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**Continuing Uncertainties:
Forced Marriage as a Crime
Against Humanity**

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ABSTRACT

On 22 February 2008, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) delivered its judgment in the Armed Forces Revolutionary Council (AFRC) case. This decision stands out as unique for setting significant precedent in the development of gender-based crimes in international criminal law by holding forced marriage to be a crime against humanity under the “other inhumane acts” category contained in Article 2(i) of the Statute of the Special Court for Sierra Leone. Although this recognition of forced marriage signifies the SCSL’s commitment to actively prosecute gender-based crimes, and may further set persuasive precedent for other international adjudicative bodies, there remain certain elements of this crime that, despite the Appeals Chamber’s decision, are unsettled and unclear. The purpose of this paper is to raise, explore, and assess these pressing questions. In the first part of the paper, the author raises three questions concerning the technical elements of the crime of forced marriage. Namely, the author asks: whether forced marriage violates the principle, *nullem crimen sine lege*; whether forced marriage is an adequately specific and distinct crime to be prosecuted separately from previously enumerated crimes; and finally, whether the definition of forced marriage requires a nexus to armed conflict. The second part of the paper raises questions relating to the implications of defining this crime using the label, *marriage*. Specifically, the author asks whether this label invokes existing connotations in relation to culture, gender, sexual orientation, and age, and whether these connotations may affect the application of this crime to new contexts. The author concludes that, without addressing these continuing uncertainties in the definition of forced marriage, the force of the precedent provided by the AFRC case is potentially insufficient to prosecute future instances of forced marriages in contexts outside of Sierra Leone, thereby failing to provide justice for *all* victims of forced marriage worldwide.

KEYWORDS: Sierra Leone; force marriage; crimes against humanity; gender-based violence.

RÉSUMÉ

Le 22 février 2008, la Cour d’appel du Tribunal Spécial pour la Sierra Leone (TSSL) a livré son jugement dans le cadre de l’affaire du Conseil Révolutionnaire des Forces Armées (CRFA). Cette décision est unique, créant ainsi un précédent dans le développement du droit criminel international concernant les crimes fondés sur le sexe, en énonçant que le mariage forcé est un crime contre l’humanité sous la catégorie “autres actes inhumains” de l’ Article 2(i) du Statut du Tribunal Spécial de Sierra Leone. Même si cette reconnaissance du mariage forcé illustre l’engagement du TSSL à poursuivre activement les crimes fondés sur le sexe et peut également servir de précédent pour d’autres instances internationales, certains éléments de ce crime, malgré la décision de la Cour d’appel, demeurent vagues et non définis.

L’objectif de cet article est de préciser, d’explorer et d’analyser certaines questions fondamentales de cette décision et de la notion de mariage forcé. Premièrement, l’auteur analyse trois questions concernant les éléments techniques du mariage forcé. Plus précisément, l’auteur discute si le mariage forcé viole le principe, *nullem crimen sine lege*; si le mariage forcé est un crime suffisamment spécifique et distinct pour être poursuivi séparément d’autres crimes déjà énumérés ; et finalement si la définition du mariage forcé est constitutive du nexus d’un conflit

armé. Deuxièmement, ce texte explore les implications de la définition du crime en utilisant la notion de mariage. En fait, l'auteur questionne l'usage de la notion de mariage en relation avec une idée précise de culture, genre, orientation sexuelle, âge et explore l'effet de ces connotations sur l'application potentielle de ce crime dans d'autres contextes. Finalement, l'auteur conclut qu'à défaut de prendre en considération ces éléments vagues et incertains de la définition du mariage forcé, la force du précédent créé par le cas de la CRFA est potentiellement insuffisante pour la poursuite future de cas de mariage forcé en dehors du contexte de la Sierra Leone, limitant la possibilité d'une justice pour l'ensemble des victimes de mariages forcés dans le monde.

MOTS CLÉS : Sierra Leone : mariage forcé : crimes contre l'humanité ; violence fondée sur le genre

INTRODUCTION:

On 22 February 2008, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) delivered its judgment in the Armed Forces Revolutionary Council (AFRC) case regarding the three accused, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.¹ The Appeals Chambers' decision stands out as unique for a number of reasons,² but, of particular interest for the purposes of this paper, the Appeals Chamber set significant precedent in the development of gender-based crimes in international criminal law by holding forced marriage to be a crime against humanity under the "other inhumane acts" category contained in Article 2(i) of the Statute of the Special Court for Sierra Leone.³ Until this point, the SCSL in the AFRC case was the first international adjudicative body to explore forced marriage as a crime against humanity.⁴ Very soon after this decision, the SCSL Appeals Chamber in the Revolutionary United Front (RUF) case upheld the first ever convictions by an international adjudicative body of forced marriage as a crime against humanity.⁵

The international community largely responded enthusiastically to this unprecedented recognition of forced marriage, declaring that the AFRC decision signifies the SCSL's commitment to actively prosecute gender-based crimes within its jurisdiction.⁶ The international community was also generally optimistic that the AFRC case set persuasive precedent for other international courts and tribunals, including the International Criminal Court (ICC), to subsequently prosecute forced marriage as a crime against humanity.⁷ In fact, forced marriage-

¹ See Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Appeal Judgment (Feb. 22, 2008) [hereinafter *AFRC Appeals Judgment*].

² The AFRC case was also one of the first cases to adjudicate at the international criminal law level the war crime of conscription, enlistment, and use of child soldiers. See Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. INT'L L. 131, 137-51 (2007).

³ Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute].

⁴ But see Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14, Trial Chamber Judgment, para. 48 (Aug. 2, 2007). In this case, the SCSL Trial Chamber orally stated that evidence would not be heard regarding crimes of a sexual nature or forced marriage despite the fact that such practices were present in the context of the case, as it was inadmissible under the current counts. The Trial Chamber further denied the Prosecution's request for leave to amend the Indictment to add four new counts relating to sexual violence. The SCSL Appeals Chamber subsequently attempted, but failed, to correct this omission. See Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14, Appeal Judgment, para. 427 (May 28, 2008). See also Oosterveld, *supra* note 2, at 152, 159.

⁵ See Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15, Appeal Judgment (Oct. 26, 2009) [hereinafter *RUF Appeals Judgment*]. Most recently, on 5 November 2009, the Office of the Co-Investigating Judges (OCIJ) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) released information regarding the scope of the judicial investigation of Case 002, which includes allegations of crimes committed by Khieu Samphan, Nuon Chea, Ieng Sary, Ieng Thirith and Duch between 17 April 1975 and 6 January 1979. The OCIJ is investigating acts which include forced marriage. See ECCC, STATEMENT FROM THE CO-INVESTIGATING JUDGES: JUDICIAL INVESTIGATION OF CASE 002/19-09-2007-ECCC-OCIJ AND CIVIL PARTY APPLICATIONS (Nov. 5, 2009), http://www.eccc.gov.kh/english/cabinet/press/138/ECCC_Press_Release_5_Nov_2009_Eng.pdf.

⁶ See, e.g., Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime Against Humanity*, 6 J. INT'L CRIM. JUST. 1033, 1034 (2008); Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013, 1020 (2008); Khristopher Carlson & Dyan Mazurana, FORCED MARRIAGE WITHIN THE LORD'S RESISTANCE ARMY, UGANDA 40 (2008),

<https://wikis.uit.tufts.edu/confluence/display/FIC/Forced+Marriage+within+the+LRA,+Uganda>.

