting water, firewood or even during the night commuting moments in the evenings on their movement to town for safety.<sup>85</sup> This also applies to IDPs who have to move from place to place in search of security and employment in

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<sup>81</sup> SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS; See n 25 above ( explaining that in many cultures, a marriage is really the exchange and purchase of women whose price depends on factors like age and beauty).

<sup>82</sup> Smyke P: *Women & Health*. Zed Books Ltd. London & New Jersey Page 51.

<sup>83</sup> Plucknett, *Introduction to Jurisprudence*, (1979) 4<sup>th</sup> Edition, Stephen's and Sons, London, Pg. 887.

<sup>84</sup> UNHCR, *Executive Committee Conclusion on Women and Girls at Risk*, 6<sup>th</sup> October 2006, available at <<http://www.internal-displacement.org>> (accessed on 09 October, 2007).

<sup>85</sup> Diane Paul, *Fulfilling the Forgotten Promise: The Protection of Civilian in Northern Uganda*, report for Interaction Protection Working Group, Northern Uganda Protection Mission, January 2006. See also, n 40 above.



the urban settings. However, particular attention should be given to the protection of the IDPs who transit from camps to the night commuter centres since it does separate families and exposes girl children to sexual violence which leads into early marriage.<sup>86</sup>

IDP girl children therefore become involved in early marriages for a host of reasons, including factors linked to such sexual harassment and peer pressure. For example in Northern Uganda many girls are left unprotected in every area of their lives with few alternatives and the 'protection gap' with respect to girls appears to be more serious than any other protection issues especially with regard to defilement, sexual harassment and exploitation where the victims end up marrying the perpetrators.<sup>87</sup>

### **2.5.5 Child Marriage and Contemporary Pressures**

Other pressures do promote early child marriage in societies in armed conflict. Fear of HIV infection, for example, has encouraged men in some African countries to seek young virgin and therefore uninfected partners.<sup>88</sup> Early child marriage is interlinked to the frequency of the incidences of rape, trafficking, domestic violence, sexual servitude and child abduction especially in the IDP settlements where girl children are vulnerable.

## **2.6 The Impact of Child Marriage**

### **2.6.1 Physical, social and psychological consequences of child marriage**

Early marriage grants children adult status with domestic and childbearing responsibilities. Young girls who get married will most likely be forced into having sexual intercourse with their much older husbands. This has severe negative health consequences and the girl is often not psychologically, physically and sexually mature and may become pregnant consequently at an early age and there is a strong correlation between the age of a mother and maternal mortality and morbidity.<sup>89</sup> Girls aged 10-14 are five times more likely to die in pregnancy or childbirth than

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<sup>86</sup> n 37 above page 27.

<sup>87</sup> n 37 above page 26.

<sup>88</sup> Owen, M (1996), *A World of Widows*, Zed Books, London; also Kabir, R(1998) *Adolescent Girls in Bangladesh*, UNICEF Dhaka.

<sup>89</sup> WHOSE RIGHT TO CHOOSE? See n 25 above (stating that girls ages fifteen through nineteen are not mature enough for child bearing).

women aged 20-24 and girls aged 15-19 are twice as likely to die.<sup>90</sup> Erica Royston and Sue Armstrong maintain that high maternal deaths' following too many pregnancies is also a result of early marriage.<sup>91</sup> Regardless of how early child marriage occurs, it takes a terrible toll on a girls emotional health too. Because of her age, inexperience, and vulnerability, she is faced with the dominance and controls of her husband, who is empowered to keep her as a prisoner.<sup>92</sup>

On top of pregnancy-related complications, young married girls are also at high risk of contracting HIV/AIDS. Girls are disproportionately affected by HIV/AIDS as compared to boys due to physical and social factors. Young married girls are at higher risk because their older husbands may already be infected in previous sexual relationships.<sup>93</sup> This is a common phenomenon in the IDP settlements where the men are idle most of the time and maintain several sexual partners.<sup>94</sup> Girls and women who are married younger, especially when married as children, are more likely to experience domestic violence and to believe that it is justified for a man to beat his wife. In addition, children are least likely to take action against this abuse<sup>95</sup> that seriously endangers the physical and mental health of girls and can even put their lives at risk.

Gender inequality is both a cause as well as a consequence of child marriage in the IDP settlements. Child brides usually have lower levels of education than girls who get married at an older age. Their education if any terminates upon marriage. Repeated pregnancies follow with a lot of time spent on household chores, she loses the opportunity to earn her own living.<sup>96</sup> Once

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<sup>90</sup> UNFPA, Child Marriage Fact Sheet, 2005; see also CHILD SPOUSES, n 25 above, at 10-11 (Pregnancy related deaths are a leading cause of mortality for fifteen to nineteen year old girls worldwide. Mothers in this age group face a twenty to two hundred percent greater chance of dying in pregnancy than women aged 20 - 24.

<sup>91</sup> Child Mothers and Marriage, L.A. TIMES, Sept.5, 1996, at B12; Hellen O' Connel, Women and the Family 16 (1994); Ruth Dixon – Mueller, Population Policies and Women's Rights: Transforming Reproductive Choice 128 (1993); Achievements made in the implementation of the UNICEF Policy on Women in Development, Including the Situation of the Girl Child, U.N. ESCOR, E/ICEF/1992/L.5 (1992); PREVENTING MATERNAL DEATHS 55 (Erica Royston & Sue Amstrong) eds., 1989).

<sup>92</sup> WHOSE RIGHT TO CHOOSE? See n 25 above at 9 ; also see Monica Satya Kalra, Forced Marriage: Rwanda's Secret Revealed, 7 U.C Davis J. International Law & Policy 197, 215-16 (2001) (describing the experience of Tutsi women who were forced, by threat of death, into marriage by their Hutu captors during the 1994 genocide in Rwanda and categorising forced marriage as a form of enslavement, specifically sexual slavery).

<sup>93</sup> CHILD SPOUSES, see n 25, at 10 (citing studies that show that girls who have their pregnancy at an early age have a higher incidence of HIV infection).

<sup>94</sup> n 37 above page 26.

<sup>95</sup> IPPF and the Forum on Marriage and the Rights of Women and Girls. Ending Child Marriage, (2006) A Guide for Global Policy Action.

<sup>96</sup> WHOSE RIGHT TO CHOOSE? n 25 At 17-18 (explaining that girls are not sent to school because education is thought to be incompatible with their roles as wives and mothers); see also CHILD SPOUSES, n 25 At 11-12 (stating that the lack of education prevents girls from developing her own sense of identity and leads to lower levels of self-esteem).

a girl is married, she experiences a lack of autonomy to make personal decisions about her life. Early marriage in IDP settings, together with its relation to low levels of education, high levels of violence and abuse, severe health risks and harmful power dynamics, results in increased vulnerability to poverty for young girls.

## **2.8 Conclusion**

The discussion in this Chapter establishes that as a result of the phenomenon of early child marriages, African children have for long been subjected to violence, discrimination and various human rights abuses as victims of forced child marriages. Child marriage has therefore been studied out of concern that it goes hand in hand with early childbirth that exposes children to physical and mental suffering. Much as it is important to study child marriage from a medical perspective, a human rights approach would offer a more complete analysis of the topic.<sup>97</sup> This was by identifying the connection between child marriage and the socio-economic stresses on a society caused by internal displacement.

The impact of child marriage among the IDP's against the dying notion of state responsibility especially in Africa offers a powerful basis upon which to argue for implementation of International legal instruments to the question of child marriage in the IDP settlements. This will enable us establish whether the existing international and regional legal framework provides sufficient protection to the internally displaced children against child marriage.

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<sup>97</sup> n 95 above.

## **CHAPTER 3: EMERGING TRENDS TOWARDS THE IMPLEMENTATION OF INTERNATIONAL LAW TO CURB CHILD MARRIAGE**

### **3.1 Introduction**

This chapter examines the legislative framework established to address child sexual exploitation and early marriage that is applicable to IDPs. It will reflect on the importance of the implementation of International treaties relating to sexual exploitation of children,<sup>98</sup> and discusses the wider legislative context that affords protection for children vulnerable to early marriage and sexual exploitation in the IDP settlements. Finally, it will provide recommendations at the national and international level to prevent and combat early child marriage.

### **3.2 HUMAN RIGHTS CONVENTIONS**

Early marriage in general and child marriage in particular are increasingly facing criticism internationally including some Middle Eastern and North African countries.<sup>99</sup> This change is manifested in various international statements as will be discussed in this chapter.

