

Public

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ARTICLE



Women's law-making and contestations of "marriage" in African conflict situations

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Funding information

Social Sciences and Humanities Research Council
of Canada, Grant/Award Number: 895-2015-1006

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Abstract

International criminal law has developed significantly over the past 20 years since the establishment of the ad hoc Tribunals and International Criminal Court. Much scholarly attention has focused on the politics and jurisprudence of these courts, with particular focus on the prosecution of sexual and gender-based violence. This article adds to the literature with comparative, qualitative research with survivors of conflict-related forced marriage in Liberia, Sierra Leone, and Uganda, revealing context-specific understandings of marriage, consent and harm. We argue women exercise "tactic agency" in captivity in ways that are, taken together, "law-making" in their contestations over the socio-legal categories of marriage. Their contestations of marriage impact the norms within rebel groups as well as the development of new crimes against humanity in international criminal law. Building on the empirical findings, we argue that prosecution of crimes against humanity and reparation programs ought to be flexible and responsive enough to capture the varied experiences of women and girls abducted in war for purposes of sexual exploitation.

1 | INTRODUCTION

On February 4, 2021, Dominic Ongwen was found guilty of a total of 61 crimes committed while he was a commander in the Lord's Resistance Army (LRA) in Uganda (*The Prosecutor v. Dominic Ongwen ICC-02/04-01/15*). These crimes included rape, sexual slavery, and, for the first time at the International Criminal Court (ICC), forced marriage and forced pregnancy. The written verdict included excerpts from women's testimonies, detailing the specific nature of harms they have suffered as a result of being ascribed the status of "wife" by Ongwen and impressing upon the court that this violation supersedes sexual violence and forced labor; that there is a unique offense in being forcibly labeled a "wife." These findings echo those from the Special Court of Sierra Leone (SCSL), the first in the world to try and successfully prosecute forced marriage as a crime against humanity,

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of other inhumane acts. What these verdicts make clear is the role women's experiences and articulations of violence can sometimes play in international criminal law: the ways that women survivors contribute to law-making, nuancing, and developing international law's engagement with gendered crimes. What is less clear is how the ascription of forced marriage operates within armed groups in a legalistic fashion, simultaneously acting as a mode of social organization and relational violence.

By engaging with survivors' voices, we analyze how two levels of "law-making" are interrogated, contributed to, and contested by women—in captivity and in international criminal law. We argue that the first level occurs during conflict in the ways that "marriage" operates as a category of governance within rebel groups (Provost 2017), as well as how it impacts both individual and communal conceptions of harm and violence. We center women's experiences to explore conceptions of harm and violence, uncovering how forcible marriage operates in a way to extend conflict-related violence into the post-conflict period, impacting and constraining women's present situations and their futures. The category of marriage in war operates legalistically, imposing specific gendered expectations on women during conflict and into the post-conflict period to limit access to resources, land and social support. We intersect this first level of law-making with the development of international criminal law in relation to forced marriage and the ways that women's experiences have helped shape the development of the crime of forced marriage, while also being constricted by the legal category.

The jurisprudence of international criminal law did not include a separate crime for the practice of abduction for forced sexual and other labor under the auspices of status of "marriage" until 2008. Like other sexual and gender-based crimes, the criminalization of this set of harms has evolved rapidly over the past decade. Forced marriage was characterized and prosecuted before the Special Court for Sierra Leone (SCSL) as a distinct crime encapsulating a variety of both sexual and non-sexual acts which in themselves are criminal and may be regarded as crimes against humanity (SCSL *AFRC* 2007, 2008). Some of the distinct components of forced marriage are kidnapping, enslavement, sexual slavery, forced labor, rape, and forced pregnancy committed in a systematic and/ or widespread manner. The Rome Statute of the International Criminal Court (ICC), like the statutes of previous international criminal tribunals and courts, does not specifically criminalize the crime of forced marriage but in several of the cases before the ICC, there have been reports of forcible abduction, continued rape, forced domestic chores, and the imposition of marital status on women and young girls. In each of the cases of *Prosecutor v. Thomas Lubanga Dyilo* (*Lubanga's case*), *Prosecutor v. Germain Katanga* (*Katanga's case*) and *Prosecutor v. Dominic Ongwen* (*Ongwen's case*), evidence of the practice of forced marriage has been presented before the ICC. The Extraordinary Chambers in the Courts of Cambodia, the tribunal set up to adjudicate crimes committed during the Khmer Rouge regime, found the accused guilty on charges of forced marriage for the systematic ascription of conjugal status on unwilling women and men.¹ Related charges include forced pregnancy and rape (Bunting and Ikhimiukor 2018). Through these criminal proceedings, the crime of forced marriage has become articulated, clarified, and challenged, with victim-survivors and witnesses testifying as to the nature of the harms suffered within forced conjugal unions.

Take, for example, the testimony from witness NN during the *Prosecutor v. Jean-Paul Akayesu* trial (1998) before the International Criminal Tribunal for Rwanda (ICTR). This was the Tribunal's first judgment and included the precedent-setting finding of rape as a tool of genocide for which Akayesu was found guilty. During her testimony, among other crimes, "Witness NN said Rafiki, the Interahamwe who had locked her in his house, took her out of the group and said that she was his

¹Importantly, the judges convicted on charges of forced marriage against men, as well as women—a first in international criminal law. Rape, specifically non-consensual sex within the forced marriages, was recognized only against women and not men. The reasoning outlined in the decision explains that sexual crimes against men were not recognized in domestic or international law during the time period in which the events being tried occurred although men were arguably victimized in similar ways to women in these particular cases. See Grey, Rosemary, 2019, Gendering the Khmer Rouge period: last Friday's judgment. *IntLawGrrls* <https://ilg2.org/2018/11/19/gendering-the-khmer-rouge-period-last-fridays-judgment/> for a detailed discussion. *Prosecutor v. NUON Chea and KHIEU Samphan*, 16 November 2018, CASE 002/02 JUDGEMENT, Case File 002/19-09-2007/ECCC/TC ("Case 002"). And see the CSiW amicus brief: <http://csiw-ectg.org/amicus-brief-to-eccc/>

wife" (ICTR-96-4-T para. 435). As Bunting (2017) discussed, reports emerging during and shortly after the Rwandan genocide detailed practices of forced marriage, with young women abducted and distributed among fighters as "wives" (Africa Rights 1994; Human Rights Watch 1994 in Bunting 2017). Despite the weight of evidence demonstrating the practice of forced marriage, the ICTR did not include indictments of enslavement for purposes of forced marriage (Bunting 2017).

International criminal law has made significant advancements in normative understandings of the harms associated with forced marriage and related gender violence since *Akayesu*, and the testimony of victim-survivors has been preserved as important public records in articulating these harms (Grey 2019; Grey and Chappell 2019). There are important critiques, however, of the limitations of victim testimony in demanding narrative structures that may limit survivors' opportunities in communicating their experiences (Bunting 2018; Viebach 2017). Elements of the crimes that are most important to survivors may sometimes be left out as they are deemed unintelligible or irrelevant in criminal proceedings. Critical scholars such as Clarke (2009), Engle (2018), Buss (2009, 2014a), Halley (2008), and Henry (2016) have challenged that international criminal law reinforces particular gendered and racialized relations that may run counter to feminist projects, and that an over-emphasis on penetrative rape occludes the myriad of gendered harms experienced in war. Further and in considering women's engagement with law-making at the international level, it is important to attend to the ways that international law imposes its own limitations on what stories may be told, when and by whom, with victim-witnesses required to shape their testimony within these scripts (Buss 2014b; Viebach 2017). Qualitative research grounded in the experiences of victim-survivors, then, is necessary to draw out the elements of harm and violence in conflict and how these continue to resonate and have effect in post-conflict contexts.

By intersecting these perspectives, we examine the ways that women have contributed to the development of international criminal law, and the potential for their perspectives and experiences to further inform understandings of the crime of forced marriage in ways that have not yet been fully recognized. Since the crux of the issue of this crime is the ascription of the status of spouse/wife, we analyze the ways in which women articulate the contours of the harms they experienced and how these articulations map onto and intersect with the debates around definitions of legitimate marriage, forced marriage and international crimes against humanity. In order to meet the needs of survivors of conflict violence, reparations and transitional justice programs need to be grounded in more nuanced understandings of victimhood and perpetration (Baines 2017). Based on our analysis of 170 original interviews from Liberia, Sierra Leone, and Uganda, we argue that prosecution of crimes against humanity ought to be flexible and responsive enough to capture the varied experiences of women and men, boys and girls abducted for forced labor, including domestic and sexual exploitation, in war (Dolan, Eriksson Baaz and Stern 2020). This is not only an exercise in including the voices of victim survivors in the record of international criminal law—this is a practice of law-making by victims and non-governmental organizations.

Women's conceptions of violence and the ongoing impact they experience are inextricable from the nature of the violence inflicted. Through the interviews conducted, it became clear that certain experiences led to stronger feelings of "wrongness" that women continue to struggle with. This article explores the factors that lead to ongoing suffering, the elements of forced marriages emphasized as most important to victim-survivors (age, consent, violence, resistance, and abandonment) and how women continue to be impacted by particular modes of violence, at once interpersonal and structural. After describing our research methods and settings, we turn to the ways in which women experience and contest being abducted and forced into conjugal unions in conditions of captivity—their agency, subjectivity, and law-making. We argue that survivors and witnesses, like NN quoted above, have shifted and are shifting the legal understandings of marriage and crimes against humanity in ways that contribute to law-making at the international level.

2 | METHODS AND CONTRIBUTIONS

This article is part of the Conjugal Slavery in War (CSiW) Project—a multi-partner research grant comprised of research teams in Uganda, Sierra Leone, Nigeria, Liberia, Rwanda, and Democratic Republic of Congo. This SSHRC-funded Partnership Grant (2015–2021) documents cases of forced marriage in conflict situations, places this data in historical context, and tries to impact the international prosecution of crimes against humanity as well as local reparations programs for survivors of violence. With the central participation of community-based organizations, the project works to strengthen individual's and organizations' capacity to prevent violence, and advance understanding of the use of conjugal slavery as a tool of war through evidence-based research.² In this article, we focus on 170 interviews collected by research teams in Uganda, Sierra Leone, and Liberia between 2013 and 2015. A standard interview question guide was developed collaboratively with the country team leads. We worked with local community-based partners to conduct interviews in different communities within each country. These interviews were translated, transcribed, and coded using first open and then thematic coding.

We partnered with ADWANGA in Liberia (Amelia Cooper), the Women's Forum in Sierra Leone (Rosaline Mcarthy), and Teddy Atim and Grace Acan (Women's Advocacy Network) in Uganda. Each of these organizations offers service provision as well as conducting research. It is through the organizations' established community networks that this research was possible, but collecting interviews with those who also rely on the organization for services is not without challenges and ethical considerations. While the researchers impressed upon participants that the interviews were entirely voluntary and would not impact relationships with the organization, it is difficult to know how pre-existing connections affected the choice to give an interview. Relatedly, participants may have felt more comfortable with the interviewers and trusted that they had the participants' best interests in mind.

The coding and analysis of the interviews was conducted by the authors, after preliminary analysis by the country teams.³ It is important to acknowledge that, in this division of labor, from data collection to analysis and writing, meaning is not straightforward and that positionality impacts what is seen and understood. Thanks to our ongoing partnership with the researchers and organizations who conducted the interviews, conversations about interpretation, contextual nuance, and translation continued well beyond the interview design. While our positionality as white, Global North-based, female researchers undoubtedly influenced how the interviews were read and what was considered important to include herein, we validated the findings with our partners. Our analytic process was not abstracted from their analysis and their perceptions of the central elements of the interviews informed how we read and understood what women chose to share.

Researchers in Liberia interviewed 78 women in six communities across three districts in Nimba County, Liberia. In Sierra Leone, 44 interviews were collected in Bo, Kailahun, Kanema Town, and Mattru Jong. Researchers in Uganda collected 48 interviews in Lango and Acholi sub-regions in northern Uganda. The demographics of women and girls abducted by rebels varies significantly across the three countries: the average age of abduction of interviewees in Uganda was 13 years; in Liberia women were anywhere between 13 and 40 when they were abducted; in Sierra Leone most women were abducted as teenagers or while in their early 20s.⁴ The length of time spent in captivity also varied for the participants in our study: in Sierra Leone it was from 2 days to 11 years while in

²Please see the Conjugal Slavery in War Partnership for more information: <http://csiw-ectg.org/>

³The country reports for Uganda, Sierra Leone, and Liberia are available online through the Conjugal Slavery in War (CSiW) Research Partnership: <http://csiw-ectg.org/resources/publications/>

⁴Due to variations in interview style and responses from participants, it is impossible to know exactly how old women from Liberia and Sierra Leone were when they were forced into "marriages," we can only infer approximate ages based on current age and details from their stories (Ex: "I was 17 years old when war broke out. I know that the war started in Kailahun. It took a long time before it got to our region. My home was attacked by rebels. I do not know which group was involved. I was abducted and raped by three men. I was pregnant by then. As a result I had a miscarriage" (Sierra Leone, Interview #7). Likewise, we were unable to determine the average length in time Liberian women spent in captivity.

Uganda the average time was 3.5 years. Finally, while we will focus on their experiences as "spouses" in this article, our results show that women, like men in rebel forces and state-based armed groups, had many roles including spies, fighters, porters, and cooks. Abduction for the purposes of forced sexual and domestic labor was not a uniform practice across these different contexts and the expectations placed on women forced into marriages varied considerably.

3 | MAPPING CONJUGAL UNIONS IN WAR

While we are comparing and drawing out commonalities of experience among women from different national contexts, it is important to ground this work in attention to the contextual specificities of the conflicts in which forced marriage was utilized. The war in Northern Uganda began in 1986 and was fought primarily between the Lord's Resistance Army and Museveni's National Resistance Army, later the Uganda People's Defense Force. Museveni had recently assumed power in Uganda, and was fiercely contested by actors in the Northern regions of the country, long considered to be marginalized and exploited by the central government, most notably the Acholi ethnic groups. Joseph Kony, leader of the LRA, was first positioned as somewhat of a spiritual leader but his movement soon shifted into one of active war-making to promote the creation of an Acholi nation distinct from the rest of Uganda (Baines et al. 2018). During the decades of conflict, both sides committed atrocities, including sexualized violence (Dolan 2009).

The practices of forced marriage developed and implemented by the LRA are well-researched due to the young age of many abducted girls, the highly systematic nature of the forced unions, and the strong ethnically driven components that prioritized high birth rates (Annan et al. 2009; Baines 2014; Kiconco & Nthakomwa 2018; Kramer 2012). Marriages were typically determined by high ranking commanders who would then "distribute" girls and women to soldiers. Receiving a wife was often treated as a reward for discipline and adherence to LRA rules, and the more senior commanders would choose women for themselves first (Atim et al. 2018; Baines 2014; Kiconco 2021). Grace Acan (2017) and Evelyn Amony (2015), both women abducted and forced into marriage by the LRA as young girls, detail their experiences in their respective memoirs in heart-wrenching detail, drawing out the complexities of this system of forced marriage as well as the myriad of violences, not all of them sexual and not all perpetrated by men, endured by forced wives.

During the two successive wars in Liberia, from 1989 to 1996 then 1999 to 2003, gender and sexual violence was rampant and committed by members of most armed groups and the national army.⁵ Bamidele (2017) reports that over 50% of women in Liberia were raped during the wars and many were abducted. The conflict in Liberia was predicated partly on historic power differentials between descendants of Liberians who relocated to the country from the United States following the abolition of slavery and those considered indigenous Liberians. Charles Taylor returned to Liberia in 1989 from the United States to lead the National Patriotic Front of Liberia to overthrow the existing government. Numerous rebel groups emerged, some in support and some in opposition to Taylor, and allegiances, leadership, and names changed frequently (Hoffman 2011). The first Liberian war ended in 1997 when Taylor assumed the role of president, but conflict began again shortly thereafter, merging with fighting in Sierra Leone which began in 1991 and continued through the formal peace agreement in 2002.

Taylor has been convicted at the Special Court for Sierra Leone (SCSL) for being directly involved in atrocities in Sierra Leone, contributing to wider regional instability and violence (SCSL-03-01-A). In Sierra Leone, particular attention has been paid to the atrocities committed by the Revolutionary United Front (RUF) in relation to child soldiering and sexual violence (Marks 2014), the Armed Forces Revolutionary Council (AFRC), and Civil Defense Forces (CDF) (Oosterveld 2009).

⁵See the Final Report of the Truth and Reconciliation Report, Liberia, in particular Volume 3. The TRC was established in 2005 and reported in 2009: <http://www.trcofliberia.org/index.html>.

Hoffman (2011) argues that the wars throughout the Mano River region were so entangled that a distinct analysis based on state lines does not make sense. Indeed, the armed groups accused of committing sexual violence are sometimes common between Sierra Leone and Liberia and the trial of Charles Taylor, the former president of Liberia, and the decisions from the SCSL were viewed by some as justice rendered for both countries. Others, however, considered Liberia to not have achieved the justice deserved due to a lack of specific attention to atrocities committed against Liberians (Ruggariza 2019).

Little is known about Liberian women's experiences of forced marriage as a particular mode of gendered violence. There has been more scholarly research on women's experiences of forced marriage in Sierra Leone due to dedicated studies by scholars such as Coulter (2005; 2009), Ferme (2013; 2018), and Marks 2014, as well as through the convictions for forced marriage secured by the SCSL (Bunting 2012; Oosterveld 2009, 2011). These scholars have discussed sexual violence in Sierra Leone as operating on a continuum between war and peace, but caution against positioning war-related harms as merely an extension of "cultural practices," emphasizing the importance of carefully considering internal gender dynamics within the various armed groups, as well as the political and economic imperatives driving the war (Marks 2014). There is a temptation to extend these findings to women in Liberia, but this may in fact occlude specificities of Liberian women's experiences and further contribute to rather than help address a dearth in research on forced marriage as a distinct gendered harm in Liberia.

Despite the different historical and conflict contexts discussed in this article, the categories of "marriage," "wife," and "husband" were mobilized by armed actors operating in highly diverse armed groups with different methods, political aims, and organizational structure. At one extreme, we can consider the highly systematic and centrally controlled LRA in Uganda. LRA commanders assigned women as wives to soldiers, and forced marriages were a factor considered to be central to the construction of an Acholi nation (Amony 2015; Baines 2017). Conversely, we can consider the individualized and opportunistic violence of some rebel soldiers in Sierra Leone, such as in the instance described by one interview participant: "One of them brandished a knife and said, you all stay away. This woman is my wife, keep off or I will kill you" (Interview 31, Sierra Leone). Indeed, many participants from Sierra Leone and Liberia described being taken as a wife by an individual or by multiple soldiers without mention of this being an organized or necessarily strategic method of war. It is noteworthy, however, that in all cases the language of "marriage" was invoked by participants. This terminology was used by women to describe situations of systematic forced marriage, as in cases where commanders assigned women as wives to particular soldiers, as well as something individual soldiers told the woman to express a sense of ownership, expectation of domestic and sexual servitude, and/or exclusivity. Therefore, despite the contextual variation across regions, it is important to attend to the utility and importance of forced "marriage" within war.

The interview data below also demonstrates that women chose different terms to describe their time in rebel captivity such as "rebel husband," "bush husband," "sex wife." The mimicry and language of marriage did not, in the minds of the women interviewed in this project, make the assignment of conjugal status valid or "legal." In some circumstances, women were assigned to a particular rebel as his wife, others were forced into it by one or several rebels. As one interview participant describes it, "I was not assigned, but taken as a wife and raped" (Interview 8, Liberia). Another woman described her role as a "sex wife," noting: "No, I was not assigned but was arrested and kept as a sex wife" (Interview 7, Liberia).

The purpose of our article is not to re-hash academic or legal debates⁶ about the application of the terms slavery or forced marriage, but rather to foreground the voices of women themselves who indeed used various terms to describe what happened to them; language that, at times, have

⁶There has been extensive debate within international criminal law as well as in the academic literature about the relative merits of labelling experiences such as those described by our participants as forced marriage, conjugal slavery, or sexual slavery (Bunting 2012, 2018; Bunting & Ikhimuikor 2018; O'Brien 2016; Oosterveld 2009, 2011, 2018).

influenced the development of the category of forced marriage as a crime against humanity. In this regard, it is important to note that the women described their experiences as forced marriage and/or sexual slavery, while emphasizing that in addition to sexual violence they were also forced to perform domestic tasks such as cooking and cleaning, carrying heavy loads, and in some instances participate in fighting. This seems to extend their abuses beyond what is encapsulated by the criminal category of sexual slavery and the ascription of "marriage," "husband," and "wife" were prevalent throughout these contexts.

4 | PERCEPTIONS OF HARMS IN FORCED "MARRIAGE"

In the subsections that follow, we explore the ways in which women talk about and contest the constraints on their agency and consent in the context of captivity. The factors that were most important in survivors' conceptions of violence included age (most notably virginity and menstruation), lack of familial and community participation in the so-called marriage, the nature of the violence, sexual exclusivity, the context of war, and lack of alternatives or imagined futures. The constraints on women's agency and ability to determine their own life courses were imposed through the social ordering inflicted by the armed groups, with women forced to navigate within both tactical and opportunistic social structures.

In response to their situation, women expressed a range of emotions, including sadness, fear, hopelessness, anxiety, surprise, and feelings of being trapped. As one woman expressed it, "I felt very sad and afraid; the killers of my father were taking me to be with them. Only God knows what was going to happen to me" (Interview 5, Liberia). Another woman from Sierra Leone felt both trapped and sad: "My rebel 'husband' repeatedly told me that I was his wife and that nobody was going to take me away from him. I was deeply hurt by his constant demand for sex" (Interview 32 #, Sierra Leone). As has been well documented by scholars (Baines 2014, 2015; Baines and Stewart 2011; Bunting, 2018; Coulter 2009; Denov et al. 2018; Utas 2005), women from Uganda, Sierra Leone, and Liberia, often and strongly expressed their rejection of the bush marriages they were forced into during the conflict. While lack of consent was a strong theme coming out of interviews from all three countries, women from Sierra Leone in particular used specific language around lack of consent.⁷ This is captured by the following quotes from interviewed women:

I was assigned to a particular rebel. He said that I was going to live with him as his wife whether I liked it or not... I was now fully under the control of this rebel... I had no choice but to obey his every command. I reflected on my marriage before the war and thought that this was a very different arrangement because *nobody's consent was sought* [emphasis added] (Interview 28, Sierra Leone).

I did not understand how he could take me for his wife *without my consent* [emphasis added] (Interview 21, Sierra Leone).

While women referred to their status in captivity as "a wife," they were emphatic that theirs was not a valid customary marriage. Here we do not take for granted a liberal notion of individual consent, which holds that "real" consent can only be given in the absence of power relations (Mahmood 2004) through the negation of collective and family structures of consent and customary norms. Instead we insist that it is important to interrogate the appropriateness of the concept of

⁷While one cannot be sure why interview participants in Sierra Leone used language of consent more than in other countries, it is noteworthy that the decisions of the Special Court for Sierra Leone and the legacy of the Special Court are the stuff of public discourse. The customary law of marriage was changed to include a requirement of explicit consent after the decision from the Special Court on forced marriage as a crime against humanity. While Liberia had a Truth & Reconciliation Commission like Sierra Leone, there was no hybrid international crimes tribunal. In Uganda, only recently have trials of the International Crimes Division of the high court begun.

consent and its existence on a continuum. Doezeema's suggestion (2010) to complicate consent past rigid boundaries is useful in the context of the narratives emerging from the interviews with women from Uganda, Sierra Leone, and Liberia where some women used the language of acceptance and "consent" in reference to their forced marriages. A simplified dichotomous reading of this "consent" may challenge the women's position as survivors in ways that fail to capture the complexity and coercion inherent in contexts of conflict. For some women, the lack of consent, as well as the coercive and violent contexts of the forced marriage led many women to liken their experiences to those of slavery:

Life in the bush was completely difficult and different; all freedom was seized. I was treated like a slave (Interview 3, Liberia).

Ezekiel was very rude and abusive to me, he just treated me like a slave and didn't have no regard for me. I took him as someone who was forcing sex on me because I didn't agree to his love. He forced me because he had a gun (Interview 5, Liberia).

I was sex slave and a 'forced wife'. I cooked meals and other household chores. Sometimes I fetched water. When we were trekked, I carried heavy loads (Interview 35, Sierra Leone).

Other women used the language of "consent" to describe a situation where lack of options, threats of violence and survival were often the reasons that they resigned into these forced marriages. As one woman from Liberia recalls, "I wept bitterly for mercy at first, but as time went on I had to *accept* it. Because it was a do or die affair. Agree or be killed" [emphasis added] (Interview 3, Liberia). Another participant from Sierra Leone notes a similar story, "I was told that two of them will marry me. I thought there was no one to help me as if there was no government. I had to *accept* because they threatened to kill me" [emphasis added] (Interview 41, Sierra Leone). What we see then is that the concept of "consent" must be complicated beyond the dichotomous boundaries and to take into consideration the context within which this consent and acceptance is taking place.

For instance, for some women, being taken as a "spouse" provided protection from sexual violence from other men and the risk of other forms of violence. One of the participants taken by the LRA explained "I was afraid because I thought I was going to be killed but when I realized to be his wife, I did not run" (Interview 16, Uganda). A survivor of armed-conflict in Liberia expressed similar resignation to her assigned status as "wife" out of a promise of protection noting, "I did not escape because he promised to take care of me as a wife" (Interview 6, Liberia). A second survivor in Liberia explained accepting her forced conjugal status sharing, "He told me he will help save my life, but I will be his wife if I agree. I accepted and he brought me to Nimba. I was feeling at some point he will kill me but he did not" (Interview 6, Liberia). In these instances, not actively resisting the situation did not negate the violence endured by the women in these situations, rather the decision was one of survival and limited protection from harms in addition to those endured through and within the forced marriage.

4.1 | Age

Through our analysis it became clear that many women considered their young age at the time of abduction as having impacted experiences with marriage and sexual violence in captivity, as well as establishing its perceived violence and illegality. This was often interpreted in relation to whether the girl was prepubescent. Some women who were quite young when they were raped and forced into "marriage" described the fear and confusion they experienced at the time as being due to their youth, demonstrating that age was an important factor aggravating feelings of victimization. For instance,

one survivor from Liberia who was abducted when she was 15 shared, "I was very afraid to the point that I lost my senses. I was just living numbly and in total fear. I felt these guys were going to kill or do any wicked thing to me (Interview 57, Liberia). Another woman in Uganda expressed similar feelings explaining "Even though eventually I did [accept the marriage], I didn't feel like it because he was an old man. He was not my size and I was still young and afraid to be sexually involved" (Interview 6, Uganda).

While the experiences varied across different contexts, a number of survivors shared stories about cultural beliefs about virginity and menstruation and how these beliefs impacted their experiences and sometimes served as aggravating factors for how they conceptualized the violence they experienced. The rules of governance set by Joseph Kony for the LRA outlined menstruation as a key determining factor marking when a girl had become a woman and could be taken as a wife sexually (Acan 2017), though our interviews demonstrate that this was not always adhered to by either Kony or other commanders. Many women from Uganda explained this to our research team. The following quote emphasizes this:

Since I hadn't started seeing my periods, the commander I was assigned to wanted me to start menstruating, so he sent me to a local herbalist in the group to take local herbs so I can start menstruating and be able to conceive. But I refused and he didn't do anything about it and he didn't punish me at all for that (Interview 4, Uganda).

Some women explained their experiences of being given to men before they had begun menstruating. One participant shared, "Kony told his escort that I will be his wife, then that particular escort took me by force for his wife before I was old enough before my first menstrual period" (Interview 8, Uganda). Another survivor explained, "He told me that I was given to him as a wife and asked me that whether I know how to have sex. He raped me and I cried all night and the next day he threaten to kill me and later advised me to get used to the situation. After 2 months I started my menstruation period" (Interview 15, Uganda).

For these women, being made a wife before they considered themselves to have reached womanhood contributed to the enduring harm of the violence. This was also expressed by some women who placed great emphasis on the fact that they were virgins when raped by rebels. In the Liberian context, virginity seemed to be a determining factor in classifying the sexual violence that some participants experienced as rape. This came up in discussions with three survivors. One woman explained, "They were very cruel and rude to me, I considered them to be rapists because at the time I was still a virgin" (Interview 9, Liberia). Another stated, "He was very cruel to me, he did not give me chance to rest from sex because he was not a major frontline soldier. I always considered him a rapist. I was still very young at that time and still a virgin. Everything he did to me was forced upon me" (Interview 52, Liberia). A third woman explained, "He said if I didn't agree to have sex with him he would kill me. I was a virgin at that time, he raped me right before his fellow soldiers. I considered him to be a rapist" (Interview 68, Liberia). The connections made between rape, a legal category, and virginity emphasizes that experiences of sexual violence were not wholly determined by lack of consent but rather draw on culturally relevant connections between age, virginity, consent, and violence to determine what is understood as a particularly grievous harm.

4.2 | Consent

Consent is further complicated by the perception that in some socio-legal contexts it is the consent of the family that determines the legitimacy of the marriage. This was particularly salient for women in Sierra Leone who explained to our research teams that being called "wives" by rebels despite their parents not consenting to the "marriage" was significant:

As we moved along, one of them opted to be my husband. He told me harshly that from now on I was his property. I was taken aback because I could not imagine a strange man taking me as a wife without my family's consent (Interview 6, Sierra Leone).

I did not consider my 'marriage' with the rebel as a lawful one because my consent was not sought. Also my parents were not involved in the arrangement (Interview 4, Sierra Leone).

Similarly and in relation to Uganda, Porter (2013) discusses how sex considered unsanctioned by the community or that was otherwise clandestine carried stigma for the Acholi people in times of relative peace. For example, sex that occurred outside the village, "in the bush", was seen to be done in secret and was largely disapproved of. Both Ferme (2016) and Porter describe "the bush" as an interstitial, liminal space, outside the community and society. It is possible that the lack of community approval of sex and "marriages" that occurred in the LRA in Uganda and the RUF, AFRC in Sierra Leone after girls and women were abducted contributes to some of the stigma women experience upon returning to their community, but this requires further investigation.

In Uganda, we can see a similar emphasis on the lack of community sanctioning in forced marriages as being a central component of harm suffered. We can compare the crime of virgination with payment of "luk," or bridewealth, following sexual assault among Acholi people: both emphasize the social regulation aspects of sexuality over liberal understandings of consent by girls and women. Porter (2019) explains that the commonly shared perspective that rape did not happen before war is not to say there was not sexual violence and forced sex. Rather, these instances often happened within systems of established or soon-to-be-established kinship ties, facilitated through the expectation of luk payment following non-consensual sex, meaning they did not create enduring social ruptures and were thus broadly accepted (see also Apio). Similarly, Ferme (2016) explains that accusations of virgination are primarily based on unsanctioned sex having occurred with a girl who was still virgin; the social issue lies less with whether the girl provided consent, and more with the potential impact on future marriages and bride wealth.

Thornhill's (2017) work with post-war survivors in Liberia analyzes how some people conceptualize rape as an act committed against a child. Thornhill, in citing Fassin (2012), discusses the social utility of emphasizing the offense of child rape in that it has a regularizing effect on sexual and gender based violence more broadly as rape of a virgin is viewed as outside social norms of acceptability, whereas rape of older girls and adult women is viewed as largely the fault of the woman herself. These beliefs are sometimes shaped by customary laws around virginity and sexual violence.

Relatedly in discussing Sierra Leone, Ferme (2016) draws attention to the fact that many customary courts consider sex, consensual or otherwise with a virgin to be a distinct criminal category ("virgination"), whereas rape is not a prosecutable offense. For example, it is a particular criminal offense to have sex with an unmarried virgin (Ferme 2016). The crime is "virgination" and it remains in use within some customary courts and, while described as rape, can also be applied in cases where sex is consensual (Ferme 2016). Others have also documented how the process of "virginating" was committed by combatants against young women and girls⁸ (Batick, Grimm, and Kunz 2007; Human Rights Watch 2003). Some of the women who participated in our research in Sierra Leone used the same language. For example, one survivor explained, "The rebels virginated me" (Interview 5, Sierra Leone). Another linked the process with "marriage" explaining, "After virginating me, one of them took me as his wife" (Interview 9, Sierra Leone).

We draw on these examples to emphasize that rape and sexual violence are, like marriage, socially constructed and defined, as well as historically and contextually specific. As Porter (2018)

⁸Human Rights Watch (2003) "We'll Kill You if You Cry": Sexual Violence in the Sierra Leone Conflict". Available online: <https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict>

writes, "the law, particularly as it has developed in the context of war, wrestles with the individual and relational dimensions of the transgression of rape which animate the central question of what rape is" (597). In this analysis, Porter is drawing out complications arising in international law's contending with issues of sexual violence as individualized, as is central to liberal notions of consent, and a more culturally nuanced and contextually grounded conception of rape as a social as well as interpersonal crime (Bunting, Lawrance and Roberts 2016). For participants in our interviews, questions of consent extended beyond the individual to include the family and the community, with women explaining that as no consent was given they considered their experiences to be rape. Women are exercising agency in their explanations of *why* they considered the violence they experienced to be rape, extending beyond legal definitions that emphasize a liberal and individualized notion of consent. While there are few who would argue that the details given do not constitute sexual violence, the "why" is nonetheless important here to show the multiple ways of understanding violence and the elements necessary for marriage to be consensual.

Women's understandings of violence and forced marriage, as we have demonstrated, are informed by their local customary laws as well as, potentially, international legal norms. It is important here to again emphasize the relationality in these processes. The women interviewed would, in some cases, be aware of the prosecutions for forced marriage at the Special Court for Sierra Leone and the charge of forced marriage in the Ongwen case at the ICC. The lack of reliance on a strictly liberal notion of consent and the invocation of age, virginity, and lack of family/community consent, then, can be read as complicating notions of what constitutes sexual violence; the factors influencing their experiences extend beyond the fact that they did not consent to sexual relations. It is an insistence on the complexity and contextual specificity of what is considered a particular wrongdoing, rather than a reliance on a general set of harms codified within criminal law.