⁷ See, e.g., Jain, *supra* note 6, at 1032; Oosterveld, *supra* note 2, at 132; Valerie Oosterveld, *Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes*, 17 AM. U. J. GENDER SOC. POL'Y & L.

type practices, similar to those found during the Sierra Leonean conflict, have been likewise alleged in other conflicts, including in Cambodia under the Khmer Rouge regime,⁸ in Rwanda,⁹ in Uganda,¹⁰ in the Darfur region of Sudan, and in the Democratic Republic of the Congo.¹¹

This enthusiasm regarding the potential precedence set by the AFRC decision is similarly shared by this author. However, there remain certain elements of this new crime of forced marriage that, despite the Appeals Chamber decision in the AFRC case, remain unsettled, unclear, and certainly open to debate, especially with regard to the exact definition of forced marriage, along with the precise conduct that constitutes this crime. While the AFRC decision provides some description of the conduct constituting this practice in the context of Sierra Leone, this description potentially provides little guidance for other international adjudicative bodies, which could face forced marriage practices in new and varying contexts. Consequently, in order to provide sufficient clarity to this new crime, it is imperative that certain issues and debate be addressed.¹²

It is this lack of clarity with regard to the definition and constitutive elements of forced marriage that is the focus of this paper. This paper's purpose is to raise, explore, and assess pressing questions that must be addressed in relation to forced marriage in order to accord this crime a certain level of coherence. The author does not purport to authoritatively answer these often times complex questions, but, rather, the author hopes that the mere act of raising these questions may provide a means through which this crime may be better applied to new and varying contexts.

In order to raise these questions, this paper is divided into three major parts. The first part of this paper addresses certain preliminary issues. Specifically, this initial section defines the practice of forced marriage in the context of the Sierra Leonean conflict, notes the author's use of language in this paper, and concludes with a brief overview of the SCSL Trial and Appeals Chamber judgments in the AFRC case. Following this section, in the second part of this paper, the author raises three questions concerning the technical elements of the crime of forced marriage. Namely, the author asks: whether forced marriage violates the international criminal law principle, *nullem crimen sine lege*, which prohibits the retroactive prosecution of crimes; whether forced marriage is an adequately specific and distinct crime to be prosecuted separately from previously enumerated crimes, such as sexual slavery and forced labor; and finally, whether the definition of forced marriage requires a nexus to armed conflict. Finally, the third part of this

407, 418 (2009); Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of 'Forced Marriage'*, 7 NW. U. J. INT'L HUM. RTS. 133, para. 11 (2009). The capability of the ICC to prosecute the crime of forced marriage was also advocated earlier. See Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. DAVIS J. INT'L L. & POL'Y 197, 220 (2001).

⁸ See, e.g., ELIZABETH BECKER, WHEN THE WAR WAS OVER: THE VOICES OF CAMBODIA'S REVOLUTION AND ITS PEOPLE 162 (1986); François Ponchaud, *Social Change in the Vortex of Revolution, in CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH* 151, 166-67 (Karl D. Jackson ed., 1989).

⁹ See, e.g., Kalra, *supra* note 7; Human Rights Watch, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), <http://www.hrw.org/legacy/reports/1996/Rwanda.htm>.

¹⁰ See, e.g., Carlson & Mazurana, *supra* note 6; Amnesty Int'l, BREAKING GOD'S COMMANDS: THE DESTRUCTION OF CHILDHOOD BY THE LORD'S RESISTANCE ARMY (1997), <http://www.amnesty.org/en/library/asset/AFR59/001/1997/en/e3d1420e-ea53-11dd-965c-b55c1122d73f/afr590011997en.pdf>.

¹¹ See Frulli, *supra* note 6, at 1037, 1041.

¹² This lack of clarity regarding the crime of forced marriage has also been highlighted by other commentators. See Oosterveld, *supra* note 2, at 152, 170-71; Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes*, 7 J. INT'L CRIM. JUST. 353, 371 (2009).

paper raises questions relating to the implications of defining this crime using the label, *marriage*. Specifically, the author asks whether this label invokes existing connotations in relation to culture, sex and gender, sexual orientation, and age, and whether these connotations may affect the application of this crime to new and varying contexts.

(1) SETTING THE STAGE: PRELIMINARY CONSIDERATIONS REGARDING FORCED MARRIAGE

(i) What is forced marriage?:

Before beginning this analysis, it is imperative to outline a general definition of forced marriage, particularly the form of forced marriage carried out during the Sierra Leonean conflict, as this was the context in which the crime of forced marriage was first recognized. Broadly speaking, forced marriage most commonly involves a woman or girl who coercively enters into a formal conjugal union with an adult male. The major distinguishing feature between a forced marriage and a lawful marriage is the presence, or absence, of valid consent of the female or her family. Forced marriage is characterized by the traditional attributes of conjugal unions, albeit under coercive circumstances. These traditional attributes include: cohabitation; bearing of children; sexual relations; and domestic responsibilities such as cooking and cleaning.¹³ Forced marriage therefore involves both sexual and non-sexual attributes.¹⁴

The Sierra Leonean conflict provides an illustrative example of forced marriage. During this conflict, thousands of women and girls were raped and abducted by the RUF, the West Side Boys, and the AFRC.¹⁵ Many of these abducted women and girls were subsequently assigned to an adult male combatant as a “wife.” It is estimated that sixty percent of girls involved with the fighting forces in Sierra Leone acted as such “wives.”¹⁶ A “wife” was forced to submit to all her “husband’s” sexual demands,¹⁷ and was frequently subjected to physical abuse.¹⁸ In addition to the sexual aspect of this practice, the “wife” was also forced to perform a range of domestic tasks, including cooking, cleaning, and gathering water.¹⁹ If a “wife” attempted to escape, she risked her life,²⁰ or risked capture by another rebel group.²¹ Further, many “husbands” carved their rebel camp’s letters, “RUF” or “AFRC,” onto the chests of their “wives.”²² As a result of this marking, “wives” who escaped and were ultimately caught by government forces were suspected of being rebels themselves, and often killed.²³ These “wives” also experienced

¹³ Jain, *supra* note 6, at 1024-25.

¹⁴ Oosterveld, *supra* note 7, at 414-15.

¹⁵ See generally Susan McKay & Dyan Mazurana, WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR (2004), <http://www.dd-rd.ca/site/publications/index.php?id=1401&subsection=catalogue>; Human Rights Watch, WE’LL KILL YOU IF YOU CRY: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT (2003), <http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf>; Physicians for Human Rights, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE: A POPULATION-BASED ASSESSMENT (2002), <http://physiciansforhumanrights.org/library/documents/reports/sexual-violence-sierra-leone.pdf>.

¹⁶ McKay & Mazurana, *supra* note 15, at 92.

¹⁷ Human Rights Watch, *supra* note 15, at 42.

¹⁸ *Id.* at 34, 38, 44.

¹⁹ *Id.* at 43-44.

²⁰ *Id.* at 32.

²¹ *Id.* at 42.

²² *Id.* at 43-44.