#### **3.2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS**

The Universal Declaration of Human Rights (UDHR)<sup>100</sup> adopted in 1948 through a United Nations General Assembly resolution. Much as the UDHR is not a binding instrument, it is a basis for human rights treaties with the status of customary international law,<sup>101</sup> or as a general

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<sup>98</sup> The Universal Declaration of Human Rights (UDHR) G.A Res. 217, U.N . GAOR, 3d Sess., U.N. Doc. A/810/(1948); Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S 3 [herein after CRC]; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 9, 1962 U.N.T.S 231 [herein after Marriage Convention]. As of Sept. 19, 2007, the United States had ratified this treaty; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S 13, 19 I.L.M 33 (1980) [ herein after CEDAW] available at <<http://www.untreaty.un.org/englishinternetbible/parti/chapteriv/treaty10.asp>>; ILO Convention C182, June 17, 1999 (date of adoption) [herein after Child Labour Convention], available at <<http://www.ilo.org/ilolex/english/condisp.htm>> (accessed on September 19, 2007); Convention Against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 146 U.N.T.S. 85, modified , 24 I.L.M. 535; African Charter on the Rights and Welfare of the Child (1990) (here in called The African's Children's Charter); Organization of African Unity: Banjul Charter on Human and Peoples' Rights, 21 I.L.M. 58, 59 (1982) (entry into force Oct. 21, 1986).

<sup>99</sup> Mikhail B & Louis S , Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation, (2002) In GENDER, TRAFFICKING & SLAVERY 43-44 (Rachel Masika ed., 2002).

<sup>100</sup> G.A Res. 217, U.N . GAOR, 3d Sess., U.N. Doc. A/810/(1948).

<sup>101</sup> Barrey E. Carter & Phillip R Trimble, International Law 848 (3<sup>rd</sup> ed. 1999)

principle of law.<sup>102</sup> Dugard argues that it is necessary to turn to judicial precedent to decide which rules of customary international law applied and proved.<sup>103</sup>

The UDHR in its preamble proclaims the pledge by states to achieve, in cooperation with the UN, the promotion of universal respect for human and observance of human rights and freedoms.

“...this [Declaration] as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>104</sup>

This makes the Declaration a symbol of what the international community means by “human rights” reinforcing the conviction that all governments have an obligation to ensure the enjoyment of rights the Declaration proclaims.<sup>105</sup> Article 16.1 of the UDHR, men and women of full age have the right to marry and are entitled to equal rights in marriage.<sup>106</sup> Article 16.2 provides that marriage should only happen with the free and full consent of the intending parties.<sup>107</sup> These provisions do not give a ray of hope compared to other treaties because of the difficulty of enforcement of the UDHR. Other international sources could provide sanctuary to the problem of child marriage because the sexual abuse of children through the practice of early marriage is a fundamental violation of their rights.

### **3.2.2 CONVENTION ON THE RIGHTS OF THE CHILD (CRC)<sup>108</sup>**

It is important to examine the relevance of the CRC to preventing and combating child marriage as a form of child sexual exploitation among the IDPs. In 1989, the CRC became the first

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<sup>102</sup> Thomas Buergenthal, Dinah Shelton and David Stewart, *International Human Rights in a Nut Shell* (2004); See also Sohn, “The New International LAW: Protection of the Rights of Individuals Rather than States,” 32 *Am. U. L. Rev.* 1, 16-17 (1982); L. Henkin, *The Age of Rights* 19 (1990); Simma & Alston, “The Source of Human Rights Law: Custom, Jus Cogens, and General Principles,” 12 *Australian Y. B Int’l L.* 82 (1992).

<sup>103</sup> Dugard J, *International Law, a South African Perspective*, 3<sup>rd</sup> ed. 2005.

<sup>104</sup> n 100 above, Preamble of the UDHR.

<sup>105</sup> Shelton & Stewart, *International Human Rights in a Nut Shell*, 2004; See also Humphrey, “The Universal Declaration of Human Rights: Its History, Impact and Juridical Character,” in B. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration* 21, at 28-37 (1979).

<sup>106</sup> n 100 above art. 16.1.

<sup>107</sup> n 100 above art. 16.2.

<sup>108</sup> Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S 3 [herein after CRC].

international treaty to place a comprehensive duty on states to ensure the right of children and protect them from all forms of abuse, exploitation and violence. This implies that a State can be held responsible for its failure to respond to the requirements of the CRC to prevent child abuse through sexual exploitation.

Articles of the Convention relate specifically to exploitation of children and its consequences. In the Convention, no single article or group of articles are interpreted independently and the entire convention must be seen as indivisible because it suggests an integrated and comprehensive approach to action that can guide and unify priorities and policies. Countries that have ratified the Convention are required to take appropriate action to protect children from all forms of physical or mental violence, injury and abuse, including sexual abuse by parent(s), guardian(s) or caretaker(s).<sup>109</sup> The protection from inducement or coercion of a child to engage in unlawful sexual activity and from the abduction of, sale of or traffic in children for any purpose<sup>110</sup> is an obligation of member states.

A number of provisions in the CRC apply to child marriage although it contains no explicit provision on the subject by specifically prohibiting the practice of child marriage. In article 3 in all actions concerning children, the best interests of the child shall be a primary consideration. Article 19 stipulates that, “The right to protection from all forms of physical or mental violence, injury or abuse, exploitation and sexual abuse, while in the care of parents, guardian, or any other person”. Article 24 provides for the right to health; access to health services; and protection from harmful traditional practices, Article 34 for the right to protection from all forms of sexual exploitation and Article 36 provides for the right to protection from all forms of exploitation prejudicial to any aspect of the child's welfare. However, despite of these provisions for the protection of children, children in armed conflict and in IDP camps continue to face abuse and sexual exploitation as already discussed in the previous chapter.

However, given the horrific consequences of child marriage discussed in the previous chapter, it is worth attempting to challenge the practice as in breach of some CRC provisions. For example, article 24.3 stipulates that ‘state parties shall take measures to abolish ‘traditional practices prejudicial to the health of children.’<sup>111</sup> Although this provision does not mention child marriage, it can be the best clause to invoke against child marriage, because of the health risks associated with child marriage.

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<sup>109</sup> n 108 above article 19.

<sup>110</sup> n 108 above article 35.

<sup>111</sup> n 108 above at art. 24(3).

Some areas of international law that can provide guidance on aspects of the problem of child marriage in IDP settings in the CRC which guarantees the protection of children from discrimination or punishment based on their status, activities, expressed opinions or belief of their parents or family members.<sup>112</sup> The Convention on Consent to Marriage proposes some admirable goals towards the problem of child marriage with a better source of protection for children. The CRC further requires that both the public and private actors consider the children's best interest when making decisions regarding them.<sup>113</sup> This is relevant to the child marriage issues because it is generally harmful to children who are victims in the IDP communities where it occurs regularly,<sup>114</sup> and requires proper enforcement and implementation by state parties.

### **3.2.3 OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS, 2000<sup>115</sup>**

The sexual exploitation of children is not expressly included in the Armed Conflicts Protocol. Nevertheless, articles 2 and 4 prohibit the compulsory recruitment into armed forces of all those under 18 years and this would include those pressed into the service for purposes of sexual exploitation through child marriage. Article 7 is also of potential benefit, as it obliges state parties to rehabilitate and socially integrate all child victims, including those who have been sexually exploited in the conflict.

### **3.2.4 CONVENTION ON CONSENT TO MARRIAGE, MINIMUM AGE FOR MARRIAGE AND REGISTRATION OF MARRIAGES<sup>116</sup> (MARRIAGE CONVENTION)**

The Marriage Convention ensures that marriages are the result of consent by adults and in particular to eliminate 'child marriage and the betrothal of young girls before the age of

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<sup>112</sup> n 108 above ('State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.')

<sup>113</sup> n 108 above art.3 ('In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.')

<sup>114</sup> Minnesota Advocates for Human Rights, Effects of Domestic Violence on Children, available at <<http://www.stopvaw.org/>> (accessed on the 03 October, 2007).

<sup>115</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by the General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12th February 2002. Available at <<http://www.unhcr.ch/html/menu2/6/protocolchild.htm>> (accessed on the 20th October 2007).

<sup>116</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 9, 1962 U.N.T.S 231 [herein after Marriage Convention].

puberty.<sup>117</sup> Article 1 of the Marriage Convention requires the full and free consent of both parties before marriage occurs.<sup>118</sup> However, as discussed in the previous chapter, a young girl cannot give reasonable consent to be married since she is not in a position to understand its implications. This therefore leaves the girls vulnerable to family and cultural demands against her interests. The marriage convention evidently does not go far enough in giving the meaning of 'consent' and its determining factors. This omission creates doubt especially when interpreted to the effect that the Marriage Convention targets people whose consent is a result of manipulation.

Article 2 of the Marriage Convention requires state parties<sup>119</sup> to specify in domestic legislation, a minimum age for marriage.<sup>120</sup> This provision creates an exception to the age requirement where a "competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses."<sup>121</sup> This creates a lacuna in establishing who falls under the category of competent authority and the proof of age of a child because of absence of reliable birth records.<sup>122</sup>

The Marriage Convention also contains no monitoring or reporting requirement that makes it very complicated to ascertain the level of its effectiveness in preventing child marriages. Much as the Marriage Convention preaches admirable goals, Warner describes it as a toothless man without its dentures.<sup>123</sup> Consequently, this convention cannot be effective in combating the practice of child marriage because of its failure to impose a mandatory requirement on the age of marriage which should be at 18 years and above as proposed in the working definition of child marriage in chapter two of this research.