5 | RESISTANCE

Most women forcefully emphasized that they did not consent to marriage and were forced to abide by the demands of the rebels to survive. A number of women also resisted and some described rejecting the rebel's demands of marriage. As one woman who was abducted by the LRA in Uganda stated,

That month, he left me and his senior wife pleaded with me to go and make his bed the next month. He even called other senior women from Kony's homestead and others to talk to me to behave and accept to take him as his wife ... I found it hard (Interview 6, Uganda).

Such explicit rejections, although seemingly rare, took place in cases where the demands were made by a "small," low ranking, rebel. The small rebels were considered unable to provide the same protection as commanders or higher-ranking soldiers, and therefore were less preferred by women, even in these confined circumstances. This is captured by the following quote:

One of the rebels, a lower ranked asked me that he wanted me to come and live with him just like a wife and a husband, I told him that no, I do not want to be his wife because he was also a new abductee and with lower rank, I thought this would create problems between the commanders because he had not lived there for long just like me (Interview 2, Uganda).

As the above quote suggests, the woman's decision to reject the small rebel was also tied to his recent arrival and the potential problems this could create with the commander. Another participant describes her initial rejection of the rebel as her husband and her refusal to do tasks that he

demanding of her. This recalls the notion of tactic agency and acts of resistance can be subtle and private refusals. She explained,

After a week in the evening he said I was given as his wife and he told me to cut grass and prepare a bed but I refused then I was threaten to be beaten with machete. I was beaten. In fear, I went and slept with the man. I was not willing to be his wife, I was still young and not ready to be with a man (Interview 12, Uganda).

This comment links to the earlier narratives about conceptions of violence intensified through notions of age and lack of readiness for sex, as well as the physical harm suffered by women who resisted. In this context, the woman shared her initial rejection of the rebel's demands but his constant threats of violence frustrated her ability to refuse him sexually. Similarly, another woman from Sierra Leone notes "I was assigned to a small rebel. He told me to be his wife. I was given treatment for my wound. I was discouraged and refused to accept him as my husband" (Interview 8, Sierra Leone).

Indeed, a few women stayed with the rebel even after the conflict was over; "I still live with 'D' as my husband ... and I feel satisfied to live with him because he saved my life" (Interview 8, Liberia). Some women accepted their marriage perceiving it, in the words of one participant, as a "normal husband and wife family relationship". One woman in Uganda explained,

It was a husband and wife relationship. Men with women because he takes you as a wife he wants to make love to you although during the day he was so harsh and rude. He would even order that you be beaten or punished for any acts. I kind of got confused what the arrangement was like, although for me it was like a normal husband and wife family relationship (Interview 43, Uganda).

Thus, despite the harshness, rudeness, and violence of the rebel, this woman saw her marriage as any other. Similarly, another woman from Liberia described her relationship as having turned from a forced one to a willing one: "When [he] met me he was different from the other guys who came across me. He was kind to me and took me as his wife. At first, I took it as a force relationship because he had gun. But later on I began to accept his relationship willingly" (Interview 50, Liberia).

These quotes demonstrate the complicated and ambivalent feelings of some women toward their forced husbands. Despite the violence and abuse, women also received protection, and some described genuine feelings of affection developing. These nuances do not negate the initial, and often ongoing, violence inflicted and does not mitigate its seriousness. It does, however, demand increased attention to the complicated relationships that develop during constrained and difficult circumstances marked by conflict (Bunting 2018).

5.1 | Escape

Violence occurred often for the women interviewed, but there were certain experiences of wrongdoing that led to a great sense of violation and sometimes prompted responses such as escape attempts, refusal to perform domestic duties, and attempts to secure a safer position or a higher status.

As one woman from Liberia describes it, "I tried on several occasions to escape but I was always caught by them. I was not successful because I did not know the area well" (Interview 5, Liberia). Another woman from Liberia tells a similar story: "I tried on several occasions to escape. Any time I make an attempt they will grab me and beat me unmercifully. I wanted to escape because of the bad treatment I was receiving from the rebels" (Interview 12, Liberia). A woman from Uganda attempted escape despite the consequences she had to bear, "I tried all my best to escape and when they caught me, they beat me 50 strokes of cane. In fact, they told me they had just pardoned me, I should have

been killed. I couldn't do much, so I just gave up" (Interview 47, Uganda). Successful escape stories also reveal the careful planning women put into their escape attempts:

Yes, I did escape. Some friends who were making business came to him and we all beg him so that I can join them to sell some small food items the like them. He agreed. When we went for the items in Taylor control area, we heard information that Prince Johnson base will be attacked. We all decided to remain. After some days we made our way to Nimba (Interview #17, Liberia).

Women's decisions not to escape were also enacted to avoid bringing harm to themselves and/or their children. As a Liberian woman describes it, "I did not run away because the soldier advised me not to before someone kills me" (Interview #8, Liberia). Another woman also from Liberia cites similar reasons for her decision not to escape: "No, I did not run away. I was told if I am caught running away, I would be killed" (Interview 15, Liberia).

5.2 | Abandonment

By looking at different experiences through the lens of wrongdoing and harm caused, we can move toward understanding some women's sense of abandonment and feelings of betrayal by men with whom they were forced into conjugal relationships. Language of abandonment was particularly strong in Liberia where many women expressed resentment toward rebel husbands who left them without resources and protection.

When asked about the hardest part of the time period immediately after captivity in the bush, one woman explained "There was no money to take care of the pregnancy when he abandoned me. I seriously needed money" (Interview 2, Liberia). Another explained how her time with the rebels came to an end noting "He abandoned me after ill-treating me for some years and gets new women" (Interview 12, Liberia). Another shared her experience of being abandoned by her rebel husband during childbirth stating "When I was in labor pain the man abandoned and I was helped by one midwife where I was" (Interview 19, Liberia). And another highlighted both the experience of being protected by a rebel by being made his wife but also feeling abandoned by him when he got another woman: "After capturing Gbanga the rebels were killing people when they came across me, commander (x) said I should not be killed and he took me as a wife and brought me to Nimba. I had eight children by him and three died. There after he abandoned me and the children, got new woman and was gone" (Interview 20, Liberia).

These feelings are also often linked to a sense that the men who forced women to have children should continue to maintain responsibility for them. Not only is there a lack of financial and material support from fathers abandoning their children, which was important for women across contexts, but there was also a rupturing of patrilineal kinship relations whereby children are cut off from their paternal families and from accessing land inheritances. This was a particular concern for women from Uganda.⁹ Compounding this lack of direct paternal support is the very limited state support for survivors and, indeed, the further abandonment of women by their governments who have not provided adequate reparative measures. Reparations for survivors are crucial, as emphasized by many participants: school fees for their children, medical care, housing and economic support, as well as psycho-social reintegration and community education cannot alter the harms suffered, but can contribute to survivors' rebuilding their lives, families, and communities in the aftermath of conflict.

Women's sense of abandonment following return to their communities is interrelated to our contention that women are law-making in their engagement with experiences of forced marriage.

⁹See CSiW's Children Born of War bibliography <http://csiw-ectg.org/resources/bibliography/>

The “marriage,” despite being forced, marked by often extreme violence, and resisted by women, nonetheless carries with it the belief that the ascription of the status of wife necessarily elicits expectations from the “husband.” To negate these responsibilities, then, runs counter to the expectations that accompany the title of “husband,” distinct from the lack of expectations for the perpetrator of other forms of sexual violence. Here, women demonstrate not only agency in rejecting the legitimacy of the marriage, of describing their wartime experiences as “forced marriage,” but also holding their forced husbands to a standard of support and responsibility that they consider to accompany any conjugal union, forced or consensual. This serves to reinforce the obligations inherent within the socio-legal category of marriage within the post-conflict context, despite the lack of consent within the forced conjugal association.

6 | DISCUSSION: CRITICAL LEGAL PLURALISM AND WOMEN’S LAW-MAKING

In foregrounding and analyzing the lived experiences of survivors of abduction for forced marriages in conflict, we understand survivors as having exercised “tactic agency” to contest the taken-for-granted norms of so-called marriages in conditions of captivity. While the norms within the insurgent groups such as the Lord’s Resistance Army (LRA) in Uganda, the Revolutionary United Front (RUF) in Sierra Leone, or other rebel groups are neither state law nor customary law, they are a type of social ordering, as understood in the field of legal pluralism (Falk Moore 1978). Legal pluralism, as law and society scholars know well, pays attention to overlapping normative orders and draws our analytic lens to the ways in which state-promulgated laws intersect with and are interpreted through other scales of legal normativity (Merry 1988; Tamanaha 2010). As Provost (2017) argues in his analysis of Revolutionary Armed Forces (FARC) justice in Colombia,

legal pluralism emerges as an especially promising perspective for the analysis of the administration of justice by insurgents. This is so both because such norms and practices do not derive any legitimacy from the state, quite the opposite, but also because in many if not most civil wars the official law of the state will cohabit with norms established by armed opposition groups. (5).

Legal pluralism has evolved from an approach that sought to de-center state law, taking seriously the religious, non-state, business, or community-based legal systems, to an approach that now includes global (Berman 2012; Darian-Smith 2013) and critical legal pluralisms, going “beyond social ordering” (Tamanaha 2010). Kleinhans and Macdonald (1997) lay out the key elements of critical legal pluralism drawing on poststructuralism, with a focus on individuals’ agency and subjectivity in relation to legal knowledge. These key insights from critical legal pluralism are those on which we rely to understand women’s law-making capacity within and following captivity and forced marriage.

Women abducted by the LRA, RUF, or other groups and assigned to commanders and soldiers as forced wives are participating in and negotiating “multiple normative communities”, that is, drawing on their understandings of customary or statutory family law but extending “beyond customary law” (Blackett 2019, 42) to interpret the normative ordering within the armed group and their lived experience (and that of other wives) of competing norms. In other words, we build on Provost’s analysis of “insurgent jurisprudence” (2017) to include internal contestations over socio-legal expectations of marriage and gender (Amony 2015, 38–9). Provost reminds us “[r]ebel governance, indeed all forms of governance, must be grounded in some degree of symbiotic relation between those wielding power and those subject to it” (11). Take, for example, the reflections of one woman who was abducted during the civil war in Sierra Leone:

I was not assigned to a particular rebel. Many of the rebels had sex with me much against my will. I thought my life had come to an end. I was made to perform all wifely roles even though my consent had not been sought. The rebels told me I was *their wife* (Interview 27, Sierra Leone) [emphasis added].

Despite conditions of captivity, women are negotiating marriage norms not just within rebel groups but also within their home communities and, therefore, are “‘law inventing’ not merely ‘law abiding’” (Kleinhans & Macdonald: 39, referring to de Sousa Santos). We found women’s understandings of the expectations of “marriage in the bush” are structured but not “wholly determined” (Kleinhans & Macdonald 1997) by customary and rebel marriage practices. This goes beyond reactive resistance as women are mobilizing understandings of legal marriage or legitimate marriage in order to challenge social understandings. A second woman from Sierra Leone stated, “I was virtually the rebel’s slave. He made me do things without my consent. He said that I was his wife all the time. He said he was never going to let go of me.” (Interview 33, Sierra Leone). Women recount how they contested more than consented to relationships in captivity.

Evelyn Amony (2015), for example, had been taken into the house of LRA top commander Joseph Kony and then, at 40 years old, Kony took her forcibly as his wife (38). Amony wrote that when Kony refused to let her seek medical attention for her firstborn daughter, she effectively went on domestic strike: “I stayed for three months without doing anything for Kony. I never made him even a cup of tea when he came to my home [compound in the LRA camp]. I never greeted him or responded when he talked to me [...] I refused to bring him water when he sent me to do so; that is work for a wife.” (52–3) Further, the LRA had a complex chain of command that responded to social or relational, as well as military, disputes within the group. The senior commanders, the “elders” in her words, heard her complaints and supported her (56), effectively acting as mediators between Amony and Kony.

This analysis combines the insights of tactic agency in war with critical legal pluralism’s process of legal subjectivity. In distinguishing tactic agency from strategic agency, Utas (2005) argues that, “the social navigation tactics of young women in war include establishing and carefully managing relations with boyfriends, commanders, co-wives, peacekeepers, NGO staff, and other categories of marginalized civilians. It may include both the taking of humanitarian aid and the taking up of arms at different times and under different circumstances” (408). This is closely indebted to Michel de Certeau’s work (1980/84) on strategies and tactics (34–37) and to what James Scott (1985) refers to as the “weapons of the weak” in their “everyday” resistance (29, 31).¹⁰ Sometimes acts of public refusal or resistance, by contrast with tactics, can have deadly consequences for women, as in the story of Stella narrated in Amony’s memoir (2015). Stella had tried to escape the LRA after being “taken to live with another senior commander, Ocan Bunia” (60) but was severely beaten and shot by LRA commanders. This example, alongside experiences relayed by interview participants in this study, demonstrates the extreme violence experienced by women, but also the constraints on individual refusal (tactic agency). Women’s law-making, thus, is not necessarily grounded in individual acts of strategic resistance but rather arises from patterns in how experiences are articulated across relationships and contexts and how these come to shift legal norms through the sum of the parts of resistance.

On returning home, women enter into negotiations around marriage and gender norms with their parents, extended families and communities (see Amony 2015, Epilogue; Baines 2011). As Apio (2016) found in the Ugandan/ LRA context, sometimes these reintegration negotiations reinforce the existing gender hierarchies in order to achieve acceptance for themselves and their children: the post-conflict space was “largely shaped by patriarchal idioms of identity which assigned and

¹⁰Here is Certeau (1984): “By contrast with a strategy [...], a *tactic* is a calculated action determined by the absence of a proper locus. No delimitation of an exteriority, then, provides it with the condition necessary for autonomy. The space of a tactic is the space of the other. Thus it must play on and with a terrain imposed on it and organized by the law of a foreign power. [...] It is a guileful ruse. In short, a tactic is an art of the weak.” (37)

enforced gender roles by which girls and boys were perceived” (175). Their legal subjectivity is in constant development, therefore, reflecting back in time to pre-conflict norms, and looking forward in time, imagining possible futures marked by their experiences in captivity. It is through these reflections that women are shaping international criminal law as well: victim survivors’ articulation of the harms of forced marriage in conflict situations and the violence of forced labor, the ascription of the status of “wife” and other violations has led to the recognition of forced marriage as a new crime against humanity of other inhumane acts (SCSL 2008). This development indicates a recognition of women’s experiences of being forcibly ascribed the role of “wife” as a unique set of harms beyond those of forced labor and sexual violence, one that elucidates complex interrelationships between violence, social ordering, conjugal associations, and war.

As we explored, one cannot take for granted how victims experience violations and violence. Through an interpretive and reiterative process, experiences become known to a person as a harm, as wrong. Some of these harms are violations of cultural norms but do not necessarily bring in legal prohibition, while others come to be known as violations that demand specific definition within law and legal redress. It is another matter, of course, whether international, domestic, or customary law can respond to the complex experiences of violence in conflict situations – sometimes so masked in repetition or the language of marriage as to be made mundane. The terms “marriage,” “bush wife,” or “rebel husband” serve to normalize the violence over time for participants in the conflict; and, for women in our study, “forced marriage” serves as an alternative explanation to accusations of their consensual participation in the conflict. For example, in part due to post-conflict stigma, women may feel compelled to refute the narrative that they willingly volunteered to fight for the LRA or other armed groups. Paradoxically, while “marriage” is employed as a shorthand for a set of expectations in conflict situations and often crudely mimics the social institution from times of relative peace (Ferre 2016; Hynd 2016), women insist it is not a “real marriage.”

These findings have implications for humanitarian policies and reparations programs. Important dimensions of transitional justice programs include contending with psycho-social needs as well as stigma experienced by survivors and their children. In order to meet their needs, policy and programs ought to be grounded in solid empirical foundations that do not shy away from the complexity and nuance associated with gendered violence and forced marriage in conflict situations. For example, to see women’s victimization as all-encompassing is not respectful of the ways in which women exercised their agency in captivity and may contribute to further disempowerment and community stigma. Further, without a clear sense of the harms of the ascription of the term “wife” nor the intergenerational implications of identity, nationality, and trauma for their children born in captivity, reparation programs will fall short of meeting their needs and justice expectations. Support and reparations programs will be more effective if they work in partnership with community and survivor-led organizations to address the complex and multi-faceted needs of survivors through locally appropriate, feminist, and transformative approaches.

7 | CONCLUSION: “HOW CAN I BE A WIFE TO ALL THESE MEN?”

In complicating conceptions of victimhood, it is important to consider the lack of a definite end date to suffering and understandings of violence. Through experiencing ongoing pain, social suffering, and lack of recognition for harms, women continue to live the war through social and structural violence in post-conflict contexts. While formal law alone cannot mitigate these harms, these are important considerations for the jurisprudence on forced marriage. Beyond abduction and sexual violence, survivors of forced marriage experience a myriad of social impacts, labor exploitation, and the distinct sense that social and cultural marriage customs were perverted in furtherance of the war. As one participant explained, “They told me I was their wife. I thought how can I be their wife when I did not give my consent. How can I be a wife to all of these men? I turned these thoughts in my mind not daring to utter them” (Interview 26, Sierra Leone).

Through our research, we found that survivors make sense of the violence they experienced in the conflicts in Liberia, Sierra Leone, and Uganda against the backdrop of cultural understandings of marriage, consent, wrongfulness, and responsibility. Further, we demonstrate how women are contesting these concepts, though within structures of constraint. As Utas' (2005) argues, this "suggests a need for a far more complex understanding of women's experience in African and other wars than prevailing depictions that deduce from women's accounts of victimization that they have no agency" (409).

For the participants in our research, the context of conflict mattered to them as it was marked by the compromised conditions of "the gun," violence, or threat of death. Nonetheless, women are "law-making" through their lack of consent or refusal to accept the male ascription of the status of wife and definition of legitimate marriage, as well as through their articulation of the specificities of harms suffered within systems of rebel governance. In our interviews, women contested the armed groups' sanctioning of the relationship in favor of community or customary legitimation of the marriage, thereby re-establishing the roles of parents, family, community to sanction the marriage or conjugal relationship. They further expressed that age and menstruation were important factors in legitimate marriage, and violations of these norms denoted a particular mode of violence. Importantly, their perspectives have been accepted by international courts and tribunals, albeit on a limited basis. Women have provided the experiential grounding for the legal argument that abduction for conjugal enslavement is a crime against humanity, not a customary marriage nor the legitimate spoils of war. What comes next must be the development of reparative actions to recognize, understand, and redress the long-term impacts of this violence on women, their children, and communities.

ACKNOWLEDGEMENTS

We extend our sincere thanks to Amelie Barras, Benedetta Rossi, and Bruce Ryder for their helpful and thought-provoking comments and edits on earlier drafts of this article. The paper is much stronger as a result of their input. Dr. Katrin Roots contributed important analysis early on in our process; her insights helped inform ongoing conversations both on and off the page. Thank you also to the anonymous reviewers for their detailed feedback. Lastly, thank you to the entire Conjugal Slavery in War Partnership - your collegiality, expertise, and contributions made this article possible.

REFERENCES

- Acan, Grace. 2017. *Not Yet Sunset: A Story of Survival and Perseverance in LRA Captivity*. Kampala: Fountain Publishers.
- Amony, Evelyn. 2015. *I Am Evelyn Amony: Reclaiming My Life from the Lord's Resistance Army* (edited with an Introduction by Erin Baines). Madison: University of Wisconsin Press.
- Annan, Jeannie, Moriah Brier, and Filder Aryemo. 2009. "From "Rebel" to "Returnee" Daily Life and Reintegration for Young Soldiers in Northern Uganda." *Journal of Adolescent Research* 24(6): 639-67.
- Apio, Eunice Otuko. 2016. "Children Born of War in Northern Uganda: Kinship, Marriage, and the Politics of Post-Conflict Reintegration in Lango Society." Doctoral Dissertation Approved by School of Arts & Law; University of Birmingham.
- Atim, Teddy, Grace Acan, Jane Etap, and Annie Bunting. 2018. *Forced Marriage inside the LRA, Conjugal Slavery in War* (CSiW) Research Partnership, Uganda Country Report.
- Baines, Erin. 2014. "Forced Marriage as a Political Project: Sexual Rules and Relations in the Lord's Resistance Army." *Journal of Peace Research* 51(3): 405-17.
- Baines, Erin. 2017. *Buried in the Heart: Women, Complex Victimhood and the War in Northern Uganda*. Cambridge: Cambridge University Press.
- Baines, Erin, and Stewart, Beth. 2011. "I Cannot Accept What I Have Not Done": Storytelling, Gender and Transitional Justice. *Journal of Human Rights Practice* 3(3): 245-63.
- Baines, Erin K. 2015. "Today, I Want to Speak Out the Truth": Victim Agency, Responsibility, and Transitional Justice. *International Political Sociology* 9(4): 316-32.
- Bamidele, Oluwaseun. 2017. "War, Sex and Justice: Barriers to Gender Justice in Post-Conflict Liberia." *International Journal of Criminal Justice Sciences* 12(1): 69-82.
- Berman, P. 2012. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781139028615>

- Blackett, Adelle. 2019. *"Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law."* Ithaca, NY: Cornell University Press.
- Bunting, Annie. 2012. "Forced Marriage in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes." *Canadian Journal of Human Rights* 1: 165–85.
- Bunting, Annie. 2017. "Narrating Wartime Enslavement, Forced Marriage, and Modern Slavery." In *Contemporary Slavery: Popular Rhetoric and Political Practice*, edited by A. Bunting and J. Quirk. Vancouver: UBC Press.
- Bunting, Annie. 2018. "Gender Politics and Geopolitics of International Criminal Law in Uganda Gender Politics and Geopolitics of International Criminal Law in Uganda." *Global Discourse* 8(3): 1–16.
- Bunting, Annie, and Izevbuwa Ikimiukor. 2018. "The Expressive Nature of Law: What we Learn from Conjugal Slavery to Forced Marriage in International Criminal Law." *International Criminal Law Review* 18(2): 331–53.
- Bunting, Annie, Benjamin Lawrance, and Richard Roberts, eds. 2016. *Marriage by Force? Contestation Over Consent and Coercion in Africa*. Ohio: Ohio University Press.
- Buss, Doris E. 2007. "The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law." *Windsor Yearbook of Access to Justice* 25(3): 2–22.
- Buss, Doris. 2009. "Rethinking 'rape as a weapon of war'." *Feminist Legal Studies* 17(2): 145–63.
- Buss, Doris. 2014a. "Seeing Sexual Violence in Conflict and Post-Conflicts: The Limits of Visibility." In *Sexual Violence in Conflict and Post-Conflict Societies: International Agendas and African Contexts*, edited by D. Buss, J. Lebert, B. Rutherford, D. Sharkey, and A. Aginam. New York: Routledge.
- Buss, Doris E. 2014b. "Knowing Women: Translating Patriarchy in International Criminal Law." *Social & Legal Studies* 23(1): 73–92.
- de Certeau, Michel. 1984. *The Practice of Everyday Life*. London, England: Univ. of California Press. Translated by Steven Rendall.
- Clarke, Kamari Maxine. 2009. *Fictions of justice: The International Criminal Court and the challenge of legal pluralism in Sub-Saharan Africa*. Cambridge UK: Cambridge University Press.
- Coulter, Chris. 2005. "The Post War Moment: Female Fighters in Sierra Leone." *Migration Studies Working Papers Series* 22(3): 1–18.
- Coulter, Chris. 2009. *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone*. Ithaca, NY: Cornell University Press.
- Darian-Smith, Eve. 2013. *"Laws and societies in global contexts: Contemporary approaches."* Cambridge UK: Cambridge University Press.
- Denov, Myriam, Green, Amber, Atim, Angela Lakor, and Arach, Janet. 2018. "Mothering in the Aftermath of Forced Marriage and Wartime Rape: The Complexities of Motherhood in Postwar Northern Uganda." *Journal of the Motherhood Initiative for Research and Community Involvement* 9(1): 158–76.
- Dolan, Chris. 2009. *Social Torture: The Case of Northern Uganda, 1986–2006*, Vol 4. New York: Berghahn Books.
- Dolan, Chris, Eriksson Baaz, Maria, and Stern, Maria. 2020. "What is Sexual about Conflict-Related Sexual Violence? Stories from Men and Women Survivors." *International Affairs* 96(5): 1151–68.
- Engle, Karen. 2017. Feminist Governance and International Law: From Liberal to Carceral Feminism. In *Governance Feminism: Notes from the Field*, edited by Janet Halley, Prabha Kotiswaran, Rachel Rebouché and Hila Shamir. Minneapolis Min: University of Minnesota Press.
- Engle, Karen. 2018. "Feminist Governance and International Law: From Liberal to Carceral Feminism." In *Governance Feminism: Notes from the Field*, edited by Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir. Minneapolis: University of Minnesota Press.
- Fassin, Didier. 2012. "Towards a Critical Moral Anthropology. La Lettre de l'École des hautes études en sciences sociales."
- Ferme, Mariane. 2013. "Archetypes of Humanitarian Discourse: Child Soldiers, Forced Marriage, and the Framing of Communities in Post-Conflict Sierra Leone." *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 4(1): 49–71.
- Ferme, Mariane. 2016. "Consent, Custom, and Law in Debates around Forced Marriage at the Special Court for Sierra Leone." In *Marriage by Force?* edited by A. Bunting, B. Lawrance, and R. Roberts. Ohio: Ohio University Press.
- Ferme, Mariane. 2018. Forced Marriage and Sexual Enslavement. *Out of War: Violence, Trauma, and the Political Imagination in Sierra Leone*. Oakland CA: University of California Press.
- Grey, Rosemary. 2019. *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential*, Vol 143. Cambridge: Cambridge University Press.
- Grey, Rosemary, and Louise Chappell. 2019. "'Gender-Just Judging' in International Criminal Courts: New Directions for Research." In *Research Handbook on Feminist Engagement with International Law*. Cheltenham: Edward Elgar Publishing.
- Halley, Janet. 2008. "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law." *Michigan Journal of International Law*, 30, 1.
- Henry, Nicola. 2016. "Theorizing Wartime Rape." *Gender & Society* 30(1): 44–56.
- Hoffman, Danny. 2011. *The War Machines: Young Men and Violence in Sierra Leone and Liberia*. Durham: Duke University Press.

- Human Rights Watch. 2003. "We'll Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict." <https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict>
- Hynd, Stacey. 2016. *To be taken as a wife is a form of death: The Social, Military, and Humanitarian Dynamics of Forced marriage and Girl Soldiers in African Conflicts, c. 1990-2010*. Athens Ohio: Ohio University Press.
- Kiconco, Allen, and Martin Nthakomwa. 2018. "Marriage for the 'New Woman' from the Lord's Resistance Army: Experiences of Female Ex-Abductees in Acholi Region of Uganda." *Women's Studies International Forum* 68: 65-74.
- Kiconco, Allen. 2021. *Gender, Conflict and Reintegration in Uganda: Abducted Girls, Returning Women*. Studies on Gender and Sexuality in Africa: Routledge.
- Kleinhans, Martha-Marie, and Macdonald, Roderick A. 1997. "What is a Critical Legal Pluralism?" *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 12(2): 25-46.
- Mahmood, Saba. 2004. *Politics of Piety: The Islamic Revival and the Subject of Feminism*. Princeton, NJ: Princeton University Press.
- Marks, Zoe. 2014. "Sexual Violence in Sierra Leone's Civil War: 'Virgination', Rape, and Marriage." *African Affairs* 113(450): 67-87.
- Merry, Sally Engle. 1988. "Legal Pluralism." *Law & Society Review* 5(22): 869-96. <https://doi.org/10.2307/3053638>
- Moore, Sally Falk. 1972. "Law and social change: the semi-autonomous social field as an appropriate subject of study." *Law and Society Review* 7: 719-46.
- O'Brien, Melanie. 2016. "'Don't Kill them, let's Choose them as wives': The Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law." *The International Journal of Human Rights* 20(3): 386-406.
- Oosterveld, Valerie. 2009. "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes." *Journal of Gender, Social Policy and the Law* 17(2): 407-30.
- Oosterveld, Valerie. 2011. "The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments." *Cornell International Law Journal* 44: 49-74.
- Oosterveld, Valerie. 2018. "Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law." *William & Mary Bill of Rights Journal* 27: 1263-82.
- Porter, Holly. 2013. "After Rape: Justice and Social Harmony in Northern Uganda (Doctoral Dissertation, The London School of Economics and Political Science (LSE))."
- Porter, Holly. 2018. Rape Without Bodies? Reimagining the phenomenon we call "rape". *Social Politics: International Studies in Gender, State & Society* 25(4): 589-612.
- Porter, Holly. 2019. "Moral Spaces and Sexual Transgression: Understanding Rape in War and Post Conflict." *Development and Change* 50(4): 1009-32.
- Provost, René. 2017. https://www.academia.edu/31648083/FARC_Justice_Rebel_Rule_of_Law
- Ruggariza, Ephrem. 2019. Does the Liberian President Really Want a War crimes' Court? *Justice Info.Net*, October 03, 2019. <https://www.justiceinfo.net/en/tribunals/national-tribunals/42510-liberian-president-war-crimes-court.html>
- Tamanaha, Brian. 2010. In *Law and Society. A Companion to Philosophy of Law and Legal Theory [finish CITE]*, edited by Dennis Patterson. Hoboken: Blackwell Publishing.
- Thornhill, Kerrie. 2017. "Power, Predation, and Postwar State Formation: The Public Discourse of Ritual Child Rape in Liberia." *Third World Thematics: A TWQ Journal* 2(2-3): 229-47.
- Utas, Mats. 2005. "West-African Warscapes: Victimcy, Girlfriending, Soldiering: Tactic Agency in a Young woman's Social Navigation of the Liberian War Zone." *Anthropological Quarterly* 78: 403-30.
- Viebach, Julia. (2017). "The Evidence of What cannot Be Heard: Reading Trauma into and Testimony against the Witness Stand at the International Criminal Tribunal for Rwanda." 6(1) *International Journal for Crime, Justice and Social Democracy* 51-72.

CASES CITED

- Prosecutor v. Brima, Kamara & Kanu*, (AFRC Case), 20 June 2007, Trial Judgment, Case No. SCSL-04-16-T.
- Prosecutor v. Brima, Kamara & Kanu*, (AFRC Case), 22 February 2008, Appeals Judgment, Case No. SCSL-04-16.
- Prosecutor v. Germain Katanga*, (Katanga case), 7 March 2014, ICC-01/04-01/07, paras. 958-960; *Prosecutor v. Katanga and Chui*, 30 September 2008, Decision on the Confirmation of Charges, ICC-01/04-01/07, para. 431.
- Prosecutor v. Thomas Lubanga Dyilo*, (Lubanga case), 14 March 2012, ICC-01/04-01/06, para. 629.
- Prosecutor v. Dominic Ongwen*, (Ongwen case) 23 March 2016, Decision on the Confirmation of Charges, ICC-02/04-01/15.
- Prosecutor v. Dominic Ongwen*, (Ongwen case) 28 February 2020, Public redacted version of Common Legal Representative of Victims' Closing Brief, ICC-02/04-01/15-1720-Conf.

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How to cite this article: Bunting, Annie, Heather Tasker, Emily Lockhart. 2021. "Women's law-making and contestations of "marriage" in African conflict situations." *Law & Society Review* 55(4): 614–633. <https://doi.org/10.1111/lasr.12576>

Ending Impunity for Forced Marriage in Conflict Zones

The Need for Greater Judicial Emphasis on the Human Rights of Girls

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Abstract

Countless women and girls have been abducted, raped, forcibly assigned as 'wives' to combatants and held captive within such forced marriages in conflict zones around the world. Forced marriage as an international crime remains controversial because it (i) is not codified in any international criminal statute, (ii) involves conduct overlapping with already-enumerated crimes against humanity and (iii) is inconsistently defined. Legal protections for girls in forced marriage reside in historical proscriptions against various forms of slavery — banned by jus cogens norms, international human rights and humanitarian law — including the crimes against humanity of sexual slavery and enslavement. Yet, despite similarities between forced marriage and numerous forms of slavery, international criminal courts have not yet prosecuted or convicted forced marriage as enslavement, and even its conviction as sexual slavery insufficiently captures the unique, multi-layered injuries its youngest victims suffer. International tribunals confronting evidence of very young girls captured as 'wives' and of female child soldiers serving as sex slaves have failed to adequately recognize or redress the egregious harms girls endure through forced marriage. Competing judicial and academic views on its proper classification have obscured courts' oversight of forced marriage's most vulnerable victims — female children. This article argues that, to advance justice for girls in conflict zones and end impunity for these atrocities, greater judicial emphasis is needed on the constellation of internationally recognized fundamental human rights of children violated by forced

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marriage, whether prosecuted as an ‘other inhumane act’ or slavery-related crime against humanity.