²³ *Id.*

ostracism and rejection from their community and family as a result of the shame and stigma of being in such a “marriage.”²⁴ The number of “wives” in Sierra Leone who remain with their “husbands” today is unknown.²⁵

(ii) A note on language:

Also before beginning this analysis, a note on the author’s use of language is necessary. As apparent in the section above, the author uses quotation marks when referring to the terms, “husband,” “wife,” and “marriage,” when stated in the context of a forced marriage. Similarly, quotation marks are commonly used for these terms in reports on this practice,²⁶ academic scholarship on forced marriage,²⁷ and also in Tribunal jurisprudence.²⁸ The widespread use of quotation marks likely indicates an uneasiness, or incredulity, in the appropriate use of such matrimonial terms to describe the type of situation suffered by women and girls coerced into these violent relationships.²⁹

Although the nature and meanings of marriage vary widely across and within various cultures, religions, and state jurisdictions, and change drastically through time as well, in a Western Judeo-Christian perspective, these matrimonial terms are traditionally used to describe a union between two individuals characterized by love, understanding, and mutual respect.³⁰ Forced marriage, however, drastically deviates from this understanding of marriage. Rather, women and girls were raped, abducted, and subsequently coercively subjected to further cycles of sexual violence and forced labor by adult males. Many women and girls remain with their abductors today, likely not by choice, but because they know of no other life, or have no other life to which to return. These women and girls are therefore more accurately described as captives or prisoners than “wives.”³¹

Nevertheless, these matrimonial terms were deliberately adopted, not by the reporters or academics studying the practice, but by the victims and perpetrators themselves to describe their relationship with each other.³² As a result of the informal adoption of these terms, reports, academic scholarship, and Tribunal jurisprudence consistently describe this practice using the same terminology. Consequently, for the sake of uniformity, this author will continue to use, or misuse, these terms to discuss the relationship between these rebel “husbands” and their captured “wives,” albeit in quotation marks to illustrate the continued unease concerning the use of these terms.

²⁴ *Id.* at 52.

²⁵ *Id.* at 44.

²⁶ *See, e.g., id.*; Physicians for Human Rights, *supra* note 15.

²⁷ *See, e.g.,* Karine Bélair, *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 COLUM. J. GENDER & L. 551 (2006); Kalra, *supra* note 7; Oosterveld, *supra* note 7; Augustine J. Park, ‘Other Inhumane Acts’: *Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone*, 15 SOC. & LEGAL STUD. 315 (2006); Michael P. Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity*, in CASE RESEARCH PAPER SERIES IN LEGAL STUDIES (2005), available at <http://law.case.edu/faculty/ssrn/indexDNN.asp?id=58>.

²⁸ *See, e.g., RUF Appeals Judgment, supra* note 5, para. 739; *AFRC Appeals Judgment, supra* note 1, para. 195.

²⁹ Bélair, *supra* note 27, at 552-53.

³⁰ Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19, 24-30 (2007).

³¹ Human Rights Watch, *supra* note 9, at 56.

³² Bélair, *supra* note 27, at 565-66.

(iii) The AFRC Decision:

The following section will briefly outline the SCSL Trial Chamber and Appeals Chamber decisions in the AFRC case, strictly concerning the definition of forced marriage. In this case, the three accused, Brima, Kamara, and Kanu, were allegedly former high-ranking officials of the AFRC. All accused were reportedly members of the Junta governing body and the AFRC Supreme Council.³³ Indictments against the accused were approved in 2003, and later consolidated and amended. The amended consolidated indictment charged the accused with, among other charges, forced marriage under the ‘other inhumane acts’ category of crimes against humanity.³⁴

(a) The AFRC Trial Chamber Decision:

In its decision, the Trial Chamber concluded that it was not satisfied that the evidence presented by the Prosecution was capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery.³⁵ In fact, the Trial Chamber found that the evidence did not point to “even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery.”³⁶ Consequently, the majority at the Trial Chamber held that the evidence of forced marriage was completely subsumed by the crime of sexual slavery, and there was therefore no lacuna in the law that would necessitate a separate crime of forced marriage under the “other inhumane act” category.³⁷

Justice Sebutinde further wrote a separate concurring opinion strictly concerning the issue of forced marriage. Justice Sebutinde accepted the majority’s conclusion that forced marriage possessed all the characteristics of sexual slavery,³⁸ finding that women in forced marriages were regularly subjected to sexual intercourse without consent, and forcibly kept in captivity and sexual servitude.³⁹ However, Justice Sebutinde additionally emphasized that a clear distinction must be made between traditional or religious marital unions, such as arranged marriages, during times of peace, and forced marriages as found during the Sierra Leonean conflict. She found that only the latter are criminal in nature.⁴⁰

Justice Doherty, however, wrote a partly dissenting opinion, again relating to the issue of forced marriage. Justice Doherty disagreed with the majority’s approach, instead holding that forced marriage constitutes a crime against humanity.⁴¹ She did not strictly focus on the sexual aspects of forced marriage, but rather concluded that the mental and moral suffering of the victim in a forced marriage was different than in sexual slavery as a result of the conjugal status forced on these women and girls.⁴² Justice Doherty then defined forced marriage as the imposition, by

³³ Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Trial Chamber Judgment, paras. 11-13 (June 20, 2007) [hereinafter *AFRC Trial Judgment*].

³⁴ *Id.* paras. 4-8, 20. For a critique of the specificity of these indictments specifically regarding forced marriage, see Rose, *supra* note 12, at 368-69.

³⁵ *AFRC Trial Judgment*, *supra* note 33, para. 704.

³⁶ *Id.* para. 710.

³⁷ *Id.* para. 713.

³⁸ *Id.* para. 4 (separate concurring opinion of Justice Sebutinde).

³⁹ *Id.* para. 16.

⁴⁰ *Id.* para. 12.

⁴¹ *Id.* para. 71 (partly dissenting opinion of Justice Doherty).

⁴² *Id.* paras. 69-71.

threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim.⁴³

(b) The AFRC Appeals Chamber Decision:

The Prosecution and the accused appealed the Trial Chamber's decision on many grounds,⁴⁴ but this analysis is limited to the Appeals Chamber's reconsideration of the Trial Chamber's decision concerning forced marriage. The Appeals Chamber ultimately disagreed with the Trial Chamber's characterization of forced marriage, finding that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery.⁴⁵ Similar to Justice Doherty's dissent, the Appeals Chamber held that, while forced marriage shares certain elements with sexual slavery, such as non-consensual sex and the deprivation of liberty, there are also important distinguishing factors, including forced conjugal association with the perpetrator resulting in suffering or serious physical or mental injury. These distinctions imply that forced marriage is not a predominantly sexual crime, and therefore should not be subsumed in the elements of sexual slavery.⁴⁶ Moreover, similar to Justice Sebutinde, the Appeals Chamber made a clear distinction between peacetime arranged marriages and wartime forced marriage, finding that only the latter should be considered criminal.⁴⁷

The Appeals Chamber, however, defined the crime of forced marriage in a slightly more expansive manner than did Justice Doherty in her dissent. The Appeals Chamber held that forced marriage describes a situation in which the perpetrator, through his words or conduct, or those of someone for 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.⁴⁸

(2) THE VIABILITY OF THE FUTURE APPLICATION OF FORCED MARRIAGE:
ADDRESSING THE TECHNICAL ASPECTS OF A NEW CRIME

The AFRC Appeals Chamber decision may have persuasive influence on other international adjudicative bodies when prosecuting forced marriage-type practices committed in other contexts. However, there remain certain technical issues that must be addressed before applying this precedent to future cases. In the second part of this paper, the author poses three questions that relate to the application of forced marriage to other contexts. The author queries whether forced marriage: (i) violates the *nullem crimen sine lege* principle; (ii) is sufficiently specific and unique to be charged as its own crime; and (iii) should require a nexus to armed conflict in its definition.