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<sup>117</sup> n 116 above at 232 (the preamble though not binding declares that 'states should take the appropriate with a view to abolish such custom, and ancient laws and practices by ensuring complete freedom in the choice of a spouse, eliminating completely child marriage and the betrothal of girls before the age of puberty...').

<sup>118</sup> n 116 above art.1.

<sup>119</sup> The term "state parties" in this research refers to those countries which have signed and ratified the subject agreement.

<sup>120</sup> n 116 above (stating that; State parties to the Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses).

<sup>121</sup> n 116 above.

<sup>122</sup> n 25 above see CHILD SPOUSES.

<sup>123</sup> n 48 above page 250.



### 3.2.5 CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)<sup>124</sup>

Unlike the Marriage Convention and CRC, CEDAW contains provisions that specifically discuss and prohibit the practice of child marriage. In article 16.2, it stipulates that the betrothal and marriage of a child shall have no legal, effect and states must specify a minimum age for marriage.<sup>125</sup> This provision covers the gaps of the Marriage Convention by explicitly outlawing child marriage. However, CEDAW has the highest rate of reservations of any other human rights treaty that makes it incompetent as an international treaty.<sup>126</sup> These reservations have the effect of limiting the treaty obligations and the domestic effect by implying partial commitment.<sup>127</sup> This also reflects a weakness of the essential guarantee of the human rights treaty.<sup>128</sup> The overwhelming number of reservations therefore make CEDAW a weak human rights instrument and more so, because it does not have wide ratification.

The provisions under CEDAW addresses a wide range of problems encountered by women in their struggle for equality<sup>129</sup> and not children because the existence of a provision against child marriage in CEDAW seems to be misplaced and is incompatible with the rest of the treaty.

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<sup>124</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S 13, 19 I.L.M 33 (1980) [herein after CEDAW].

<sup>125</sup> n 124 above at art.16.2. The full text of the article reads 'The betrothal and 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 registration of marriages in an official registry compulsory'.

<sup>126</sup> Ladan Askari, THE CONVENTION ON THE RIGHTS OF THE CHILD: THE NECESSITY OF ADDING A PROVISION TO BAN CHILD MARRIAGES. At n 56; William Schabas, Reservation to the United Nations Convention on the Rights of the Child, 18 HM. RTS. Q.472, 474 (1996); Tracy R. Thomas, The Status of Women and Health under International Law, in the Emergence of Women in the twenty first century 19 ( Patricia L. Munhall & Virginia M. Fitzsimons eds., 1995); Elissavet Stamatopoulou, women's Rights and the United Nations, in WOMEN'S RIGHTS, HUMAN RIGHTS, note 34 at 38; Rebecca J. Cook, Women, in the United Nations Legal Orders 451-53 ( Oscar Schachchter and Christopher C. Joyner eds., 1995); LIESBETH LUNZAAD, RESERVATION TO THE UNITED NATIONS HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 4 (1995); Elizabeth Ann Mayer, Cultural Particularism s a bar to Women's Rights; Reflections of the Middle East Experience, in WOMENS RIGHTS, HUMAN RIGHTS, note 34, at 179; HOSSAIN, note 52, at 470; Stanlie M. James, challenging patriarchal Privilege through the Development of International Human Rights, 17 WOMEN'S STUD. INT'L F. 563, 569 (1994); Hilary Charlesworth, What are Women's International Human Rights?, HUMAN RIGHTS OF WOMEN, note 50, at 59; Anne F. Bayefsky, General Approaches to Domestic Application of Women's International Human Rights Law, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, note 50, at 352; OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS 5 ( Joanna Kerr ed., 1993).

<sup>127</sup> Askari L, Girl's Rights Under International Law: AN Argument for Establishing Gender Equality as a *Jus Cogens* , (1998) 8 S. CAL. L. REV. L. & WOMEN'S STUD.

<sup>128</sup> Rebecca J. C, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, (1990) 30 VA. J. INT'L L. 643, 649.

<sup>129</sup> Shelton & Stewart , International Human Rights in a Nut Shell, 2004; See also Hevener N, International Law and the status of women (1993); Cook, "State Accountability under the Convention on the Elimination of All Forms of Discrimination Against Women ," in R.J. Cook (ed.), (1994) Human Rights of Women 228.

Article 16 in CEDAW aims at equalizing the rights of spouses<sup>130</sup> and give the adult women chance to choose their marriage partners and not a provision against child marriages. The article is therefore not about ending child marriage but granting adult women more rights on marital decisions.

The CEDAW convention does not define the term 'child' as an anomaly and does not address problems specific to children. The Convention tactfully explains the term 'child' by reference to other laws. It is therefore right to assert that CEDAW provides solutions to the child marriage phenomenon to a small extent since the ban on child marriage comes in as an after thought<sup>131</sup> than the focus in article 16.

In an important step, the United Nations has called upon states to implement and enforce the necessary domestic legislation to protect girls and women from gender based violence.<sup>132</sup> Due to lack of enforcement for international treaties, CEDAW can only have impact if the signatory countries enact domestic legislation to ensure that its provisions get implemented. For example, in Uganda the Domestic Relations Bill if passed into law by parliament would give effect to CEDAW. Early child marriage would therefore be challenged in the country.

### **3.2.6 CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR (CHILD LABOUR CONVENTION)<sup>133</sup>**

The Child Labour Convention requires as 'a matter of urgency' that States prohibit and eliminate the worst forms of child labour and sexual exploitation.<sup>134</sup> This Convention is important because it helps raise awareness against sexual exploitation of children by forcing them into marriage and it is particularly valuable as a tool to prevent child sex that directly promotes the sale of children, child prostitution and pornography.

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<sup>130</sup> n 57 above.

<sup>131</sup> n 57 above.

<sup>132</sup> Amy G. Lewis, Gender-Based Violence Among Refugee and Internally Displaced Women in Africa, (2006) 20 Georgetown Immigration Law Journal; See also, Annual Review of Population Law, Domestic Violence of the World, <[http://www.law.harvard.edu/programs/annual\\_review/](http://www.law.harvard.edu/programs/annual_review/)>( accessed on September 19, 2007).

<sup>133</sup> ILO Convention C182, June 17, 1999 (date of adoption) [herein after Child Labour Convention], available at <<http://www.ilo.org/ilolex/english/condisp.htm>> (accessed on September 19, 2007).

<sup>134</sup> n 133 above, article 3.

This convention defines a child as any person under the age of eighteen<sup>135</sup> and makes provisions to states to undertake to adopt specific measures to prevent child labour. In contrary to other conventions that are silent on implementation, article 7 of the Child Labour Convention requires state parties to take all necessary steps including criminal sanctions, to implement and enforce its provisions and specifically encourages states to take into account 'the special situation of girls'.<sup>136</sup>

This Convention is relevant to the situation of IDPs because child marriage is a form of child sexual exploitation and sometimes the young girls are also hired out as house helpers to the people in the urban areas who end up exploiting them because of their vulnerable position. The Convention makes article 1 of the Anti Slavery Convention applicable to girls who are victims of child labour when it provides that "State parties must undertake to adopt specific measures to prevent all forms of slavery and practices similar to slavery."<sup>137</sup> However, the consent exception, and all the associated difficulties with determining whether a child is deemed to have consented to being married, remains unresolved especially among IDPs.

### **3.2.7 CONVENTION AGAINST TORTURE, AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT (CAT)<sup>138</sup>**

This convention defines torture to include;

" any act by which severe pain or suffering , whether physical or mental, is intentionally inflicted on a person..... for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity."<sup>139</sup>

Karla argues that the forced marriages like it occurred during the Rwanda genocide in 1994 would qualify as torture under this definition.<sup>140</sup> The requirement of official consent or acquiescence would be visible when a government officer performs marriage; what would need

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<sup>135</sup> n 133 above art. 2.

<sup>136</sup> n 133 above art. 7.2 (e).

<sup>137</sup> n 133 above art. 3.

<sup>138</sup> Convention Against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 146 U.N.T.S. 85, modified , 24 I.L.M. 535.

<sup>139</sup> n 138 above art. 1.