1. Introduction: Forced Marriage in International Law

Girls ... should not be made to serve as sex slaves and soldiers. They should not be subjected to rape and sexual violence, nor made to witness brutal sexual attacks. In accordance with the Rome Statute of the International Criminal Court, I shall continue to include gender crimes and crimes against children in our charges and to bring the full force of the law to bear on those most responsible for them.¹

This proclamation by the first female Chief Prosecutor of the International Criminal Court (ICC) essentially condemned the victimization of girls through forced marriage, which international tribunals have prosecuted as various war crimes and crimes against humanity (CAH), including sexual slavery and ‘other inhumane acts’. Yet, during the eight years since Fatou Bensouda made this commitment, reinforced by her Policy on Sexual and Gender-Based Crimes, the ICC has been slow in delivering justice — including the direct right to reparations — to female child soldiers and women suffering harms from sexual and gender-based violence in armed conflicts.² Girls continue to endure these harms so integral to forced marriage in conflict zones spanning the globe.³

The ICC appears to be taking such atrocities more seriously of late, prosecuting forced marriage for the first time as a CAH under other inhumane acts against Ugandan warlord Dominic Ongwen, noting:

... abducted girls were distributed amongst LRA fighters, as prizes. They could not refuse sexual advances from the men they had been awarded to. They were beaten and caned for

- 1 Office of the Prosecutor (OTP), *Statement ICC Prosecutor Fatou Bensouda on International Day of the Girl*, 11 October 2012. The ICC is governed by its founding treaty, the Rome Statute (17 July 1998, last amended 2010) (ICCSt.). This article focuses on women and girls due to the disproportionate number of, and impact on, female victims, but recognizes that boys and men have also suffered from forced marriages, especially during the genocidal Khmer Rouge regime. See Section 5, *infra*; I. Aijazi and E. Baines, ‘Relationality, Culpability and Consent in Wartime: Men’s Experiences of Forced Marriage’, 11 *International Journal of Transitional Justice* (2017) 463; M.S. Denov and M.A. Drumbl, ‘The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda’, 18 *Journal of International Criminal Justice* (JICJ) (2020) 349.
- 2 F. Bensouda, Keynote Remarks, ‘Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court’, SAIFIC Conference: International Law and Justice for Victims of the Gross Human Rights Violation of Sexual and Gender-Based Violence, 27 November 2019; OTP, *Policy Paper on Sexual and Gender-Based Crimes* (‘ICC-OTP, Policy SGB Crimes’), June 2014; Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, *Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber, 3 March 2015 (‘Amended Reparations Order’), §§ 196–199 (right to reparations for sexual and gender-based violence harms).
- 3 SC Res. 2467, 23 April 2019; *Secretary General’s Report to Security Council on Sexual Violence in Armed Conflict*, UN Doc. S/2020/487, 3 June 2020 (‘Secretary-General’s Report’).

trying to escape. For years, they were subjected to repeated rape. Some were as young as seven years old, when their childhood was disrupted and shattered.⁴

Most recently, in February 2021, the ICC rendered its first conviction for forced marriage, finding Ongwen guilty of direct and indirect perpetration of ‘the crime of forced marriage as other inhumane acts pursuant to article 7(1)(k)’ constituting a CAH.⁵ This inaugural ICC conviction for forced marriage accompanied Ongwen’s convictions for other CAH — torture, sexual slavery, enslavement and forced pregnancy.⁶

International law has grappled with forced marriage because it is not codified in any international criminal statute, but its constituent elements are comparable to and overlap with other grave international crimes, including various CAH. Consequently, the Special Court of Sierra Leone (SCSL), the first internationalized tribunal that convicted forced marriage as the CAH of ‘other inhumane acts’, struggled to differentiate it from other CAH of ‘enslavement, imprisonment, torture, rape, sexual slavery and sexual violence’.⁷

International criminal courts continue to confront cases involving girls captured as ‘wives’ and female child soldiers abused as sex slaves. Yet they have failed to adequately recognize the unique, multidimensional harms girls suffer in such forced marriages as grave violations of core human rights and *jus cogens* norms of international law,⁸ including prohibitions against slavery.⁹

Many human rights instruments proscribe forced marriages of girls and women¹⁰ but states’ treaty reservations and uneven implementation have perpetuated a protection gap even in peacetime. Similarly, international humanitarian law (IHL) regulating conduct by states and non-state actors in armed conflict has failed to protect girls and women from forced marriages

4 Public redacted version of ‘Notice of Intended Charges against Dominic Ongwen’, *Ongwen* (ICC-02/04-01/15-305-Conf), OTP, 18 September 2015, at 23 fn 9, 24. Also see Public Redacted Version of Prosecution Closing Brief, *Ongwen* (ICC-02/02-01/15), Pre-Trial Chamber II, 24 February 2020 (‘Prosecution Closing Brief *Ongwen*’), §§ 74–75.

5 Public Redacted Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021 (‘*Ongwen* TJ’), §§ 3026, 3069, 3116.

6 *Ibid.*, at §§ 3034, 3049, 3055, 3062.

7 Judgment, *Brima and others* (SCSL-2004-16-A), Appeals Chamber, 22 February 2008 (‘AFRC AJ’), § 200.

8 M.C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011) 263, 266–267 (peremptory, non-derogable).

9 S.S. Guan, ‘Jus Cogens: To Revise a Narrative’ 285 *Minnesota Journal of International Law* (2017) 461, at 472.

10 Art. 16(2) Universal Declaration of Human Rights (adopted 10 December 1948); UN General Assembly Resolution 217A (UDHR); Art. 1(1) Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) 32 UNTS 231 (‘Marriage Convention’); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 1 September 1981) 1249 UNTS 13 (CEDAW); Arts 1(c)(i–iii), 1(d), 2, 7 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3 (‘Supplementary Convention’).

rampant in conflicts in Sierra Leone,¹¹ Liberia,¹² Sudan and the Central African Republic (CAR),¹³ Uganda,¹⁴ the Democratic Republic of the Congo (DRC),¹⁵ Somalia,¹⁶ Rwanda,¹⁷ Angola,¹⁸ Iraq, Syria, Nigeria and Mali.¹⁹ Although acts integral to forced marriage like sexual slavery and using child soldiers have been criminalized by global treaties and statutes, forced marriages have been insufficiently prosecuted or punished.

Increasing cross-fertilization among international human rights law (IHRL), IHL and international criminal law (ICL), exemplified by these domains' converging prohibitions on rape,²⁰ portends fewer lacunae in addressing sexual and gender-based violence in war and peace. Nonetheless, the international legal regime's safety net for girls has been appallingly porous. The growing recognition that forced marriage comprises conduct penalized under multiple categories of international crimes reveals the importance of the interrelationship between ICL and IHRL. International criminal courts should strengthen this linkage by elucidating how forced marriage contravenes the most fundamental human rights of girls, thereby fortifying their legal protection in all contexts.

One promising development is the ICC's recently commenced *Al Hassan* trial for forced marriage as the CAH of other inhumane acts, wherein the prosecution broadcast the brutality of forced marriage, in particular to young girls:

But there was an additional level to the horror. I am referring to all the sexual violence the women and girls — *sometimes very young* — were subjected to. ... [A] system of marriage

- 11 C. Coulter, *Bush Wives and Girl Soldiers: Women's Lives Through War and Peace in Sierra Leone* (Cornell University Press, 2009).
- 12 I. Specht (Crisis Response and Reconstruction), 'Red Shoes: Experiences of Girl-combatants in Liberia', International Labor Office, Geneva 2006, available online at http://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-ifp_crisis/documents/publication/wcms_116435.pdf (visited 2 February 2021), at 12.
- 13 UNSC, *Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army*, UN Doc S/2012/365, 25 May 2012, §§ 2, 17–28.
- 14 K. Carlson and D. Mazurana, 'Forced Marriage within the Lord's Resistance Army, Uganda', Feinstein International Center, May 2008, available online at <https://fic.tufts.edu/assets/Forced+Marriage+within+the+LRA-2008.pdf> (visited 2 February 2021).
- 15 UNGA, *Children in Armed Conflict: Report of the Secretary General*, UN Doc. A/66/782-S/2012/261, 26 April 2012, § 62.
- 16 Human Rights Watch, 'No Place for Children: Child Recruitment, Forced Marriage, and Attacks on Schools in Somalia', February 2012, available online at <https://www.hrw.org/report/2012/02/20/no-place-children/child-recruitment-forced-marriage-and-attacks-schools-somalia> (visited 2 August 2020).
- 17 M.S. Kalra, 'Forced Marriage: Rwanda's Secret Revealed', 7 *UC Davis Journal of International Law and Policy* (2001) 197, 203.
- 18 D. Steinberg, 'Make forced marriage a crime against humanity: The UN must protect conflict zone "bush wives"', *Christian Science Monitor*, 9 June 2008, Op-Ed.
- 19 *Secretary General's Report*, *supra* note 3 (adding Myanmar, Bangladesh); K. Stout, 'What's in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime Under International Humanitarian Law' 19, *Dalhousie Journal of Legal Studies* (2010) 1, 3.
- 20 M. Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Martinus Nijhoff, 2011), at 529.

was put in place, mainly intended to enable the members of the armed groups to satisfy their sexual desires and needs at the expense of the women and girls. Many were hence forced into marriage, confined against their will, and repeatedly raped by one or more members of these armed groups. 'All that was left of me was a corpse', it (*sic*) is how one victim recounted her ordeal.²¹

Such judicial concentration on atrocities committed against girls, especially very young girls, is long overdue. Despite progress in convicting forced marriage as several international crimes, judges have narrowly focused on violations of only two internationally recognized human rights: the independent right to consensually marry and the right to establish a family.

Considering the fact that forced marriage cases involve countless preschool and prepubescent victims, the priority afforded these two rights over arguably more basic rights of female children seems at best misplaced (reflecting historical patriarchal devaluation of women and girls outside of familial and reproductive roles) and, at worse, perverse (perpetuating discriminatory norms and abuse of children). Judgments prioritizing young girls' marital and procreative rights over those indispensable to their survival, development and protection from all forms of slavery and violence challenge the principle that all human rights enjoy equal, non-hierarchical status.

The unitary phrase 'women and children' further obscures girls' distinct claims for violations against them. The Convention on the Elimination of Discrimination Against Women (CEDAW) does not specify that 'women' includes 'girls', as the African women's rights treaty does,²² but this hardly excuses international tribunals' continuing references to female child victims as 'women'. The ICC's Trial Chamber convicting *Ongwen* as a direct perpetrator of forced marriage of girls *as young as 7 to 11–12 years* old called these victims 'women'; only in convicting him as an indirect co-perpetrator did the judges call the victims women *and* girls or young(er) girls.²³

Misrepresentative labelling is problematic because the harms girls suffer in forced marriages are exacerbated by their young age. Girls suffer unique aggravated harms that are likewise obscured by gender-neutral references to children's rights. Vulnerabilities due to their age, status as virgins, developmental immaturity and dependency intensify the severity and irreversibility of physical and sexual injuries, forced pregnancy, childbearing and child-rearing. A non-exhaustive list of other long-lasting harms includes loss of chastity and marriageability in cultures where these are central to girls' survival, health problems ranging from infertility to incontinence, loss of education and ostracism.

21 OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the trial in the case against Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 14 July 2020 (emphasis added), available online at <https://www.icc-cpi.int/Pages/item.aspx?name=200714-otp-statement-al-hassan> (visited 28 January 2021).

22 CEDAW, *supra* note 10; C. Chinkin and M.A. Freeman, 'Introduction', in M.A. Freeman, C. Chinkin, and B. Rudolf (eds), *CEDAW Commentary* (Oxford University Press, 2012) 1, at 14–15; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003) ('African Women's Protocol'), Art. 1(k).

23 *Ongwen* TJ, *supra* note 5, at §§ 2029, 2036, 2248–2255, 3023–3026, 3069–3071.

The SCSL's consideration of age in assessing forced marriage's gravity set the stage for tribunals' greater attention to girls' rights.²⁴ The ICC's mandate to apply and interpret the law 'consistent with internationally recognized human rights'²⁵ provides statutory authority for analysing fundamental human rights inherently violated by forced marriage.

Such an analysis seems inextricable from the determination of whether other inhumane acts' *actus reus* (causing 'great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act' of a 'character similar to any other' under other CAH categories) and *mens rea* (intending the act and knowing the factual circumstances establishing its gravity) requirements for CAH are met by forced marriage.²⁶ For instance, in evaluating Ongwen's guilt for the CAH of political persecution, the judges recognized his violations of the following *fundamental* rights: to life, to personal liberty, to private property, not to be held in slavery or servitude, and not to be subjected to torture or cruel, inhumane or degrading treatment.²⁷ They also identified violations of numerous human rights contrary to the standards of international law in finding Ongwen guilty of forced pregnancy and torture.²⁸ Yet none of these rights were acknowledged in Ongwen's convictions for forced marriage except the 'fundamental right to enter a marriage with the free and full consent of another person'.²⁹

The ICC and other tribunals have disregarded forced marriage's infringement of the most fundamental human rights of girls as *children*. These include the universally recognized children's *rights to* life, survival and development, and special care in or when affected by armed conflicts, as well as *freedom and protection from* sexual exploitation and abuse, abduction, trafficking, exploitation, torture or other cruel, inhumane or degrading treatment, unlawful deprivation of liberty, recruitment into armed forces and direct participation in hostilities under age 15, and all forms of violence.³⁰

This article first analyses the evolution of forced marriage in international criminal law, including judicial and scholarly controversies over its most appropriate legal classification. The following sections argue that prosecutorial and jurisprudential approaches to forced marriage, thus far, have fallen short in recognizing and redressing the unique harms girls suffer. Finally, this article

24 AFRC AJ, *supra* note 7, at § 199.

25 Art. 21(3) ICCSt.

26 Art. 7(1)(k), Elements of Crimes (EOC); Art. 7(1)(k) ICCSt.

27 Ongwen TJ, *supra* note 5, at §§ 2733, 2846, 2906, 2959, 2961.

28 *Ibid.*, at §§ 2724 and fn 1779, 2717, 2724, 2701.

29 *Ibid.*, at § 2748.

30 Arts 6, 19, 38(4), 34, 35, 36, 37(a–c), 38(1–4) Convention on the Rights of the Child (CRC), 1577 UNTS 3 (1989) (listed in order of appearance above; CRC ratified by all states except US); UN Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence*, CRC/C/GC/13 (18 April 2011) (Art. 19(1) CRC mandates states 'shall take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse ...' and sexual slavery, forced marriage, other harmful practices §§ 16, 25(d), 29(e)).

concludes that greater judicial emphasis on forced marriage's obliteration of female children's fundamental human rights is needed to hold perpetrators more fully accountable, both directly (in determinations of guilt, sentencing and reparations) and indirectly (by reinforcing states' obligations to protect women and children from violence).

2. Original Approach to Forced Marriage: The Special Court of Sierra Leone

The first prosecutions of forced marriage as crimes against humanity and war crimes were propelled by global alarm over the brutal treatment of children during the 1991–2002 civil war in Sierra Leone. Thousands of girls and women were abducted, over 90% of whom were raped,³¹ and forcibly assigned as rebels' 'wives' throughout the armed conflict. Virgins, or those believed to be, were targeted for rape.³² Girls as young as four were held as sexual slaves; many girls suffered fistulas and serious health problems due to rape and childbearing while their bodies were immature.³³ Abducted women and girls, including one captured as a 'bush wife' at age nine, recounted that

the first rapes were often performed by several men and could go on for days ... followed by the entrance of one man, often of higher command, claiming the woman as his 'wife' and thereby 'saving' her from future rapes and in turn making her feel loyal to him for having saved her life.³⁴

The SCSL Prosecutor charged defendants from the Armed Forces Revolutionary Council (AFRC) with the CAH of both other inhumane acts and sexual slavery, and the war crime of outrages upon personal dignity associated with forced marriages.³⁵ The Statute of the SCSL, established to try those who bore 'the greatest responsibility' for atrocities, provided for the prosecution of sexual violence as CAH and as war crimes.³⁶

Since the SCSL Statute did not list forced marriage as a standalone crime, AFRC defendants were prosecuted for the CAH of 'other inhumane acts', using evidence of forced marriage. Yet Trial Chamber II found that proof of forced marriage as an 'other inhuman act' went to proof of elements subsumed by the CAH of sexual slavery, thus dismissing the forced marriage charge for duplicity, and concluded that evidence led in support of forced marriage and

31 UNCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences* ('Coomaraswamy Report'), UN Doc E/CN.4/2002/83/Add.2, 11 February 2002, § 27.

32 *Ibid.*, at §§ 55–56; Coulter, *supra* note 11, at 9, 224.

33 Coomaraswamy Report, *supra* note 31, at §§ 55, 61.

34 Coulter, *supra* note 11, at 113, 126–127.

35 Further Amended Consolidated Indictment, *Brima* (SCSL-2004-16-PT), 18 February 2005, §§ 51–57.

36 Arts 2(g), 3(e), 5 SCSLSt. (authorized prosecution under national law for abuse of girls under age 13–14 or 'abducting a girl for immoral purposes').

sexual slavery justified conviction for the war crime of outrages upon personal dignity.³⁷

The AFRC Appeals Chamber disagreed with Trial Chamber II that forced marriage was subsumed by sexual slavery. The Appeals Chamber instead agreed with Judge Doherty's partial dissent³⁸ that forced marriage was distinguishable from sexual slavery and constituted a separate CAH as an 'other inhumane act'.³⁹

Trial evidence demonstrated girls and women were abducted and 'married' to rebels without their (or familial) consent,⁴⁰ 'belonged' exclusively to one man⁴¹ whose property they had to protect and porter,⁴² submitted to domestic chores, childbearing, beatings during and after pregnancies and 'husbands' sexual demands despite sexually transmitted diseases, including HIV.⁴³ 'Bush wives' — subjected to psychological, physical, emotional and sexual abuse — were expected to show 'undying loyalty' and 'love and affection' to 'husbands', facing punishment or death for disloyalty.⁴⁴ The Appeals Chamber recognized that these women and girls suffered forced pregnancy, childbirth and child-rearing, with the label 'wives' triggering their and their children's ostracism from communities,⁴⁵ compelling many to stay with their 'husbands'.⁴⁶

The Appeals Chamber validated that 'use of the term "wife" is indicative of forced marital status which has lasting and serious impacts on the victim ... [thus] the *actus reus* and *mens rea* of an Other Inhumane Act, forced marriage, are satisfied[,]'⁴⁷ concluding such 'wives' and their children suffer long-term stigmatizing harm.⁴⁸ In assessing the crime's gravity, the Appeals Chamber focused not only on its long-lasting effects, but also on victims' age, stating many 'were children themselves'.⁴⁹ The Court determined forced marriage satisfied the elements of the CAH of other inhumane acts per the ICC Statute's Article 7(1)(k), and that its constituent acts were comparably as grave as 'several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery, and sexual violence'.⁵⁰ Forced marriage was defined as 'a situation in which the perpetrator through his words or conduct, or those of someone for

37 Judgment, *Brima* (SCSL-04-16-T), Trial Chamber II, 20 June 2007 ('AFRC TJ'), §§ 95, 703, 711, 713, 1069 (for forced marriage to be prosecuted under residual category of 'other inhumane acts', it cannot involve conduct subsumed by Statute's other CAH).

38 *Ibid.*, (Partly Dissenting Opinion Judge Doherty) ('Doherty Dissent'), at §§ 43–44.

39 AFRC AJ, *supra* note 7, at §§ 195–201, yet no cumulative conviction for forced marriage was entered. See § 202.

40 Doherty Dissent, *supra* note 38, at § 27.

41 *Ibid.*, at § 29.

42 AFRC TJ, *supra* note 37 (Concurring Opinion Judge Sebutinde), at §§ 13–14.

43 *Ibid.*, at §15; Doherty Dissent, *supra* note 38, at §§ 30–31.

44 Doherty Dissent, *supra* note 38, at § 32.

45 AFRC AJ, *supra* note 7, at §§ 190, 199.

46 Doherty Dissent, *supra* note 38, at § 33.

47 *Ibid.*, at § 51.

48 AFRC AJ, *supra* note 7, at § 199.

49 *Ibid.*, at § 200.

50 *Ibid.*

whose actions he is responsible, compels a person by force, threat of force or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim' and 'unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife", which could lead to disciplinary consequences for breach of this exclusive relationship'.⁵¹

The Appeals Chamber nevertheless declined to enter a separate conviction for forced marriage as a CAH, concluding:

society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread and systematic attack against the civilian population, is adequately reflected by recognizing that such conduct is criminal and that it constitutes an 'Other Inhumane Act' capable of incurring individual criminal responsibility in international law.⁵²

A year later, the Appeals Chamber upheld Trial Chamber I's conviction of Revolutionary United Front (RUF) defendants for forced marriage as a CAH under 'other inhumane acts'.⁵³ Trial Chamber I determined the RUF strategically used the label wife 'with the aim of enslaving and psychologically manipulating' civilian women and girls 'and with the purpose of treating them like possessions'.⁵⁴ The RUF Trial and Appeals Chambers agreed that the constituent acts of forced marriage met the requisite *actus reus* elements of both sexual slavery and other inhumane acts as distinct CAH,⁵⁵ upholding the first-ever convictions for conduct related to forced marriage. The SCSL thus joined other international courts convicting other inhumane acts as:

a wide range of acts as inhumane, including forcible transfer, sexual and physical violence perpetrated upon dead bodies, forced undressing and public marching of women, forcing women to perform exercises naked, forced disappearances, beatings, torture, sexual violence, humiliation, psychological abuse, and confinement in inhumane conditions.⁵⁶

3. Debate on Forced Marriage Classification Beyond the SCSL

This forced marriage jurisprudence precipitated debate about which legal classifications are most appropriate and where such criminal conduct fits within ICL frameworks. Such controversy is common with respect to conduct that may integrate more than one crime, and was intensified — with respect to the ICC in particular — by the ICC Statute drafters' failure to agree on a basic charging rule for such cases, which have largely been left to the ICC's

⁵¹ *Ibid.*, respectively at § 195 and § 196.

⁵² *Ibid.*, at § 202.

⁵³ Judgment, *Sesay* (SCSL-04-15-A), Appeals Chamber, 26 October 2009 ('RUF AJ'), §§ 726, 849.

⁵⁴ Judgment, *Sesay* (SCSL-04-15-T), Trial Chamber I, 2 March 2009 ('RUF TJ'), § 1466.

⁵⁵ *Ibid.*, at § 2307.

⁵⁶ V. Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', 44 *Cornell International Law Journal* (2011) 49, at 64.

discretion.⁵⁷ The forced marriage debate is further complicated by the term ‘marriage’ and the hazy zone between ‘forced’ versus ‘arranged’, ‘early’ or ‘child’ marriage even in non-conflict situations.

The SCSL’s Trial Chamber II’s conviction, affirmed on appeal, of Liberian ex-President Charles Taylor illustrates forced marriage’s unpredictable categorization. Although forced marriage was not charged despite its commission by Taylor’s forces, SCSL Judges in *obiter dicta* called forced marriage a misnomer for the ‘forced conjugal association imposed on women and girls in the circumstances of armed conflict’.⁵⁸ They argued forced marriage ‘should be considered a conjugal form of enslavement’⁵⁹ and that ‘conjugal slavery’ is simply a distinct form of sexual slavery with no additional elements requiring the ‘conceptualization of a new crime’.⁶⁰

This definitional confusion reflects duelling perspectives between SCSL Trial Chambers I and II regarding forced marriage, as well as complexities borne of the ICC Statute’s CAH list, which clusters sexual slavery with other sexual violence crimes but apart from enslavement despite clear overlap.⁶¹ The Taylor court’s disapproval of using perpetrators’ terms like ‘bush wives’ and ‘forced marriage’, even though victims often used the same phrases to describe their status, magnifies the problems language poses in victims’ legal claims for justice.

The terminology of marriage risks legitimizing atrocities committed under its cover, much like the euphemism ‘comfort women’ trivialized the suffering of women sexually enslaved in World War II. The SCSL thus raised important linguistic issues, but still failed to provide redress for the most vulnerable victims of forced marriage — girls, especially very young girls — traumatized in that conflict.

The SCSL may have achieved better results along these lines if it had paid less attention to terminological distinctions regarding marriage and more attention to all forms of violence women and girls suffer through forced marriage. The African Women’s Protocol characterizes violence against women as:

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.⁶²

This Protocol includes special protections for women and girls in armed conflict, obligating state parties to ensure that ‘all forms of violence, rape and other forms of exploitation ... are considered war crimes, genocide and/

57 M. Kelt and H. von Hebel, ‘General Principles of Criminal Law and the Elements of Crimes’, in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational, 2001), 39–40.

58 Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber II, 18 May 2012 (‘*Taylor* TJ’), § 425.

59 *Ibid.*, at §§ 426–427.

60 *Ibid.*, at §§ 428–430.

61 ICCSt., *supra* note 1; W.A. Schabas, *An Introduction to the International Criminal Court* (4th edn., Cambridge University Press 2011) 115–116; Bassiouni, *supra* note 8, at 470–471 (producing dilemmas regarding multiple convictions, concurrent or consecutive sentences).

62 African Women’s Protocol, *supra* note 22, at Art. 1(j).

or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction'.⁶³

Many other treaties obligate state parties to criminalize certain humanitarian and human rights violations like those amounting to war crimes, genocide or trafficking in persons and to ensure prosecution, and sometimes extradition, of suspected perpetrators within their jurisdiction.⁶⁴ Historically, the best protection for girls — either as children 'exploited' by, or women forced into, marriage — has resided in prohibitions on slavery and slavery-related institutions or practices imposing 'servile status' on them.⁶⁵ The most recent proscription of all forms of slavery has been adopted by most nations through ratification of the Trafficking Protocol criminalizing trafficking in persons, especially of women and children, for the purpose of exploitation, which 'shall include, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.⁶⁶ In recent decades, sexual slavery has been recognized as an international crime.

A. Forced Marriage and Sexual Slavery

The ICC Statute does not define sexual slavery, but classifies it as a CAH and a war crime.⁶⁷ The ICC Statute's Elements of Crimes (EOC) specify that the *actus reus* of sexual slavery is identical to that of enslavement, with the additional requirement that the 'perpetrator caused such person or persons to engage in one or more acts of a sexual nature'.⁶⁸ ICC Statute drafters asserted 'similar deprivations of liberty' could include situations like the sexual abuse of Rwandan and Bosnian women who 'were not locked in a particular place and therefore were "free to go", but were in fact deprived of their liberty as they had nowhere else to go and feared for their lives'.⁶⁹

The ICTY interpreted sexual slavery as a form of enslavement,⁷⁰ finding in *Kunarac* that neither 'monetary or other compensation' nor physical captivity were requisite elements of enslavement.⁷¹ The *Kunarac* court convicted sexual

⁶³ *Ibid.*, Art. 11(3).

⁶⁴ Art. 49, Geneva Convention of 1949 ('GC') I; Art. 50 GC II; Art. 129 GC III; Art. 146 GC IV; Arts 85, 88, Protocol Additional to the Geneva Conventions of 12 August 1949 ('Protocol I') (governing international armed conflicts); Art. VI Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'); Arts 16, 16(10) UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime ('Trafficking Protocol'), 15 November 2000.

⁶⁵ Supplementary Convention, *supra* note 10, at Arts 1(c)(i–iii), 1(d), 2, 6(2), 7(b).

⁶⁶ Trafficking Protocol, *supra* note 64, at Art. 3(a).

⁶⁷ Arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) ICCSt.

⁶⁸ EOC, *supra* note 26, at Arts 7(1)c, 7(1)(g)-2. See E. La Haye, 'Article 8(2)(b)(xxii) — Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence', in Lee (ed.), *supra* note 57, at 190.

⁶⁹ La Haye, *supra* note 68, at 184, 191–192.

⁷⁰ Judgment, *Kunarac* (IT-96-23-T, IT-96-23/1-T), Trial Chamber, 22 February 2001, § 541 fn 1333 ('*Kunarac* TJ').

⁷¹ *Ibid.*, at §§ 542–543.

slavery as the CAH of enslavement.⁷² The AFRC Appeals Chambers and RUF Trial Chamber validated this approach, conceding sexual slavery was (i) of similar gravity to enslavement and a ‘particularized form of slavery or enslavement’ that had been ‘prosecuted as enslavement in the past[,]’⁷³ and (ii) an international crime and a violation of *jus cogens* norm exactly like slavery.⁷⁴

The *Kunarac* Appeals Chamber stressed that traditional slavery as defined in the 1926 Slavery Convention ‘has evolved to encompass various contemporary forms of slavery’, including conduct in the case deemed ‘enslavement as a crime against humanity under international customary law’.⁷⁵ Witnesses like 15-year-old FWS-87 were repeatedly raped by Serb soldiers and forced to do household chores like other confined girls, including one who married a perpetrator.⁷⁶ While the ICTY concluded in the *Kunarac* case that this amounted to the CAH of enslavement, the SCSL found similar conduct constituted arguably less all-inclusive CAH like sexual slavery.⁷⁷

Yet, in Sierra Leone, confinement generally lasted longer, made girls as young as ten and those from the ‘Small Girls Unit’ into ‘wives’, and ‘carried lasting social stigma which hampers [victims] recovery and reintegration into society’.⁷⁸ Sierra Leonean customary and national laws further precluded victims’ recourse since raping wives and non-virgins was not criminalized.⁷⁹ The Sierra Leone Truth and Reconciliation Commission (TRC) found the wartime rape and treatment of forced wives stemmed from traditional beliefs and laws — requiring neither the consent of minors for sex nor the consent of brides for marriage — deemed to legitimize such conduct.⁸⁰

B. Forced Marriages and Controversial Issues of Victims’ Consent

The AFRC Appeals Chamber at the SCSL agreed with Judge Sebutinde that

a clear distinction should be drawn between traditional or religious marital unions involving minors (early or arranged marriages), during times of peace; and the forceful abduction and holding in captivity of women and girls (‘bush wives’) against their will, for purposes of sexual gratification of the ‘bush husbands’ and for gender-specific forms of labor including

72 This was perhaps necessitated by sexual slavery’s omission in the ICTY’s Statute. Art. 5 ICTYST.

73 AFRC AJ, *supra* note 7, at §§ 200–201; RUF TJ, *supra* note 54, at §§ 155, 157.

74 The recognition that sexual slavery includes forced marriage of girls and women has been established in IHRL and IHL since 1998. *Final Report of Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices during Wartime*, UN Doc E/CN.4/Sub.2/1998/13, (1998), §§ 9–10 (‘Final Report SR’).

75 Judgment, *Kunarac* (IT-96-23-A & IT-96-23/1-A), Appeals Chamber, 12 June 2002, §§ 117, 124 (‘*Kunarac* AJ’).

76 *Kunarac* TJ, *supra* note 70, at §§ 63, 84–85, 194–195, 264–265.

77 RUF TJ, *supra* note 54, §2307; *Taylor* TJ, *supra* note 58, at §§ 425–430.

78 RUF TJ, *supra* note 54, at §§ 1407, 1579(a), 1296.

79 See Doherty Dissent, *supra* note 26.

80 Sierra Leone Truth and Reconciliation Commission, ‘Witness to the Truth: Report of the Sierra Leone Truth and Reconciliation Commission’, (‘TRC Report’), 5 October 2004, vol. 2, §§ 107, 336.

cooking, cleaning, washing clothes (conjugal duties). In my view, while the former is proscribed as a violation of human rights under international human rights instruments or treaties like CEDAW, it is not recognized as a crime in International Humanitarian Law. The latter conduct, on the other hand, is clearly criminal in nature and is liable to attract prosecution.⁸¹

The Working Group on Contemporary Forms of Slavery concluded arranged marriages involve both parties' consent whereas forced marriages do not, and '[a]ny duress in a marriage is a violation of internationally recognized human rights standards and cannot be justified on religious or cultural grounds'.⁸² However, the United Nations (UN) Special Rapporteur on trafficking in persons cautions

the difference between an arranged and a forced marriage is tenuous... If a young woman is bodily kidnapped the force is obvious but when a marriage is "arranged" by her relatives' trickery and stealth, she does not realize, often until it is too late, that an arranged and forced marriage amounts to much the same thing. A marriage imposed on a woman not by explicit force, but by subjecting her to relentless pressure and/or manipulation, often by telling her that her refusal of a suitor will harm her family's standing in the community, can also be understood as forced.⁸³

Human rights marriage-related provisions on consent⁸⁴ are hard enough to apply in peacetime, but in conflict situations, consent is even more difficult to ascertain or irrelevant. For example, the SCSL found consent in forced marriage is vitiated, as women in CAH contexts were in violent, coercive, hostile, subjugated, uncertain, and captive circumstances.⁸⁵ The issue of consent should be treated as immaterial when it comes to forced marriage involving any form of slavery or exploitation of children. Consent is not an element in the CAH of sexual slavery, enslavement or other inhumane acts.

In-depth analyses of consent differentiating forced versus arranged marriage exceed the scope of this article.⁸⁶ However, continuing attention is paid to consent in forced marriage cases in part because the 1956 Supplementary Slavery Convention classifies non-consensual 'servile' marriage as one of the prohibited 'institutions and practices similar to slavery'.⁸⁷

81 AFRC AJ, *supra* note 7, at § 50; AFRC TJ, *supra* note 37, at § 12 (Concurring Opinion Judge Sebutinde).

82 UNHRC *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, UN Doc A/HRC/21/4, 10 July 2012, § 21

83 UNHRC *Report of the Special Rapporteur on human rights aspects of the victims of trafficking in persons, especially women and children*, UN Doc A/HRC/4/23, 24 January 2007, § 26 (footnote omitted).

84 UDHR, *supra* note 10, at Art. 16(2); Art. 23(3) ICCPR; CEDAW, *supra* note 10, at Art. 16(1)(b); Marriage Convention, *supra* note 10, at Art. 1; African Women's Protocol, *supra* note 22, at Art. 6(a).

85 RUF AJ, *supra* note 53, at § 733–734, 736.

86 See N. Jain, 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution', 6 *JICJ* (2008) 1013; M.P. Scharf and S. Mattler, 'Forced Marriage: Exploring the Viability of the Special Court of Sierra Leone's New Crime Against Humanity', Case Research Paper Series in Legal Studies No 05-35, (October 2005) 10–12.