(i) Does Forced Marriage Violate the *Nullem Crimen Sine Lege* Principle?:

Forced marriage was prosecuted for the first time in the AFRC case as a crime against humanity under the "other inhumane acts" category of the SCSL Statute.⁴⁹ As forced marriage was a novel crime at that point, it must first be determined whether this crime violates the *nullem*

⁴³ *Id.* para. 53.

⁴⁴ *AFRC Appeals Judgment, supra* note 1, para. 175.

⁴⁵ *Id.* para. 195.

⁴⁶ *Id.*

⁴⁷ *Id.* para. 194.

⁴⁸ *Id.* para. 196. This definition of forced marriage was subsequently followed by the SCSL Appeals Chamber in the RUF case. See *RUF Appeals Judgment, supra* note 5, para. 735.

⁴⁹ SCSL Statute, *supra* note 3, art. 2.

crimen sine lege principle.⁵⁰ Under this international criminal law principle, an individual cannot be prosecuted for acts that were not characterized as criminal at the time at which those acts were committed.⁵¹ This principle features two aspects: non-retroactivity of criminal penalties to acts not criminalized at the time committed, and clarity of the law.⁵² In order to prosecute an individual for a previously unrecognized crime without violation of this principle, a court or tribunal must determine whether customary international law recognizes the act as a crime.⁵³ If the perpetrator's conduct is clearly considered criminal under existing customary international law, it may be assumed that the perpetrator indeed had knowledge that his or her conduct was in fact culpable, and should therefore expect punishment for that conduct.⁵⁴

Therefore, in order to prosecute the new crime of forced marriage without violation of the *nullem crimen sine lege* principle, it must be determined whether forced marriage is considered criminal under customary criminal law.⁵⁵ In the AFRC case, the Appeals Chamber found that the "other inhumane acts" category contained in Article 2(i) of the SCSL Statute forms part of customary international law.⁵⁶ This category has indeed been included in the definition of crimes against humanity since its incorporation into Article 6(c) of the Charter of the International Military Tribunal,⁵⁷ and was restated in Article 7(1)(k) of the Rome Statute of the International Criminal Court,⁵⁸ which is said to codify, and develop, customary international law.⁵⁹ Moreover, since its early inception, the category of "other inhumane acts" existed as a residual category, primarily used to ensure prosecution of those crimes against humanity not previously envisioned or specifically enumerated,⁶⁰ but which are of comparable gravity to those crimes listed as crimes against humanity.⁶¹ In fact, to date, no specific act identified in an indictment before an international court or tribunal as a crime against humanity under the "other inhumane acts" category has been successfully challenged on the grounds that it violated the *nullum crimen sine lege* principle.⁶² Consequently, considering this longstanding and widespread consensus that the "other inhumane acts" category forms part of customary international law, future prosecutions of forced marriage under this category would not violate the *nullem crimen sine lege* principle.

There are, however, three threshold elements to meet in order to allege forced marriage as an "other inhumane act" without violating the *nullem crimen sine lege* principle. First, the act

⁵⁰ ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 15 (2007).

⁵¹ For further information on the principle of legality of crimes, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 37-51 (2d ed. 2008). See also CRYER ET AL., *supra* note 50, at 13-15.

⁵² CASSESE, *supra* note 51, at 37-38; CRYER ET AL., *supra* note 50, at 13.

⁵³ CRYER ET AL., *supra* note 50, at 13-14.

⁵⁴ *Id.*

⁵⁵ *Id.* at 14.

⁵⁶ AFRC Appeals Judgment, *supra* note 1, para. 198.

⁵⁷ July 8, 1945, 82 U.N.T.S. 279.

⁵⁸ July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Note that Sierra Leone has both signed and ratified the Rome Statute.

⁵⁹ The 'other inhumane acts' category is also included in Article 3(i) of the Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [ICTR Statute], and Article 5(i) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1159 [ICTY Statute]. See also CASSESE, *supra* note 51, at 113-114.

⁶⁰ Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Chamber Judgment, para. 563 (Jan. 14, 2000) [hereinafter *Kupreškić Trial Judgment*]. See also Frulli, *supra* note 6, at 1038; Scharf & Mattler, *supra* note 27, at 6-7.

⁶¹ *Kupreškić Trial Judgment*, *supra* note 60, paras. 563-64.

⁶² Scharf & Mattler, *supra* note 27, at 6-7.

must be of similar gravity or seriousness to other prohibited acts enumerated as crimes against humanity.⁶³ In order to determine if forced marriage is of comparable gravity and seriousness, past precedent may be examined.⁶⁴ Tribunal jurisprudence indeed demonstrates that a wide range of acts, both sexual and non-sexual, has been recognized as “other inhumane acts.” Such acts include: forcible transfer;⁶⁵ forced undressing and marching of women in public;⁶⁶ forced exercising of naked women;⁶⁷ and forced disappearance, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.⁶⁸

Considering this broad range of sexual and non-sexual acts that have been held to be crimes against humanity under the “other inhumane acts” category, it is likely that the sexual violence, enslavement, forced labor, forced pregnancy, and other harmful acts committed in a forced marriage would similarly be held under this category. In fact, the international community has already recognized the constitutive sexual and non-sexual acts perpetrated against a “wife” in a forced marriage as crimes against humanity,⁶⁹ including rape, torture, enslavement, sexual slavery, and forced pregnancy.⁷⁰ The gravity and seriousness of forced marriage is further compounded by the often young age of the victims of forced marriage,⁷¹ in addition to the continuous and long-lasting nature of the practice.⁷² Considering the broad interpretation of this category within past Tribunal decisions and the previous recognition of the constitutive acts of forced marriage as crimes against humanity, along with the age and continual nature of the practice, forced marriage may therefore easily be categorized of similar gravity and seriousness as compared to other recognized crimes against humanity.

A second restriction in using the “other inhumane acts” category is that the acts must cause great suffering or serious injury to the body or the mental or physical health of the victim.⁷³ Forced marriage has already been found to violate long-established and well-documented human rights doctrines, mainly on the basis of the absence of free and full consent of the intending spouses.⁷⁴ According to these various treaties, the single act of forcing an individual into a “marriage” is a serious violation of her, or his, fundamental rights. These

⁶³ See Rome Statute, *supra* note 58, art. 7(1)(k); *RUF Appeals Judgment*, *supra* note 5, para. 735; *AFRC Trial Judgment*, *supra* note 33, para. 698.

⁶⁴ Scharf & Mattler, *supra* note 27, at 7.

⁶⁵ Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Chamber Judgment, para. 523 (Aug. 2, 2001).