<sup>140</sup> Monika Satya Karla, Forced Marriage: Rwanda's Secret Revealed, 7 U.C. Davis J. at 215-216 (describing forced marriage as a form of torture).

proof is the fact that the marriage inflicted severe pain or suffering, which happens in child marriages. The specific purposes behind torture in child marriage includes; intimidation, punishment, and discrimination.<sup>141</sup> Further, more, child brides face physical and mental abuse in the hands of their husbands and in-laws for of intimidation as a way to keep her in her place or punishment when she fails to accomplish a task satisfactorily.<sup>142</sup> Many of the risks to the physical security of IDP children, of course fall short of the risk to life. Article 7 of the International Covenant on Civil and Political Rights (ICCPR), however also prohibits actions that amount to torture. Like the guarantee of the right of life article 7 also requires governments to take affirmative steps to protect everyone under their authority from relevant risks.<sup>143</sup> This is illustrated by the American case of *Rivas v. Salvador*<sup>144</sup> in which Rivas, a 14 year old girl was tortured and sexually harassed while under detention and the Inter-American Commission of Human Rights found the government of Salvador responsible for the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>145</sup>

Furthermore, IDP children are usually victims of gender-based violence, rape especially by the armed combatants during conflict situations. For example, in the Akayesu case,<sup>146</sup> in which Tutsi girls and women were subjected to sexual violence, beaten and killed, the tribunal considered rape as a form of aggression, and that it constituted a crime against humanity pursuant to article 3(g) of the statute.<sup>147</sup> Further, in the Celebici case, in which civilians were detained resulting from the conflict in Bosnia and Herzegovina and they were subjected to torture, rape and sexual harassment by accused persons. The trial chamber found rape to amount to torture and

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<sup>141</sup> Rhoda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in *HUMAN RIGHTS OF WOMEN: NATIONAL & INTERNATIONAL PERSPECTIVES* 129-135 (Rebecca Cook ed., 1994).

<sup>142</sup> n 57 above.

<sup>143</sup> James C. Hathaway, *The Rights of Refugees under International Law*; Cambridge University Press, 2005, pg 453. ("It is the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"); UN Human Rights Committee, "General Comment No. 20: Prohibiting torture, or other cruel, inhuman or degrading treatment or punishment" (1992), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 150, para 2.

<sup>144</sup> *Hernandez Rivas v. El Salvador*, Inter – American Commission on Human Rights, (1994) Case 10.911, Report No. 7/94, Inter-Am.C.H.R. OEA/Ser.L/V/II.85 Doc. 9 rev. at 188.

<sup>145</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 17, 1978).

<sup>146</sup> Forrest, Schnably, Wilson, Simon & Tushnet, *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: Treaties, Cases & Analysis*, Cambridge University Press, 2006. *The Prosecutor v. Jean- Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chambers Judgment, International Criminal Tribunal for Rwanda, 2nd September 1998.

<sup>147</sup> Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/Res/955, Annex (1994), reprinted in 33 I.L.M. 1598, 1602 (1994).

a breach of the Geneva Conventions and a violation of the laws and customs of war as stated, “there can be no question that acts of rape may constitute torture under customary law.”<sup>148</sup>

In light of the challenging circumstances characterized in child marriage and by looking at torture from this broader perspective, it is possible to make a case to stop child marriages because they constitute a form of torture, and therefore, if member states do not adopt stronger measures to eliminate child marriage, they are responsible for violation of the Torture Convention.

### **3.2.8 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC), 1998<sup>149</sup>**

The ICC has jurisdiction for war crimes and crimes against humanity. Included in the crimes against humanity is enslavement<sup>150</sup>, which includes trafficking and rape, sexual slavery, enforced prostitution or any form of sexual violence of comparable gravity if knowingly committed as part of a wide spread systemic attack.<sup>151</sup>

Ultimately, the power of the Court lies in its jurisdiction over the most serious crimes of concern to the international community. Hence, it is significant that the Court by its definition of enslavement has included widespread or systematic sexual exploitation of children in this categorization. For example, the ICC has begun its trial of the LRA for child abduction and sexual exploitation of girls in Northern Uganda.<sup>152</sup>

This is mainly to try cases of abuses against displaced women and girls perpetrated with impunity by the LRA. A number of investigations into sexual abuse have been ongoing since 2006 through a lengthy process in northern Uganda that has had widespread allegations of systematic patterns of rape of displaced girls and women.<sup>153</sup> In this case, the Government of Uganda will appear before the ICC because it is responsible under the ICCPR<sup>154</sup> and other

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<sup>148</sup> *The Prosecutor v. Delalic and Delic* (Celebici case), Case No. IT-96-21-T, International Criminal Tribunal for Yugoslavia, Judgement (16 November 1998).

<sup>149</sup> As of 9th October, 2007, 105 countries had ratified or acceded to the Rome statute and 41 states had signed but not ratified the treaty. Available at <<http://www.un.org/law/icc/index.html>> (accessed on the 9th October 2007).

<sup>150</sup> n 149 above article 7.1.c.

<sup>151</sup> n 149 above article 7.1.g.

<sup>152</sup> Internal Displacement Monitoring Centre IDMC, INTERNALLY DISPLACED WOMEN, 2007. Available at <<http://www.internal-displacement.org/8025708F004BDODA>>.

<sup>153</sup> n 152 above.

<sup>154</sup> For example, ICCPR, Art 2 (3)(a); CEDAW, Art 2(e); CERD, Art 2 (e); ECHR, Art 1; African Charter,

human rights instruments for failure to take effective measure to prevent human rights violations by the LRA.

This has been confirmed by the famous judgment of the Inter-American court on Human Rights in the *Velasquez Rodriguez* case in which it was established that the state of Honduras pays Velasquez compensatory damages for its breaches, the court affirmed that: -

“An illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the state, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention.”<sup>155</sup>

The requirement of “due diligence” as dictated by the *Velasquez Rodriguez* case may be likened to the common law duty of care in the municipal law context.<sup>156</sup> “Due diligence” has therefore been interpreted to require such reasonable measures of prevention of human rights violation that a well-administered government could be expected to exercise under similar circumstances.<sup>157</sup> In this regard, the states have a duty to prevent, investigate, punish and remedy human rights violations committed by private actors.<sup>158</sup>

### **3.3 REGIONAL HUMAN RIGHTS INSTRUMENTS**

#### **3.3.1 AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, 1990 (AFRICAN CHILDREN’S CHARTER)<sup>159</sup>**

The African Children’s Charter was adopted by the Organization of the African Unity in Nairobi on 27<sup>th</sup> June 1981 with fifty-three state parties. Compared to other international treaties, the African Children’s Charter significantly prohibits marriage of person’s below eighteen years. It provides;

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Art 2; American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123 (entered into force 18/07/1978) reprinted in Basic Documents (n 77 above) Art 1.

<sup>155</sup> *Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights (Ser. C) No. 4 (1988) 28 ILM (1989) para 172.

<sup>156</sup> This is with reference to the requisite of “reasonableness” in the common law duty of negligence.

<sup>157</sup> Shelton “State responsibility for covert and indirect forms of violence” in Mahoney & Mahoney (eds)(1993) 272.

<sup>158</sup> n 155 above, para 173-174.

<sup>159</sup> Organization of African Unity: Banjul Charter on Human and Peoples’ Rights, 21 I.L.M. 58, 59 (1982) (entry into force Oct. 21, 1986).

“Child marriage and betrothal of girls and boys shall be prohibited, and effective action including legislation shall be taken to specify the minimum age of marriage to be eighteen years.”<sup>160</sup>

This is the most explicit provision in comparison to the other treaties discussed above. It sets a minimum age of marriage at eighteen and contains no exceptions for local religious and other cultural practices, it also does not provide for exceptions based upon the consent of a local authority or the parents of the children concerned. Mikhail argues that the African Children’s Charter is a true reflection of changes in attitudes towards child marriages.<sup>161</sup> However, the only set back to the charter is the fact that only a few states are parties to it.

### **3.5 INTERNATIONAL HUMANITARIAN LAW AND IDP CHILDREN**

Although the provisions of the Geneva Conventions can technically bind only States, many of the prohibited acts like, torture, murder and mutilation by rebels during civil war or ethnic conflict fall under the category of peremptory norms in international law. Therefore, the prohibitions of the Geneva Conventions and its protocols should be binding on non-parties, including non-state actors, as well. Second, from a liberal perspective, traditional conceptions of sovereignty and how it defines obligations in international law are not just changing but are an anachronism altogether, i.e., the "state is now widely understood to be the servant of the people and not vice-versa."<sup>162</sup>

The 1949 Geneva Conventions and their two additional protocols of 1977 implicitly and explicitly condemn rape and other forms of sexual violence as serious violations of humanitarian law in both international and internal conflicts.<sup>163</sup> Although its provisions outrages upon personal dignity, in particular humiliating and degrading treatment, Common Article 3 implicitly condemns sexual violence,<sup>164</sup> which is a major element in child marriages among the IDPs.

However, as shown above, both rebels and government forces have continued to attack IDPs and abduct especially the girl children for ‘wives’, provisions of law notwithstanding. Thus, the problem is not so much a lack of legal framework but rather a failure in the implementation of

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<sup>160</sup> African Children’s Charter See n 167 above Art. XXI (2).

<sup>161</sup> n 159 above.

<sup>162</sup> Annan K, U.N Secretary General Address to the United Nations General Assembly, (1999) New York, Sept.20.

<sup>163</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force Dec. 12, 1977).

<sup>164</sup> n 163 above.

the law. International Humanitarian law regulates the conduct of hostilities and seeks to protect the victims of armed conflict by striving to ensure protection of non-combatants from the effects of war and to limit the use of certain methods of warfare. There is a wide consensus that the key provisions of these treaties, which are designed to protect the victims of all armed conflicts, have acquired the status of rules of general or customary international law binding on all states. These treaties being particularly applicable for IDP protection place an obligation on states to observe and protect rights that accrue to IDPs as any other citizen especially the children.