87 Supplementary Convention, *supra* note 10, at Arts 1(c)(i–iii), 1(d), 2, 6(2), 7(b).

4. Evolution of ICC Approaches to Forced Marriage

Armed conflict is not required to prosecute forced marriage as a CAH under other inhumane acts or sexual slavery, but the conduct must be ‘part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.⁸⁸ The ICC Elements of Crimes clarify the ‘acts need not constitute a military attack’.⁸⁹

If forced marriage occurs in connection with an armed conflict, the Geneva Conventions of 1949 and Additional Protocols of 1977 apply.⁹⁰ Although these treaties do not mention forced marriage, the SCSL considered evidence of forced marriage and sexual slavery in rendering convictions for the war crime of outrages upon personal dignity based on violations of Article 3 common to the Geneva Conventions and Article 3 of its Statute.⁹¹

Kunarac’s holding that the rape of female victims detained in that case constituted both a war crime and the crime against humanity of enslavement led to breakthroughs in treating forced marriage as various CAH. The ICTY’s Trial Chamber in *Kvočka* viewed sexual violence as broader than rape and noted that forced marriage, like sexual mutilation and forced abortion, belonged with gendered CAH explicitly enumerated in the ICC Statute.⁹²

While forced marriage has been rampant in situations investigated by the ICC, its prosecution has been limited until recently. Forced marriage may amount to several crimes listed in the ICC Statute. These include CAH Articles 7(1)(g) — ‘[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or *any other form of sexual violence of comparable gravity*’⁹³ — and 7(1)(k) — ‘[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.⁹⁴ One may also imagine forced marriage being prosecuted at the ICC under war crimes provisions that ban conscripting or enlisting of children under 15 into armed forces/groups as well as using them to ‘participate actively in hostilities’.⁹⁵

In the ICC’s first trial for this crime in *Lubanga*, Judge Odio Benito stressed that the ICC Statute’s provisions ‘seek to protect children under the age of 15 from multiple and different risks which they are subject to in the context of any armed conflict, such as ill treatment, sexual violence and *forced*

88 Art. 7(1) ICCSt.

89 EOC, *supra* note 26, at Art. 7 Introduction (3).

90 GC IV, *supra* note 64, at Art. 3(I)(c); Protocol I, *supra* note 64, at Art. 75(2)(b); Arts 4(2)(a), 4(2)(e), 4(2)(f) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (‘Protocol II’) (slavery and slave trade in all their forms).

91 AFRC TJ, *supra* note 37, at §§ 241, 715–717; SCSLSt., *supra* note 36, at Art. 3(e).

92 Judgment, *Kvočka* (IT-98-30/1-T), Trial Chamber, 2 November 2001, § 180 fn 343.

93 Art. 7 ICCSt.

94 *Ibid.*

95 Arts 8(2)(b)(xxvi), 8(2)(e)(vii) ICCSt.

marriages'.⁹⁶ Yet the Trial Chamber refused to rule on these aspects because they were not alleged in the charges or allowed in amendments thereto,⁹⁷ reserving judgment on sexual violence for consideration in sentencing and reparations decisions.⁹⁸

Judge Odio Benito's dissent emphasized that girls who were sexually enslaved or combatants' 'wives' provided critical support to armed groups and were often recruited for that purpose, so excluding sexual violence from the legal concept of 'used to participate actively in hostilities' renders this 'critical aspect of the crime invisible'.⁹⁹ She decried the disparate impact of convicting as war crimes the use of boys as bodyguards or porters, but not of girls as sexual slaves or 'wives'.¹⁰⁰ The Trial Chamber's finding that sexual violence victims held reparations rights and that 'any differential impact of these crimes on boys and girls is to be taken into account[.]' was overruled by the Appeals Chamber.¹⁰¹

The ICC has been criticized for inadequately prosecuting forced marriages prevalent in conflicts throughout the DRC, CAR, Uganda and Sudan,¹⁰² and even when related CAH charges like sexual slavery have been confirmed, as in *Katanga and Chui*.¹⁰³ In the DRC Situation, Pre-Trial Chamber II confirmed that 'countless women' were abducted and became 'war wives' as part of UPC/FPLC policy,¹⁰⁴ including forcing underage girls into marriages.¹⁰⁵ Trial Chamber VI convicted *Ntaganda* in 2019 of the CAH and war crimes of rape and sexual slavery, but made no mention of forced marriage.¹⁰⁶

The ICC first confirmed charges of forced marriage as the CAH of other inhumane acts in *Ongwen*.¹⁰⁷ Witnesses established that women were abducted by the LRA forces Ongwen commanded, distributed to Ongwen's

96 Separate and Dissenting Opinion Judge Odio Benito, Judgment, *Lubanga* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, § 6 (emphasis added) ('Odio Benito Dissent').

97 Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, §§ 574, 629–630.

98 *Ibid.*, at § 631.

99 Odio Benito Dissent, *supra* note 96, at §§ 12, 20–21.

100 *Ibid.*, at § 21.

101 Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06-2904) 7 August 2012, §§ 207–210; Amended Reparations Order, *supra* note 2, at §§ 196–199.

102 Eriksson, *supra* note 20, at 434–435; B. Inder, 'Reflection: Gender Issues and Child Soldiers the case of Prosecutor v Thomas Lubanga Dyilo', *Women's Initiatives for Gender Justice* (25 August 2011) 6; Darfur Consortium, 'Darfur: Abductions, sexual slavery and forced labour' (17 December 2008) 8–10.

103 Decision on the Confirmation of Charges, *Katanga and Chui* (ICC-01/04-01/07-717), Pre-Trial Chamber I, 30 September 2008, §§ 348, 430–436.

104 Second Corrigendum of the Public Redacted Version of Prosecutor's Application under Art. 58, *Situation, Democratic Republic of the Congo* (ICC-01/04-611-Red-Corr2), 16 May 2012, §§ 13, 100 (emphasis added).

105 *Ibid.*, at §§ 109–100.

106 Decision on the Prosecutor's Application under Art. 58, *Ntaganda* (ICC-01/04-02/06-36-Red), Pre-Trial Chamber II, 13 July 2012, § 43; Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, 8 July 2019, §§ 930–963, 1189, 1198–1199, Disposition concerning Counts 5–7.

107 Decision on Confirmation of Charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-422-Red 23-03-2016), Pre-Trial Chamber II, 23 March 2016 ('*Ongwen Confirmation*'), § 95.

household as wives, used as domestic servants, and ‘forced to have sexual intercourse’, resulting in forced pregnancies and births.¹⁰⁸ The PTC confirmed sexual slavery, enslavement and forced marriage charges,¹⁰⁹ allowing the Prosecutor to charge cumulative offences for the same conduct or set of facts comprising more than one crime.¹¹⁰ The PTC concluded that while forced marriage was of similar gravity to sexual slavery, it was ‘not predominantly a sexual crime’ since it involved imposed conjugal duties, social stigma, and exclusivity enforced by threat of death and beatings better categorized as other inhumane acts.¹¹¹

The *Ongwen* PTC further opined that since forced marriage constitutes the additional violation of the *independently recognized international human right* to consensually marry,¹¹² it could not be subsumed by the CAH of sexual slavery or enslavement.¹¹³ The PTC stressed it was ‘the value (distinct from *e.g.* physical or sexual integrity, or personal liberty)’ of the individual’s ‘basic right’ to consensually marry and establish a family that ‘demands protection’.¹¹⁴ This view disregards that children and girls themselves demand protection.

Trial Chamber IX’s reasoning in *Ongwen*, convicting forced marriage in the other inhumane act category, mirrored the PTC’s approach, acknowledging only victims’ ‘rights to choose his or her spouse’ as ‘fundamental’.¹¹⁵ However, female child victims are guaranteed many more fundamental human rights and special protections, enshrined in universally ratified human rights and humanitarian law treaties. These are reinforced by the ICC Statute’s own provision that in applying and interpreting the law the Court must comply with internationally recognized human rights *without adverse distinction regarding gender or age*.¹¹⁶

The fact that the girls in forced marriages have children resulting from rape and forced pregnancy entitles them to heightened protections that international treaties provide women, especially mothers, and children, in wartime.¹¹⁷ The ICC, although bound by its statutory duty to apply relevant treaties,

108 *Ibid.*, at §§ 109–135; Prosecution Closing Brief *Ongwen*, *supra* note 4, at §§ 164, 174.

109 *Ongwen* Confirmation, *supra* note 107, at §§ 102–105.

110 *Ibid.*, at §§ 29–33.

111 *Ibid.*, at § 93 (citation omitted), § 137.

112 *Ibid.*, at § 94 (emphasis added). UDHR, *supra* note 10, at Art. 16(2); ICCPR, *supra* note 69, at Art. 23(3); CEDAW, *supra* note 10, at Art. 16(1)(b); Marriage Convention, *supra* note 7, at Art. 1; African Women’s Protocol, *supra* note 22, at Art. 6(a). The SCSL concluded that consent was vitiated or impossible in certain hostile, coercive, violent, subjugated and captive circumstances. RUF AJ, *supra* note 53, at § 733–734, 736.

113 *Ongwen* Confirmation, *supra* note 107, at §91–92, 94.

114 *Ibid.*, at §§ 86–95.

115 *Ongwen* TJ, *supra* note 5, at §§ 87–88, 2748–2749.

116 UDHR, *supra* note 10, at Art. 25(2) (‘Motherhood and childhood are entitled to special care and assistance’); CRC, *supra* note 30, at Preamble, Article 3(2), Art. 38(4); Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict, GA Res. A/RES/54/263 25 May 2000 and entered into force 12 February 2002), Preamble, Art. 3 (‘Optional Protocol CRC Armed Conflict’); Art. 21(3) ICCSt. (emphasis added).

117 GC IV, *supra* note 64, at Arts 14, 16, 23, 38(5), 50; Protocol I, *supra* note 64, at Arts 76–78; Protocol II, *supra* note 90, at Art 4(3).

principles and rules of IHL in conformity with internationally recognized human rights,¹¹⁸ has ignored additional protections these girls deserve due to their status as women, mothers and children in armed conflicts.

For example, the *Ongwen* Trial Chamber defined forced marriage as 'forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force, or taking advantage of a coercive environment'.¹¹⁹ Age was not mentioned, even though those forced into such 'conjugal unions' were overwhelmingly children, nor was the horrific gender-based violence so central to such marriages revolving around relentless rape that only girls and young women were forced into. This definition also omits the 'severe suffering, or physical, mental or psychological injury to the victim' the SCSL included in its forced marriage definition, excludes the gender-specific sexual violence invariably committed against its victims, and overlooks children's fundamental rights to physical and sexual integrity or freedom and protection from violence,¹²⁰ arguably more pertinent to girls in conflict situations.

The ICC's definition seems particularly deficient considering that the most common and ghastly features of the forced marriages in *Ongwen* involved (almost uniquely) girls and very young girls. Perhaps the judges were more concerned about legal consistency by adopting the ECCC's gender-neutral approach, discussed below, than they were about full accountability for the forced marriages in *Ongwen*, characterized by unspeakable sexual and gender-based violence.

5. Forced Marriage as State Policy: ECCC Jurisprudence

The Khmer Rouge governing Cambodia from 1975 to 1979 forced thousands of men and women to marry and procreate. The ECCC indicted leaders for forced marriage as 'part of the attack against the civilian population, in particular the imposition of sexual relations and enforced procreation'.¹²¹ The ECCC Statute does not list forced marriage as one of the underlying categories of CAH, but civil parties in the *Kaing Guek Eav (alias Duch)* case requested an expanded investigation into the prison leader's role in planning and ordering forced marriages as other inhumane acts under CAH.¹²² The Trial Chamber convicted *Duch* of other CAH, including torture via rape, but not of forced marriage.¹²³

118 Arts 21(2), 21(3) ICCSt.

119 *Ongwen* TJ, *supra* note 5, at § 2751.

120 CRC Committee and CRC, *supra* note 30.

121 M. Fitzpatrick, 'Heartache of Khmer Rouge forced marriage victims', *AFP* (Phnom Penh, 23 March 2011).

122 Civil Parties' Co-Lawyers Request for Supplementary Preliminary Investigations (No. 001/18-07-2007-ECCC/TC) 9 February 2009; C. Aptel, 'International Criminal Justice and Child Protection', in S. Parmar et al. (eds), *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (UNICEF, 2010) 67, at 93.

123 Judgment, *Kaing Guek Eav alias Duch* (No. 001/18-07-2007/ECCC/TC), 26 July 2010, § 246.

Subsequently, prosecutors charged Khmer Rouge leaders with the CAH of rape (in the context of forced marriage) and other inhumane acts (including forced marriage).¹²⁴ The Co-Investigating Judges indicted the defendants for forced marriage.

The Trial Chamber ruled that forced marriage constituted other inhumane acts and the additional CAH of rape within the forced marriage context. Like the SCSL, the ECCC distinguished traditional or arranged marriages from the non-consensual marriages being prosecuted. The tribunal found that genuine consent was impossible in Khmer Rouge-enforced marriages given the regime's coercive environment, threatening death or other punishments for non-compliance.¹²⁵

While noting that such marriages also facilitated the rape of women by men forced into conjugal relations, the Chamber was careful to distinguish forced marriage and rape as two separate CAH. The conviction of Khmer Rouge leaders was ground-breaking not only in addressing forced marriage as state policy, but also in recognizing both sexes as victims.¹²⁶

Some criticize the ECCC's prosecution of forced marriage as other inhumane acts and other CAH, arguing these crimes were not prohibited by customary international law when committed, therefore violating the *nullum crimen sine lege* principle essential to defendants' due process rights.¹²⁷ This legality critique is often raised in connection with the 'other inhumane acts' category of CAH, first introduced in the Nuremburg Charter¹²⁸ but left undefined so that criminal offences of comparable gravity to other enumerated CAH would not go unpunished.

Others object to classifying both sexes as victims, thus deviating from the SCSL's legal definition, and to prosecuting forced marriages committed outside of traditionally defined armed conflict by individual non-state perpetrators.¹²⁹ Nevertheless, the ECCC expanded the SCSL's gender-specific framework to encompass accountability for state leaders imposing forced marriages that harmed men, women, boys and girls.¹³⁰ This jurisprudential development has generated significant scholarly debate.

124 Closing Order, *Office of the Co-Investigating Judges* (No. 002/19-09-2007-ECCC/OCIJ), 15 September 2010, §§ 1430–1447.

125 Judgment, *Nuon Chea and Khieu Samphan, Case No. 002/02*, (Public Case File/Dossier No. 002/19-09-2007/ECCC/TC E465), 16 November 2018, §§ 3620–3625, § 3694, § 3688 (sexual intercourse consummating the 'marriage' was compulsory and monitored, with refusal leading to rape by militia or husbands), §§ 3648–3661, with the Chamber finding husbands also suffered from raping their wives, § 3684.

126 *Ibid.*, at §§ 3625, 3648–3661, 3700, 3684.

127 Bassiouni, *supra* note 8, at 262; but see Scharf and Mattler, *supra* note 86, at 6.

128 Art. 6(c) Charter of the International Military Tribunal, 59 Stat. 1544, 82 UNTS 279 (1945).

129 B.A. Toy-Cronin, 'What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime Against Humanity', 19 *Columbia Journal of Gender and Law* (2010) 539, 541; Jain, *supra* note 86, at 1024.

130 Judgment, *Nuon Chea and Khieu Samphan*, *supra* note 114, 115, 125.

6. Scholarly Debate Concerning Forced Marriage

Just as the SCSL Trial Chambers I and II, the ICC and the ECCC have diverged on forced marriage's proper classification, so have legal scholars. Bridgette Toy-Cronin, analysing Khmer Rouge forced marriages victimizing both men and women, concludes forced marriage should be gender-neutrally defined as 'the conferral of the status of marriage and the continuing effects of this status on the victim'.¹³¹ Stressing that sexual offences were not dispositive features of Khmer Rouge marriages,¹³² Neha Jain favours prosecuting forced marriage as other inhumane acts distinct from other equally grave (but not predominantly sexual) gender-based crimes.¹³³

The ICC's most recent trial involving forced marriages charged the CAH of persecution on the basis of gender¹³⁴ and sexual slavery. Some scholars argue that forced marriage merits an independent CAH category, just as sexual slavery became separately enumerated as more than the sum of already existing CAH like enforced prostitution and enslavement.¹³⁵ Others advocate prosecuting forced marriage under other inhumane acts since it is a unique offence amounting to 'far more' than its constituent acts — 'rape, torture, enslavement, sexual slavery, and forced pregnancy' — that are 'already recognized as crimes against humanity in their own right[.]' thereby fulfilling *nullum crimen sine lege* criteria.¹³⁶

Valerie Oosterveld promotes treating forced marriage as a distinct CAH,¹³⁷ while retaining options to charge sexual or gender-based crimes under CAH like other inhumane acts or enslavement due to 'sensitivities of the survivors or other legitimate reasons'.¹³⁸ She insists on prosecuting forced marriage as multiple CAH, acknowledging the intersectionality of gender-based crimes.¹³⁹ Oosterveld points out that, although the ICC¹⁴⁰ and ECCC¹⁴¹ have recognized forced marriage as a CAH under other inhumane acts, international criminal law still faces normative and definitional ambiguity regarding 'marriage' and the relevance of 'enslavement' in such

131 Toy-Cronin, *supra* note 129, at 539–540.

132 Jain, *supra* note 86, at 103.

133 *Ibid.*

134 Judgment, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mohamed* (ICC-01/12-01/18-601-Red 19-02-2020), Appeals Chamber, 19 February 2020, §§ 102–104.

135 M. Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime Against Humanity', 6 *JICJ* (2008) 1033, 1036, 1039.

136 Scharf and Mattler, *supra* note 86, at 7–8, 16.

137 V. Oosterveld, 'Gender-Based Crimes Against Humanity', in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 98.

138 *Ibid.*, at 100.

139 V. Oosterveld, 'The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?' 45 *Canadian Yearbook of International Law* (2008) 131, 156; Oosterveld, *supra* note 56, at 49, 73–74.

140 *Idem*, 'Forced Marriage: Terminological Coherence and Dissonance in ICL' (2019) 27 *William and Mary Bill of Rights Journal* 1263, 1272–2177.

141 *Ibid.*, at 1277–1280.

contexts.¹⁴² She notes the ICC has focused on ‘forced consummation’ through rape that the ECCC found determinative, but also recognizes ‘restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, [and] or forced labour, such as forced domestic duties’ as other indicators of forced marriages.¹⁴³

Treating forced marriage as more than ‘other inhumane acts’ seems appropriate in light of tribunals’ convictions for conduct like forced public nudity,¹⁴⁴ sexual mutilation of corpses,¹⁴⁵ beatings and inhumane treatment¹⁴⁶ as ‘other inhumane acts’. Forced marriage in conflict zones arguably involves even more severe or prolonged abuse, especially given the *years* women and girls are held captive, repeatedly raped and compelled to bear children of combatant ‘husbands’.

Patricia Sellers points out the ‘illogical outcome’ of making ‘forced marriage, itself a form of slavery, beholden to proof of other inhumane acts’.¹⁴⁷ ‘This two-tiered process creates legal ambiguity and hints at a legal hierarchy diminishing the significance of this form of female slavery’.¹⁴⁸ Sellers criticized the SCSL for failing to charge forced marriage under already-enumerated CAH,¹⁴⁹ contending enslavement best encapsulates its myriad criminal acts.¹⁵⁰ Failure to charge gender-specific forms of labour ‘integral to wartime female slavery’ like childbearing and breastfeeding as enslavement or the war crime of slavery obviates legal remedies for victims, ‘forestalls the eradication of slavery’,¹⁵¹ and risks ‘feminizing sexual slavery’.¹⁵²

In contrast, Jennifer Gong-Gershowitz advocates for classifying forced marriage under sexual slavery rather than enslavement.¹⁵³ Sellers has pointed out, however, that the sexual act requirement that folds all subsequent slavery conduct into a sexual slavery charge means ‘sexual slavery could functionally deny a victim full judicial redress’.¹⁵⁴ She thus recommends charging sexual

142 *Ibid.*, at 1280–1282.

143 *Ibid.*, at 1274, 1277, 1281.

144 Judgment, *Akeyesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 697; Judgment, *Kayishema* (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 730.

145 Judgment, *Niyitegeka* (ICTR-96-14-T), Trial Chamber, 16 May 2003, §§ 303–313.

146 AFRC AJ, *supra* note 7, at §§ 184–185.

147 P.V. Sellers, ‘Wartime Female Slavery: Enslavement?’ 44 *Cornell International Law Journal* (2011) 115, at 138.

148 *Ibid.*

149 P.V. Sellers, ‘Gender Strategy is Not a Luxury for International Courts’, 17 *AU Journal of Gender Social Policy and Law* (2009) 301, at 316–319.

150 Sellers, *supra* note 147, at 133–135.

151 *Ibid.*, at 139.

152 *Ibid.*, at 140; see A. Bunting, ‘Forced Marriage in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes’, 1 *Canadian Journal of Human Rights* (2012) 165, at 181, arguing that charging the conduct as sexual slavery could reduce harms to sexual ones, while charging it as forced marriage could reduce harms to conjugal ones; enslavement would include both and ‘casts our attention to human exploitation, bondage, control, and violence’.

153 J. Gong-Gershowitz, ‘Forced Marriage: A “New” Crime Against Humanity?’ 8 *Northwestern University Journal of International Human Rights* (2009) 53.

154 Sellers, *supra* note 147, at 140.

slavery as a subset of enslavement.¹⁵⁵ While this terminology risks disregarding victims' understanding of forced marriage, especially where a wife traditionally 'belongs to' and must be completely subservient to her husband, forced marriage victims' views of their status varies.¹⁵⁶ Oosterveld thus proposes all international(ized) tribunals should ensure gender-based crimes, like forced marriage, 'are understood ... as crimes targeted against individuals because of socially-constructed understandings of their sex'.¹⁵⁷

Monika Kalra advises amending the ICC Statute to make forced marriage a distinct crime, noting that during the Rwandan genocide many Tutsi 'wives' had no choice but to remain with their Hutu 'husbands', with children born of forced impregnation as part of the genocidal campaign.¹⁵⁸ She warns that failure to prosecute the crime abandons women 'currently trapped in forced marriages' and dampens hope that the practice will be punished.¹⁵⁹

Also analysing forced marriages in Rwanda, Carmel O'Sullivan proposes prosecuting forced marriage as genocide.¹⁶⁰ She asserts this is necessary to expose its gravity and trigger states' obligations to intervene in cases of genocide.¹⁶¹

Convictions for conscripting, enlisting and using children in hostilities have been critiqued for not specifying 'whether girls were considered to have been recruited as child soldiers or as sexual slaves'.¹⁶² Girls' abduction, forced labour and conjugal duties have been considered as evidence of forced marriage under other inhumane acts, instead of as proof of their status as child soldiers; this 'denied them redress afforded under Article 4(c) and blurred the multiple roles of the female child soldier'.¹⁶³ Sellers and Oosterveld thus called for ICC prosecutions of forced marriage linked to child soldiers' use in Uganda and DRC.¹⁶⁴

Cécile Aptel contends the overlap of crimes committed against children *as slaves* and *as soldiers* warrants charging forced marriage cumulatively along with enslavement, sexual slavery and other CAH,¹⁶⁵ because each involve different facets of child slavery.¹⁶⁶ Such cumulative charging better captures all aspects of these crimes against children, which Aptel labels 'child slavery'.¹⁶⁷

155 *Ibid.*, at 139–140.

156 Coulter, *supra* note 11, at 80; Bunting, *supra* note 152.

157 V. Oosterveld, 'Lessons for the Special Court of Sierra Leone on the Prosecution of Gender-Based Crimes', 17 *AU Journal of Gender Social Policy and Law* (2009), 407, 430.

158 Kalra, *supra* note 17, at 197, 203.

159 *Ibid.*, at 200.

160 C. O'Sullivan, 'Dying for the Bonds of Marriage: Forced Marriage as a Weapon of Genocide', 22 *Hastings Women's Law Journal* (2011) 271, 274–281, according to which forced marriage could integrate the genocidal acts listed at Art. 6(b) ICCSt. (causing serious bodily or mental harm), Art. (6)(c) ICCSt. (deliberately inflicting conditions of life calculated to bring about the group's physical destruction), and Art. (6)(d) ICCSt. (imposing measures to prevent births).

161 *Ibid.*, at 289–290.

162 Sellers, *supra* note 147, at 132.

163 *Ibid.*

164 *Ibid.*; Oosterveld, *supra* note 137, at 170.

165 C. Aptel, 'Child Slaves and Child Brides', 14 *JICJ* (2016) 305, 309.

166 *Ibid.*, at 308.

167 *Ibid.*

7. Assessing Strategies for Prosecuting Forced Marriage of Girls

Girls have slipped through the cracks in SCSL, ECCC and ICC forced marriage cases. Prosecutions involving forced marriage have focused on gender but not crimes against girls as *children*. This oversight is glaring given Sierra Leone's TRC 2004 finding that sexual slavery and rape were most frequently committed against girls 10- to 14-years old¹⁶⁸ and the SCSL Statute's explicit incorporation of national laws criminalizing offences against young girls.¹⁶⁹ Crimes committed specifically against girls that render them targets like boys (who are targeted as potential soldiers) have not been fully prosecuted in SCSL or ICC child soldier cases.

Notably, despite forced marriages of thousands of girls to Lord's Resistance Army (LRA) commanders, ICC indictments against Joseph Kony and associates excluded such charges.¹⁷⁰ Some critics thus urge expanding CAH categories beyond rape and sexual slavery to enumerate forced marriage as an independent CAH, not least because it constitutes continuing criminal conduct ensnaring 'wives' and their offspring long after the conflict ends.¹⁷¹

Others caution that defining forced marriage as a CAH, commonly associated with situations of generalized violence, raises the bar for human rights-based protection of its victims in post- or non-conflict contexts.¹⁷² Researchers have documented continuing problems these 'wives' face and their ambiguous status in post-war culture — 'not girls, yet not "real women"' ¹⁷³ — concluding that traditional society, Disarmament, Demobilization and Reintegration (DDR) programmes, and humanitarian efforts all 'failed abducted girls and women'.¹⁷⁴

Aptel deplores the gross human rights violations that girls, young women and children borne from rape, sexual slavery and forced pregnancy endure post-conflict, calling for greater international prosecution of crimes against children.¹⁷⁵ She denounces the ICC's failure to specify crimes adjudicated were committed against girls (not just 'women') and children (not just 'civilians').¹⁷⁶

Aptel also decries the SCSL's relegation of victims' young ages to aggravating factors at sentencing¹⁷⁷ and the ICC's reservation of sexual violence

168 TRC Report, *supra* note 80, at vol. 2, § 23.

169 SCSLSt., *supra* note 36.

170 Carlson and Mazurana, *supra* note 14, at 44–45.

171 *Ibid.*, at 64.

172 K. Carlson and D. Mazurana, 'Accountability for Sexual and Gender-Based Crimes by the Lord's Resistance Army', in Parmar et al. (eds), *supra* note 122, at 236–237, fn3.

173 Coulter, *supra* note 11, at 244.

174 *Ibid.*, at 243–247; C. Clifford, 'The Forgotten Girl Soldier', *ISN Insights* (4 August 2011).

175 Aptel, *supra* note 122, at 94–95.

176 *Ibid.*, at 84–94.

177 See RUF AJ, *supra* note 53; see also Sentencing Judgement, *Taylor* (SCSL-03-01-T) Trial Chamber II, 30 May 2012, §§ 71, 75.

evidence affecting child soldiers to sentencing and reparations phases.¹⁷⁸ She contends ‘it is conceptually and morally unacceptable to consider the targeting of children merely as an “aggravating factor” [...]’¹⁷⁹ Aptel proposes all forms of children’s victimization should be investigated and prosecuted with ‘equal seriousness’, including ‘systematic patterns of criminality’ targeting children, like the CAH of enslavement.¹⁸⁰

A. Advantages in Categorizing Forced Marriage as Slavery or Enslavement

Enslavement, designated by all international criminal tribunals’ statutes as a CAH but left undefined (except by the ICC Statute), has been interpreted according to the Slavery Convention’s definition of slavery.¹⁸¹ *Kunarac* construed it, as noted above in Section 3.A., to include various forms of contemporary slavery, like the serial rape, forced domestic chores and marriage of confined girls that the ICTY convicted as enslavement.¹⁸² Enslavement shares the same defining material elements with slavery, but must also meet the *chapeau* requirements of any CAH.¹⁸³

The ICC Statute defines enslavement as constituting ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’.¹⁸⁴ Enslavement, including sexual and other forms of slavery long banned by international human rights, humanitarian and criminal law, may best convey the scope and gravity of harms these girls suffer. Yet prosecutors and judges have failed to classify forced marriage as enslavement. This oversight seems particularly glaring given that (i) enslavement is the only CAH that even mentions children in its definition and constituent elements, and (ii) girls are the primary victims of forced marriages in conflict zones worldwide.

Prosecuting forced marriage as enslavement perhaps comes closest to encapsulating the multi-dimensional abuses suffered by girls, considering their inter-sectional status (as women *and* children) and ongoing victimization post-conflict. Longstanding treaties on slavery buttress its *jus cogens* prohibition, reinforced by the ICC Statute’s criminalization of enslavement — including trafficking of women *and children* — as a CAH, and of sexual slavery as both CAH and war crimes.

SCSL convictions of forced marriage as the CAH of sexual slavery and other inhumane acts represented an important step towards greater accountability for the panoply of crimes against girls. These included myriad forms of forced

178 See *Lubanga*, *supra* note 97.

179 Aptel, *supra* note 122, at 97.

180 *Ibid.*, at 96–97.

181 N. Siller, “‘Modern Slavery’: Does International Law Distinguish between Slavery, Enslavement, and Trafficking?” 14 *JICJ* (2016) 405, at 413.

182 *Kunarac* AJ, *supra* note 75.

183 Art. 7(1) ICCSt. (emphasis added).

184 Art. 7(2)(c) ICCSt.; EOC, *supra* note 26, at Art. 7(1)(c), fn 11.

labour amounting to enslavement; such grave violations demand both human rights sanctions¹⁸⁵ and criminal convictions.

Characterizing forced marriage as enslavement or a form of slavery, prohibited by *jus cogens*, carries substantial consequences. These include states' 'duty to prosecute or extradite, the non-applicability of statutes of limitations, and universality of jurisdiction over such crimes irrespective of where they are committed, by whom . . . , against what category of victims, and irrespective of the context of their occurrence (peace or war)'.¹⁸⁶ States would thus face heightened legal and political pressure not to grant perpetrators impunity for slavery-related offences, but to hold them accountable through domestic investigations and trials or extraditions. A nation's publicized failure to do so could precipitate sanctions within regional and international human rights adjudicatory or enforcement bodies, as well as referrals of investigations for forced marriage to the ICC.

Other advantages of charging forced marriage as enslavement are that slavery is universally prohibited and victims' consent issues, often raised by those accused of forced marriage and rape, are eliminated.

As a *jus cogens* crime, neither a State nor its agents, including government or military officials, can consent to the enslavement of a person under any circumstances. Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that a person accused of slavery cannot raise consent of the victim as a defense.¹⁸⁷

Moreover, there are to date 178 Parties to the Trafficking Protocol¹⁸⁸ criminalizing trafficking, which the ICC Statute incorporates in its definition of the CAH of enslavement, specifically including women and children. While the ICC has not yet defined 'trafficking in persons',¹⁸⁹ using the near-universally ratified global definition of the Trafficking Protocol would inure to the benefit of child victims. Consent and the means of exploitation are both irrelevant if the child is under age 18, per the Trafficking Protocol,¹⁹⁰ which facilitates investigations and prosecution in domestic cases through requisite transnational cooperation that could also bolster international criminal prosecutions of forced marriages of girls.

However, female forced marriage victims (often classified as child soldiers) between the age of 15 and 18 are inadequately protected by the ICC Statute, which only criminalizes the conscription, enlistment or use of child soldiers under age 15.¹⁹¹ Girls forced into marriages in conflict zones — whether

185 Carlson and Mazurana, *supra* note 172, at 247–248.

186 N.R. Quenivet, *Sexual Offenses in Armed Conflict & International Law* (Brill, 2005), at 175 (footnote omitted).

187 Update to Final Report SR, *supra* note 74, E/CN.4/Sub.2/2000/21 (6 June 2000) § 51; see also Kunarac AJ, *supra* note 75, at § 113; AFRC TJ, *supra* note 37, at §§ 709, 746.

188 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en (visited 22 February 2021).

189 Arts 7(1)(c), 7(2)(c) ICCSt. See Siller, *supra* note 181, at 415.

190 Trafficking Protocol, *supra* note 64, at Arts 3(c)–(d).

191 ICCSt., *supra* note 1, at Arts 8(2)(b)(xxvi), 8(e)(vii).

under or over age 15 — thus fall through the definitional cracks of child soldiers, as defendants can argue such ‘wives’ were not conscripted, enlisted, or used ‘to participate actively in hostilities’. ICC judges can also minimize or dismiss the essential role these forced wives play in armed groups’ operations, denying female child soldiers full justice.¹⁹² Consequently, child soldiers forced into such marriages, especially those over age 15, might be better served by prosecuting crimes against them as enslavement, which includes trafficking of both women and children (defined per the near universally ratified Protocol as all those under age 18) under the ICC Statute’s CAH framework.

The Trafficking Protocol outlawing child exploitation recognizes vulnerability by age, like many human rights treaties. Yet numerous treaties fall short in terms of protecting the girl child in forced marriages. The CRC’s Preamble, echoing Article 25(2) of the UDHR, claims the child ‘needs special safeguards and care’, but the CRC neglects the girl child, contains loopholes for child marriage if the child attains majority before age 18, and offers little protection for children’s rights¹⁹³ except for a no-derogation clause for public emergencies and armed conflict.¹⁹⁴

The CRC’s Optional Protocol on the Involvement of Children in Armed Conflict attempted to fortify protections for girls, as did African regional human rights treaties and the Cape Town Principles in recognizing ‘child soldier’ includes ‘girls recruited for sexual purposes and for forced marriage’.¹⁹⁵ Despite these efforts to recognize sexual exploitation of girls in armed conflict, the particularized plight of girls remains neglected by international criminal tribunals. Girl child soldiers are particularly invisible as they are often ‘kept’ by commanders, who ‘father their children, and even if the girls are combatants, they are not released with the rest’.¹⁹⁶

Simpler than prosecuting forced marriage as child soldiering, at least in non-international armed conflicts, would be prosecuting it as ‘slavery and the slave trade in all its forms’, which is explicitly prohibited by Article 4 Protocol II as outrages upon personal dignity. The SCSL recognized forced marriage to amount to both outrages upon personal dignity and acts of terrorism against civilians.¹⁹⁷

Some propose adding forced marriage to the ICC Statute with other sex and gender crimes that were omitted — ‘impregnation, forced maternity, forced abortion, forced sterilization ... forced nudity, sexual molestation, sexual

192 Judgment, *Lubanga*, and Odio Benito Dissent, *supra* notes 80–84.

193 M. Freeman, ‘The Value and Values of Children’s Rights’, in A. Invernizzi and J. Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, 2011) 27; N. Cantwell, ‘Are Children’s Rights Still Human?’ in *ibid.*, at 47; CRC, *supra* note 30, at Art. 1.