⁶⁶ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, para. 697 (Sept. 2, 1998) [hereinafter *Akayesu*].

⁶⁷ *Id.*, para. 697.

⁶⁸ Prosecutor v. Kvoka et al., Case No. IT-98-30/1-T, Trial Chamber Judgment, paras. 206-9 (Nov. 2, 2001).

⁶⁹ SCSL Statute, *supra* note 3, art. 2. See also Frulli, *supra* note 6, at 1040; Kalra, *supra* note 7, at 205; Scharf & Mattler, *supra* note 27, at 7-8.

⁷⁰ This was in fact found in the AFRC Appeals Chamber decision. See *AFRC Appeals Judgment*, *supra* note 1, para. 200.

⁷¹ Frulli, *supra* note 6, at 1040. This factor was in fact taken into account in the Appeals Chamber decision in the AFRC case. See *AFRC Appeals Judgment*, *supra* note 1, para. 200.

⁷² Frulli, *supra* note 6, at 1040.

⁷³ See Rome Statute, *supra* note 58, art. 7(1)(k); *RUF Appeals Judgment*, *supra* note 5, para. 735; *AFRC Trial Judgment*, *supra* note 33, para. 698.

⁷⁴ See, e.g., Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Article 23 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Article 16 of the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Note that Sierra Leone has signed and ratified the CEDAW, and acceded to the ICCPR. See also Scharf & Mattler, *supra* note 27, at 7.

instruments, however, express forced marriage as a violation of human rights, not as a criminal offence.⁷⁵ Nevertheless, in Sierra Leone, the victims of forced marriage endured physical injury as a result of repeated acts of sexual violence, forced labor, corporal punishment, and the deprivation of liberty. Many victims were further psychologically traumatized by being forced to witness the murder or mutilation of family members before becoming “wives” to those who committed these crimes. “Wives” also experienced ostracism from their family and community following their “marriage.”⁷⁶ Consequently, forced marriage may certainly be characterized as causing great suffering or serious injury to the body and to the mental or physical health of the victim.

A third restriction in using the “other inhumane acts” category is that the perpetrator must be aware of the factual circumstances that establishes the character of the gravity of the act.⁷⁷ Considering the systematic abduction of the victims of forced marriage, along with the subsequent circumstances of coercion and intimidation, the perpetrators of forced marriage must have known that their conduct was criminal. This conclusion is strengthened by the fact that the acts described as forced marriage involve the commission of one or more previously recognized international crimes, such as enslavement, sexual slavery, and forced labor.⁷⁸ Therefore, the perpetrators certainly were aware of the seriousness and gravity of their actions.

The Appeals Chamber’s decision in the AFRC case unerringly found that the “other inhumane acts” category of crimes against humanity in the SCSL Statute is part of customary international law. Further, forced marriage may be included as an “other inhumane act” since it meets the three threshold minimum requirements of that category. Consequently, the novel recognition of forced marriage as an “other inhumane act” under crimes against humanity does not violate the *nullem crimen sine lege* principle. As such, subsequent international courts and tribunals are permitted to prosecute the crime of forced marriage in the future without concern regarding the violation of this principle.

(ii) Is forced marriage sufficiently specific and unique to be prosecuted as a separately enumerated crime?:

In its analysis, the above section concluded that the prosecution of forced marriage does not violate the *nullem crimen sine lege* principle since, among other reasons, the constitutive acts of forced marriage, such as sexual slavery and forced labor, are already recognized as crimes against humanity.⁷⁹ Given this conclusion, a question arises: if the constitutive elements of forced marriage can appropriately be prosecuted under previously recognized international crimes, is formulating a separate and specifically enumerated crime of forced marriage necessary?⁸⁰ A future international court or tribunal must therefore decide whether to try forced marriage according to, in the approach of the AFRC Trial Chamber,⁸¹ its separate constitutive acts under existing crimes, or, in the approach of the AFRC Appeals Chamber, as a separate and specific crime.⁸² The following section will therefore attempt to differentiate forced marriage

⁷⁵ Frulli, *supra* note 6, at 1039.

⁷⁶ *AFRC Appeals Judgment*, *supra* note 1, para. 199.

⁷⁷ *See RUF Appeals Judgment*, *supra* note 5, para. 735; *AFRC Trial Chamber Judgment*, *supra* note 33, para. 698.

⁷⁸ *AFRC Appeals Judgment*, *supra* note 1, para. 201.

⁷⁹ SCSL Statute, *supra* note 3, art. 2.

⁸⁰ Frulli, *supra* note 6, at 1035, 1040; Scharf & Mattler, *supra* note 27, at 15, 16.

⁸¹ *AFRC Trial Judgment*, *supra* note 33, para. 713.

⁸² *AFRC Appeals Judgment*, *supra* note 1, para. 196. This approach was followed in the RUF case. *See RUF Appeals Judgment*, *supra* note 5, para. 736.

from its constituent elements, namely sexual slavery and forced labor, and explore whether forced marriage should be prosecuted as a separate crime from these previously enumerated crimes.

(a) Forced Marriage vs. Sexual Slavery:⁸³

As outlined above, the Trial Chamber in the AFRC case found that it was redundant to prosecute forced marriage as a separate crime, and instead prosecuted forced marriage under the existing crime of sexual slavery.⁸⁴ Similar to the reasoning in this case, other academics have likewise argued that forced marriage is in fact sexual slavery. Karine Bélair, for instance, argues, “the situation of abducted Sierra Leonean women was . . . one of sexual slavery, poorly veiled by the euphemism ‘marriage’.”⁸⁵

Forced marriage does appear to be markedly similar to sexual slavery. The two central elements of the crime of sexual slavery are: (i) the exercise of powers associated with a right to ownership of another person, involving a deprivation of liberty;⁸⁶ and (ii) causing the person to engage in one or more acts of a sexual nature.⁸⁷ The crime of forced marriage undoubtedly features these elements. In Sierra Leone, the “wives” were abducted, forced to perform forced labor for their “husbands,” and repeatedly subjected to sexual violence. Moreover, their movements and lives were completely controlled by their “husbands,” and “wives” were prevented from escaping.⁸⁸ Therefore, forced marriage in Sierra Leone featured ownership of the “husband” over the “wife” to the point of no escape. Additionally, “wives” were subjected to forced sexual acts.⁸⁹

There is one substantial distinction, however, between forced marriage and sexual slavery: although one of the defining features of forced marriage is that the victim forcibly becomes the captor’s sexual partner, there are more obligations owed by the “wife” to the “husband” than simply sexual relations.⁹⁰ The “wife” is also required to perform forced domestic labor, such as cooking, washing, and gathering water, in addition to the denial of the victim’s reproductive autonomy, as the “wife” is expected to bear and raise the “husband’s” children.⁹¹ With its focus almost entirely on the sexual aspects of the practice, sexual slavery does not adequately address these non-sexual aspects of forced marriage.⁹² If prosecuted under the crime of sexual slavery alone, perpetrators of forced marriage are therefore not held responsible for the non-sexual aspect of their offences.⁹³ Forced marriage, then, should be distinguished from sexual slavery in order to capture these non-sexual elements.⁹⁴

⁸³ A similar question was asked in relation to sexual slavery during the Rome Statute negotiations, during which sexual slavery was distinguished from certain existing crimes, namely enslavement, rape, and enforced prostitution. *See generally* Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605 (2004).