### **3.6 GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (GP)<sup>165</sup>**

The rights of displaced persons are not also adequately protected on the international scene especially the aspect of early child marriage. The situation is aggravated by the fact that internally displaced persons remain citizens of the respective countries in which they have been internally displaced. This implies that they do not only have the right to enjoy all the rights that the other citizens enjoy but their respective countries still have a duty to protect them and respect, promote and uphold their rights.

The only specific international instrument in place to ensure some protection for the IDPs is *the Guiding Principles on Internal Displacement*.<sup>166</sup> *The Guiding Principles* consolidate many of the most important international protection principles applied to internally displaced persons and bring about a convergence of refugee law, international human rights and international humanitarian law. They address all phases of internal displacement and intend to provide guidance to States, Non- State actors, other authorities and inter-governmental and non-governmental organizations on issues of internal displacement.<sup>167</sup> Because of the threats that displacement presents, more so its contradiction of human rights values and guarantees, including the right to protection against child marriage, it becomes imperative to examine the extent to which children's rights are protected by the principles.

The Guiding Principles also call upon governments to provide protection for women and girls and these provisions guided by two core concerns: to safeguard them from gender specific violence and to uphold their rights to equal access to services and participation in programmes. However, this has not been the case for northern Uganda IDP's because even the government

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<sup>165</sup> n 38 above.

<sup>166</sup> the Internally Displaced-Questions and Answers: UNHCR Website, <<http://www.unhcr.org>> (accessed on October 04, 2007) The Guiding Principles were designed to help governments and humanitarian Organisations in working with displaced persons.

<sup>167</sup> See a Guide to International Refugee Law, Handbook for parliamentarians, Nos. 2-2001.



agents responsible for providing protection have been perpetrators of gender based violence. For example, in January 2006, a Ugandan soldier was reported to have been responsible for the rape of a 17-year-old girl in Pagal camp in Gulu district.<sup>168</sup>

### **3.6.1 IMPORTANT GAPS IDENTIFIED IN INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW FILLED BY THE IDP GUIDING PRINCIPLES**

All fundamental human rights are of course applicable to internally displaced persons given that they have not crossed an internationally recognised border and continue as full-worthy citizens of their own countries. However, the Principles have taken the important step to explicitly state what some of the most important rights mean in relation to the particular situation of IDPs.<sup>169</sup> In the principles under GP 4.2 children, expectant mothers, mothers with young children, female heads of households are entitled to protection and assistance required by their condition as vulnerable people.<sup>170</sup> GP 4.1 the principles also offers explicit protection to IDP women and girls to safe guard them from gender specific violence that is a major characteristic of early child marriage and to uphold their rights to equal access and full participation in assistance programmes.<sup>171</sup>

The risk of facing discrimination, as a displaced person is common to all IDP situations and, in addition to constituting a violation *per se*, has proven to be a very real obstacle to the fulfilment of other rights. IDPs are seen with suspicion for having had to flee, for having lived in “enemy” controlled territory or simply because they come from a different ethnic, national or religious group than the host community.<sup>172</sup> Therefore, the Guiding Principles address the issue of discrimination in three different Principles<sup>173</sup> explicitly highlighting IDPs’ right to freedom from

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<sup>168</sup> n 16 above page 67.

<sup>169</sup> Cohen R: The Development of International Standards to Protect Internally Displaced Persons, in Human Rights and Forced Displacement, (2000) by Anne Bayefsky and Joan Fitzpatrick eds. Klumer Press

<sup>170</sup> n 38 above Principle 4.2.

<sup>171</sup> n 38 above; (noting that Gender specific provisions which can be used against child marriage, for example 11.2.a for protection against gender specific violence and 19.2 which provides for special attention to health needs of women and girls who are victims of sexual abuses. In addition, 23.4 aim at making education facilities available to IDP adolescents, which can be a big step towards fighting early child marriage among the IDPs).

<sup>172</sup> n 169 above.

<sup>173</sup> n 38 above, Principles no. 1, 4 and 22.

discrimination. In this respect, Guiding Principle No.1<sup>174</sup> is particularly interesting given that it clarifies a grey area left by human rights and humanitarian law. GP 1.1 provides;

Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law, as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.

However, the GPs are not legally binding, but an outline of a large body of international law already in existence protecting a person's basic rights and the responsibility of States.<sup>175</sup> Therefore, different States can still plead their domestic laws, something that is internationally acceptable.<sup>176</sup> Different local policies pertinent to the different countries have expounded the GPs. Unfortunately, these local Instruments fall short of ensuring the protection of the internally displaced persons. Furthermore, State Practice has also worked against the realization of various rights by the IDPs, the whole situation calling for a much comprehensive international legal framework to protect the rights and freedoms of the Internally Displaced Persons. For example, the GP explicitly state the right of displaced persons to move freely in and out of camps or other settlements (GP 14.2)<sup>177</sup> and to seek safety in another part of the country (GP 15 a).<sup>178</sup> In Uganda, under the Constitution, the right to freedom of movement under article 29 (2), which save for general language used a reciprocal principle of GP 14 and 15 which all citizens enjoy, is not absolute. The freedom subjected to public interest and the fact that the enjoyment of the same should not interfere with the individual rights of others.<sup>179</sup>

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<sup>174</sup> n 38 above, Guiding Principle 1(1) 'Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law, as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.'

<sup>175</sup> See the Internally Displaced-Questions and Answers: UNHCR Website, <http://www.unhcr.org>. The Guiding Principles were designed to help governments and humanitarian Organisations in working with displaced persons.

<sup>176</sup> If the Guiding Principles had the force of law and had been ratified in accordance with Internationally acceptable standards, then, the States in default would have an excuse of International Law as long as they have ratified the Guiding Principles.

<sup>177</sup> n 38 above, Guiding Principle 14.2, (In particular internally displaced persons have the right to move freely in and out of camps or other settlements).

<sup>178</sup> n 38 above, Guiding Principle 15 (a), ( Internally displaced persons have the right to seek safety in another part of the country).

<sup>179</sup> n 15 above, Article 43.

### **3.7 INTERNATIONAL MONITORING MECHANISM CHILD SEXUAL EXPLOITATION**

There are special bodies established within the international bodies with monitoring mechanisms to protect children from sexual exploitation through early marriage.

#### **3.7.1 Security Council Resolutions 1261 (1999) and 1314 (2000)<sup>180</sup>**

These resolutions of the Security Council on the use of children in armed conflict address the exploitation of children and are extremely significant because they are binding on all Member States of the United Nations. While resolutions 1261 and 1314 both urge all parties to armed conflict to ensure the protection of all children in situations of conflict, they also have individual provisions for the vulnerabilities of girls.

In Resolution 1261, all parties to armed conflicts are urged to;

“take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender based violence in situations of armed conflict and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance.”

Similarly, Resolution 1314

“underlines the importance of giving consideration to the special needs and peculiar vulnerabilities of girls affected by armed conflict, inter alia, those heading households, orphaned, sexually exploited and used as combatants, and urges that their human rights, protection and welfare be incorporated in the development of policies and programmes, including those for prevention, disarmament, demobilization and reintegration.”

These resolutions have been hailed as a landmark because they formally establish safe guarding protection of the rights and welfare of the children everywhere as a crucial peace and security concern belonging to the highest agenda as Olara argues;

“ The Security Council and other actors can make big difference by using their collective weight and influence to lean on parties in conflict. In today’s world, no party in conflict is an island unto itself. The international community should make any assistance to parties in conflict, be it political, financial, material or military contingent on observing standards for the protection of children”<sup>181</sup>

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<sup>180</sup> International Relations and Security Network, Primary Resources in International Affairs (PRIA). Available at <<http://www.un.org/children/conflict>> (accessed on the 19th September 2007).

<sup>181</sup> Olara O, PLACING CHILDREN ON THE WORLD’S PEACE AND SECURITY AGENDA, addressing the UN Security Council open meeting, 26 July 2000. Available at <<http://www.un.org/children/conflict>>. (accessed on the 20th October 2007).

These resolutions are groundbreaking steps by the Security Council because resolution 1261 can be used as a tool for advocacy if the Security Council incorporates the framework established into its deliberations on specific countries. For example in Uganda, there were continued cases of sexual exploitation and violence against girls by government and military personnel in IDP camps.<sup>182</sup> This is the point at which the Security Council should have intervened to make its resolution 1314 a reality to the situation of IDPs in Northern Uganda by encouraging a systemic development of child protection policies and strengthening national institutions and civil society for the protection of children.