194 S. Siegrist, ‘Child Rights and Transitional Justice’, in Parmar et al. (eds), *supra* note 122, at 5.

195 Optional Protocol CRC Armed Conflict, *supra* note 116; Art. 3 Cape Town Principles and Best Practice on the Prevention and Recruitment of Children into the Armed Forces and Demobilization and Reintegration of Child Soldiers in Africa (1997) (‘Cape Town Principles’); R. Coomaraswamy, *Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict*, (ICC-01/04-01/06-1229-AnxA), 18 March 2008, § 24 (‘Coomaraswamy Submission’).

196 Coomaraswamy Submission, *supra* note 195, at § 26.

197 AFRC TJ, *supra* note 37; RUF TJ, *supra* note 54, at § 1493.

humiliation and sex trafficking’.¹⁹⁸ They envision a new discrete crime encompassing ‘sex and gender’ crimes like forced marriage and applicable in all armed conflicts and in peacetime.¹⁹⁹

However, prosecuting forced marriage as enslavement offers broader advantages. Enslavement encapsulates *jus cogens* prohibition of slavery in all its forms — from servile marriages and child exploitation to trafficking — thus representing the most comprehensive CAH-based approach for punishing forced marriages. Charging this crime as sexual slavery bestows similar advantages, but if the one sexual act required as an element of this crime cannot be proven, the entire charge fails.

Therefore, perhaps forced marriage should always be charged under the broadest possible CAH like enslavement. Other CAH categories of rape, sexual slavery and sexual violence are notoriously difficult to investigate and successfully prosecute or prove,²⁰⁰ with additional obvious challenges posed by armed conflict or mass atrocity contexts and child victims.

B. Advantages of Charging Forced Marriage as Various War Crimes

Considering that the vast majority of forced marriages occur in the context of an armed conflict, prosecuting them as war crimes may lead to more international convictions as well as more national trials. Treating forced marriage as a grave breach of the Geneva Conventions would remind states of their obligation to enact legislation providing effective penal sanctions for such war crimes, to search for persons alleged to have ordered or committed the crime, and either prosecute such persons — regardless of nationality — or extradite them for trial in another state.²⁰¹

Moreover, the Geneva Conventions and Additional Protocols include heightened protections for women and children in both international and non-international armed conflicts,²⁰² which should be recognized as applicable to girls

198 A. Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future* (Martinus Nijhoff, 2011), at 145, citing K.D. Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles’, 21 *Berkeley Journal of International Law* (2003) 288, at 305.

199 *Ibid.*, at 143.

200 W.H. Wiley, ‘The Difficulties Inherent in the Investigation of Allegations of Rape before International Courts and Tribunals’, in M. Bergsmo, A.B. Skre, and E.J. Wood (eds), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher, 2012) 369, at 371–372, 377, 386; M. Bergsmo and Skre, ‘Towards A More Comprehensive Understanding and Effective Proving of International Sex Crimes’, in *ibid.*, at 1, 9, available online at https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/understanding-and-proving-international-sex-crimes/FICHL_12_Web.pdf (visited 9 February 2021).

201 GC I, *supra* note 64, at Art. 49; GC II, *supra* note 64, at Art. 50; GC III, *supra* note 64, at Art. 129; GC IV, *supra* note 64, at Art. 146.

202 GC IV, *supra* note 64, at Arts 14, 16–17, 23–24, 27, 38(5), 50–51, 68, 89, 127, 132; Protocol I, *supra* note 64, at Arts 8, 14, 50, 70 (1), 75–78; Protocol II, *supra* note 90, at Arts 4 (3), 6(4).

in forced marriage cases. These special protections are more comprehensive than the ICC Statute's sole provisions protecting children — Article 8(2)(b)(xxvi) prohibiting the conscription or enlistment into armed forces or groups and Article 8(2)(c)(vi) proscribing the use of children under 15 to participate actively in hostilities.

While the ICC Statute does not explicitly list forced marriage among war crimes, such conduct may amount to the war crime of 'any other form of sexual violence' in international armed conflict (Article 8(2)(b)(xxii)) or non-international armed conflict (Article 8(2)(c)(vi)). Prosecuting forced marriage under these provisions could include charging them as grave breaches per Article 8(2)(a)(iii) ('[w]ilfully causing great suffering, or serious injury to body or health') and others like torture — already an independent international crime — or as serious common Article 3 violations per article 8(2)(c)(ii) ('[c]omitting outrages against personal dignity, in particular humiliating and degrading treatment').

The universal ratification of the Geneva Conventions and accompanying obligation of all states to criminalize and investigate grave breaches and fulfil their *aut dedere aut judicare* duty to prosecute or extradite those suspected of committing these²⁰³ or any other war crimes considered part of customary IHL,²⁰⁴ should strengthen prosecutions of forced marriages as war crimes. National penal reform and domestic prosecution of international crimes required of states within the Geneva Conventions and ICC Statute regimes would also help close existing loopholes when forced marriage is perpetrated in non-international armed conflict or otherwise amounts to war crimes not subject to grave breach or universal jurisdictional requirements.

Domestic incorporation of these treaty obligations would promote international harmonization of penal enforcement regarding forced marriage. Requisite national legislation criminalizing forced marriage would advance protection for girls faster than infrequent international trials focusing on CAH or child soldier cases where girls are hardly mentioned.

Unfortunately, the SCSL cases exemplify resistance to prosecuting forced marriage specifically of *girls*. Even though a national statute already criminalized the abuse and abduction of young girls in Sierra Leone, which was expressly incorporated by the SCSL's international statute,²⁰⁵ age-specific aspects of the crimes committed in Sierra Leone were not prosecuted or convicted by the SCSL.

203 See R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, 2005) 101–123.

204 J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law — Volume I: Rules* (International Committee of the Red Cross/Cambridge University Press, 2005), Rule 158.

205 Art. 5 SCSLSt.

8. The Importance of Greater Judicial Emphasis on Human Rights Protections of Children in Confronting Forced Marriage Atrocities

International tribunals' application and interpretation of internationally recognized human rights in forced marriage cases may help hold perpetrators more fully accountable by promoting better compliance with human rights law. Since CAH require evidence of a state or organizational policy underlying a widespread or systematic attack against any civilian population, convictions for forced marriage as a CAH would often imply some level of state responsibility for failing to prevent, and to protect victims from, such pervasive prohibited acts. Jurisprudential emphasis on forced marriage as a CAH thus reinforces states' obligations to respect, protect and fulfil the human rights of women and children by highlighting the overlap between human rights violations and international crimes.

Forced marriage convictions emphasizing violations of children's international human rights, non-derogable in peacetime and wartime,²⁰⁶ could provide education and guidance to domestic authorities responsible for incorporating laws, policies and practices to ensure these rights are respected, protected and fulfilled. This approach may promote greater harmonization of national laws with international criminal statutes, leading to greater complementarity in investigating and prosecuting forced marriage.

IHL's 'proliferation of adjudicatory bodies'²⁰⁷ also complements the *lex specialis* of IHL applied to armed conflict. The International Court of Justice has opined that in certain conflicts the 'protection offered by human rights law is more appropriate'.²⁰⁸ Since the ICC Statute failed to criminalize the war crimes of slavery or the slave trade, ICC judges could better serve victims of these crimes integral to forced marriage by underscoring universal IHL and IHL prohibitions on both.

As women and as children, girls enjoy specific protection under human rights instruments — from the slavery and trafficking conventions to the CRC and CEDAW.²⁰⁹ These treaties do not cease to apply in wartime, thus protecting girls in all circumstances. CEDAW expressly covers discrimination in both public and private life,²¹⁰ and holds states liable for the acts of non-state actors if they fail to prevent, punish or provide remedies for rights violations with due diligence, which has become an international law norm and regional human rights tribunals' rule.²¹¹ This includes states' positive

206 CRC, *supra* note 30, at Art. 2(1).

207 Eriksson, *supra* note 20, at 470.

208 *Ibid.*, at 471.

209 CEDAW, *supra* note 10, at Art. 6, Art. 16(1)(b), Art. 16(2); CEDAW Committee, *General Recommendation No. 19: Violence Against Women* (11th Session 1992) § 11; CRC, *supra* note 30, at Art. 19.

210 CEDAW, *supra* note 10, at Art. 2(e).

211 A. Edwards, *Violence Against Women Under International Human Rights Law* (Cambridge University Press, 2011), at 167.

obligation to protect women from violence, including by combating impunity for perpetrators.²¹²

Regional human rights instruments may help tighten the safety net for girls in forced marriage. The African Charter on the Rights and Welfare of the Child prohibits child marriage and the recruitment and use of child soldiers under 18.²¹³ Furthermore, the African Charter's Committee, like the European and Inter-American Courts of Human Rights, accepts children's petitions regarding violations of their rights in wartime and peacetime.²¹⁴ Similar communications and complaints procedures work well for the ICCPR at the Human Rights Committee and for CEDAW through the Committee on the Elimination of All Forms of Discrimination against Women.²¹⁵

The nearly universally ratified CRC now has an Optional Protocol, which allows children to bring rights violation complaints to the Committee on the Rights of the Child.²¹⁶ This Committee has already recommended that state parties eliminate harmful traditional practices, including early and/or forced marriage, which violate adolescent girls' rights.²¹⁷ Early and forced marriage has likewise been condemned as traditionally condoned discrimination and as violence infringing upon young girls' health and rights.²¹⁸

International forced marriage prosecutions help exert pressure for national legislative and judicial reform. For instance, the Sierra Leonean TRC's recommendation that the country's customary laws regarding early marriage, marital rape and domestic violence be revised to comply with Sierra Leone's human rights obligations per the CEDAW and CRC complemented SCSL forced marriage prosecutions.²¹⁹ Associated convictions catalysed local women's advocacy and ensuing reforms of Sierra Leone's domestic violence, marriage, sexual offences and child rights laws.²²⁰ Such reforms tied to international

212 C. Chinkin, 'Violence Against Women', in Freeman et al. (eds), *supra* note 22, 469.

213 African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999), CAB/LEG/24.9/49, arts 21(2), 2, 22(2)

214 G. Van Bueren, 'Acknowledging Children as International Citizens: A Child-Sensitive Communication Mechanism for the Convention on the Rights of the Child', in Invernizzi, *supra* note 172, at 123

215 *Ibid.*, at 126.

216 Optional Protocol to the Convention on Rights of the Child on a Communications Procedure (19 December 2011, entered into force on 14 April 2014).

217 CRC Committee, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4, 1 July 2000, § 24.

218 UNDAW and UNICEF, *The impact of harmful traditional practices on the girl child*, EGM/DVGC/2006/EP.4, 25-28 September 2006, §§ 8-14.

219 See K. Belair, 'Unearthing the Customary Law Foundations of Forced Marriages During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone', 15 *Columbia Journal of Gender and Law* (2006) 551.

220 Sierra Leone: Act No. 12 of 2012, The Sexual Offences Act, 2012, 1 November 2012, available online at <https://www.refworld.org/docid/550aa011e.html> (visited 12 April 2021); Sierra Leone: Act No. 20 of 2007, The Domestic Violence Act, 2007, 26 July 2007, available online at <https://www.refworld.org/docid/477e5cb02.html> (visited 12 April 2021); Registration of Customary Marriage and Divorce Act, 2009, No. 5 of 2009, 22 January 2009, available online at <https://sierrallii.org/node/5051>; Sierra Leone: The Child

crimes may, however, marginalize localized human rights discourse, and discount culturally specific justice or accountability mechanisms.²²¹

The rich human rights system protecting girls buttresses forced marriage prosecutions and expands the paradigm from individual victims — subject to limited trials, stringent burden of proof requirements, and restricted reparations' access — to rights-holders whom states are legally obligated to protect. Although few countries have criminalized forced marriage,²²² its prosecution as an international crime underscores the gravity of the abuse girls suffer through child or early marriages even in peacetime,²²³ which 'remain among the most difficult discriminatory practices to eliminate'.²²⁴ Just as child soldier prosecutions highlight that the 'line between voluntary and forced recruitment is ... not only legally irrelevant but practically superficial in the context of children in armed conflict[,]'²²⁵ forced marriage prosecutions help expose the thin line between voluntary and forced marriage in war zones.

Human rights treaties like the African Women's Protocol that include rights-protective provisions on women, and girls explicitly,²²⁶ deserve greater recognition and enforcement as this line continues to blur. This Protocol obligates State Parties to take all necessary measures to ensure no child, *especially any girl under age 18*, is recruited as a soldier or takes a direct part in hostilities,²²⁷ and to protect them from harmful practices²²⁸ and violence against them in peace and in war.²²⁹ State Parties are thus obligated to protect women and girls in armed conflict from all forms of violence, rape and sexual exploitation, to ensure that such acts are treated as violations of international humanitarian law, to bring perpetrators of these war crimes, genocide and/or crimes against humanity 'to justice before a competent criminal jurisdiction'.²³⁰ The Cape Town Principles defined child soldiers as including girls recruited for sexual purposes and forced marriage, and required state parties to implement national laws prohibiting the use of child soldiers, including for forced marriage.²³¹

Right Act, 2007, No. 7 of 2007, 3 September 2007, available online at <https://www.refworld.org/docid/468a5ed02.html> (visited 12 April 2021).

221 K.K. Grewal, *The Socio-Political Practice of Human Rights: Between the Universal and the Particular* (Routledge, 2017), 91–124.

222 C. Thomas, *Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws From Other Countries*, Expert Group Meeting on good practices in legislation to address harmful practices against women, EGN/GPLHP/2009/EP.08, 19 June 2009, at 14, 16, 17–19.

223 A.L. Estin, 'Unofficial Family Law', in J.A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context* (Cambridge University Press, 2012), at 113–114.

224 Freeman, 'Article 16', in CEDAW Commentary, *supra* note 22, at 412, 437.

225 Coomaraswamy Submission, *supra* note 195, at § 14.

226 African Women's Protocol, *supra* note 22, Art. 1(k).

227 *Ibid.*, Art. 11(4).

228 *Ibid.*, Art. 1(g).

229 *Ibid.*, Art. 1(j).

230 *Ibid.*, Art. 11(3).

231 Cape Town Principles, *supra* note 195, Art. 3.

International criminal courts should follow suit and treat forced marriage as the heterogeneous atrocity that it is, entailing egregious violations of women and children's human rights, grave breaches of international humanitarian law, and the commission of domestic and international crimes. This holistic approach to forced marriages advances normative, educational, accountability and impunity goals. Publicity surrounding such high-level criminal proceedings increases pressure on states to uphold their applicable treaty and customary international law obligations, including prosecuting or extraditing perpetrators of war crimes, genocide and all forms of slavery-related atrocities.

9. Conclusion

Protecting girls from, and providing redress for, forced marriage's multidimensional harms requires comprehensively applying all relevant provisions of human rights law, the laws of armed conflict and criminal statutes to hold perpetrators fully accountable. Strengthening the interstitial links among coexisting international legal frameworks is key to achieving accountability for the manifold gross human rights violations that forced marriage encompasses.

Girls between the age of 15 and 18 in armed conflicts are insufficiently protected by the ICC Statute, which only criminalizes enlisting or conscripting child soldiers under age 15 or using them to actively participate in hostilities. Female child soldiers in forced marriages thus lack legal protection due to age and activity classification restrictions. The conjugal, reproductive and forced labour of combatants' wives, essential or integral to armed groups' operations, similarly jeopardizes their status as civilians required for some war crimes and all CAH.

Prosecuting forced marriage in conflict zones under multiple categories of international crimes increases liability prospects for conduct that defies singular classification, within a system that did not anticipate this modern atrocity. This multipronged approach supplements prohibitions on violence against women and children enshrined in IHRL and IHL, especially when courts highlight these overlapping proscriptions. Judicial pronouncements in forced marriage cases may strengthen enforcement of local, national and international laws preventing and punishing such conduct in wartime and peacetime.

Continuing to use the term 'forced marriage' makes sense as it is well-established in the human rights framework. The UN Human Rights Council unanimously adopted its first resolution dedicated to preventing and eliminating child, early, and forced marriage in 2015.²³² Such global resolutions bolstering domestic prohibitions of non-consensual marriages in peacetime run the risk of creating legal and terminological confusion around the categorization of forced marriage in conflict zones as an international crime.

232 UNGA, Human Rights Council, *Resolution 29/... Strengthening efforts to prevent and eliminate child, early, and forced marriage*, A/HRC/29/L.15, 1 July 2015.

More than a common lexicon or correct classification is needed, however, for international criminal tribunals to fully prosecute and convict forced marriage. The ICC's 2014 Policy on Sexual and Gender-Based Crimes²³³ and 2016 Policy on Children²³⁴ herald progress towards holding perpetrators of grave crimes against girls accountable. Additional progress hinges on judges paying closer attention to the fundamental human rights of children and women as a means of interpreting applicable provisions of the ICC Statute in forced marriage cases.

Such a focused approach is vital to fortifying states' adherence to their obligations to protect girls within the global human rights regime, including prosecuting or extraditing those accused of serious crimes of international concern. This strategy also promotes the harmonization of domestic laws with international criminal statutes, leading to greater complementarity in investigating and prosecuting forced marriage, including state and regional tribunals exercising universal jurisdiction over such atrocity crimes.

Forced marriage jurisprudence could thus play a powerful role in ending impunity for atrocities committed against girls in all contexts. Debates surrounding the category of international crime into which forced marriage fits best should not inhibit cumulative charging to properly encapsulate the plethora of compound harms involved. Tribunals need to move beyond their myopic and patriarchal view of forced marriage that only encompasses the violation of two human rights — to consensually marry and establish a family. The ICC Statute mandates the application and interpretation of the law in conformity with internationally recognized human rights, yet core rights of forced marriage victims have hardly been mentioned in ICC decisions to date.

Greater judicial emphasis on more fundamental human rights of children contravened by forced marriage in conflict zones is needed to provide redress for its most vulnerable victims. More comprehensive prosecutorial and jurisprudential approaches to forced marriage will help seal existing normative, accountability and reparations cracks in the international criminal justice system through which women and children, especially young girls, continue to fall.

233 ICC OTP, Policy SGB Crimes, *supra* note 2, at § II (15).

234 ICC OTP, Policy on Children (November 2016), §§ IV (57), VI (101), VI (106).

‘Don’t kill them, let’s choose them as wives’: the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law

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Beyond rape, there are other crimes of sexual violence committed during armed conflicts, mass violence and genocide, including sexual slavery, enforced prostitution and forced marriage. This article explores the development in international criminal justice of these three crimes, comparing differences between the crimes, assessing any definitional overlap, and addressing challenges across jurisdictions. While there has been some development of jurisprudence in international criminal courts and tribunals, despite the extensive commission of these crimes in mass atrocities, there remains a lack of willingness by and to some extent inability of international courts and tribunals to address gender-based sexual offences. This article will conclude by confronting reasons behind this reluctance to ensure justice for female victims of sexual violence.

Keywords: sexual slavery; forced marriage; enforced prostitution; international criminal justice; armed conflict

Introduction

There is a long history of the use of sexual violence as a weapon of war and during mass atrocities such as crimes against humanity and genocide.¹ While men are also subject to sexual violence,² the majority of victims of sexual violence committed during mass atrocities are women, particularly in relation to sexual violence crimes beyond basic rape.³

These crimes have, for the most part, been committed with impunity. The long-term and devastating impact of sexual violence on women and their communities exposes the need for prosecution of the perpetrators of such violence, both as punishment and to act as a deterrent for future crimes. With the establishment of international and hybrid criminal courts and tribunals, criminal accountability for sexual violence in mass atrocities has increased.

This article examines the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal courts and tribunals. These are three types of crimes that have been, and continue to be, widespread during armed conflict and other mass atrocities. However, they have been drastically under-prosecuted. Sexual violence against women in general has not been a priority for prosecutions,⁴ and when it has, the emphasis in international criminal justice has been on the crime of rape. This

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article will conclude with a brief analysis of why sexual violence has been so absent from international prosecutions, and look to the future prosecution prospects.

Use and consequences of sexual violence in armed conflict and mass atrocities

There is a variety of reasons for the use of sexual violence in armed conflict and other mass atrocities. One use is as a demonstration of power and dominance, including through humiliation. The humiliation is of the woman herself, but also of the men in the community, to emphasise their inability to 'protect their women'⁵ (and thus the dominance of the perpetrator group). In addition, the power and dominance can be physical, as represented in the physical control over the powerless victim. Rape can be used as a form of torture in its own right, and prior to the killing of the woman. Other reasons are linked to masculinity, stemming from the hyper-masculine nature of militaries.⁶ The commission of the crimes may also be fuelled by alcohol and/or drugs, which can be prominently used by soldiers in conflict zones.⁷

Sexual violence is also used as a genocidal tool.⁸ It is used as a method of controlling the biological reproduction of a people, based on categorisation such as race, ethnicity, religion or nationality. For example, if ethnicity is transferred by means of the father, then impregnating a woman of the 'other' ethnicity will ensure she has a child of the 'desired' ethnicity.⁹ Alternatively, the murder of women of one group will ensure a reduced capability of that group to reproduce, as will the perpetration of sexual violence resulting in the physical inability to reproduce. The targeting of women occurs because the women are from a specific group, and also because the female body represents the national body.¹⁰ The female body is capable of reproduction, reproducing more people of that particular nationality, race, religion or other category of persons.

The consequences of sexual violence are devastating. Physical and emotional trauma are experienced by victims, often affecting them for the rest of their lives.¹¹ Women may be unable to have children as a result of sexual violence, or may develop lifelong health problems impacting on their reproductive organs and urogenital system. Some may even die from health complications. Emotional trauma may influence the ability of a woman to engage in consensual sexual activity, to sustain intimate relationships, or to relate to a child born of rape.¹²

In addition to these after-effects, in some societies, in addition to their own feelings of shame and guilt, women can find themselves ostracised from their communities.¹³ This may be based on, for example, the belief of the community that the woman has committed adultery or engaged in sexual activity outside of marriage, even though the sexual violence was not the woman's choice.

Thus, women who experience sexual violence encounter problems across the entire spectrum of their life: physically, emotionally, personally, within their communities, and beyond.

Prohibition of sexual violence in armed conflict

Rape was prohibited for United States (US) armed forces under the Lieber Code of 1863.¹⁴ In international humanitarian law (IHL),¹⁵ Common Article 3 of the Geneva Conventions proscribes outrages upon personal dignity, in particular humiliating and degrading treatment, and Article 27(2) of the Fourth Geneva Convention states 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'¹⁶ The Additional Protocols specifically mention

rape and enforced prostitution: 'Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.'¹⁷

It must be noted that IHL only applies in situations of armed conflict. Crimes against humanity and genocide do not have to be committed during armed conflict. In addition to the international criminal justice regime, these crimes are prohibited under international human rights law, such as the right to life, liberty and security; freedom from torture; and freedom from slavery.¹⁸

Post-World War II accountability

It has been an under-explored area in scholarly literature, but there was a significant amount of sexual violence committed during World War II and its associated atrocities, such as the Holocaust.¹⁹ This included forced abortion, sexual slavery, forced prostitution, rape, mutilation, and medical experiments such as sterilisation. In Nazi concentration and extermination camps, including Auschwitz, Mauthausen, Buchenwald, Sachsenhausen and Dachau, there were brothels for soldiers and 'privileged prisoners'.²⁰

In Asia, thousands of women from across the continent, particularly from Korea, China, Japan and the Philippines, were kept as sexual slaves by the Japanese military. They were called 'comfort women', said to be providing a vital and consensual service to the soldiers at 'comfort stations' located in occupied territory.²¹ Up to three quarters of these women died. The majority of survivors were rendered infertile due to sexual physical trauma or sexually transmitted infections.²²

Neither of the international military tribunals (IMT) established after World War II included any category of sexual violence as an express crime in their charters. Rape was included in Control Council Law No. 10 as a Crime Against Humanity, however no charges for rape were brought before any of the Nuremberg military tribunals.²³ The *Medical* case did address sterilisation that took place in camps like Auschwitz and Ravensbrück, but not forced abortion.²⁴

However, a US military tribunal and the IMT of the Far East (Tokyo Tribunal) convicted Generals Toyoda²⁵ and Matsui²⁶ of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking. These violations included widespread rapes and sexual assaults. In the case of *Yamashita*, the former general²⁷ was convicted of war crimes committed by troops under his command, which included rape.²⁸

In 2000, the Women's International War Crimes Tribunal was held for crimes against humanity of slavery, trafficking, forced labour and rape committed in relation to the Japanese 'comfort women'.²⁹ However, that was a people's tribunal only, and while it was significant in making public the stories of many 'comfort women', thus providing acknowledgement of the crimes committed, the tribunal has no legal authority, and therefore no perpetrators were punished and the findings cannot be considered opinion juris.

Thus, it is clear that, despite the thousands of victims of sexual violence during World War II and the Holocaust, there has been little in the way of prosecution of perpetrators or reparations for victims and their families.

International and hybrid criminal courts and tribunals

It has only been with the establishment of a number of international and hybrid international criminal courts and tribunals from the 1990s onwards that a real effort has been made to secure accountability for perpetrators of sexual violence in armed conflict and mass

atrocities. This article will not consider all of the tribunals and courts, with those such as the Iraqi Tribunal not relevant due to a lack of provision for sexual offences (although this omission is notable in itself).

The first international criminal tribunal to be founded was the International Criminal Tribunal for the former Yugoslavia (ICTY), in 1993, to try crimes committed in the territory of the former Yugoslavia since 1 January 1991. This was followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994 for crimes committed during the Rwandan genocide of 1994. The two hybrid courts are the Special Court for Sierra Leone (SCSL), set up in 2000 to try crimes committed in armed conflict after 30 November 1996, and the Extraordinary Chambers in the Courts of Cambodia (ECCC, formed in 2003), prosecuting senior leaders of Democratic Kampuchea, and those believed to be most responsible for grave violations of national and international law between 17 April 1975 and 6 January 1979.

The Rome Statute of the permanent International Criminal Court (ICC) was completed in 1998, and the ICC began operation in 2002. The ICC has jurisdiction over war crimes, crimes against humanity and genocide committed since 1 July 2002, within the territory of state parties, by nationals of state parties, or in any situation referred to the court by the United Nations (UN) Security Council.

Rape has been extensively explored in the international criminal jurisprudence of these courts and tribunals, and in academic scholarship.³⁰ However, beyond rape, there are other ubiquitous crimes committed during armed conflicts and genocide, such as sexual slavery, enforced prostitution and forced marriage. The remainder of this article will explore the development of these three crimes in international criminal justice, examining the case law of, *inter alia*, the ICTY, and the SCSL.

Forced marriage

Special Court for Sierra Leone

No statute of any international court or tribunal contains a provision expressly proscribing forced marriage, including the Rome Statute of the ICC. Only one international court to date has developed jurisprudence on the crime of forced marriage: the SCSL. Forced marriage was extremely common in the conflict in Sierra Leone during the 1990s. The specific context in which it was carried out was that civilian girls and women were abducted, usually raped, and forced to marry a rebel.³¹ The ‘marriage’ consisted of various elements for the woman: domestic servitude (cleaning, cooking, etc.), and the provision of forced sexual services for her ‘husband’.³² Some ‘wives’ were forced into taking drugs³³; others were beaten and even killed.³⁴ Hence, even though there is no express crime of forced marriage in the statute of the SCSL, the crime was so pervasive that prosecutors could not ignore it and leave it unprosecuted.³⁵

The first case to address forced marriage was the *AFRC* case.³⁶ The Armed Forces Revolutionary Council (AFRC) was one of the rebel groups that seized control in Sierra Leone during 1997 and 1998. In the 2007 Trial Judgment, the prosecution put forward forced marriage under the category of ‘other inhumane acts’ as a crime against humanity (Article 2(i) of the statute).³⁷ The prosecution argued that the constituent elements of forced marriage are distinct from sexual acts, so that even if sexual activity is part of the ‘marriage’, the ‘marriage’ ‘has its own distinctive features’.³⁸ The prosecution also differentiated forced marriage from sexual slavery by demonstrating that ‘a sexual slave is not necessarily obliged to pretend she is the wife of the perpetrator’.³⁹ However, the Trial Chamber determined that forced marriage was not a separate crime against humanity.

Instead, it held that the elements of the crime constituted sexual slavery due to a relationship of ownership and the sexual aspect of the crime, and thus these two aspects meant that the elements of the crime were subsumed under the definition of sexual slavery.⁴⁰ This decision did not adequately distinguish the different elements of the crime of forced marriage from sexual slavery.⁴¹ A dissenting opinion from Justice Doherty agreed with the prosecution and concluded that the forced marriage elements satisfied the requirements of 'other inhumane acts' as a crime against humanity.⁴²

On appeal, the Appeal Chamber sensibly overruled the Trial Chamber's decision. The Appeal Chamber recognised forced marriage as falling under the separate crime against humanity of 'other inhumane acts', and not under 'sexual violence', nor under 'sexual slavery'. It was determined that the crime of forced marriage was of similar gravity to crimes such as enslavement, torture and rape.⁴³ In addition, the Appeal Chamber acknowledged that forced marriage can involve other international crimes such as enslavement, rape and abduction.⁴⁴

The second case in which forced marriage was tried was the *RUF* case.⁴⁵ The Revolutionary United Front (RUF) was an armed opposition group active throughout the 1990s in Sierra Leone. The Trial Chamber in the *RUF* case upheld the judgment of the Appeal Chamber in the *AFRC* case.⁴⁶

Thus, the *AFRC* case Appeal Judgment and the *RUF* case Trial Judgment both delineated the following elements of forced marriage:

- Forced marriage is not necessarily sexual in nature. Non-consensual sex is usually an element but does not have to be.
- Forced marriage includes the deprivation of liberty; non-consensual sex; compulsion of a person by force, threat of force, or coercion, to serve as a conjugal partner; and the subsequent relationship of exclusivity which includes disciplinary breaches of that exclusivity.
- The forced marriage results in severe suffering or physical, mental or psychological injury to the victim.

Extraordinary Chambers in the Courts of Cambodia

In the ECCC Case 002 (*Prosecutor v. Chea et ors*),⁴⁷ the indictment initially contained the crime against humanity of 'other inhumane acts' through forced marriage. This was based on the significant number of forced marriages that took place under the Khmer Rouge regime. There were often group marriages, and the weddings took place with no parental consent or traditional rituals.⁴⁸ 'Marriage was ... a key means by which the CPK did "*whatever can be done that is a gain for the revolution*"', by increasing population growth.⁴⁹ The marriages were conducted in coercive circumstances, through a fear of 'refashioning' (forced 're-educating' to suit the party rhetoric), death threats, violence, or even execution.⁵⁰ These forced marriage circumstances are significantly different to those experienced in Sierra Leone, where the victims were all women and were forced into domestic servitude and sexual slavery. By contrast, in Cambodia, neither party gave consent to the marriage. While it did happen that there was forced consummation of the marriages,⁵¹ and that 'enforced procreation' was part of the goal of these marriages,⁵² there was not always a forced sexual component to the Khmer Rouge forced marriages.⁵³

Thus, Case 002 at the ECCC has the potential to produce some extremely interesting jurisprudence to expand current definitions of forced marriage. In 2012, the scope of the

trial was determined to be so enormous that ECCC lawyers were obligated to drop some of the charges from the indictment, and unfortunately this included the charges relating to forced marriage.⁵⁴ The remaining charges were selected to best represent the overall crimes alleged to have been committed by the defendants. This appeared to present a missed opportunity for the development of crucial international jurisprudence for the crime of forced marriage. However, in February 2013, the ECCC reversed its decision on the restriction of Case 002, and opened up the possibility of the inclusion of crimes of sexual violence, particularly forced marriage and rape, to be included in Case 002, *Chea et ors.*⁵⁵ In April 2014, progress was made in both Case 002 and Case 004. The Trial Chamber in Case 002 decided that forced marriage (and rape) would be part of the charges laid in the second part of the trial.⁵⁶ For Case 004, the International Co-Prosecutor 'filed a Supplementary Submission in Case 004 requesting the investigation of sexual or gender-based violence as well as forced marriage in key districts that are presently under investigation as part of this case. The allegations include forced marriages, including instances where groups of up to 80 couples were married in a single ceremony.'⁵⁷ This augurs well for the future progression of judicial rulings on the crime of forced marriage.

These two contrasting examples of the context of forced marriage do demonstrate the subtleties of forced marriage that have not been recognised by the courts. This includes the perpetrators: the 'husbands' themselves, who may, but also may not, be the ones who force the marriage; or third parties, who are the actors in forcing the marriage to happen. In addition, the courts have not discussed the definition of marriage itself, in this context. There is a need for flexibility with this definition, one that does not require a formal or official marriage, but looks more at the subjective view of the perpetrator and his or her intention to consider the couple married or to consider the woman his 'wife'. Another difficult situation is where the only means of protection from military or militia might be to 'marry' a particular member of the military or militia group, in pursuit of the sexual exclusivity attached to such a union, in order to avoid rape by multiple men. Even in the absence of an explicit threat to force the marriage, the context is coercive. The absence of the opportunity to exit the marriage would be another element of the coercive nature of the marriage. Yet it is likely that a court or tribunal in this context would follow the reasoning of coercion in other sexual offences in armed conflict: that is, the circumstances create coercion. These circumstances include the armed conflict itself, the power held over the victim simply by the position held by the perpetrator (for example, military commander), and situational conditions (for example, being held in a camp). The ICTR held that 'coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or ... military presence ... among refugee ... women ...'⁵⁸ Thus, even when a threat comes from a third party (or parties), driving a woman to 'consent' to marriage to another man would result in coercive circumstances.