⁸⁴ *AFRC Trial Judgment*, *supra* note 33, para. 713.

⁸⁵ Bélair, *supra* note 27, at 557-58. *See also* Human Rights Watch, *supra* note 15.

⁸⁶ CRYER ET AL., *supra* note 50, at 203.

⁸⁷ *Id.* at 210.

⁸⁸ Jain, *supra* note 6, at 1028.

⁸⁹ Bélair, *supra* note 27, at 563-64.

⁹⁰ Frulli, *supra* note 6, at 1036-37; Scharf & Mattler, *supra* note 27, at 18, 19.

⁹¹ Human Rights Watch, *supra* note 15, at 43-44.

⁹² *See* Oosterveld, *supra* note 7, at 415, 417; Carlson & Mazurana, *supra* note 6, at 16.

⁹³ Palmer, *supra* note 7, at para. 3.

⁹⁴ Scharf & Mattler, *supra* note 27, at 20.

(b) Forced Marriage vs. Forced Labor:

Certain academic commentators have focused heavily on the forced domestic labor aspects of forced marriage. To illustrate, Binaifer Nowrojee stated, “[r]ebels abducted thousands of women and girls and “married” them to members of the rebel force . . . ‘[C]ivilian’ abductees . . . were also required to perform forced labor, such as cooking, washing, and portering.”⁹⁵ Nowrojee therefore implicitly separates the sexual aspects of forced marriage from the forced domestic labor aspects. Similarly, Bélair, after a lengthy discussion of the sexual aspects of forced marriage, merely states, “[t]he rebels also exacted forced labor from the ‘bush wives,’ who had to perform . . . domestic chores.”⁹⁶ Again, this author separates the sexual aspects of the practice from the labor aspects. As a result of the separation between the sexual and non-sexual aspects in this academic commentary, the sexual aspects of forced marriage could arguably be prosecuted separately from the non-sexual aspects.

Forced labor, which can be prosecuted as a crime against humanity under the enumerated crime, enslavement, certainly shares characteristics with forced marriage. Forced labor is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁹⁷ To specify, this “penalty” may be in the form of a punishment, or through the loss of rights and privileges,⁹⁸ and the “involuntary” nature of the work performed refers to consent, along with the existence of coercion or deception.⁹⁹ The inquiry into whether a person is subject to forced labor, therefore, hinges on the “voluntary-ness” or consent of the victim to the labor situation.¹⁰⁰ Moreover, restrictions on the freedom of movement is a main characteristic of modern forms of forced labor.¹⁰¹

Forced marriage certainly fits this description of forced labor. In Sierra Leone, women and girls were abducted, usually during raids of villages, by rebel forces,¹⁰² where they were then forced into a “marriage” with an adult male combatant.¹⁰³ The “wives” were then coerced into completing certain domestic labor tasks for their “husband,” such as cleaning, cooking, and laundry.¹⁰⁴ They were also expected to protect the property of their “husband,” and to move his looted possessions.¹⁰⁵ Escape from this coercive labor situation was made impossible due to the possibility of death, capture, and ostracism from family and community.¹⁰⁶ Therefore, in a

⁹⁵ Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85, 89 (2005).

⁹⁶ Bélair, *supra* note 27, at 564-65.

⁹⁷ Convention concerning Forced or Compulsory Labour art. 2, June 28, 1930, 39 U.N.T.S. 55. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3 [hereinafter Convention on Abolition of Slavery], refers to forced labor as a slavery-like practice, but does not define forced labor. This Convention does, however, refer in its preamble to this definition in the International Labour Organization (ILO) Convention. Note that Sierra Leone acceded to the Convention on the Abolition of Slavery.

⁹⁸ ILO, *A Global Alliance Against Forced Labour: Global Report under the Follow Up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 5, Report I(b), Int’l Labour Conference, 93d Sess. (2005).

⁹⁹ *Id.* at 6.

¹⁰⁰ Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 68 (2001).

¹⁰¹ ILO, *supra* note 98, at 19.

¹⁰² Physicians for Human Rights, *supra* note 15, at 64-73.

¹⁰³ *Id.* at 66, 70.

¹⁰⁴ Human Rights Watch, *supra* note 15, at 26.

¹⁰⁵ *Id.* at 43.

¹⁰⁶ *Id.* at 52.

forced marriage, women and girls were involuntarily forced into a domestic labor situation without their consent, and remained under these circumstances under the threat of penalty.

However, the definition of forced labor fails to capture the sexual aspects of forced marriage. Rather, forced labor focuses solely on the non-sexual aspects of the practice. Forced marriage, however, is characterized by a unique combination of both sexual and non-sexual aspects. As Valerie Oosterveld states, “[f]orced marriage . . . may have sexual aspects (for example, repeated rape), but also may have many non-sexual aspects (for example, forced child-bearing and child-rearing, cooking and laundering).”¹⁰⁷ Too heavy a focus on the forced labor aspects of forced marriage ignores the complexity of the practice, and disregards its sexual aspects.

(c) Conclusion:

Forced marriage is a unique blending of both the sexual and non-sexual aspects of the practice, and involves specific and unique elements of psychological and moral suffering.¹⁰⁸ These aspects must be acknowledged simultaneously in order to understand and appreciate its full complexity. Previously recognized crimes, such as sexual slavery and forced labor, are inadequate to fully capture all of the acts that constitute a forced marriage. A separate charge of forced marriage would recognize the overall act, not simply the individual elements of the crime.¹⁰⁹ Therefore, when prosecuted before future international adjudicative bodies, forced marriage should be charged as a separate crime in order to appropriately recognize its full gravity and effect on the victims.¹¹⁰

(iii) Does the definition of forced marriage require a nexus to armed conflict?

The Appeals Chamber in the AFRC case deemed forced marriage to be a crime against humanity. A crime against humanity can, in fact, be committed both in times of peace and in times of war,¹¹¹ and therefore does not require a nexus to armed conflict. Consequently, there has been little to no commentary on whether the crime of forced marriage must be committed in the context of a conflict, or in both times of conflict and peace. This omission is likely due to the fact that it is assumed that the answer to this question is obvious: crimes against humanity do not require a nexus to armed conflict.

One aspect of forced marriage that has been extensively addressed in academic commentary is the assertion that forced marriage in a conflict is separate and distinct from arranged marriage in peacetime.¹¹² In fact, in one of the earlier academic commentaries on this topic, Nowrojee warned, “[c]are must also be taken to distinguish [forced marriage] from the

¹⁰⁷ Oosterveld, *supra* note 7, at 417.

¹⁰⁸ Frulli, *supra* note 6, at 1036.

¹⁰⁹ Kalra, *supra* note 7, at 214.

¹¹⁰ Palmer, *supra* note 7, at para. 85. *See also* Frulli, *supra* note 6, at 1037; Scharf & Mattler, *supra* note 27, at 24.