### 3.8 Conclusion

The discussion in this Chapter sought to lay the legal basis for asserting that failure of states to implement the provisions of international law to curb early child marriage and looked at a number of human rights instruments and the emerging jurisprudence in this regard. The discussion shows that provisions in a number of human rights instruments provide for the obligations of states to protect children from sexual violence and child marriage. While the precise nature of these obligations remains to be set out, at the very minimum, it can be said that states have an obligation to respect human rights obligations by providing adequate protection against child marriages as argued by Sagade that;

“By ratifying or acceding to international conventions, state parties accept the legal duty to abide by the conventions and thereby become obliged to take steps to protect the exercise and the enjoyment of human rights, to investigate violations and provide remedies to victims.”<sup>183</sup>

As discussed in this chapter, key international human rights instruments and regional human rights laws have positive provisions towards the problem of child marriage in IDP camps. Therefore, governments have the duty to translate these laws into national legislation and introduce mechanisms to implement them in order to protect IDPs from the child marriage phenomenon. The next chapter illustrates how Uganda’s domestication of some international instruments like the International Guidelines on Internal Displacement into the National IDP Policy and other treaties and applied to internal displacement in Uganda. This is relevant to the fight against early child marriage in the IDP settlements as will be discussed in the next chapter.

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<sup>182</sup> n 152 above.

<sup>183</sup> Sagade J. (2005) *Child Marriage in India: Socio – Legal and Human Rights Dimension*. Oxford: Oxford University Press.

## **CHAPTER 4: DOMESTIC LEGAL REGIME AND THE PROTECTION OF IDP CHILDREN AGAINST CHILD MARRIAGE IN UGANDA.**

### **4.1 Introduction**

The discussion from the preceding chapter concluded that there remains the issue of implementation of states through incorporation of the international instruments into national legislation as a responsibility to prevent human rights violations in the IDP settlements by human rights standards subjecting children to early marriage and exploitation. This is illustrated by Theo V.B who points out that, human rights are first and foremost protected domestically and that international procedures exist to complement the domestic protection of human rights.<sup>184</sup> This chapter therefore discusses Uganda's domestic framework in the protection of IDP children against child marriage.

For several years, Uganda has been affected by civil conflict. The conflicts started in the mid 1960s and have continued to the present date. It is important to note however, that these conflicts have not been always spread to the whole country and the number of abductions in northern Uganda since the onset of conflict is estimated at 25,000.<sup>185</sup> Most of these conflicts have been confined to certain particular parts of the country resulting into major displacement of the people living in such areas. The Lord's Resistance army has operated in Uganda since 1987, with a vast majority of its fighting force composed of abducted children from the villages.<sup>186</sup> Over 1.7 million people have been displaced, the majority as a result of the government's counter insurgency strategy that forced people into the protected villages (camps).<sup>187</sup> The location of the camps became targets of parties to the conflict and prime areas for abducting children hence increased vulnerability of children to other grave violations, such as sexual violence and abduction.<sup>188</sup>

Nevertheless, there has been a number of encouraging developments at the political level with peace talks between the government of Uganda and the LRA have resulted into the first prolonged cessation of hostilities in the history of the northern Uganda conflict for the past two

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<sup>184</sup> Boven V, "The International System of Human Rights: AN Overview" in P. Alston (ed) (1997) 10.

<sup>185</sup> Report of the Special Representative of the Secretary- General for Children and Armed Conflict, A/62/228 of 17<sup>th</sup> August 2007.

<sup>186</sup> U.N. Econ. & Soc. Council (ECOSOC), Comm'n on Human Rights, Rights of the Child, 14, U.N. Doc. E/CN.4/2002/86 (Nov. 9, 2001).

<sup>187</sup> n 37 above page 11.

<sup>188</sup> n 185 above.

decades.<sup>189</sup> Following the visit of the Representative of the Secretary General on Children in Armed Conflict in 2006, the Government of Uganda has improved on its commitment in strengthening the implementation of the existing legal and policy framework on the recruitment of children in armed conflict.<sup>190</sup> The argument therefore goes that the government is committed to fight against child abuse and exploitation when they are involved in armed conflict.

## **4.2 Causes of Internal Displacement in Uganda**

Separate armed conflicts in northern and south-western areas as well as violent looting and cattle raids in the east have caused internal displacement in Uganda since the mid-1990s. Natural disasters like floods have also displaced people especially in the North and Eastern parts of the country.<sup>191</sup> Three major sub-contexts of internal displacement exist in Uganda each of them with its own characteristics. Estimates of 1.7 million people remain internally displaced in Northern Uganda as a result of the conflict and floods.<sup>192</sup>

This series of conflicts have been risky especially for the children who often are left on their own and are exposed to danger of sexual harassment and forced marriage and sexual abuse by the combatants in the IDP camps. For example, in January 2006, an army man was reported to have been responsible for the rape of a 17-year-old girl in Pagal camp in Gulu district.<sup>193</sup>

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<sup>189</sup> n 37 above page 11.

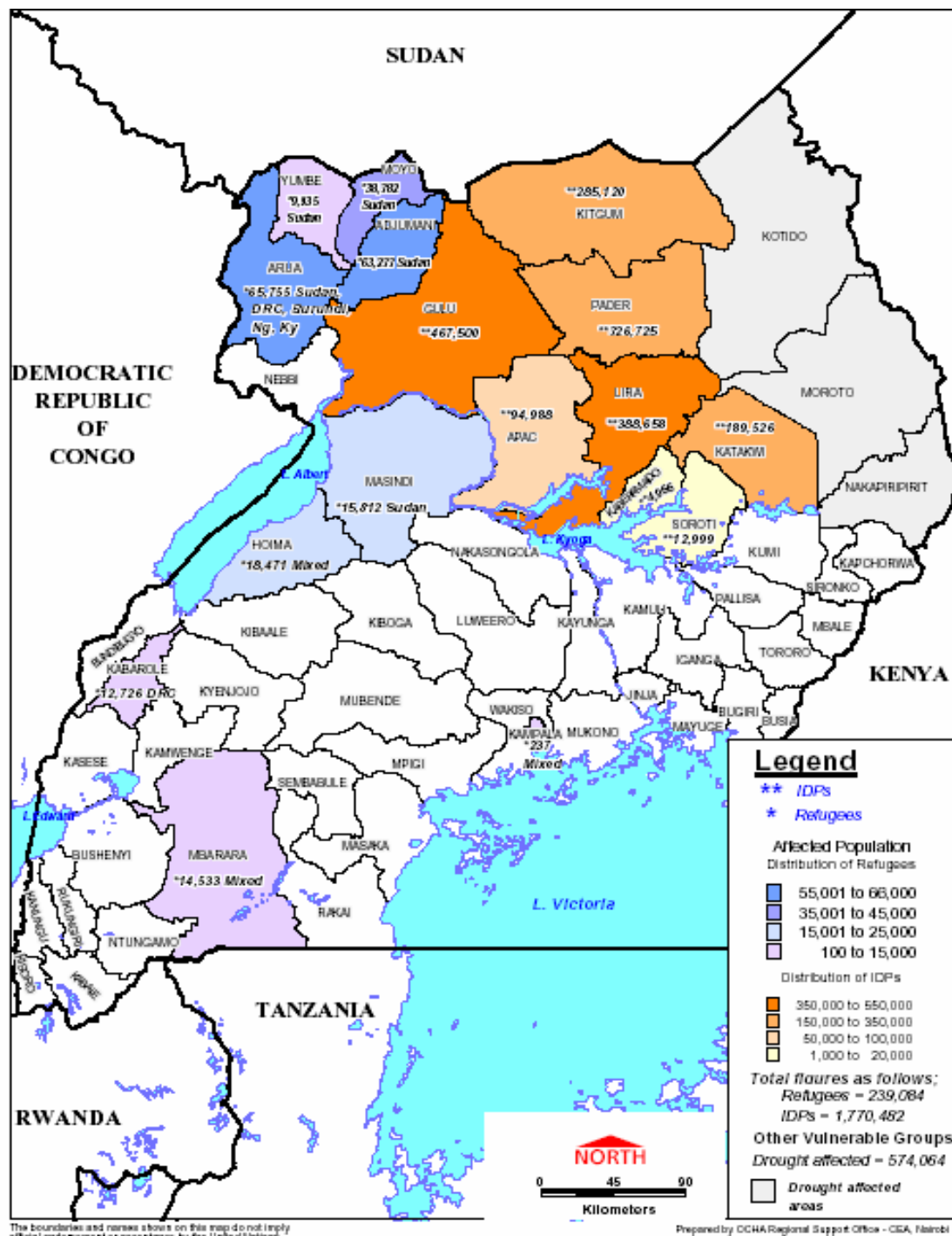
<sup>190</sup> n 185 above.

<sup>191</sup> Uganda: Museveni declares state of emergency, New Vision Daily Newspaper, September 19, 2007. Available at <<http://www.newvisiononline.org>> (accessed on 19th September).

<sup>192</sup> Uganda: Food Crisis looms for returning IDPs, IDP News alert, 20<sup>th</sup> September, 2007.

<sup>193</sup> n 152 above.