In addition, the courts and tribunals do not address the two different aspects which would both need to be subsumed under any definition: the 'official' act of marriage (such as a legal or other ceremony), and the marriage itself (that is, the continuation of a marriage or maintenance of a person in the marriage). There is the possibility that a marriage ceremony may take place or that a marriage may be entered into forcibly, but the marriage is not continued (for example, perhaps the forced party manages to escape). Likewise, a marriage may be entered into with consent but subsequently result in exploitation and slavery-like elements, resulting in an inability of one party to leave the marriage. The SCSL's definition focuses on the maintenance of a person in a marriage ('compels a

person ... to serve as a conjugal partner').⁵⁹ Any definition should encompass both the ceremony facet (whether that be formal or informal) as well as the continuation aspect. These two elements should be disjunctive and conjunctive, enabling either or both situations to be prosecuted. All of these issues have been lacking in the discussions on forced marriage to date, but remain important and necessary for a comprehensive definition to be developed in international jurisprudence.

What also needs to be considered is what, precisely, a provision proscribing forced marriage would be protecting. That is, is the prohibition about protecting the victim/survivor, or the protection of the institution of marriage? Is the emphasis on 'marriage' itself, on the violation of that institution, or is it on the experience of the victim? Would creating a new crime be based on the fact that the harm caused is harm against the institution of marriage, or harm against the victim? If there is no actual marriage ceremony, then can the crime really be considered to be forced marriage? Such an argument would weaken the ability to represent the victims and ensure accountability for perpetrators. Instead, the focus should be the intention of the perpetrator and the experience/perception of the victim, that is, that the 'relationship' was an exclusive conjugal one, regardless of whether or not a marriage ceremony was conducted. The focus should be on the harm against the victim, but this should not deter from also considering the breach(es) of broader concepts of law that a forced marriage ceremony creates.

Human rights law does not offer much more assistance in clearing up the definitional mess. 'Servile marriage' is covered under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Convention).⁶⁰ 'Servile marriage' is a more restricted concept than forced marriage, with servile marriage not allowing broadly for non-consensual marriage, but specifically constituting a marriage in which a woman (meaning the definition is not gender neutral) is sold into marriage; the husband or other person has 'the right' to sell the wife; or on the death of her husband a woman will be inherited by another person (Article 1(c) of the Supplementary Convention). The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)⁶¹ does not specifically list forced marriage as an exploitative practice; however in its interpretation and application of the Palermo Protocol, the UN Office on Drugs and Crime includes 'forced or servile marriages' in its 2009 Model Law against Trafficking in Persons as practices similar to slavery (one of the possible purposes of trafficking in persons), applying the narrow definition from the Supplementary Convention. Thus, in human rights law, not only is the terminology muddled, but there is confusion surrounding the linkages between the four crimes of forced marriage, sexual slavery, slavery, and trafficking in persons.

Sexual slavery

Post-World War II trials

Post-World War II trials did not address the crime of sexual slavery, notwithstanding the thousands of 'comfort women' kept as sexual slaves. The judges at the Tokyo Tribunal did not regard the brothels in which women were forced to work as prostitutes as a form of slavery. Instead, 'prosecutors adhered to the societal gender roles that spurred the rationale of patriotic prostitutes'.⁶²

There was extensive use of slave labour during World War II, particularly in the camps, but the jurisprudence from trials is somewhat confused. In some cases, the tribunals did not

distinguish between enslavement, deportation for slave labour and forced labour, nor did they define these crimes.⁶³ The international military tribunal did not even distinguish whether these crimes were war crimes or crimes against humanity.⁶⁴ Yet at the Nuremberg military tribunals, enslavement was charged as a war crime, despite it only being enumerated as a crime against humanity under Control Law No. 10.⁶⁵ The Tokyo Tribunal focused on ‘non-sexual, labor-intensive toil’, that is, ‘forced, industrial, agricultural, construction, or manual labor’ carried out by civilian internees and prisoners of war.⁶⁶ The only reference to female victims was to ‘female domestic workers’ within the slave labour programme, who were transferred from the Eastern Occupied Territories to Germany for domestic labour purposes.⁶⁷

International Criminal Tribunal for the former Yugoslavia

Under the ICTY Statute, the only express sexual offence is rape. It was hence a long road travelled before the court recognised sexual slavery beyond the crime of rape. In the case of *Delalić et al. (Čelebići)*, women were kept in a detention camp and raped, but no charges of sexual slavery as enslavement were brought.⁶⁸ The tribunal held that the physical, psychological and social consequences of rape amounted to torture.⁶⁹

Subsequent to *Čelebići*, the *Foča* case dealt in much more detail with sexual slavery.⁷⁰ Muslim women and girls were kept in detention and repeatedly raped by Bosnian Serb soldiers, for months on end. Some women and girls were ‘rented’, others were sold. This was all undertaken as part of the campaign of terror against Muslims by the Bosnian Serbs. These crimes were brought before the ICTY as rape, enslavement, outrages upon personal dignity, and torture (as both war crimes and crimes against humanity). Following the *Čelebići* decision, the *Foča* chambers held that rape and sexual slavery constitute torture.⁷¹ It was also determined that slavery does not require buying or selling. Rather, it was held that ‘enslavement as a crime against humanity in customary international law consisted of the [intentional] exercise of any or all of the powers attaching to the right of ownership over a person’.⁷² It held that indications of enslavement include sex and prostitution, and that enslavement can be determined through, inter alia, control of someone’s movement; psychological control; force, threat of force or coercion; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; and forced labour.⁷³ Such elements of enslavement capture aspects of both sexual slavery and forced marriage, and also cross over into enforced prostitution.

International Criminal Court

Sexual slavery is an express crime under the Rome Statute of the ICC, defined as: ‘The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.’⁷⁴ The perpetrator must also have ‘caused such person or persons to engage in one or more acts of a sexual nature’.

Under the Elements of Crimes, trafficking in persons also falls under the definition of sexual slavery. The appearance of trafficking in persons in the ICC’s Elements of Crimes is the only appearance of trafficking in any of the international criminal courts or tribunals.⁷⁵ Human trafficking is not a crime under any international court or tribunal statute. Trafficking in persons does not exist as a separate crime in the Rome Statute. This is highly questionable, as not all people are trafficked for the purposes of sexual slavery. Thus, the provision will not capture persons trafficked who do not experience forced sexual activity (for example, persons trafficked for the purposes of forced labour). Furthermore, this

inclusion of trafficking in persons under sexual slavery adds to the definitional confusion, given that, as we have seen above, forced marriage has been included by the UN under the rubric of trafficking in persons.

There is not a great deal of substantive case law from the ICC to date. However, in the *Katanga and Chui* confirmation of charges, the crime of sexual slavery was addressed.⁷⁶ Prosecution charges alleged conditions such as the detention of women in 'prisons' (a hole dug in the ground), where they were 'repeatedly raped by soldiers and commanders alike and also by soldiers who were punished and sent to prison'.⁷⁷ There are also incidences of women being abducted and kept as 'wives', repeatedly raped.⁷⁸ However, with no express crime of forced marriage in the Rome Statute, it appears that the term 'forced marriage' is being subsumed by the ICC under the crime of sexual slavery. Despite the charges in *Katanga and Chui* not being confirmed until late 2008, several months after the SCSL's *AFRC* case Appeal Judgment, the ICC Prosecutor did not put forward charges of forced marriage as an inhumane act under crimes against humanity (Article 7(1)(k) of the Rome Statute). The ICC Prosecutor and chambers are not obligated to follow jurisprudence of other international courts and tribunals; however it has generally been the case that they have done so where the jurisprudence has already been developed in those other courts or tribunals. Without the Prosecutor bringing forward charges of forced marriage as an inhumane act, it will be difficult for the chambers to consider this categorisation and look to further development of that crime. The chambers could enact Regulation 55, which permits that 'the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8'.⁷⁹ However, a recent application of this regulation with regard to the form of participation (also permitted under Regulation 55) has met with a great deal of criticism from scholars, and therefore Regulation 55 will not likely be used frequently or lightly by the court's judges.⁸⁰

Thus, in the *Katanga and Chui* confirmation of charges, the Pre-Trial Chamber (PTC) addressed sexual slavery as a particular form of enslavement.⁸¹ The PTC made specific reference to the Supplementary Convention, which, as noted above, includes 'forced marriage practices' (Art. 1(c)(i)). In accordance with this link to enslavement, sexual slavery must include limitations on the victim's autonomy, freedom of movement and power.

The PTC held sexual slavery to encompass situations including forced marriage (including temporary forced marriages); domestic servitude or other forced labour that ultimately involves forced sexual activity (including rape); detention in 'rape camps'; detention in 'comfort stations'; and the treatment of women as chattel.⁸² Hence, the PTC determined that 'a particular parameter of the crime of sexual enslavement – in addition to limitations on the victim's autonomy, freedom of movement and power' is the restrictions placed on a person's ability to decide matters relating to his or her sexual activity.⁸³ All these examples amount to 'violations of the peremptory norm prohibiting slavery'.⁸⁴ In the *Katanga* judgment, the Trial Chamber held:

Powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy ... it considers that the notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature.⁸⁵

Special Court for Sierra Leone

Turning back to the SCSL, the judgment in the trial of Charles Taylor in May 2012 saw the Trial Chamber muddy the waters on forced marriage/sexual slavery jurisprudence.⁸⁶ We

have seen above the contradictory findings from the SCSL Appeal Chamber and the ICC Pre-Trial Chamber: the former holding that forced marriage is an inhumane act as a crime against humanity and not sexual slavery; and the latter identifying forced marriage as a form of sexual slavery. Despite the *AFRC* case and the *RUF* case judgments, the prosecutor did not charge forced marriage in the Taylor indictment, but did adduce evidence of forced marriage under charges related to sexual violence. As a consequence, the *Taylor* Trial Chamber decided to categorise the crimes amounting to forced marriage as sexual slavery,⁸⁷ and even expressed its disapproval of the prosecutor's decision in the previous cases to charge forced marriage under the crime against humanity of other inhumane acts.⁸⁸

The Trial Chamber agreed with the *AFRC* case Trial Judgment Dissenting Opinion of Justices Doherty and the Concurring Opinion of Justice Sebutinde, who both emphasised the 'sexual and non-sexual acts involved in this forced conjugal association cannot be considered separately as they are integrated in this form of abuse'.⁸⁹ It was held that the forced marriages contained the exercise of powers of ownership over the victims through deprivation of their liberty (that is, the absence of consent or free will of the victim); forced labour; and forced acts of a sexual nature.⁹⁰

Yet in a strange logic, the Trial Chamber then went on to determine that:

conjugal slavery best describes these acts, and while they may constitute more than sexual slavery, they nevertheless satisfy the elements of sexual slavery. [Therefore] *conjugal slavery is better conceptualized as a distinctive form of the crime of sexual slavery*, with the additional component [of forced domestic labour] described by the Appeals Chamber. However, the Trial Chamber is of the view that this additional component, which related to forced conjugal labour, is simply a descriptive component of a distinctive form of sexual slavery. It is not a definitional element of a new crime ...⁹¹

It seems that all this logic was based on was the fact that the Trial Chamber refused to use the term 'marriage', or the concept of 'forced marriage' as presented in the *AFRC* and *RUF* cases. Instead, the Trial Chamber chose the terms forced conjugal association, or conjugal slavery. So even though the Trial Chamber did not differentiate the facts or definition of forced marriage from the *AFRC* case Appeal Judgment, the chamber appears to have decided that the crime is different (that is, a type of sexual slavery), simply by changing the terminology used to refer to such conduct. The Trial Chamber justified this by the fact that it did not 'consider the nomenclature of "marriage" to be helpful in describing what happened to the victims of this forced conjugal association and finds it inappropriate to refer to their perpetrators as "husbands"'.⁹² While it may be true that the perpetrators are not husbands in the true sense of the word (legally or emotionally), the fact is that 'conjugal' means 'of or relating to marriage, matrimonial'.⁹³ It is therefore a synonym for 'marriage', and thus in law does not remove the link of the crime to marriage. Yet it could be proposed that, for the victims and their communities, the word 'conjugal' carries with it fewer challenges than employing a term such as 'marriage', which may affect how people think about the crime and the survivor. This may include judges, as the somewhat sacred view of the institution of marriage may lead to a blocking of judicial reasoning. Does the use of the word 'marriage' also serve to legitimise the relationship between the victim and the perpetrator? While this is possible in a cultural context, this is unlikely in law. A marriage is a contract, and any contract entered into under duress is considered void. Thus, simply using the term 'marriage' would not legitimise a forced marriage and create an obligation for the victim to obtain annulment or divorce.

The Trial Chamber did not consider that the two main elements of the forced marriages that had taken place, namely exclusive sexual access to the victim and forced domestic

work, were 'new elements that require the conceptualization of a new crime'.⁹⁴ However, this fails to recognise that these two elements that the victims experienced draw from other crimes, sexual slavery (to a certain extent, in that exclusive sexual access does not necessarily equate to sexual slavery) and forced labour, and in doing so, create a whole new crime rather than one to be subsumed. The case went to appeal; however the prosecutor did not appeal against the Trial Chamber's decision with regard to forced marriage as sexual slavery.⁹⁵

In the Appeal Judgment, the Appeals Chamber only mentioned the forced marriages in passing under the rubric of sexual slavery, without engaging in any discussion of the definition of forced marriage, or in fact even using the term forced marriage: 'women captured during rebel attacks on towns or villages were forced to be the "wives" of rebels'.⁹⁶ The Appeals Chamber upheld the conviction for sexual slavery based on the fact that

fighters were encouraged to take anything they wanted from the civilians, including wives, who were perceived as chattel. Many captured young women lived with RUF/AFRC commanders, in conjugal servitude, and commanders perpetrated rapes. There was a recognised system of ownership and hierarchy among captured women in the rebel forces, demonstrated by the fact that commanders' 'wives' were accorded 'special' treatment. RUF/AFRC commanders also screened civilians captured by fighters, after which women and girls were allowed to be taken by fighters, who then said they had 'married' the women.⁹⁷

In this situation, while there is no ceremony, formal or informal, there is the structure and continuation of a forced marriage, including elements of ownership.

However, if sexual slavery were to be used to prosecute forced marriage, it is difficult to see how some of these elements reconcile with the elements of the forced marriage as experienced in the Cambodian context. In the Cambodian context, forced labour and forced sexual activity were not necessarily an element of the forced marriage. In addition, it can be asked how the concept of 'ownership' fits with the Cambodian context. In those forced marriages, both parties to the marriage were forced, and neither exercised powers of ownership over the other. There was no purchasing, selling or lending of persons carried out. It would be difficult even to say that the victims were subject to a deprivation of liberty, although that may be contextual and vary from case to case. Taking this into consideration, consigning the crime of forced marriage as a category of sexual slavery is not possible as a long-term international solution. In considering forced marriage to be sexual slavery, the SCSL was considering only one particular set of facts, a narrow contextual concept of what forced marriage is, rather than contemplating the possibility that forced marriage may take place under different circumstances.

Enforced prostitution

There is currently no jurisprudence from any international criminal court or tribunal on the crime of enforced prostitution. The crime is covered under the ICTR Statute (Article 4, as a violation of Common Article 3 of the Geneva Conventions and Additional Protocol II); and the SCSL Statute (Article 2, as a crime against humanity; Article 3 as a violation of Common Article 3 of the Geneva Conventions and Additional Protocol II). It is implied in Article 3 of the ICTY Statute, under violations of the laws or customs of war.

The ICC defines enforced prostitution as:

The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress,

detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

Furthermore, the perpetrator or another person must have 'obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature'. It has been suggested by the UN Special Rapporteur Gay J. McDougall that 'As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery'.⁹⁸ While there is a relationship between enforced prostitution and sexual slavery *to a certain extent*, the prosecutor should not steer away from prosecuting perpetrators under the provisions of enforced prostitution. Enforced prostitution has elements that distinguish that crime from sexual slavery, namely the pecuniary or other advantage exchanged for or received in connection with the acts of a sexual nature. While women kept as enforced prostitutes may also be considered sexual slaves, this extra pecuniary aspect is important. It is important because it demonstrates a whole separate aspect to the crime, and also to the motives of the perpetrator (for example, greed rather than just power). In situations of armed conflict, post-conflict, or during mass atrocities, society is no longer functioning normally,⁹⁹ and it is this lack of infrastructure (including law and order) that perpetrators take advantage of in order to exploit women and earn money through criminal exploits. The perpetrator is profiting from the fear, oppression and pain of the victims, and that element of profiting needs to be recognised. In addition, the 'business' of enforced prostitution often increases trafficking in women and girls.¹⁰⁰ Trafficking and enforced prostitution often flourish in conflict and post-conflict zones, including when there is (or sometimes because of) an international peacekeeping presence.¹⁰¹ Under these circumstances, trafficking and enforced prostitution rings are often a large contributor to crimes perpetrated by organised crime consortiums that benefit from post-conflict instability. Therefore it is vital to prosecute this element of the crime and not just the sexual enslavement. In addition, a woman can be a sexual slave to just one man, whereas a prostitute is usually forced to engage in sexual activity with many men; being subject to crimes committed by multiple perpetrators may increase the gravity of the experience for the victim.

That being said, prosecutors may also consider deferring to the wishes of the victim when it comes to making the decision between charging sexual slavery or enforced prostitution. A survivor of sexual violence may prefer the perpetrators of the crimes against her to be prosecuted for using her as a slave rather than for using her as a prostitute. This distinction may have repercussions for the survivor within their community. In this regard, while it is important to capture all elements of the crimes committed in the charges proffered, it is also important to ensure that the charges are appropriate for the survivors of the crimes.

Conclusion: Why no justice for female victims of sexual and gender-based violence?

It is evident that the evolution of the prohibition and prosecution of the crimes of forced marriage, sexual slavery and enforced prostitution has been slow. While jurisprudence on the crime of rape and analysis of that law has increased substantially since the early 1990s, other gender-based crimes of sexual violence remain a long way behind. This is despite the fact that thousands of women have been and continue to be victims of forced

marriage, sexual slavery and enforced prostitution. Why has there been so little justice in international criminal justice for female victims of sexual violence?¹⁰²

There has always been a general reluctance on the part of legal systems to deliver justice to women for gender-based crimes, particularly crimes of sexual violence. Law enforcement officials and lawyers have traditionally been men, and preventing and prosecuting crimes against women have not been a priority.¹⁰³ This attitude is part of the pervasive global violence against women, both in peace and conflict. With regard to crimes committed during armed conflict, sexual violence has been seen as part and parcel of war. Male dominance continues in post-conflict societies, with women often excluded from reconstruction and justice processes.¹⁰⁴

Women have had great difficulty and reluctance in bringing their own cases forward. This is due to a number of fears: fear of retribution from the perpetrator; fear of being ostracised from their communities; fear of being ridiculed or not taken seriously by police or lawyers.¹⁰⁵ In addition, victims can feel shame and guilt.¹⁰⁶

Within the legal system, there have been claims of lack of evidence.¹⁰⁷ There has been a history of prosecutorial and judicial indifference, with the push for prosecution of sexual violence against women coming from specific motivated individual lawyers or judges,¹⁰⁸ or from non-governmental organisations such as the Women's Caucus for Gender Justice who fought successfully for inclusion of sexual violence provisions in the Rome Statute.¹⁰⁹ These crimes have not been seen as important, despite being committed on a large scale. This is evidenced by a lack of a general strategy in some prosecution offices of any focus on sexual violence.¹¹⁰ It is also demonstrated by such specific examples as the initial decision of the ECCC to drop the charges of forced marriage; although these charges have been reintroduced in Case 002 and may be introduced in Case 004, the fact that they were dropped in the first place is deplorable. In the ad hoc tribunals, there was initially a lack of priority for prosecuting crimes of sexual violence, combined with a lack of skill/expertise in the area by both investigators and lawyers. From this perspective, it was easier to charge the more obvious crimes such as killing or attacks on civilians. Once attention was drawn to the lack of prosecutions for sexual violence, the tribunals made charging gender-based violence part of their prosecutorial policy, and recruited gender advisors and specialist investigators (especially at the ICTY). This resulted in a number of successfully prosecuted cases. However, given the scale of sexual violence in Bosnia and Rwanda, the rate of convictions does not reflect the situation that occurred during the conflict in the former Yugoslavia and the genocide in Rwanda. This stems in part from a number of factors: individual prosecutor attitudes, with sexual violence not a priority among some male staff; lack of evidence (there may have been sufficient evidence for indictment confirmations, but during trial the prosecutor deemed the evidence insufficient so did not lead any evidence on the sexual violence crimes); a charging policy where sexual violence crimes were charged under the rubric of persecutions and other broader crimes rather than specific individual crimes (in particular at the ICTY, although the prosecution was restricted in that regard, due to rape being the only express sexual violence provision in the ICTY Statute); and plea bargaining (sexual violence charges appear to have been dropped during plea negotiations at the ICTR).¹¹¹

In addition, difficulties arise when the statute of a court or tribunal has no specific provision for the crime at issue, as is evident with regard to forced marriage. This creates a necessity to turn to a more general provision, such as outrages upon personal dignity, other inhumane acts, torture, enslavement, or sexual violence, in order to prosecute crimes like sexual slavery, forced marriage and forced prostitution. This has created contradictions and confusion in the jurisprudence emerging from the different courts and

tribunals. While the ad hoc tribunals are in the process of completion, the ICC is a permanent court with many years of trials ahead. Thus, it should be a consideration of the state parties to the Rome Statute to propose amending the Rome Statute to include additional provisions proscribing specific crimes of sexual violence such as forced marriage.¹¹² This will enable a definition to be formulated in the Elements of Crimes, and create an opportunity for judges to create a definitive and inclusive jurisprudence on forced marriage.

So what are the future prospects? There are some cases before the ICC that address crimes of sexual violence. The majority of these cases contain charges of rape (as a war crime and/or a crime against humanity)¹¹³; with *Katanga* and *Chui* the sole cases to examine sexual slavery. Chui was acquitted of all charges on 18 December 2012, with the case currently under appeal by the Prosecutor.¹¹⁴ Katanga was acquitted of the sexual slavery charges on 7 March 2014. Thus there has been no conviction as yet at the ICC for any form of sexual violence. At the SCSL there is no appeal on the sexual slavery ruling in the *Taylor* case. This demonstrates the difficulty of crimes such as forced marriage, sexual slavery and enforced prostitution evolving and developing in international criminal jurisprudence.

The ICC has a gender advisor, whose role is to integrate a gender perspective into the work of the court, particularly in relation to sexual violence.¹¹⁵ The Prosecutor of the ICC, Fatou Bensouda, has pledged to step up prosecution of sexual and gender-based crimes, and the Office of The Prosecutor (OTP) has included 'enhance[ment of] the integration of a gender perspective in all areas of our work and continu[ing] to pay particular attention to sexual and gender based crimes and crimes against children' as its third strategic goal in its current strategic plan.¹¹⁶ In June 2014, the ICC OTP released its Policy Paper on Sexual and Gender-Based Crimes.¹¹⁷ This policy paper implements obligations under the Rome Statute and the Rules of Procedure and Evidence into policy for the OTP, creating a strategy and also a framework to follow from preliminary examination stage to investigations and prosecution. It also includes policy for state cooperation and institutional development (such as recruitment and staff training). The aim of the policy is to 'apply a gender analysis to all crimes within [the Office's] jurisdiction, examining how those crimes are related to inequalities between women and men, and girls and boys, and the power relationships and other dynamics which shape gender roles in a specific context'.¹¹⁸ This indicates that the policy is about more than just focusing on sexual violence, but is about the creation of a comprehensive outlook of gender inclusiveness. Of course, the policy also includes in its goal the bringing of charges for sexual and gender-based crimes where 'there is sufficient evidence to support such charges'.¹¹⁹

Thus it remains to be seen whether the ICC will see more prosecutions for sexual violence, whether the ECCC will further develop the definition of forced marriage, and whether the ICC Assembly of States Parties Review Conference will at some stage address the omission of forced marriage from the Rome Statute.

Acknowledgements

Much of the work on this article was done while the author held the position of Research Fellow at the Australian Research Council Centre of Excellence in Policing and Security, Griffith University, Australia. The author would like to thank participants at the 2014 Australian International Criminal Law Workshop at UNSW for their helpful feedback, attendance at which was funded by Anti-Slavery Australia, University of Technology.

Disclosure statement

No potential conflict of interest was reported by the author.

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Notes

1. Susan Brownmiller, *Against Our Will: Men, Women and Rape* (London: Secker & Warburg, 1975); Alexandra Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln and London: University of Nebraska Press, 1994).
2. Maria Eriksson Baaz and Maria Stern, *The Complexity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo (DRC)* (Uppsala: SIDA and Nordiska Afrikainstitutet 2010), 43–7; Dustin Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law', *Wisconsin International Law Journal* 27, no. 1 (2009): 1–49; Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict', *European Journal of International Law* 18, no. 2 (2007): 253–76; Sandesh Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict', *International Review of the Red Cross* 92, no. 877 (2010): 259–77.
3. Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law', *International Review of the Red Cross* 92, no. 877 (2010): 31–52.
4. Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (The Hague: Martinus Nijhoff Publishers, 1997); Margaret M. deGuzman, 'Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda', *SSRN* (2011); Heidi Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', *Human Rights Review* 12 (2011): 109–32; Patricia Viseur Sellers, 'Gender Strategy is Not a Luxury for International Courts', *American University Journal of Gender, Social Policy & Law* 17 (2009): 301–25. This is not to say that sexual violence should be the sole focus of any prosecutor's office, as there are many serious crimes committed, but it should be one of the priorities as it is a critical issue.
5. Laurel Fletcher et al., 'No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia', *Hastings Women's Law Journal* 5, no. 1 (1994): 89–128, 108.
6. Maria Eriksson Baaz and Maria Stern, 'Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)', *International Studies Quarterly* 53 (2009): 495–518, 505–8; Above note 2, Baaz and Stern, *The Complexity of Violence*, 47–50; Claire Duncanson, 'Forces for Good? Narratives of Military Masculinity in Peacekeeping Operations', *International Feminist Journal of Politics* 11, no. 1 (2009): 63–80; Paul Higate, ed., *Military Masculinities: Identity and the State* (Westport, CT: Praeger, 2003); Sandra Whitworth, *Men, Militarism, and UN Peacekeeping*, *Critical Security Studies*, ed. Ken Booth (London: Lynne Rienner Publishers, 2004).
7. Baaz and Stern, *The Complexity of Violence*, 23–4.
8. Catharine A. MacKinnon, 'Rape, Genocide, and Women's Human Rights', *Harvard Women's Law Journal* 17(1994): 5–16; Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu', *Columbia Journal of Transnational Law* 44 (2006): 940–58; Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', *Boston College International & Comparative Law Review* 36 (2013): 1207–37.
9. R. Charli Carpenter, 'Surfacing Children: Limitations of Genocidal Rape Discourse', *Human Rights Quarterly* 22 (2000): 428–77.
10. Alison Desforges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 163; Binaifer Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996).
11. Fletcher et al., 'No Justice', 109–10; Evelyne Josse, '"They Came with Two Guns": the Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts', *International Review of the Red Cross* 92, no. 877 (2010): 177–95.

12. Josse, "They Came With Two Guns".
13. See for example, *Prosecutor v. Sesay, Kallon and Gbao* (RUF case), 2 March 2009, Trial Judgment, SCSL-04-15-T, 403–4, para. 1349.
14. Article 44, Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office. Binaifer Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996).
15. Theodor Meron, 'Rape as a Crime under International Humanitarian Law', *American Journal of International Law* 87, no. 3 (1993): 424–8.
16. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (75 UNTS 287), entered into force 21 October 1950.
17. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (API), 8 June 1977, Article 75(2)(b) fundamental guarantees prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault' and 76(1) Protection of Women; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (APII), 8 June 1977, Article 4(2)(c) fundamental guarantees prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault'.
18. Universal Declaration of Human Rights, 10 December 1948, Articles 3, 4, 5; International Covenant on Civil and Political Rights, entry into force 23 March 1976, Articles 6, 7, 9.
19. Sonja M. Hedgepeth and Rochelle G. Saidel, eds, *Sexual Violence Against Jewish Women During the Holocaust* (Waltham: Brandeis University Press, 2010); Rochelle G. Saidel, *The Jewish Women of Ravenbrück Concentration Camp* (Madison: University of Wisconsin Press, 2004), 212–14.
20. Saidel, *The Jewish Women of Ravenbrück Concentration Camp*, 214.
21. Patricia Viseur Sellers, 'Wartime Female Slavery: Enslavement?', *Cornell International Law Journal* 44 (2011): 115–43, 117.
22. Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Cambridge: Intersentia, 2005), 8.
23. Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity 'to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal'.
24. *United States of America v. Karl Brandt et al.*, Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 (1949).
25. *Soemu Toyoda*, United States, US Military Tribunal sitting in Tokyo, 6 September 1949, Official Transcript of Record of Trial, 4998-5007.
26. *Iwane Matsui*, International Military Tribunal for the Far East, November 1948 at 453–4.
27. Yamashita was formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands.
28. *In re Yamashita* (1945) 327 US 1.
29. Kelly D. Askin, 'Comfort Women – Shifting Shame and Stigma from Victims to Victimizers', *International Criminal Law Review* 1 (2001): 5–32; Christine M. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', *American Journal of International Law* 95, no. 2 (2001): 335–41.
30. Cases include: *Prosecutor v. Akayesu*, Trial Judgment; *Prosecutor v. Delalic et al.* (Celebici), 16 November 1998, Trial Judgment, IT-96-21-T; *Prosecutor v. Furundzija*, 10 December 1998, Trial Judgment, IT-95-17/1-T; *Prosecutor v. Kunarac et al.* (Foca), 22 February 2001, Trial Chamber Judgment, IT-96-23-T & IT-96-23/1-T; *Prosecutor v. Semanza*, 15 May 2003, Judgment and Sentence, ICTR-97-20-T; *Prosecutor v. Gacumbitsi*, 17 June 2004, ICTR-2001-64-T, Trial Judgment. Literature includes: Stiglmeier, *Mass Rape*; Kelly D. Askin, 'The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes', *Leiden Journal of International Law* 12 (1999): 935–55; Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?', *European Journal of International Law* 13, no. 3 (2002): 697–719; Doris Buss, 'Prosecuting Mass Rape: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic',

- Feminist Legal Studies* 10 (2002): 91–9; Patricia Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', *Case Western Reserve Journal of International Law* 34 (2002): 287–303; Stephanie K. Wood, 'A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda', *Columbia Journal of Gender & Law* 13 (2004): 274–327; David S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrin', *Duke Journal of Comparative and International Law* 15 (2005): 219–57; Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu', *Columbia Journal of Transnational Law* 44 (2006): 940–58; Doris Buss, 'Rethinking Rape as a Weapon of War', *Feminist Legal Studies* 17 (2009): 145–63; Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-related Violence in Positive International Criminal Law', *Michigan Journal of International Law* 30 (2009): 1–123; Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', *B. C. Int'l & Comp. L. Rev.* 36 (2013): 1207–37; Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights', *The Australian Feminist Law Journal* 33 (2010): 57–79.
31. The quote in the title of this article, 'Don't kill them, let's choose them as wives', was a statement by a military commander to his subordinates, as related by I.S., a 27 year old who the commander subsequently raped (under the threat of killing her by cutting her to pieces with a knife), and took as his 'wife'; *We'll Kill You If You Cry': Sexual Violence in the Sierra Leone Conflict* (New York: Human Rights Watch, 2003).
 32. *Prosecutor v. Brima, Kamara and Kanu (AFRC case)*, 22 February 2008, SCSL-2004-16-A, Appeal Judgment, para. 190; *RUF case Trial Judgment*, paras 1408, 1413.
 33. *RUF case Trial Judgment*, para. 1408.
 34. *AFRC case Appeal Judgment*, para. 191.
 35. For discussion on the issue of *nullum crimen sine lege* and the establishment of forced marriage as a 'new' crime, see for example, Micaela Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime against Humanity', *Journal of International Criminal Justice* 6 (2008): 1033–42; Sara Wharton, 'The Evolution of International Criminal Law: Prosecuting "New" Crimes before the Special Court for Sierra Leone', *International Criminal Law Review* 11 (2011): 217–39. Sexual violence in general was pervasive in the Sierra Leone conflict, and included rape, forced pregnancy and forced abortion; see Human Rights Watch, *We'll Kill You If You Cry'*.
 36. *Prosecutor v Brima, Kamara and Kanu*.
 37. *AFRC case Trial Judgment*, paras 697–707.
 38. *Ibid.*, para. 701.
 39. *Ibid.*, para. 701.
 40. *Ibid.*, paras 710–13.
 41. Frulli, 'Advancing International Criminal Law'.
 42. *AFRC case Trial Judgment*, Partly Dissenting Opinion of Justice Doherty. Valerie Oosterveld, 'Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-based Crimes', *American University Journal of Gender, Social Policy & Law* 17 (2009): 407–30, 415–16.
 43. *AFRC case Appeal Judgment*, para. 200.
 44. *Ibid.*, para. 201. For further discussion, see Jennifer Gong-Gershowitz, 'Forced Marriage: A "New" Crime Against Humanity?', *Northwestern Journal of International Human Rights* 8, no. 1 (2009): 53–76.
 45. *RUF case Trial Judgment*.
 46. *Ibid.*, paras 1298, 1464, 1473, 1581.
 47. Information and documents available at <http://www.eccc.gov.kh/en/case/topic/2>.
 48. *Prosecutors v. Chea et ors*, 15 September 2010, Closing Order (Indictment), Case No. 002/19-09-2007-ECCC-OCIJ, para. 1447.
 49. *Ibid.*, para. 217.
 50. *Ibid.*, para. 1447.
 51. *Ibid.*
 52. *Ibid.*, para. 1445.
 53. Conversation between author and Susan Lamb, Senior Legal Officer, Trial Chamber of the ECCC, 25 October 2012.
 54. *Ibid.*

55. 'Cambodia: UN Official Welcomes Possibility of Genocide Court Trying Sexual Crimes', *UN News*, 1 March 2013, <http://www.un.org/apps/news/story.asp?NewsID=44264#.UV4WlcqBJM8>; *Prosecutors v. Chea et ors*, 8 February 2013, Supreme Court Chamber Appeal Judgment, Decision on the Co-prosecutors' immediate appeal of the Trial Chamber's decision concerning the scope of case 002/01, Case 002/19-09-2007-ECCC-TC/SC(18).
56. *Prosecutors v. Chea et ors*, 4 April 2014, Trial Chamber Decision, Decision on Additional Severance of Case 002/02 and Scope of Case 002/02, Case 002/02, 002/19-09-2007-ECCC-TC.
57. Nicholas Koumjian, 'International Co-Prosecutor Requests Investigation of Alleged Sexual and Gender-based Violence in Case 004' (Phnom Penh: ECCC, 2014).
58. *Prosecutor v. Akayesu*, 2 September 1998, Trial Judgment, ICTR-96-4-T, paras 686–8.
59. *AFRC* case, Appeal Judgment, para. 192. Frances Simmons and Jennifer Burn, 'Without Consent: Forced Consent in Australia', *Melbourne University Law Review* 36 (2013): 970–1008.
60. Opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957).
61. Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 November 2003).
62. Sellers, 'Wartime Female Slavery', 120.
63. *Nuremberg Judgement: Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945–1 October 1946, Vol. 22 (1947), 470, 477–8, 480–1, 486–91; *The Tokyo Judgement: The International Military Tribunal for the Far East (IMFTE)* 29 April 1946–12 November 1948, Vol. I (1977), 388, 403–6, 413–14, 416–7, 452, 462–3.
64. With the exception of the defendant Von Schirach; *Nuremberg Judgement*, 565–6.
65. Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), 220–1.
66. *Ibid.*, 119–20.
67. *Nuremberg Judgement*, 586.
68. *Prosecutor v. Delalić et al. (Čelebići)*, 16 November 1998, Trial Judgment, IT-96-21-T; 20 February 2001, Appeal Judgment, IT-96-21-A.
69. *Čelebići* Trial Judgment, paras 475–97.
70. *Prosecutor v. Kunarac et al. (Foča)*, 22 February 2001, Trial Judgment, IT-96-23-T & IT-96-21/1-T; 12 June 2002, Appeal Judgment, IT-96-21 & IT-96-23/1-A.
71. *Foča* Appeal Judgment, paras 150–1.
72. *Foča* Trial Judgment, para. 540.
73. *Ibid.*, paras 542–3.
74. Rome Statute, Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), as a crime against humanity and a war crime.
75. It is notable that no cases bring up the issue of trafficking in persons, despite the fact that it occurs in high frequency during armed conflict and mass violence, and in post-conflict areas. For example, many women who are subject to sexual slavery and/or enforced prostitution are trafficked, moved from place to place, whether by armed groups or by criminal consortiums (the latter particularly the case in post-conflict zones where women are trafficked in to cater for international forces). The abductions of women to be kept as 'wives' as well as of children and men to force them into the armed forces also constitute trafficking in persons.
76. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 30 September 2008, Decision on the Confirmation of Charges, ICC-01/04-01/07. Katanga was acquitted of sexual slavery charges on 7 March 2014; *Prosecutor v. Germain Katanga*, 7 March 2015, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07. Ngudjolo Chui was acquitted of all charges on 18 December 2012.
77. *Ibid.*, para. 345.
78. *Ibid.*, paras 353, 431, 434.
79. Regulations of the Court, Adopted by the Judges of the Court on 26 May 2004, Official Documents of the International Criminal Court ICC-BD/01-01-04.
80. Kevin Jon Heller, "'A Stick to Hit the Accused With': The Legal Recharacterization of Facts under Regulation 55", in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn (Oxford: Oxford University Press, 2015), 981–1006.
81. *Katanga and Chui* Confirmation of Charges, para. 430.