¹¹¹ The SCSL Statute does not require a nexus to armed conflict in its definition of crimes against humanity. *See* SCSL Statute, *supra* note 3, art. 2. Similarly, the ICTR Statute and Rome Statute also do not require this nexus. *See* Rome Statute, *supra* note at 58, art. 7; ICTR Statute, *supra* note 59, art. 3. This nexus is required, however, in the ICTY Statute, although this inclusion appears to be an anomaly and an admitted deviation from customary law. *See* ICTY Statute, *supra* note 59, art. 5. *See also* CASSESE, *supra* note 51, at 99; CRYER ET AL., *supra* note 50, at 191.

¹¹² It is important to note that, in Sierra Leone, there are three recognized types of marriage: (i) customary (or arranged); (ii) religious (Islamic or Christian); and (iii) civil ceremonies. This paper focuses solely on customary marriages in Sierra Leone. *See* Scharf & Mattler, *supra* note 27, at 3-4.

Sierra Leonean practice of arranged marriage.”¹¹³ There are two bases upon which this distinction is found. First, arranged marriages, unlike forced marriages, allegedly feature consent. In an arranged marriage, an individual in a fiduciary relationship with the female, likely a family member or guardian, consents to the union on her behalf. In a forced marriage, however, neither the female nor any individual with a fiduciary relationship to her consents to the union.¹¹⁴ Second, in order to be prosecuted as a crime against humanity, the act must be part of a widespread and systematic attack upon a civilian population. Unlike forced marriage, arranged marriage purportedly does not constitute such an attack.¹¹⁵

This author, however, would like to challenge these two distinctions between forced marriages in times of conflict and arranged marriages in times of peace, instead arguing that, in the context of Sierra Leone, there are similarities between the two types of marriages.¹¹⁶ The author asserts that forced marriage during times of conflict are similar to *forced* arranged marriages in times of peace. If these two distinctions can in fact be challenged, forced arranged marriages in peacetime may be prosecuted in a similar manner as forced marriages during conflict, as a crime against humanity.¹¹⁷

The first distinction between forced and arranged marriages focuses on consent. This distinction is based on the assumption that, in an arranged marriage, the woman consents to the ability of a family member or guardian to choose a spouse on her behalf. However, in some arranged marriages, this “consent” may be less a product of her own will than a product of pressure from her family or guardian. Rather, some arranged marriages occur as a result of coercion, blackmail, intense psychological pressure, physical violence, abduction, and threats of abandonment or excommunication from her family or community.¹¹⁸ Additionally, betrothals may also be entered into while the intending spouse is a child; these children are sometimes married as soon as they reach puberty, and in some cases, even earlier.¹¹⁹ In such a context, the female’s desires are entirely subordinate to her families’ desire to arrange a particular marriage,¹²⁰ and this “marriage” certainly does not feature consent.¹²¹ These external factors, such as coercion and threat, can significantly influence, or obliterate, an individual’s ability to genuinely and voluntarily consent to marriage. The decision to marry is not freely exercised, but is instead shaped by elements of force, captivity, and deceit. These coercive external factors place the female in a state of fear or submission, rather than a position of willing participation. This is particularly the case with child marriages, since, while it is conceivable that a girl may later decide that she is content with the marriage to a spouse her family member or other guardian selected, it is difficult to view such a marriage as featuring consent since the partner, or partners, involved are by definition too young to make an informed choice.

¹¹³ Nowrojee, *supra* note 95, at 102. *See also* AFRC Appeals Judgment, *supra* note 1, para. 194; Scharf & Mattler, *supra* note 27, at 10.

¹¹⁴ Scharf & Mattler, *supra* note 27, at 11-12.

¹¹⁵ *Id.* at 10-11.

¹¹⁶ Bélair, *supra* note 27, at 565-66.

¹¹⁷ *Id.* at 573.

¹¹⁸ ANDREA PARROT & NINA CUMMINGS, *SEXUAL ENSLAVEMENT OF GIRLS AND WOMEN WORLDWIDE 57* (2008) [Parrot & Cummings, *Sexual Enslavement*]; Jain, “Forced Marriage as a Crime against Humanity,” *supra* note 6 at 1027.

¹¹⁹ PARROT & CUMMINGS, *supra* note 118, at 58-59.

¹²⁰ Bélair, *supra* note 27, at 573.

¹²¹ *Id.* at 574.

It is therefore difficult to argue that one of the distinguishing features between forced and arranged marriages is the presence of consent, since consent is not always present in arranged marriages. Consequently, if lack of consent is an important element in the definition of the crime of forced marriage, that same lack of consent in a forced arranged marriage could result in such marriages being classified as forced marriages,¹²² and equally prosecuted as a crime against humanity. However, although this lack of consent certainly violates international human rights norms requiring consent of both parties to a marriage, the absence of consent does not necessarily cause the forced arranged marriage to become an offense under international criminal law. Forced and arranged marriages were further distinguished on a second basis: the latter are not carried out in the context of a widespread or systematic attack against a civilian population, an element which must be present in order to be prosecuted as a crime against humanity.¹²³ Therefore, in order to assert that forced arranged marriages should be prosecuted in the same manner as forced marriages, this practice must exist in such circumstances.

Women and girls in a forced arranged marriage may undoubtedly be considered a civilian population.¹²⁴ As these women and girls are likely not part of any governmental unit, nor are they likely persons who take part in armed hostilities during a conflict, women and girls in a forced arranged marriage would fit under this element of the crime. However, one must demonstrate that a widespread and systematic attack was committed against them. According to Antonio Cassese, in order to be characterized as part of a widespread or systematic practice, the practice may either form part of a governmental policy, *or* is tolerated, condoned or acquiesced in by a government or de facto authority.¹²⁵ Although normally committed by state organs, Cassese further states that crimes against humanity may be committed by individuals acting in a private capacity, provided that the governmental authorities approve of, condone, or fail to repress such private actions.¹²⁶ Therefore, as Cassese suggests, in order to satisfy this element, a governmental policy actively promoting or encouraging such a practice is not required; instead, mere tolerance or acquiescence by a government is sufficient. Moreover, private individuals may perpetrate crimes against humanity where that government tolerates or acquiesces in the practice.

Under Cassese's broad definition of this element of a crime against humanity, forced arranged marriages may be characterized as a widespread or systematic practice. To begin, forced arranged marriages can constitute a widespread practice. The term, "widespread," includes a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.¹²⁷ In certain states and among certain religions, forced arranged marriage is a frequent and extensive occurrence. For example, in

¹²² Jain, *supra* note 6, at 1025.

¹²³ *Id.* at 1027; Scharf & Mattler, *supra* note 27, at 12.

¹²⁴ CASSESE, *supra* note 51, at 98-99; CRYER ET AL., *supra* note 50, at 192-94.

¹²⁵ *But see* CRYER ET AL., *supra* note 50, at 196-98. The authors highlight the continuing debate regarding whether governmental policy is a requirement in the definition of crimes against humanity. In fact, the Rome Statute indicates that policy is required. This statute was adopted by many states purporting to codify existing customary law. *See* Rome Statute, *supra* note 58, art. 7(2)(a). The SCSL Statute, however, does not feature similar wording in its definition of crimes against humanity. *See* SCSL Statute, *supra* note 3, art. 2. *See also Prosecutor v. Kunarac, Kovač & Vuković*, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber Judgment, para. 58 (June 12, 2002), where the ICTY Appeals Chamber held that nothing in the ICTY Statute or in customary international law requires proof of the existence of a plan or policy to commit the crimes.