Below is a map of Uganda showing the patterns of displacement in 2005 of both refugees and IDPs by UN OCHA.<sup>194</sup>



<sup>194</sup> Map prepared by the UN Office for Coordination of Humanitarian Affairs (UN OCHA) regional support office in Nairobi available at [http://www.reliefweb.int/luFullmap/4D6F3577C7BF23B8C12570690037976F/\\$ocha\\_AFC\\_uga150605](http://www.reliefweb.int/luFullmap/4D6F3577C7BF23B8C12570690037976F/$ocha_AFC_uga150605)

#### **4.2.1 Patterns of Displacement in Uganda.**

In Uganda, the main cause of displacement has been the activities of rebels like the LRA who in the process of fighting the Uganda national army, have subjected several children to untold suffering by displacement since 1987 in Northern Uganda. Additionally, the activities of the Allied Democratic Forces (ADF) also contributed to internal displacement especially in 2000 in the west and southwest of Uganda.<sup>195</sup> The cattle raids by the Karamojong have taken on the character of military confrontations, with destabilising effects and displacement of increasing numbers of persons. However, the government disarmament process has resulted into a new displacement in northeast Uganda.<sup>196</sup> Populations on the country side have been displaced due to insecurity but this chapter with focus mainly on northern Uganda and draw examples from the different regions.

#### **4.3 Initiatives Undertaken by the Uganda Government in Response to Internal Displacement**

##### **4.3.1 2006 - 2007 Peace Talks**

In order to demonstrate government responsibility for IDPs, Peace talks have been going on since 2006 between the Government of Uganda and the LRA leadership to date, however, all hope for peace in the north is still on shaky ground because the LRA is planning fresh attacks on Uganda from their base in Garamba, Congo.<sup>197</sup>

“ Any attack on our military positions by forces of the government of Uganda or any allied groups allied to the Uganda dictatorship shall be strictly treated as a declaration of war, resumption of war and above all, an invitation to bring war back to Uganda.”<sup>198</sup>

As a result of the above threats by the LRA, fear has been created fear among some IDP have begun the process of resettlement in their homes after a long stay in the camps.<sup>199</sup> However,

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<sup>195</sup> UN OCHA, July/August 2002 (reporting that the south-western district of Bundibugyo bore the brunt of the ADF attacks and had the largest number of IDPs in the region, which peaked at 120,000 in the year 2000).

<sup>196</sup> ‘Uncertain Peace Process impedes return in north while protection crisis looms in Karamoja region,’ by Internal Displacement Monitoring Centre (IDMC) Report of 28<sup>th</sup> March 2007. Available at <<http://www.internal-displacement.org>> (accessed on the 15<sup>th</sup> October 2007).

<sup>197</sup> Africa News of 15 September, 2007 ‘LRA Threatens Attack’. LexisNexis@Academic Documents.

<sup>198</sup> LRA spokesperson Godfrey Ayoo in his address to a press conference in Nairobi in response to Uganda government’s agreement with the Democratic Republic of Congo that aims to have the rebels out of Garamba in 90 days. Available at Africa News 15 September, 2007 ‘LRA Threatens Attack’. See LexisNexis@Academic Documents.



reports<sup>200</sup> have indicated that IDPs have begun resettlement in their homes which will mark a big step towards to prevention of child marriage in the camps.

### 4.3.2 Creation of ‘Protected Villages’

In Uganda, the establishment of the ‘protected villages’ followed a decision by the military authorities in 1996.<sup>201</sup> The ‘protected villages’ were created as a means of isolating the civilian population from the LRA, in order to protect it from the LRA attack while reducing the ability of the LRA to strengthen itself through looting and abducting and preventing them from receiving assistance from the civilian population.<sup>202</sup>

The nature and prolonged forced encampment of the people, and the lack of clarity on the circumstances under which they may or may not leave the ‘protected villages’, to pursue agricultural activities in their home areas, would seem to stand in contradiction of a number of core personal freedoms and inconsistent with the Principles on Internal Displacement.<sup>203</sup> There is anxiety among the IDPs to return to their homes, which is also supported by the Guiding Principles,<sup>204</sup> however, as long as insecurity continues to prevail the IDPs are placed in a precarious situation in the camps and the girl children remain vulnerable to early marriages.

### 4.3.3 The National Policy on Internal Displacement

Uganda’s National Policy for IDPs was adopted in 2004, following a visit by Francis Deng, former Representative of the Secretary General on IDPs.<sup>205</sup> It draws on the Guiding Principles on Internal Displacement and commits the government to protect its citizens against arbitrary displacement, guarantee their rights during displacement and promote durable solutions by

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<sup>199</sup> n 16 above page 29.

<sup>200</sup> Uganda: IDP Numbers alarming, Africa News 8<sup>th</sup> June 2007. See LexisNexis@Academic Documents.

<sup>201</sup> The decision to create the ‘protected camps’ was officially announced by the President of Uganda and Commander in Chief of the Uganda Armed Forces, Lt. Gen. Yoweri Kaguta Museveni, to the Parliamentary Committee on the Presidential and Foreign Affairs on the 27<sup>th</sup> September 1996.

<sup>202</sup> n 41 above page 5.

<sup>203</sup> n 38 above, Principle 6.

<sup>204</sup> n 38 above, Principle 14

<sup>205</sup> FMR 19, available at <<http://www.fmreview.org/FMR19/FMR19Brookings.pdf>> (accessed on the 9 September 2007).

facilitating voluntary return, settlement, integration and re-integration.<sup>206</sup> However, the UN Guiding Principles have been continuously regarded as soft law, and thus their application and implementation is limited, what new dimensions in the field of IDP protection will it introduce?

Under the Constitution of the Republic of Uganda,<sup>207</sup> all people are entitled to all the rights and freedoms that are contained in Chapter four of the Constitution.<sup>208</sup> Further, Uganda being a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) among others has an obligation to ensure that it not only protects the rights enshrined therein but also promotes them.<sup>209</sup> The nature of the war in northern Uganda has 'ensured' that none of the above rights are enjoyed. With this background, the IDP policy was formulated with the objective of minimizing internal displacement and put in place coordinated response mechanisms to internal displacement, and ensures an enabling environment in IDP camps to uphold the enjoyment of rights.

The National Policy for the IDPs provides for district committees on Human promotion and protection to monitor the protection of IDPs and pay particular attention to the most vulnerable groups like children who may require special assistance in resettlement and reintegration to their place of origin.<sup>210</sup>

The policy goes further and states that all measures shall be taken to prevent internal displacement which may result into the possible alteration of ethnic or religious composition, unjustified large scale development projects or when it is used as collective punishment. The Policy imposes a duty on the government to provide security for the IDPs and this duty is delegated to the Uganda People's Defence Forces (UPDF), Uganda Police force and other security agencies.<sup>211</sup> The Policy specifically states that the objectives of these agencies are to

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<sup>206</sup> Joy Miller, Uganda's IDP Policy; Forced Migration Review, University of Oxford, 31 January, 2007. available at <<http://www.brookings.edu/fp/projects/idp/conferences/contents.htm>> (accessed on the 13 October 2007).

<sup>207</sup> n 15 above, Chapter 4 Part IV.

<sup>208</sup> n 15 above, chapter 4 Part IV.

<sup>209</sup> ICCPR Article 2(3) (a).

<sup>210</sup> National Policy for Internally Displaced Person's 2004, Para 2.4.

<sup>211</sup> n 210, Section 3.1.

ensure security to the IDPs through out all phases of displacement and the maintenance of law and order in the IDP settlements.<sup>212</sup>

The recognition of the applicability of the IDP policy the prevention of internal displacement and maintenance of law and order in the camps to combat the situation of early child marriages holds significant potential for the protection of the rights of the IDPs since they will no longer remain vulnerable to abuse. However, the UPDF and security personnel have not yet clearly defined their roles and responsibilities, and thus have not prioritised the IDP protection leaving them exposed to abuse.<sup>213</sup>

#### 4.4 Early Marriage in Uganda

Since Uganda operates both customary law and statutory or written law, it is pertinent to approach the child marriage phenomenon under both regimes. It will be shown that even where the law is adequate, its implementation is hindered by customary practices and social attitudes.

However, before a custom becomes law in Uganda, it must have existed for a long time; it must be continuous and undisputed by the majority of the community and must be certain and consistent with other customs. Customary law in Uganda encourages child marriage.<sup>214</sup> However, customary law must be established and proved to be in existence through reliance on experts for proof as illustrated in the case the of *Kimani V Giatanga*,<sup>215</sup> where it was held that, where African customary law is neither in common practice nor documented, it must be established for the courts guidance by the party intending to rely on it.

Customary law therefore is applicable so long as it is proved. In Uganda, it is applicable as the 1995 constitution provides that, “every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.”<sup>216</sup>

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<sup>212</sup> n 210 above.

<sup>213</sup> n 37 above page 22.

<sup>214</sup> Customary Registration Decree, 1973 Laws of Uganda.(Providing that for customary marriage to be valid, a girl must have attained the age of 16 years.)

<sup>215</sup> *Kimani V Giatanga* (1965) E.A. 735.

<sup>216</sup> n 15 above, article 37.

The Judicature Act (1996) also provides for the operation and application of customary law in traditional marriages however, the Constitution gives the High Court power to observe or enforce the observance of any existing custom which is not repugnant to natural justice, equity and good conscience and not incompatible with directly or by necessary implication to any written law.<sup>217</sup> In such a situation, when customary law supports child marriages, it can be challenged by the high court for not being repugnant to good conscience and hence be nullified.