82. Ibid., para. 431.
83. Ibid., para. 432.
84. Ibid., para. 431.
85. *Katanga*, Trial Judgment (English trans.), paras 975, 978. Original above note 76, *Katanga*, Judgment, paras 975, 978. Some of the factors the Trial Chamber deemed can be taken into account are 'the exertion of powers which may be associated with the right of ownership or which may ensue therefrom... may include detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socio-economic conditions in which the power is exerted may also be taken into account'; para. 976.
86. *Prosecutor v. Charles Ghankay Taylor*, 18 May 2012, Trial Judgment, SCSL-03-01-T.
87. Article 2(g) of the SCSL Statute.
88. *Taylor* Trial Judgment, paras 429, 424. The Trial Chamber also held that sexual slavery as represented by the phenomenon of 'bush wives' amounted to the crime against humanity of outrages upon personal dignity (Article 3(e) of the SCSL Statute); *ibid.*, para. 432.
89. Ibid., paras 424, 427.
90. Ibid., paras 420, 427.
91. Ibid., para. 429, emphasis added.
92. Ibid., para. 426.
93. OED online. www.oed.com
94. Ibid., para. 430.
95. *Prosecutor v. Taylor*, 1 October 2012, Public Prosecution Appellant's Submissions, SCSL-03-01-A. The Appeal Chamber's decision was announced 26 September 2013, Press Release, 'Appeals Chamber Upholds Charles Taylor's Conviction, 50 Year Sentence'. <http://www.scs-l.org/LinkClick.aspx?fileticket=gEJ2L%2b5%2frBo%3d&tabid=53> (accessed 2 October, 2013).
96. *Prosecutor v. Charles Ghankay Taylor*, 26 September 2013, Appeal Judgment, SCSL-03-01-A, para. 264.
97. Ibid., para. 266 (footnotes omitted).
98. *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict*, Final Report Submitted by Ms Gay J. McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 33.
99. Bruce Oswald, 'Addressing the Institutional Law and Order Vacuum: Key Issues and Dilemmas for Peacekeeping Operations', *New Zealand Armed Forces Law Review* (2006): 1–19.
100. N. Hotaling and L. Levitas-Martin, 'Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women', *Hastings Women's Law Journal* 13 (2002): 117–26.
101. Melanie O'Brien, 'Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes', *International Criminal Law Review* 11, no. 4 (2011): 803–27; Sarah Martin, *Must Boys be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions* (Washington, DC: Refugees International, 2005); Sarah E. Mendelson, *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans* (Washington, DC: Center for Strategic and International Studies (CSIS), 2005); Madeleine Rees, 'Intergovernmental Actions in Bosnia-Herzegovina: The Cost of Ignoring Gender', in *The Postwar Moment: Militarities, Masculinities and International Peacekeeping*, ed. Cynthia Cockburn and Dubravka Zarkov (London: Lawrence and Wishart, 2002); Martina Vandenberg, *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution* (New York: Human Rights Watch, 2002).
102. Although notably, there has been even less discussion about male victims of sexual violence, and this article does not want to suggest that justice has been adequate for male victims of sexual violence. Paula Drumond, 'Invisible Males: A Critical Assessment of UN Gender Mainstreaming Policies in the Congolese Genocide', in *New Directions in Genocide Research*, ed. Adam Jones (London: Routledge, 2012), 96–112.
103. *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda* (New York: Human Rights Watch, 2004).

104. Susan Willett, 'Introduction: Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security', *International Peacekeeping* 17, no. 2 (2010): 142–58, <http://dx.doi.org/10.1080/13533311003625043> (accessed 30 May 2012); Dianne Otto, 'Power and Danger: Feminist Engagement with International Law through the UN Security Council', *Australian Feminist Law Journal* 32 (2010): 97–121; Kathryn Lockett, 'The Mechanisms of Exclusion: Women in Conflict', *Feminist Legal Studies* 16 (2008): 369–76; Hilary Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building', Kathryn Lockett, 'The Mechanisms of Exclusion: Women in Conflict', *Feminist Legal Studies* 16 (2008): 347–61; Jackie Kirk and Suzanne Taylor, 'UN Security Council Resolution 1325', *Forced Migration Review*, no. 27 (2007): 13–14.
105. Fletcher et al., 'No Justice', 108, 110; Human Rights Watch, *Struggling to Survive*, 29–30.
106. Fletcher et al., 'No Justice', 108.
107. This was given as a reason for the lack of prosecution of sexual crimes in the ICC's *Lubanga* case, even though victims and witnesses gave evidence of such crimes during the trial by Dr Fabricio Guariglia, an ICC lawyer, now Senior Trial Attorney (University of Nottingham Human Rights Law Centre Student Conference 2007, International Criminal Accountability). See also Human Rights Watch, *Struggling to Survive*.
108. Such as Justice Pillay during the ICTR's *Akayesu* case; Beth Van Schaak, 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson', *American University Journal of Gender, Social Policy & Law* 17 (2009): 361–406. See Sellers, 'Gender Strategy', for an overview of the feminists who have fought for gender justice (Viseur Sellers herself has been one of them).
109. Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law', *McGill Law Journal* 46 (2000): 217.
110. As mentioned above, sexual violence should not be the sole focus of any prosecutor's office, but it should be one of the priorities. Haddad, 'Mobilizing the Will'; Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia', *International Journal of Transitional Justice* 1 (2007): 411–32; Stephanie K. Wood, 'A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda', *Columbia Journal of Gender & Law* 13 (2004): 274–327.
111. See Kirsten M.F. Keith, 'Justice at the International Criminal Tribunal for Rwanda: Are Criticisms Just?', *Law in Context* 27, no. 1 (2009): 78–102, 96. These factors listed are also based on interviews with a former ICTY case manager and a former ICTR lawyer, undertaken in person and by email over a period of time in 2014 and 2015.
112. Sexual exploitation should also be added to the list of crimes; see Melanie O'Brien, 'Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes', *International Criminal Law Review* 11, no. 4 (2011): 803–27.
113. See *Prosecutor v. Bemba Gombo*, 15 June 2009, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08; *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09; *Prosecutor v. Ahmad Harun and Ali Kushayb*, Warrant of Arrest for Ahmad Harun, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07; *Prosecutor v. Laurent Gbagbo*, 23 November 2011, Warrant of Arrest for Laurent Koudou Gbagbo, ICC-02/11-01/11-1; *Prosecutor v. Charles Blé Goudé*, 21 December 2011, Warrant of Arrest for Charles Blé Goudé, ICC-02/11-02/11; *Prosecutor v. Simone Gbagbo*, 29 February 2012, Warrant of Arrest for Simone Gbagbo, ICC-02/11-01/12; *Prosecutor v. Uhuru Muigai Kenyatta*, 23 January 2013, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.
114. *Prosecutor v. Mathieu Ngudjolo Chui*, 18 December 2012, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12.
115. ICC, 'ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor' (2012).
116. AP, 'Next ICC Prosecutor Warns against Sex Crimes', *CBC News*, 13 December 2011, <http://www.cbc.ca/news/world/story/2011/12/13/icc-chief-prosecutor.html?cmp=rss>; Fatou Bensouda, 'Statement for Ceremony for the Solemn Undertaking of the Prosecutor of the

International Criminal Court' (2012); International Criminal Court, 'Office of the Prosecutor Strategic Plan June 2012–2015' (2013).

117. Available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>.
118. Executive Summary, *ibid.*, 5.
119. *Ibid.*, 6.

GENDER, ENSLAVEMENT AND WAR ECONOMIES IN SIERRA LEONE

A Case Study from the Special Court for Sierra Leone

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1. INTRODUCTION

Enslavement of civilians played a central role in sustaining the war economy during Sierra Leone's 1991–2002 armed conflict.¹ In particular, two warring parties – the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) – used various kinds of enslavement to further

* The author wishes to thank the Social Sciences and Humanities Research Council of Canada and the Canadian Partnership for International Justice for funding support, to make this chapter possible. Any errors are the author's own.

¹ SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Graphic Packaging 2004, vol. 3(A), ch. 4, paras. 54–60.

their war effort, including forced diamond mining, forced food procurement, forced carrying of loads, forced domestic labour and sexual slavery. Certain types of enslavement were highly gendered, as were the roles played by that enslavement in advancing the financial and organisational sustainability of the RUF and AFRC as fighting forces. For example, men were often targeted for forced portering of heavy loads and forced diamond mining.² These forms of enslavement were crucial to the continuity of the two groups, which generated tradable commodities such as diamonds, food and looted valuables through forced labour. The RUF and AFRC also used forced labour of women and girls to create social units to undertake domestic duties, such as cooking and laundry, to keeping their forces fed and clothed.³ Finally, they also instituted sexual slavery as a form of extreme control over female (and, by extension, male) civilians and a reward for their forces.⁴

The Special Court for Sierra Leone was created to prosecute those bearing the greatest responsibility for crimes committed during the 1996–2002 period of the decade-long civil war.⁵ Given the prevalence of enslavement during the war, it is not surprising that the Special Court examined various forms of forced labour in some depth. It did so in cases involving former RUF and AFRC leaders, as well as the former President of Liberia, Charles Taylor.⁶ But did the Court's analysis recognise the gendered nature of the enslavement and thus the gendered nature of the war economy? This chapter analyses this question through an examination of the Special Court's Trial Chamber judgments in the RUF, AFRC and *Taylor* cases. It also considers why the linkage between gender, enslavement and the war economy is an important consideration in international criminal law.

The chapter begins by providing background on the Special Court for Sierra Leone in addressing serious international crimes committed during the war. It then discusses enslavement as charged in the AFRC, RUF and *Taylor* cases. This section sets out the Special Court's legal definitions of enslavement and sexual slavery, and turns to an exploration of the Court's factual findings on the various forms of enslavement identified by the Prosecutor – forced diamond mining; forced food procurement; forced portering; and forced domestic labour,

² See sections 3.2.1 and 3.2.3 below.

³ See section 3.2.4 below.

⁴ *Prosecutor v. Sesay, Kallon and Gbao* (Judgment) SCSL-04-15-T (2 March 2009) paras. 1347–50 ('RUF Trial Judgment').

⁵ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex – Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138, art. 1(1) ('SCSL Agreement').

⁶ RUF Trial Judgment, above n. 4; *Prosecutor v. Brima, Kamara and Kanu* (Judgment) SCSL-04-16-T (20 June 2007) ('AFRC Trial Judgment'); *Prosecutor v. Taylor* (Judgment) SCSL-03-01-T (18 May 2012) ('*Taylor* Trial Judgment').

sexual slavery and forced marriage – especially as they reveal the gendered underpinnings of the war economy. This chapter ends with a discussion of the lessons that may be drawn from the Special Court’s consideration of enslavement and gender within the larger picture of the economics of war – lessons that may be useful in investigations and prosecutions involving other situations involving gendered war economies, such as in ISIS-held areas of northern Iraq and Syria.⁷

2. THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone was created in 2002 as a result of an agreement between the United Nations and the Government of Sierra Leone.⁸ The Court was mandated to try those bearing the greatest responsibility for crimes against humanity, war crimes and certain violations of Sierra Leone law committed during the 1996–2002 phase of the civil war.⁹

The Special Court’s Prosecutor indicted a number of individuals, whose cases were clustered according to the armed group to which they belonged. One case, which resulted in the Special Court’s first trial judgment, involved the prosecution of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu of the AFRC.¹⁰ The AFRC was formed as a result of a 1997 coup by members of the Sierra Leone Army, who overthrew the elected government of President Kabbah and invited the RUF to form a junta.¹¹ Brima was a high-ranking member of the AFRC’s Supreme Council and Principal Liaison Officer in the AFRC government.¹² He was responsible for overseeing AFRC-controlled diamond mining activities and, at times, served as an overall commander.¹³ Kamara was also a member of the Supreme Council and a Principal Liaison Officer in the AFRC government.¹⁴ He was responsible for supervising the Agriculture,

⁷ UNSC, ‘The Eighth Annual Report of the Secretary-General on Conflict-related Sexual Violence’ (2017) UN Doc S/2017/249, para. 39.

⁸ SCSL Agreement, above n. 5.

⁹ *ibid.*, arts. 1–5. The 1996–2002 time period was the result of political compromise within the UN Security Council and has been the subject of criticism for excluding serious crimes committed in rural areas during the five years prior to this time period: A. SMITH, ‘The Expectations and Role of International and National Civil Society and the SCSL’ in C. JALLOH (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press 2014, pp. 46, 48.

¹⁰ *Prosecutor v. Brima, Kamara and Kanu* (Sentencing Judgment) SCSL-04-16-T (19 July 2007) Disposition; *Prosecutor v. Brima, Kamara and Kanu* (Judgment) SCSL-04-16-A (22 February 2008) 105–106 (‘AFRC Appeals Judgment’).

¹¹ AFRC Trial Judgment, above n. 6, para. 164.

¹² *ibid.*, para. 322.

¹³ *ibid.*, paras. 332, 378, 420.

¹⁴ *ibid.*, paras. 434–35.

Forestry, Fisheries, Energy and Power, Lotto and Income Tax Ministries.¹⁵ Kanu was a senior commander in the AFRC, with overall or deputy command of forces in Kono, Port Loko, Koinadugu and Bombali Districts, including of the forces that invaded Sierra Leone's capital, Freetown, in 1999.¹⁶ Kanu planned and took part in the coup, and served on the Supreme Council.¹⁷ He also was a senior commander and Chief of Staff in the AFRC fighting forces.¹⁸ He was in charge of abducted civilians, including girls and women assigned as forced wives.¹⁹ All three AFRC accused were convicted of numerous acts, including enslavement, and sentenced to 45–50 years of imprisonment.²⁰

The second completed trial involved members of the Civil Defence Forces (CDF) militia, a rural security force aimed at supporting the elected government of Sierra Leone in its fight against the AFRC and RUF.²¹ Sam Hinga Norman, the former National Coordinator of the CDF, died after the completion of trial but before the issuance of the judgment.²² Moinina Fofana was the CDF's Director of War and Allieu Kondewa was the High Priest of the CDF.²³ As these individuals were not charged with enslavement, this chapter will not discuss the CDF case.

The third case brought to judgment involved three members of the RUF: Issa Sesay, Morris Kallon and Augustine Gbao. Each of the accused was charged with – among other crimes – enslavement as a crime against humanity in respect of forced labour in a number of districts in Sierra Leone between 1997–2000.²⁴ Sesay was a senior officer and commander in the RUF, including Battle Field Commander.²⁵ Kallon was also a senior officer and commander in the RUF, serving as Deputy Area Commander, Battle Group Commander and, subsequently, Battle Field Commander.²⁶ Within the RUF, Gbao served as Commander of the RUF Internal Defence Unit, senior RUF Commander in charge of Kailahun Town, Overall Security Commander, and joint Commander of AFRC/RUF Forces in the Makeni Area at different points in time.²⁷ All three RUF accused were convicted of numerous charges, including enslavement, and sentenced to 25–52 years of imprisonment.²⁸

¹⁵ *ibid.*, para. 436.

¹⁶ *ibid.*, paras. 461, 468, 474, 500.

¹⁷ *ibid.*, paras. 507–09.

¹⁸ *ibid.*, paras. 526, 532, 535.

¹⁹ *ibid.*, paras. 523–26. Forced marriage is discussed in section 3.2.4 below.

²⁰ AFRC Appeals Judgment, above n. 10, para. 106.

²¹ *Prosecutor v. Fofana and Kondewa* (Judgment) SCSL-04-14-T (2 August 2007) para. 2.

²² *ibid.*, para. 4. The trial proceedings were therefore terminated: *ibid.*, para. 5.

²³ *ibid.*, para 1.

²⁴ *Prosecutor v. Sesay, Kallon and Gbao* (Corrected Amended Consolidated Indictment) SCSL-04-15-PT (2 August 2006) paras. 69–76 and Count 13 (RUF Indictment).

²⁵ *ibid.*, paras. 21–23.

²⁶ *ibid.*, paras. 24–28.

²⁷ *ibid.*, paras. 30–33.

²⁸ *Prosecutor v. Sesay, Kallon and Gbao* (Judgment) SCSL-04-15-A (26 October 2009) 480 ('RUF Appeals Judgment').

The final case decided by the Special Court for Sierra Leone involved Charles Taylor, the former President of Liberia. He was charged under a number of modes of responsibility – joint criminal enterprise, aiding and abetting, planning, instigating, ordering and superior responsibility – for his involvement in crimes perpetrated by the RUF and AFRC, as well as others.²⁹ Taylor was charged with, *inter alia*, enslavement as a crime against humanity and cruel treatment as a war crime related to forced diamond mining. The enslavement charges related, in part, to forced alluvial diamond mining in Kenema, Kono and Kailahun Districts of Sierra Leone between 1997–2002.³⁰ Taylor was convicted and sentenced to 50 years of imprisonment.³¹

3. THE SPECIAL COURT'S CONSIDERATION OF ENSLAVEMENT

The Prosecutor of the Special Court for Sierra Leone brought a charge of the crime against humanity of enslavement in three out of four cases.³² In doing so, the prosecution identified several different types of enslavement, including forced diamond mining, forced farming and other forms of food procurement, forced carrying of loads, forced domestic labour, sexual slavery and forced marriage.³³ The Special Court became the first international criminal tribunal to examine enslavement related to conflict-related mining, as well as the first to consider and convict individuals for the crime against humanity of sexual slavery and forced marriage as an inhumane act.³⁴

This section will examine the Special Court's legal definition of enslavement, followed by a description – through the lens of gender – of the Court's factual findings on four different types of enslavement: forced mining; forced food procurement; forced portering; and forced domestic labour, sexual slavery and forced marriage.

²⁹ *Taylor* Trial Judgment, above n. 6, paras 13–14.

³⁰ *Prosecutor v. Taylor* (Prosecutor's Second Amended Indictment) SCSL-03-01-PT (29 May 2007) paras. 23–27 ('*Taylor* Indictment').

³¹ *Prosecutor v. Taylor* (Judgment) SCSL-03-01(26 September 2013), para. 305.

³² There were no charges of enslavement in *Prosecutor v. Fofana and Kondewa*.

³³ See, for example the analysis in the *Taylor* trial judgment of Count Ten (Enslavement): *Taylor* Trial Judgment, above n. 6, paras. 572–740. Forced marriage was charged under the crime against humanity of other inhumane acts; however, as the Court considered evidence of sexual slavery and forced domestic labour in evaluating this charge, this chapter will consider forced marriage under the theme of enslavement and the war economy.

³⁴ Special Court for Sierra Leone Office of the Prosecutor Press Release, 'Special Court Prosecutor Hails RUF Convictions' (Special Court for Sierra Leone, 25 February 2009) <<http://www.rscsl.org/Documents/Press/OTP/prosecutor-022509.pdf>> accessed 14.04.2018; Special Court for Sierra Leone Office of the Prosecutor Press Release, 'Prosecutor Hollis hails the historic conviction of Charles Taylor' (Special Court for Sierra Leone, 26 April 2012) <<http://www.rscsl.org/Documents/Press/OTP/prosecutor-042612.pdf>> accessed 14.04.2018.

3.1. THE SPECIAL COURT'S LEGAL DEFINITIONS OF ENSLAVEMENT

Enslavement was defined by the Trial Chamber in both the AFRC and *Taylor* trial judgments as follows:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator exercised these powers intentionally.³⁵

The RUF trial judgment adopted a very similar definition, but added that the accused may also have acted in the reasonable knowledge that the act of enslavement was likely to occur,³⁶ a point which was disputed by the *Taylor* Trial Chamber.³⁷ Sexual slavery was defined in a similar manner, with the additional element that 'The Accused cause such a person or persons to engage in one or more acts of a sexual nature'.³⁸ All three judgments based their approach on the definition of enslavement found in the International Criminal Court's Elements of Crime document,³⁹ which, in turn, was based in part on the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery.⁴⁰

Building on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia's *Kunarac* case on enslavement, the Special Court identified indicia of enslavement as 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'.⁴¹ The Special

³⁵ *Taylor* Trial Judgment, above n. 6; AFRC Trial Judgment, above n. 6, para. 749.

³⁶ RUF Trial Judgment, above n. 4, para. 197.

³⁷ *Taylor* Trial Judgment, above n. 6, para. 450.

³⁸ RUF Trial Judgment, above n. 4, para. 158; AFRC Trial Judgment, above n. 6, para. 708; *Taylor* Trial Judgment, above n. 6, para. 418.

³⁹ Elements of Crimes of the International Criminal Court (2000) ICC-ASP/1/3 at 108, UN Doc. PCNICC/2000/1/Add.2 (2000) art. 7(1)(c).

⁴⁰ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, art. 1(1); 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3, art. 6(1); as cited in AFRC Trial Judgment, above n. 6, para. 742 and n. 1435. See also R.S. LEE ET AL., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers 2001, pp. 84–86.

⁴¹ AFRC Trial Judgment, above n. 6, para. 745; RUF Trial Judgment, above n. 4, para. 199; *Taylor* Trial Judgment, above n. 6, para. 447; citing *Prosecutor v. Kunarac et al.* (Judgment) ICTY-96-23-T and ICTY-96-23/1-T (22 February 2001), para. 543; cited with approval by

Court's Trial Chambers confirmed that lack of consent of the victim is not an element to be proven by the prosecution, although it may be relevant from an evidentiary perspective.⁴² In addition, they indicated that there is no specific duration required for the relationship between the accused and the victim, but that the duration may be relevant in determining the quality of the relationship.⁴³ The AFRC trial judgment noted that 'a person may be enslaved for a short period of time provided that[,] in that time[,] the perpetrator intentionally exercises a degree of control over the person sufficient to constitute the *actus reus* of the crime'.⁴⁴

Given that many of the enslavement charges related to forced labour, the Trial Chambers considered whether 'the relevant persons had no choice as to whether they would work', a determination which requires objective evidence of the situation.⁴⁵ Objective indicators include 'threats or use of violence by the perpetrators and lack of compensation'.⁴⁶ The Trial Chambers also recognised that enslavement is a continuing crime.⁴⁷ This is due to its prolonged nature over time and location, 'especially in the context of the Sierra Leone conflict where the perpetrators were often on the move between villages and Districts for a significant period of time'.⁴⁸ The Trial Chamber additionally recognised that enslaved civilians were 'used to perform a multiplicity of critical tasks for the troops'.⁴⁹ The framework within which the enslavement took place was systematic, continuous, organised and large-scale, requiring 'a substantial degree of planning and preparation'.⁵⁰ For example, the rebels kept records of the women and girls who were sexually enslaved and the AFRC had a position within the brigade with designated responsibility for abducted civilians.⁵¹ The result was that the RUF and AFRC furthered their ultimate goal of securing, among other things, economic control over Sierra Leone.⁵²

Note that, while forced marriage was recognised as a form of forced labour, it was charged separately under the crime against humanity of 'other inhumane

Prosecutor v. Kunarac et al. (Judgment) ICTY-96-23-A & ICTY-96-23/1-A (12 June 2002), para. 119.

⁴² AFRC Trial Judgment, above n. 6, para. 746; RUF Trial Judgment, above n. 4, para. 200; *Taylor* Trial Judgment, above n. 6, para. 447.

⁴³ RUF Trial Judgment, above n. 4, para. 200; *Taylor* Trial Judgment, above n. 6, para. 447.

⁴⁴ AFRC Trial Judgment, above n. 6, para. 1282.

⁴⁵ *Taylor* Trial Judgment, above n. 6, para. 448; RUF Trial Judgment, above n. 4, para. 202; both referring to *Prosecutor v. Krnojelac* (Judgment) ICTY-97-25-A (17 September 2003) paras. 194–95.

⁴⁶ AFRC Trial Judgment, above n. 6, para. 1283.

⁴⁷ *ibid.*, para. 39. See also *Taylor* Trial Judgment, above n. 6, paras. 119, 1018.

⁴⁸ AFRC Trial Judgment, above n. 6, para. 40.

⁴⁹ *ibid.*, para. 1821.

⁵⁰ *ibid.*, paras. 1824, 1826.

⁵¹ *ibid.*, para. 1824.

⁵² RUF Trial Judgment, above n. 4, para. 2159.

acts' in the AFRC and RUF cases.⁵³ The AFRC Appeals Chamber defined forced marriage as 'a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim'.⁵⁴ This was endorsed in the RUF appeals judgment.⁵⁵ The *Taylor* trial judgment, in *dicta*, took a different approach, characterising the acts as 'a conjugal form of enslavement'.⁵⁶ This conjugal enslavement included sexual slavery, forced domestic labour such as cooking and cleaning, forced pregnancy and forced childrearing.⁵⁷

In sum, the Special Court's legal findings on enslavement both confirmed previous international criminal law understandings on enslavement and pushed the application of that law into new territories, as explained in the following subsection.

3.2. THE SPECIAL COURT'S FACTUAL FINDINGS ON ENSLAVEMENT THROUGH A GENDER LENS

3.2.1. *Forced Diamond Mining*

In the AFRC, RUF and *Taylor* cases, the accused were charged with forcing civilians in Kenema, Kono and Kailahun Districts to mine for alluvial diamonds.⁵⁸ As the Trial Chamber notes, 'alluvial diamond mining in Kono [as well as elsewhere] was the major source of income for the AFRC/RUF regime'.⁵⁹ Diamonds, therefore, were a 'vital source of revenue for the AFRC/RUF'.⁶⁰ This was because the regime 'was experiencing difficulties generating revenue from taxes as the private sector was non-operational, there was widespread civil disobedience and the international embargo against Sierra Leone reduced trade'.⁶¹ The AFRC/RUF's Supreme Council therefore created an internal structure to enforce and supervise mining in Sierra Leone's diamond districts under their control.⁶² The revenue from forced diamond mining was used for

⁵³ For example, RUF Indictment, above n. 24, para. 60 (Count 8).

⁵⁴ AFRC Appeals Judgment, above n. 10, para. 195.

⁵⁵ RUF Appeals Judgment, above n. 28, para. 735.

⁵⁶ *Taylor* Trial Judgment, above n. 6, para. 427.

⁵⁷ *ibid.*

⁵⁸ *Prosecutor v. Brima, Kamara and Kanu* (Further Amended Consolidated Indictment) SCSL-04-16-PT (18 February 2005) paras. 66–73; RUF Indictment, above n. 24, paras 69–76; *Taylor* Indictment, above n. 30, paras. 23–27.

⁵⁹ RUF Trial Judgment, above n. 4, para. 1088.

⁶⁰ *ibid.*, para. 1485.

⁶¹ *ibid.*, para. 1088.

⁶² *ibid.*

the salaries of members of the Council, procurement of arms and ammunition and logistics support for the fighters, and basics such as food and medicine.⁶³

Key witnesses described how, throughout the periods of AFRC/RUF control of the diamond mining area, the mining was organised and strategic, with forced civilian labour and coerced assistance at its core. Additionally, the Trial Chamber found that ‘the conditions worked at the mines cumulatively created an atmosphere of terror in which genuine consent was not possible.’⁶⁴ This combination of strategic organisation and control through terror was accomplished through a system reliant on captured civilians’ intent on survival, child soldiers and fear.

In order to create an enslaved workforce and identify mine locations, the AFRC/RUF created committees ‘made up of predominantly elderly civilians who had been captured’, with the mandate to ‘assist the fighters in obtaining civilian labour, to identify potential mining sites and to help assess the diamonds found.’⁶⁵ The AFRC/RUF troops would conduct house-to-house searches, or village raids, to capture at gunpoint 150–500 civilians per day.⁶⁶ While many of the witnesses referred to male civilians (both men and boys) being forced to mine, the judgments also reveal that some women and girls were also forced to mine.⁶⁷ However, young men seemed to be preferred.⁶⁸ This preference largely reflected a continuation of the gendered division of mining prior to the armed conflict.

The captured civilians were stripped naked or left only with their underpants (to prevent escape), tied together with their shirts, ropes or chains, and marched to the mining work.⁶⁹ Those who tried to hide or escape these raids were detained, stripped and left naked.⁷⁰ The wives of the captured male civilians were often left behind to do other work for the rebels.⁷¹

⁶³ *ibid.*, paras. 1088 and 1240.

⁶⁴ *Taylor* Trial Judgment, above n. 6, para. 1657.

⁶⁵ RUF Trial Judgment, above n. 4, para. 1090.

⁶⁶ AFRC Trial Judgment, above n. 6, para. 1326 (one witness indicated that 240 civilians were forced to mine each day by the RUF in Kono District); *Taylor* Trial Judgment, above n. 6, paras. 1627, 1629, 1639, 1720; RUF Trial Judgment, above n. 4, paras. 1246 (approximately 200 civilians were forced to mine in each major pit), 1247 (up to 300 civilians per day), 1249 (400 civilians forced to mine in Kono), 1256 (more than 500 civilians), and 1257 (200 civilians).

⁶⁷ RUF Trial Judgment, above n. 4, para. 1089. See also Susan McKay and Dyan Mazurana, *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone, and Mozambique: Their Lives During and After War* (Rights & Democracy, 2004) noting at pp. 91–93 that some girls were labourers in diamond mines.

⁶⁸ For example, RUF Trial Judgment, above n. 4, para. 1258.

⁶⁹ AFRC Trial Judgment, above n. 6, para. 1297; *Taylor* Trial Judgment, above n. 6, paras. 1627, 1639, 1742; RUF Trial Judgment, above n. 4, paras 1094, 1252.

⁷⁰ RUF Trial Judgment, above n. 4, para. 1093.

⁷¹ *Taylor* Trial Judgment, above n. 6, para. 1639 (reference to wives of captured civilians).