Therefore, customary marriages are normally regulated by different customs of different communities and according to particular Acts, such as the customary marriages Registration Decree, 1973 although such marriages do have legal implications and can be challenged in law as illustrated below if it involves children.

#### **4.4.1 The Legal Implications of Early Marriage in Uganda**

Early marriages are widespread in all the IDP camps in Uganda, despite being illegal under international and Ugandan law.<sup>218</sup> The CEDAW Convention, to which Uganda is a party, specifies 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....”<sup>219</sup> The African Charter on the Rights and Welfare of the Child, to which Uganda is also a party, goes even further. In addition to prohibiting “child marriage and the betrothal of girls and boys”, it states that “effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years....”<sup>220</sup>

This strengthens the arguments in chapter 3 that the existing international legal framework has positive provisions towards the problems of early marriage but the enforcement of the provisions still remains problematic. Uganda’s Constitution supports this argument by providing that “Men and women of the age of eighteen years and above, have the right to marry and to found a family”, specifying that “Marriage shall be entered into with the free consent of the man and woman intending to marry.”<sup>221</sup> Early marriages in Uganda not only violate accepted international

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<sup>217</sup> n 15 above, article 273(2).

<sup>218</sup> n 100 above; See also n 108 above; See also n 116 above; See also n 124 above; See also n 133 above; See also n 136 above; See also n 160 above; See also n 38 above; See also n 15 above; See also n 14 above, CAP 106 Laws of Uganda.

<sup>219</sup> n 124 art.16.2.

<sup>220</sup> n 160 above art. 21.2.

<sup>221</sup> n 15 above, Article 31 (1) and (3)

norms and the country's Constitution, but also constitute the crime of defilement under the Penal Code Act<sup>222</sup> which is a capital offence. This is based on the presumption that a minor girl is not capable of giving reasonable consent. Research indicates that a large number of would-be criminal cases are settled within IDP communities without the involvement of the Ugandan authorities.<sup>223</sup>

The Children's Statute also establishes the age of criminal responsibility at 12 years and consequently boys below 17 years who engage in sexual intercourse with girls of the same age group are treated as perpetrators despite their own status as minors.<sup>224</sup> This Statute was enacted as a sign of translating the CRC into national legislation to protect the rights of children. However, the CRC guarantees more protection for girl children from being subjected to early marriage because the girls are more vulnerable and requires special protection by the law.

#### **4.4.2 Measures to Combat Early Marriage**

Interventions to combat early marriage are sometimes misdirected. Culture, for example, may appear too ingrained or sacrosanct to challenge, while sensitisation campaigns on the age of consent are often facile responses that fail to address the more fundamental issues of economic and physical insecurity that lead IDPs to engage in early marriages.

Therefore, in this context of resource constraints and IDPs underlying need for survival, what official interventions are possible often has little concrete effect. Although sensitizations should not be abandoned altogether, they must honestly and realistically reflect the conditions under which IDPs are living. Even so, they will have little practical meaning if official actions are unable to address the circumstances that lead refugees to pursue early marriages.

The Domestic Relations Bill in Uganda carries some hope against early child marriage by setting the age of marriage at 18 years and thus is in consonance with the 1995 Constitution<sup>225</sup> and the Children's Act of 1996<sup>226</sup> among others. Further, it is the same age for both boys and girls and departs from the present scenario where different marriage laws and practices

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<sup>222</sup> See n 14 above, Section 129 (stipulating that anyone who unlawfully has sexual intercourse with a girl under the age of 18 years commits a crime and is liable to suffer death.)

<sup>223</sup> Mesiku Harriet, *Early Marriage in Adjumani District: a Case for the Girl Child*, 2000. LLB Desertation.

<sup>224</sup> Laws of Uganda: The Children's Act, Cap 59, Section 88.

<sup>225</sup> n 15 above, Article 31 (1) and (3)

<sup>226</sup> n 224 above, Section 88.

prescribe different ages between girls and boys, with the most common elements being that girls are allowed to marry at a much younger age than boys since marriage is their destiny. Having the marriage age set at 18 years will therefore address the ills of early child marriage as discussed in chapter 2 above.

#### **4.6 Conclusion**

Addressing early child marriage concerns is relevant and necessary at all stages of internal displacement. The widespread and grave violations of basic human rights that internally displaced people are exposed to reveal that adequate and consistent protection remain a major gap in the national and international response. If tailored to the particular needs of internally displaced people especially the vulnerable, this response is likely to be improved especially with regard to child marriage.

In this light, a specific legal framework is a useful means of stimulating relevant actors to protect IDPs from being exposed to violence and other types of abuses like child marriages. It must also be emphasized that there is no inherent contradiction between more legal prescription and better implementation of existing domestic law; providing clarity of existing obligations towards government is a means to ensure better implementation. To this end, a major challenge will be to ensure that the IDP Policy is widely disseminated to the field, so that internally displaced people, organisations working on their behalf and government officials can in a simple manner seek guidance on how to address the relevant problems. So is the need to encourage the Government to embark on the peaceful resolution of the conflicts in the country.

## **CHAPTER 5 RECOMMENDATIONS AND CONCLUSION**

### **5.1 Introduction**

For a considerably long time, there have been communities in Uganda that have been displaced due to a variety of reasons as discussed above. Such people have failed in most cases to realise their rights notwithstanding the existence of Constitutions and international legal instruments especially the girl children who are victims of child marriage. The policy on internally displaced people has attempted to ensure that displaced people enjoy their rights and that this is done in a coordinated manner. However, one would hasten to add that to effectuate this policy there must be commitment whether political, financial or otherwise. If there is no such commitment, the policy will join the many other spectacular policies on the shelves of some libraries in Uganda.

The findings of this study show that, regardless of some areas of improvement towards the protection of IDPs in Uganda, little has changed in the lives of the victims of sexual violence and early marriage in the camps. Despite the efforts by numerous actors, children in the IDP camps still continue to be subjected to abuse through defilement and early child marriage.

### **5.2 Recommendations**

A number of points ought to be suggested to the Government and stakeholders concerning the problems of early marriage of the child mother in order to establish and determine ways by which the problem can be handled.

#### **5.2.1 Enact, Standardise and Enforce National laws**

Defilement is one of the most common crimes closely related to the phenomenon of early marriages committed in the IDP settlements in Uganda. In most cases, the IDPs cannot afford the financial and social costs of reporting defilement cases, instead, they arrange early child marriages to conceal or otherwise legitimate such relationships.

The government of Uganda and other concerned actors must recognise that the harsh criminal penalties for defilement actually encourage early marriages and their associated rights violations. All relevant actors should encourage communities to seek legal means of resolving defilement claims other than the arrangement of early marriages.

It is important that government enacts standardizes and enforce its national laws. This can be done through revision of laws like the Customary Marriage Registration Decree regarding the minimum age of marriage and enforce the registration of all births and marriages to support effective implementation of laws against child marriage.

### **5.2.2 Attitudinal change**

The Government should introduce initiatives at the national level that aims at changing policies especially at the local and community levels, where traditions and customs reinforce child marriage; interventions should aim at changing attitudes and behavior especially in the IDP settlements where child marriage is so prevalent.

Government must encourage and support, as appropriate, non-governmental organisations in their efforts to promote changes in negative attitudes and practices toward girls, set up educational programmes and develop teaching materials and text books for sensitization against child marriage.

### **5.2.3 Education and awareness programmes**

It is recommended that sex education should be introduced in schools as part of the syllabus so that both girls and boys are taught right from the beginning about the consequences of sex, pregnancy and early marriage. Sex education will help to delay the onset of sexual activity and hence reduce child marriage.

### **5.2.4 Reporting to treaty bodies**

The government of Uganda needs to ensure that reports to the African Commission and international treaty bodies, in particular the CRC and CEDAW, include a focus on measures adopted to delay child marriage and progress towards reducing child marriage.

## **5.3 Conclusion**

From the foregoing research on early child marriage among IDPs, lessons can be learned from African experiences with displaced masses. First it is clear that the existing international legal framework does not provide sufficient legal grounds for protecting IDP against the practice of early child marriage. What is lacking is the commitment from African states to strictly adhere to these instruments and ensure their implementation both in law and practice and this position



was held by the African Commission on Human and Peoples' Rights in a seminar on the protection of refugees and IDPs in Harare, Zimbabwe, in February 1994.<sup>227</sup>

Recognition must therefore be made of the need to balance requirements of ending conflict in Africa, with the need to attend to the immediate phenomenon of early marriages and sexual harassment of girls who are caught up in conflict and end up in displacement. The dilemma lies in the heart of conflict, and is one that civilians, state officials, aid workers and numerous actors have to deal with until conflicts come to an end in Africa.

Word count 14,105 words (excluding table of contents, footnotes and bibliography).

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<sup>227</sup> SARDC & ACHPR, (1995) Protection of the African Refugees and Internally Displaced Persons.

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