Once at the mining site, the miners ‘were not allowed to move freely in the mining sites and had to obtain passes for any movement’.⁷² They were forced at gunpoint to mine from sunrise to sunset, though not usually at night.⁷³ If they refused, would be flogged or shot dead.⁷⁴ The miners were kept in difficult conditions for long periods of time (e.g. in muddy water, washing the gravel) and were fed either nothing or very little, such as one plantain or some garri per day.⁷⁵ They were not provided with compensation, clothing (with most mining in their underwear only), medical care or housing.⁷⁶ They were often bitten by mosquitoes and ants, but were not given any medication to protect against disease, and consequently some died.⁷⁷ Some were forced to erect their own shacks so they could live near the mine.⁷⁸ Some of these civilians had nowhere else to live, as the RUF had burned their houses down.⁷⁹ As a result of this treatment, the miners were haggard.⁸⁰ Captured civilians were sometimes moved from mine to mine, as the war front moved and the rebels gained and lost control of land.⁸¹ When civilians did not find diamonds, the rebels would punish them, accusing them of being wizards or witches and flogging, stabbing or restraining the older civilians in cells.⁸²

Child soldiers were sometimes left to guard the mines.⁸³ These children had been brutalised and brainwashed. They were often addicted to drugs and were effective mining guards, as they would kill civilians whom they suspected of mining for themselves rather than for the ‘government’.⁸⁴ In addition, they would sometimes shoot at the miners as a result of internal RUF disagreements unrelated to the behaviour of the miners.⁸⁵

The AFRC/RUF initially designated certain days of the week – sometimes Monday to Thursday – as ‘government’ days, during which the civilians were

⁷² RUF Trial Judgment, above n. 4, para. 1094.

⁷³ *Taylor* Trial Judgment, above n. 6, para. 1742; RUF Trial Judgment, above n. 4, paras. 1095, 1247, 1251.

⁷⁴ *Taylor* Trial Judgment, above n. 6, paras. 1621, 1725, 1742.

⁷⁵ RUF Trial Judgment, above n. 4, para. 1433; *Taylor* Trial Judgment, above n. 6., paras. 1617–18, 1620, 1642, 1742; RUF Trial Judgment, above n. 5, para. 1094; AFRC Trial Judgment, above n. 6, para. 1292. While there was evidence that the miners were not given food, there were other situations in which some food was provided: AFRC Trial Judgment, above n. 6, para. 1296; *Taylor* Trial Judgment, above n. 6, paras. 1642, 1742; RUF Trial Judgment, above n. 4, paras. 1251, 1256.

⁷⁶ *Taylor* Trial Judgment, above n. 6, paras. 1617–18, 1620, 1642, 1742; RUF Trial Judgment, above n. 4, paras. 1248, 1251, 1258; AFRC Trial Judgment, above n. 6, para. 1292.

⁷⁷ RUF Trial Judgment, above n. 4, para. 1251.

⁷⁸ *ibid.*, para. 1248.

⁷⁹ *ibid.*

⁸⁰ *ibid.*, para. 1094.

⁸¹ For example, AFRC Trial Judgment, above n. 6, para. 1327.

⁸² RUF Trial Judgment, above n. 4, para. 1253.

⁸³ *ibid.*, para. 1251.

⁸⁴ *Taylor* Trial Judgment, above n. 6., para. 1641.

⁸⁵ RUF Trial Judgment, above n. 4, paras. 1084–87.

forced to work from sunrise to sunset in the mines and were not provided with any compensation or housing.⁸⁶ The civilians were forced to hand over any diamonds to the AFRC/RUF fighters supervising the mining, and these fighters were armed with an array of weapons, such as rocket-propelled grenades and AK-47s.⁸⁷ Civilians who tried to keep the diamonds they mined on 'government days' were flogged almost to death, or were killed as an example to other civilians.⁸⁸ When released from the mining, the civilians would go to surrounding villages to find food.⁸⁹ This system was also referred to as the 'one-pile' system, 'meaning that the RUF confiscated the entirety of the diamonds extracted'.⁹⁰

As the RUF Trial Chamber noted, the AFRC/RUF's 'government' system was markedly different from the civilian mining that had occurred prior to the conflict.⁹¹ In peacetime, mining sites were operated by civilians as private enterprises. The civilian bosses who owned the mining sites were responsible for negotiating remuneration with the workers and providing them with food and medical assistance. Workers generally handed diamonds to their bosses in return for a share of the profits from the sale of the diamonds.⁹²

Prior to 1999, forced mining was largely done by hand using shovels, pickaxes, sieves and pans.⁹³ After 1999, and more so after 2000, mining became mechanised, with the use of diggers and mechanical washers, to wash the gravel to reveal the stones.⁹⁴ The system also changed to the 'two pile system', in which the gravel was divided into two shares, one for the RUF and one for the miners.⁹⁵ This meant that some personal mining re-emerged, as had been the case in peacetime, and, in theory, 'civilians were allowed to keep the diamonds for resale'.⁹⁶ However, the RUF set up checkpoints around the mines, at which the RUF would 'take the diamonds found on civilians or force the sale of the diamonds to the RUF at prices fixed by the RUF agents'.⁹⁷ Additionally, if 'something attractive' was in a labourer's pile, it would be confiscated by the RUF.⁹⁸ In some places, the 'two pile system' was implemented through designation of non-'government days', though the AFRC/RUF would still be present at the mines, and would take the larger

⁸⁶ AFRC Trial Judgment, above n. 6, para. 1292; *Taylor* Trial Judgment, above n. 6, paras. 1617–18, 1620; RUF Trial Judgment, above n. 4, para. 1248.

⁸⁷ AFRC Trial Judgment, above n. 6, para. 1293; *Taylor* Trial Judgment, above n. 6, para. 1621.

⁸⁸ AFRC Trial Judgment, above n. 6, para. 1293; RUF Trial Judgment, above n. 4, para. 1095.

⁸⁹ RUF Trial Judgment, above n. 4, para. 1248.

⁹⁰ *ibid.*, para. 1250.

⁹¹ *ibid.*, para. 1093.

⁹² *ibid.*

⁹³ *ibid.*, para. 1250.

⁹⁴ *ibid.*, paras. 1250, 1255.

⁹⁵ *ibid.*, para. 380.

⁹⁶ *ibid.*, para. 1250.

⁹⁷ *ibid.*; *Taylor* Trial Judgment, above n. 6, para. 1742.

⁹⁸ *Taylor* Trial Judgment, above n. 6, para. 1727.

diamonds found by civilians and force them to wash the gravel.⁹⁹ The Court heard evidence that the 'two pile' system did not benefit civilians in reality.¹⁰⁰

Within the RUF-controlled mines, of which there were over 30, the civilians were put in groups of nine, called 'gangs', each with a leader.¹⁰¹ They were provided with shovels, diggers and, sometimes, boots.¹⁰² The miners were told to hand over any diamonds to the gang leader, who would then give it to the RUF Operation Commander.¹⁰³ The Operation Commander and the Deputy Commander would collect and weigh the diamonds, 'before reporting and passing them to the Overall Mining Commander and his team of diamond evaluators and clerks.'¹⁰⁴ The Overall Mining Commander was in charge of deploying the civilians to the mine sites, detailed bookkeeping and registering diamonds in Diamond Production Records according to area of providence.¹⁰⁵ The Records provided evidence of 8,000 pieces of diamonds extracted from Kono and Kailahun District between 30 October 1998 and 31 July 1999, and of 2,134 pieces of diamonds extracted in Kono between 2 February 1999 and 11 January 2000.¹⁰⁶ The Overall Mining Commander and Minister for Mines collected the diamonds, weighed and packaged them in sealed parcels and delivered them to one of the accused, Sesay, in his capacity as Battlefield Commander.¹⁰⁷ Sesay then conveyed them to the Chief of Defence Staff, and the diamonds would be bartered or sold for arms, ammunition, medicine and food.¹⁰⁸

While the rebels' centralised scheme provided significant economic benefit to the AFRC/RUF, there was also corruption within the system, with some AFRC/RUF commanders operating mining sites for their personal profit.¹⁰⁹ In these situations, AFRC/RUF commanders forced both civilians and bodyguards to mine and hand over any diamonds from the mines directly to the commanders.¹¹⁰

In sum, enslavement of largely male, but including some female, civilians for the purposes of forced diamond mining was a key element of the wartime economy for the AFRC/RUF. Without the mass civilian labour used to extract diamonds, which were then used to pay for weapons, food and other wartime provisions, it is unlikely that the rebels would have been able to sustain their war effort over a decade.

⁹⁹ AFRC Trial Judgment, above n. 6, para. 1293; *Taylor* Trial Judgment, above n. 6, paras. 1622, 1632.

¹⁰⁰ *Taylor* Trial Judgment, above n. 6, paras. 1730, 1736.

¹⁰¹ RUF Trial Judgment, above n. 4, paras. 1243, 1246.

¹⁰² *ibid.*, para. 1244.

¹⁰³ *ibid.*, para. 1243.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*, para. 1244.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*, para. 1245.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*, paras. 1092, 1259.

¹¹⁰ *ibid.*

3.2.2. *Forced Farming, Forced Food-Finding Missions and Forced Fishing*

As with the forced mining, the rebels – particularly the RUF – put into a place a ‘widespread and systematic’ program of slavery to supply food for the fighters.¹¹¹ This was done in a number of ways: through forced farming, harvesting in the wild, and fishing, as well as through forced food-finding missions in which food was stolen from the civilian population.

The forced farming system was extensive. The RUF established so-called ‘government’ farms in order to supply its fighters.¹¹² The logistics of the forced farming were managed by the RUF’s Army Agricultural Unit.¹¹³ Captured civilians were screened by a branch of the RUF tasked with addressing civilian-military issues, with some allocated to the Unit for forced farming to cultivate food.¹¹⁴ Some districts had farms with anywhere from 100–500 forced labourers.¹¹⁵ The civilians were forced to work at gunpoint.¹¹⁶ They had no choice as to when, where and how they worked.¹¹⁷ Civilians who refused to farm were beaten.¹¹⁸

As with the other forms of forced labour, the working conditions on the RUF farms were difficult.¹¹⁹ Many civilians walked many miles to and from the farms each day, while some were forced to live at the farms for extended periods or in ‘zoo bushes’, semi-permanent communities with civilians and fighters living in the bush to evade attack.¹²⁰ Those forced to farm were expected to undertake various hard labour tasks such as ‘brushing roads, weeding, cutting trees, cultivating crops and carrying the crops to trading posts’ or to RUF commanders for distribution.¹²¹ They were not permitted to have personal crops, and did not receive any pay, accommodation or food supply.¹²² All of the food produced by the farm was designated exclusively for the RUF commanders.¹²³ Since the forced labourers were not fed, many resorted to scavenging wild crops such as bananas and bush yams to survive.¹²⁴ Some of the civilians were injured, suffered from starvation or died as a result of their mistreatment.¹²⁵

¹¹¹ *ibid.*, para. 2158.

¹¹² *ibid.*, para. 1417.

¹¹³ *ibid.*

¹¹⁴ *ibid.*, para. 1414.

¹¹⁵ *ibid.*, paras. 1417, 1422 (300 labourers for two large ‘government’ farms).

¹¹⁶ *ibid.*, paras. 1422–23.

¹¹⁷ *ibid.*, paras. 1418–19.

¹¹⁸ *ibid.*, para. 1420.

¹¹⁹ *ibid.*, para. 1418.

¹²⁰ *ibid.*, paras 1415, 1418, 1425, 2367.

¹²¹ *ibid.*, para. 1418.

¹²² *ibid.*, paras. 1418, 1424.

¹²³ *ibid.*, para. 1424.

¹²⁴ *ibid.*, para. 1420.

¹²⁵ *ibid.*, para. 1418.

The rebels also forced civilians to cultivate rice farms, harvest the rice, pound the rice and hand it over to the rebels.¹²⁶ If civilians refused to work, they were beaten or killed.¹²⁷ The RUF fighters checked the rice on the farms, and if any of it was missing, they would beat the civilians.¹²⁸ In certain parts of the country, this forced rice cultivation and harvesting was central to the war economy, as rice was the main source of food.¹²⁹ Others were forced to harvest palm fruits and process the palm oil for the AFRC/RUF fighters.¹³⁰ All food grown and gathered by the civilians was referred to as 'government property' and was given to the rebels.¹³¹

As with internal corruption within the forced diamond mining system, civilians were also forced to labour at gunpoint on the private farms of the RUF commanders, often suffering maltreatment and beatings.¹³² The food produced on these farms was for the exclusive enjoyment of the specific commanders who controlled the farms.¹³³ For example, civilians were forced to farm and harvest rice, and also build a rice storage barn on a farm controlled by the accused Sesay.¹³⁴

In addition to the RUF farms, the RUF created a forced subscription system: each town occupied by the RUF was forced to provide a certain amount of farm produce to the RUF.¹³⁵ This included contributions of rice, cocoa, palm oil, coffee and meat, as well as other food.¹³⁶ While some of this food was used for RUF consumption, cocoa, coffee and palm oil were sold to buy ammunition.¹³⁷ For example, from 1997–1999 in Talia, up to 150 civilians would 'subscribe' to harvest and deliver 300 bags of cocoa per year to the RUF.¹³⁸ Apart from forced farming and the forced subscription system, the RUF also 'simply confiscated from civilians'.¹³⁹

Some civilians were forced to fish and hand over anything caught to the rebels.¹⁴⁰ For example, in Talia, women were forced to fish for the RUF.¹⁴¹

¹²⁶ AFRC Trial Judgment, above n. 6, paras. 1348, 1349, 1368–69.

¹²⁷ *ibid.*, para. 1349.

¹²⁸ RUF Trial Judgment, above n. 4, para. 1423.

¹²⁹ AFRC Trial Judgment, above n. 6, para. 1821.

¹³⁰ RUF Trial Judgment, above n. 4, para. 1230.

¹³¹ *ibid.*, para. 1235.

¹³² *ibid.*, paras. 1425, 1480.

¹³³ *ibid.*, para. 1425.

¹³⁴ *ibid.*, para. 1426.

¹³⁵ *ibid.*, para. 1427.

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ *ibid.*, para. 1428.

¹³⁹ *ibid.*, para. 1479.

¹⁴⁰ *ibid.*, para. 1230.

¹⁴¹ *ibid.*, para. 1428.

Those who did not catch fish were beaten.¹⁴² In the same region, women were also forced to hunt as a means of providing food to the RUF.¹⁴³

Apart from forced farming, forced fishing and forced food ‘subscription’, witnesses also described being forced to search for food and fetch water for the rebels, sometimes through food-finding missions.¹⁴⁴ These missions could last as long as a week and included looting food from other civilians.¹⁴⁵ If they refused to find food, the civilians risked being killed by the rebels.¹⁴⁶

Forced trading sometime accompanied the forced farming, subscription or seizure of food. For example, those who were near the border with Guinea were forced to trade farm products such as cocoa, coffee and palm oil at border trading sites once a week, in exchange for rice, salt, Maggi (stock cubes) and clothes.¹⁴⁷ The money earned in these transactions was given to the RUF.¹⁴⁸

The enslaved civilians were sometimes kept in camps surrounded by checkpoints, and were not permitted to move alone outside the camps.¹⁴⁹ Their lives were so prescribed that they could not even urinate without an escort.¹⁵⁰ The camp leaders assembled the civilians on a daily basis and informed them of the rules, ‘the first of which was that escape was prohibited.’¹⁵¹ Civilians who attempted to escape were beaten, given extra work or executed.¹⁵² Conditions in these camps were difficult, with frequent shortages of food and medicine.¹⁵³

The rebels targeted both women and men, including older civilians, for enslavement related to food procurement.¹⁵⁴ This is not surprising, as women, men and children all farmed – albeit often with differing, gender-specific tasks – in pre-war Sierra Leone.¹⁵⁵ Indeed, civilians living in rural Sierra Leone produced 70 per cent of the nation’s food, with women constituting 80 per cent of that labour force.¹⁵⁶ Within the forms of enslavement, the Special Court’s judgments reveal both gender-neutral targeting (insofar as both women and

¹⁴² *ibid.*

¹⁴³ *ibid.*, para. 1479.

¹⁴⁴ *ibid.*, paras. 1218, 1233, 1237; AFRC Trial Judgment, above n. 6, paras. 1346, 1360, 1387.

¹⁴⁵ RUF Trial Judgment, above n. 4, para. 1235.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*, paras. 1430–31.

¹⁴⁸ *ibid.*, para. 1431.

¹⁴⁹ *ibid.*, paras. 1218, 1233.

¹⁵⁰ *ibid.*, para. 1234.

¹⁵¹ *ibid.*, paras. 1222, 1231.

¹⁵² *ibid.*, paras. 1218, 1231.

¹⁵³ *ibid.*, para. 1220.

¹⁵⁴ *ibid.*, para. 1423.

¹⁵⁵ J. BEOKU-BETTS, ‘Agricultural Development in Sierra Leone: Implications for Rural Women in the Aftermath of the Women’s Decade’ (1990) 37(1) *Africa Today* 19 at pp. 21, 23, 24, 27, 29.

¹⁵⁶ MINISTRY OF SOCIAL WELFARE, GENDER AND CHILDREN’S AFFAIRS, *National Policy on the Advancement of Women* (Government of Sierra Leone, 2000) 7, cited in HUMAN RIGHTS WATCH, *We’ll Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict*, Human Rights Watch 2003, n. 84.

men were forced to carry out food procurement labour)¹⁵⁷ and gender-specific targeting, for example, in the example noted above of women forced to fish in Talia.

Forced farming and other means of food procurement by civilian women, men and children were absolutely crucial features of Sierra Leone's war economy: without these forms of enslavement, the rebels would not have been able to survive and carry out their modes of control and exploitation.

3.2.3. *Forced Carrying of Loads*

Several accused were convicted by the Special Court for Sierra Leone for the crime against humanity of enslaving civilians, including by forcing them to carry loads.¹⁵⁸ Both male and female civilians, including children, were captured and forced to carry loads at gunpoint, often on their heads, from place to place, in order to supply the fighters.¹⁵⁹ These loads included pillaged goods, the possessions of rebels moving from one encampment to another, arms, ammunition, medicine and food (such as rice, beans and ground nuts).¹⁶⁰ For example, some civilians were forced to carry beds, baling machines, communications equipment, radio batteries, logged wood, corrugated iron, doors from houses and bombs.¹⁶¹ The forced portering of arms and ammunition ensured that the RUF could move weapons supplies procured in Liberia to RUF headquarters in Sierra Leone and out to RUF-held areas.¹⁶² It also ensured the movement of valuable loads, such as coffee and cocoa, to RUF headquarters and the return supply of staples such as salt, Maggi and cigarettes for the troops.¹⁶³

Civilians who were unable to carry their loads were executed rather than released, and their loads were transferred to the heads of other civilians.¹⁶⁴ Children who did not walk very fast were beaten.¹⁶⁵ Sometimes these groups of forced labourers were as large as 500 captured civilians.¹⁶⁶ The rebels sought

¹⁵⁷ RUF Trial Judgment, above n. 4, para. 1423.

¹⁵⁸ AFRC Trial Judgment, above n. 6, paras. 569, 571–72; RUF Trial Judgment, above n. 4, paras. 679, 683, 686.

¹⁵⁹ AFRC Trial Judgment, above n. 6, paras. 1315, 1316, 1317, 1342, 1343, 1344, 1348, 1356, 1369, 1451.

¹⁶⁰ *ibid.*, paras. 1324, 1326, 1338, 1343, 1345, 1359, 1379; RUF Trial Judgment, above n. 4, para. 1218.

¹⁶¹ AFRC Trial Judgment, above n. 6, paras. 1330, 1340, 1370 (the iron was sold in Liberia and the doors in Guinea), 1383; RUF Trial Judgment, above n. 4, para. 1217.

¹⁶² RUF Trial Judgment, above n. 4, para. 1221.

¹⁶³ *ibid.*, para. 1237.

¹⁶⁴ AFRC Trial Judgment, above n. 6, para. 1326; RUF Trial Judgment, above n. 4, paras. 1216, 1221: 'This was also done in order to prevent them from reporting the abductions and location of the rebels': para. 1216.

¹⁶⁵ AFRC Trial Judgment, above n. 6, para. 1348.

¹⁶⁶ *ibid.*, para. 1326.

out strong civilians for forced portering,¹⁶⁷ which is why they often targeted males.¹⁶⁸ For example, the RUF Trial Chamber noted that, in Kono, '[s]trong men were used to carry food for the troops'.¹⁶⁹ However, they would also use a wide range of captured civilians, both female and male, from children to adult, when necessary. Some were children as young as 8 years old.¹⁷⁰ Sometimes the captured civilians were guarded by armed boys.¹⁷¹

Forced construction was also touched upon in the judgments of the Special Court for Sierra Leone. For example, the AFRC trial judgment discusses the case of a male civilian captured by the RUF and former members of the Sierra Leone Army who was forced to build over 20 huts and guard posts along a strategically important road for RUF fighters.¹⁷² Another witness described how civilians were forced by the RUF to construct roads for vehicles.¹⁷³

The forced carrying of loads and forced road construction contributed to the rebels' war economy because it created a human and vehicular supply chain for a variety of provisions. As noted earlier, although the selection of forced porters was sometimes highly gendered, with the RUF seeking out strong men to carry heavy loads, at other times, particularly when mass movement was occurring within the war front or substantial looting had occurred, all types of civilians were pressed into service and used to porter goods. There is not enough detail on the forced road and other construction to make gender-related conclusions.

3.2.4. *Forced Domestic Labour, Sexual Slavery and Forced Marriage*

A highly gendered type of enslavement within the Sierra Leonean war economy related to forced domestic labour, sexual slavery and forced marriage: three separate but also, at times, intertwined forms of servitude. Girls and women were abducted or captured and often assigned tasks that were considered 'female' in nature in order to support the political and socio-economic structures of the AFRC and RUF. In this sense, these captured girls and women were fundamental to the ability of the rebels to focus on the waging of war. This section will focus on the so-called 'bush wife' or forced marriage system as it encapsulates both forced domestic labour and sexual slavery under the heading of a single form of harm. However, it is important to note that forced domestic labour and sexual slavery also existed outside of the forced marriage framework,

¹⁶⁷ *ibid.*, para. 1355.

¹⁶⁸ AFRC Trial Judgment, above n. 6, para. 1357.

¹⁶⁹ RUF Trial Judgment, above n. 4, para. 1215.

¹⁷⁰ AFRC Trial Judgment, above n. 6, paras. 1331, 1338.

¹⁷¹ *ibid.*, para. 1384.

¹⁷² *ibid.*, para. 1341.

¹⁷³ *ibid.*, para. 1371.

particularly when the victims were very young or were not assigned to a particular fighter.¹⁷⁴

The AFRC, RUF and *Taylor* trial judgments provide significant detail on the 'bush wife' system implemented during the Sierra Leone civil war. This was important, as this form of servitude had never before been examined by an international criminal tribunal. The judgments explained how abducted or coerced girls and women (some as young as 10 years old)¹⁷⁵ were forcibly assigned to AFRC and RUF commanders and soldiers regardless of whether they were already legally married,¹⁷⁶ and this assignment was registered.¹⁷⁷ The RUF Trial Chamber found that 'the use of the term 'wife' by the rebels was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions'.¹⁷⁸ The term 'wife' was used although no marriage had occurred under law.¹⁷⁹ As with the forced diamond mining, the bush wife system was systematic in its operation and documentation – for example, with paperwork to document the dispersion of the captured girls and women as property, and mechanisms to punish girls and women who refused to do as they were told by their 'husbands'.¹⁸⁰

These 'wives' were expected to submit to rape on demand by their 'husbands' and maintain an exclusive sexual relationship.¹⁸¹ They were required to cook, clean, carry their 'husbands' possessions when he had to move, bear and rear any resulting children, and otherwise do whatever their 'husband' instructed.¹⁸² Some RUF 'husbands' has multiple 'bush wives'.¹⁸³ The 'husbands' knew that they held power over their 'wives' and that the victims were not consenting to their 'bush wife' status.¹⁸⁴ The rebels created systems of punishment for 'bush wives' who did not do what they were told by their 'husbands', including being lashed and locked in a box.¹⁸⁵ The lives of these 'bush wives' were often filled with extreme violence. The deliberate and concerted campaign to rape women constitutes 'an extension of the battlefield to the women's bodies, a degrading treatment that inflicts physical, mental and sexual suffering to the victims and

¹⁷⁴ For example, after the invasion of Freetown, the retreating RUF forces intentionally abducted girls and women and forced many of them to do domestic chores: RUF Trial Judgment, above n. 4., paras. 1589–91.

¹⁷⁵ RUF Trial Judgment, above n. 4, para. 1553.

¹⁷⁶ *ibid.*, para. 1412.

¹⁷⁷ AFRC Trial Judgment, above n. 6, paras. 1128–29.

¹⁷⁸ RUF Trial Judgment, above n. 4, para. 1466.

¹⁷⁹ AFRC Trial Judgment, above n. 6, para. 701.

¹⁸⁰ *ibid.*, paras. 1115–33.

¹⁸¹ RUF Trial Judgment, above n. 4, paras. 460, 1154–55, 1211–13, 1293, 1295, 1413, 1469, 1472.

¹⁸² *ibid.*, paras. 152, 164, 460, 1154–55, 1211–13, 1293, 1295, 1413, 1469, 1472; AFRC Trial Judgment, above n. 6, p. 711, paras 13–18 (Sebutinde Concurring Opinion).

¹⁸³ RUF Trial Judgment, above n. 4, para. 1411.

¹⁸⁴ *ibid.*, para. 1293.

¹⁸⁵ AFRC Trial Judgment, above n. 6, para. 1138.

their communities'.¹⁸⁶ The status of 'bush wife' led to a number of physical, psychological and sociological harms, including injuries caused by rape and beatings, and 'a lasting social stigma which hampers [the victim's] recovery and reintegration into society'.¹⁸⁷

Forced marriage was the subject of intense discussion by the Trial and Appeals Chambers of the Special Court for Sierra Leone for several legal reasons.¹⁸⁸ However, the contribution of forced marriage (and, separately, forced domestic labour and sexual slavery) to Sierra Leone's war economy was not as clearly articulated as the contribution of, for example, forced diamond mining. This may be because the work captured by these labels – for example, cooking, cleaning and childrearing – resembles the types of work often overlooked and undervalued in economic valuations as occurring in the 'private' sphere. Additionally, the sexual violence present in forced marriage is challenging to articulate as part of a war economy but certainly should be considered as such. Sexual slavery was present in the forced marriages for specific reasons, including an overarching 'calculated and concerted pattern ... to use sexual violence as a weapon of terror' to assert physical and psychological control of the female (and, by extension, male) civilian population,¹⁸⁹ and as a 'reward' or incentive for troops not otherwise receiving pay.¹⁹⁰

¹⁸⁶ RUF Trial Judgment, above n. 4, para. 1602.

¹⁸⁷ *ibid.*, para. 1296.

¹⁸⁸ The Trial and Appeals Chambers grappled with a number of conceptual legal issues, outlined in V. OOSTERVELD, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties' (2011) 2 *Journal of International Humanitarian Legal Studies* 127.

¹⁸⁹ RUF Trial Judgment, above n. 4, para. 1347. Note that the AFRC and RUF Trial Chambers came to differing conclusions on this. The AFRC Trial Judgment, above n. 6, para. 1454 found that the 'primary purpose behind commission of abductions and forced labour was not to spread terror among the civilian population, but rather was primarily utilitarian or military in nature'. The AFRC Trial Chamber came to the same conclusion with respect to sexual slavery, *ibid.*, para. 1459: 'the primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs'. Even if subjection to forced labour indeed did spread terror among the civilian population, this was rather a 'side-effect' and did not satisfy the specific intent required for this crime: *ibid.*, para. 1453. The Appeals Chamber declined to overturn these findings because the accused had already been convicted of the war crime of committing acts of terror for other acts and therefore adding the enslavement crimes was 'an unnecessary exercise': AFRC Appeals Judgment, above n. 10, para. 172. In contrast, the RUF Trial Judgment found that the consistent pattern of sexual violence, such as sexual slavery and forced marriage, demonstrated the requisite intent to terrorise the civilian population, and therefore constituted acts of terrorism: RUF Trial Judgment, above n. 4, paras. 1346–52, 1493. On other types of enslavement, the RUF Trial Judgment found that the prosecution had failed to prove, in relation to forced farming, that the accused acted with the specific intent to terrorise the civilian population: RUF Trial Judgment, above n. 4, para. 1494. However, forced diamond mining was an act of terror: *ibid.*, para. 2051.

¹⁹⁰ AFRC Trial Chamber, above n. 6, para. 1459.

In sum, the AFRC and RUF put into place organised systems of enslavement to provide ‘female’ domestic work, such as cooking and cleaning, to support the roles of male commanders and fighters. They also simultaneously created a system of sexual slavery to allow for sanctioned rape as a means of control of the civilian population, and as a reward for male commanders and fighters.¹⁹¹

4. LESSONS FROM THE COURT’S CONSIDERATION OF ENSLAVEMENT, GENDER AND WAR ECONOMIES

The depth of analysis by the Special Court for Sierra Leone of the role of gender in war economies grew from case to case, with the most sophisticated consideration found in the RUF and *Taylor* trial judgments. That said, the type of analysis was still somewhat rudimentary and there are lessons that can be learned from the Special Court’s approach.

The first lesson is that future courts could and should be more explicit about the gender of the affected or targeted populations in order to ‘surface’ the gendered impacts of various crimes, including enslavement.¹⁹² While the above examination of various forms of enslavement highlighted the gender of the civilians involved in forced diamond mining, food procurement and portering, the Special Court often only referred to the affected population generically as ‘civilians’. The gender of these civilians was revealed through an examination of the pronouns used in the description of evidence, or by referring to the transcripts. Thus, it only became clear through this textual analysis that although men were largely the targets of forced diamond mining, they were not the sole targets. The exception to this approach related to evidence and analysis of forced marriage, sexual slavery and forced domestic labour: the judgments clearly highlighted the impact of these violations on girls and women. A more explicit articulation of the gender of the victims would provide a sharper picture of modes of victimisation and therefore inform the Court’s analysis of harm caused to victims – and categories of victims – by the perpetrators.

The second lesson is that even a basic articulation of the link between gender and the war economy provides important gender-sensitive contextualisation of how particular fighting forces integrated themselves into a geographic area

¹⁹¹ Note that not all males assigned ‘bush wives’ likely accepted such ‘wives’ willingly. Aijazi and Baines highlight that most men assigned forced ‘wives’ by the Lord’s Resistance Army in the Ugandan conflict had no choice about who would be their wife: O. AIJAZI AND E. BAINES, ‘Relationality, Culpability and Consent in Wartime: Men’s Experiences of Forced Marriages’ (2017) 11(3) *International Journal of Transitional Justice* 463, 476–77.

¹⁹² This term is taken from R. COPELON, ‘Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law’ (1994) 5(2) *Hastings Women’s Law Journal* 243.

at particular points in time through massive social disruption.¹⁹³ For example, the explanations of forced diamond mining and forced marriage provided in the AFRC, RUF and *Taylor* judgments demonstrated that this integration was oftentimes carried out along highly gendered lines: for example, forcing men to work in the mines left many women and girls in vulnerable situations, and they were abducted into forced marriages.

A third, related, lesson is that gendered violence used to secure the functioning of war economies is part of a continuum of gendered social, political and economic violence in conflict.¹⁹⁴ Gendered violence is often committed in tandem with other types of atrocities. Additionally, there is often an overlap between war economies and economies of criminality.¹⁹⁵ Thus, attention to the place of gendered international crimes in the creation and perpetuation of war economies helps to more fully explain the overarching context of the armed conflict. At present, explanations of conflicts tend to overlook how gendered ideologies or inequalities are intrinsic to the 'sustenance and legitimization' of the violence.¹⁹⁶

Some may question why an international criminal tribunal should situate crimes such as the crime against humanity of enslavement within the context of a war economy. The answer to that question may be clear for violations such as forced diamond mining, in which an economic analysis reveals how diamonds fuelled, for example, weapons supplies for the RUF. However, the same reasoning applies to other types of enslavement, which were also necessary or beneficial to the supply of food and other goods, and the supply of free domestic and sexual services to the fighting forces.

The Special Court for Sierra Leone's judgments set a positive precedent in the implicit and explicit prosecutorial and judicial recognition of the links

¹⁹³ Such contextualisation is fundamental to a thorough understanding of the interconnections between crimes in a conflict: L. BAIG, M. JARVIS, E. MARTIN SELGADO AND G. PINZAUTI, 'Contextualizing Sexual Violence – Selection of Crimes' in S. BRAMMERTZ AND M. JARVIS, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, OUP 2016, pp. 172, 173.

¹⁹⁴ F. NÍ AOLÁIN, D.F. HAYNES AND N. CAHN, *On the Frontlines: Gender, War and the Post-Conflict Process*, Oxford University Press 2011, p. 36.

¹⁹⁵ *ibid.*, p. 35. The authors note at p. 35 that this examination can expose how 'women's labour operates to sustain and support ongoing hostilities within and between states'. This crime-conflict overlap allows for various forms of resource exploitation and money-laundering, providing 'incentive to foster more conflict in order to spirit away and hide more resources', at p. 249.

¹⁹⁶ Dubravka Zarkov notes that "there is still no substantial feminist scholarship of war economies": D. ZARKOV, 'From Women and War to Gender and Conflict? Feminist Trajectories' in F. NÍ AOLÁIN, D.F. HAYNES, N. CAHN AND N. VALJI, *The Oxford Handbook of Gender and Conflict*, Oxford University Press 2017, pp. 17, 29. Thus, she calls for more analysis of, *inter alia*, how women and men 'become modes of both economic production and social reproduction' and 'how racialized and sexualized gendered ideologies and practices, hierarchies and inequalities become necessary for the sustenance and legitimization of the violence world order', at p. 29. This chapter posits that there is a role for international courts to contribute to this analysis.

between, and harms stemming from,¹⁹⁷ the confluence of enslavement, war economies and gender. But the Court's efforts represent only a start for international criminal law. Further and more nuanced contextualisation of crimes such as enslavement within the larger picture of war economies, and the role gender plays within both these crimes and these economies, will more clearly identify and explain the role of the accused and the experiences of the victims.

¹⁹⁷ NÍ AOLÁIN, HAYNES AND CAHN, above n. 194, pp. 35–36: '[W]omen are deeply affected by violent disorder in complex and multifaceted ways' and an understanding of their forced contributions to the war economy would assist in a deeper understanding of the harms they have experienced.