¹²⁶ CASSESE, *supra* note 51 at 123. CRYER ET AL., however, are silent as to this interpretation regarding private individuals. *See* CRYER ET AL., *supra* note 50.

¹²⁷ Akayesu, *supra* note 66, para. 580.

Afghanistan, approximately sixty to eighty percent of arranged marriages are forced.¹²⁸ Moreover, in the U.K., approximately one thousand women per year are taken to their country of origin to be forced into an arranged marriage.¹²⁹ This pattern of forced arranged marriage cannot be characterized as an isolated, random, or abnormal event. Rather, these statistics reveal a pattern that is frequent, large-scale, and carried out against a multiplicity of victims. Although this practice is coordinated by private individuals, according to Cassese's interpretation of this element, private individuals may institute the practice as long as the state condones or acquiesces such a practice.

In Sierra Leone, where forced marriage was first recognized as a crime against humanity, the state can be characterized as *both* acquiescing in and condoning the practice of forced arranged marriage. First, Sierra Leone acquiesced in the practice of forced arranged marriage by failing to provide protection to its victims. Article 16 of the CEDAW, of which Sierra Leone has both signed and ratified without reservation, mandates party states to take all necessary measures to eliminate discrimination against women in all matters relating to marriage and family relations.¹³⁰ Forced arranged marriages can be described as discriminatory, in that such marriages may condemn the "wife" to a lifetime of isolation, sexual and physical abuse, and health problems. A forced arranged marriage involving children also typically denies the girl education, subjects her to extensive abuse, and forces her to bear children before she is physically ready.¹³¹ Sierra Leone has a duty to create and enforce laws and policies to make such practices illegal,¹³² but failed to do so. As a result of its inaction, the Sierra Leonean government can be characterized as acquiescing in the practice of forced arranged marriages.

Second, Sierra Leonean customary law indeed could be characterized as condoning and facilitating such discriminatory marriages. For example, although sexual violence constituted a crime in Sierra Leone, only the rape of a virgin was truly considered a crime; rape of a married female or a non-virgin was not considered a crime due to the general assumption that the female consented.¹³³ Moreover, domestic violence under customary law permitted a husband to "reasonably chastise his wife by physical force."¹³⁴ Also, there were no, or very few, recognized reasons for which a female could divorce her husband without an obligation to refund the marriage payments. Conversely, the consideration was refundable when a male requested a divorce for reasons as varied as his wife's disobedience or persistent laziness in performing domestic tasks. In many cases, the family was unable to return the consideration. Divorce was therefore difficult for a female to obtain under customary law. These discriminatory customary laws fostered an environment where forced arranged marriages could occur, and where they did, women and girls were given very few options to ameliorate their circumstances. Therefore, Sierra Leone both acquiesced in and condoned an environment that fostered the practice of forced arranged marriages by private individuals. Clearly, then, forced arranged marriages in the

¹²⁸ PARROT & CUMMINGS, *supra* note 118, at 59.

¹²⁹ *Id.* at 61.

¹³⁰ CEDAW, *supra* note 74. See also Bélair, *supra* note 27, at 592-93.

¹³¹ PARROT & CUMMINGS, *supra* note 118, at 65.

¹³² Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 157, 161-62 (Dorinda Dallmeyer ed., 1993).

¹³³ Human Rights Watch, *supra* note 15, at 19-21, 24.

¹³⁴ *Id.* at 22.

context of Sierra Leone may be characterized as a widespread and systemic attack against a civilian population.¹³⁵

To conclude, under this broad definition of a widespread and systematic attack committed against a civilian population as provided by Cassese, forced arranged marriages committed in times of peace can, and perhaps should, potentially be prosecuted as a crime against humanity in the same manner as forced marriage. The author, however, admits that this is a controversial assertion, and runs the risk of certain limitations. The first limitation would be the risk of adverse reactions from certain states where arranged marriages are common. These states may argue that such a broad and expansionist interpretation of forced marriage, subsuming forced arranged marriages in times of peace under its definition, could potentially include some traditional family-related norms within the scope of international criminal law. Arranged marriages, as they may argue, are a sacred traditional and religious practice related to the family, and therefore should be immune from international criminal prosecution.¹³⁶ Therefore, the assertion that forced arranged marriages should be prosecuted as a crime against humanity would likely meet strong opposition and lack of cooperation from certain states.¹³⁷

A second limitation to this assertion is that arranged marriage is not a concretely uniform practice. Rather, the forms of arranged marriage vary globally, and may take many forms. For example, arranged marriages may take place both in countries where such marriages are the cultural norm, and also among diasporic members of a culture who have relocated to another state where such marriages are not common.¹³⁸ Moreover, arranged marriages take place within isolated, scattered, and private homes, and are often kept hidden and concealed within a particular family. As a result of the diversity of arranged marriages, and the fact that such marriages often take place in the individual private home, the investigation and prosecution of forced arranged marriages would be undeniably onerous to accomplish.

Nevertheless, despite these limitations, the purpose of drawing this connection between forced arranged marriages in times of peace and forced marriages in times of conflict is to highlight the fact that practices similar to forced marriages in the context of conflict are also committed in times of peace. This violence against women and girls disguised as “marriage” exists, rather, on a continuum, regardless of the presence or absence of conflict. If we recognize rights for women and girls in times of war, we must also recognize those same rights in times of peace.¹³⁹ However, if we merely acknowledge violence committed against women and girls during periods of conflict, we simultaneously render violence against women and girls during

¹³⁵ Note, however, three recent statutes passed unanimously by Sierra Leone’s Parliament, known collectively as the Gender Bills. The Domestic Violence Act, 2007, No. 20 (2007) (Sierra Leone), contains a broad definition of domestic violence, thereby allowing both the police and the individual the means to permit criminal and civil action when there is a violation. The Registration of Customary Marriage and Divorce Act, 2009, No. 1 (2009) (Sierra Leone), introduces a minimum age, eighteen years, to marry, requires consent of both parties for such marriages to be valid, and prohibits child brides and forced marriages. Finally, The Devolution of Estates Act, 2007, No. 21 (2007) (Sierra Leone), ensures that, if a husband dies without a will, his wife is entitled to his property. For more information on these statutes, see Palmer, *supra* note 7, at para. 76.

¹³⁶ This was also the case when defining the crime of sexual slavery. The “Arab states” sought to limit the crime of sexual slavery by not including such “family matters” as the rights, duties, and obligations incident to marriage between a man or woman. See Bélair, *supra* note 27, at 577-78.

¹³⁷ *Id.* at 579-80.

¹³⁸ PARROT & CUMMINGS, *supra* note 118, at 57-58. See also Sara Hossain & Suzanne Turner, *Abduction for Forced Marriage: Rights and Remedies in Bangladesh and Pakistan*, 2001 INT’L FAM. L. 15.

¹³⁹ Bélair, *supra* note 27, at 589. See also Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601, 604, 607 (1998).

periods of peace invisible. Rather, where it is found that an arranged marriage features similar characteristics as forced marriages, namely the absence of consent and the presence of a widespread and systematic attack, regardless of whether that marriage is found in a time of peace or conflict, it should be prosecuted similarly as a crime against humanity.

(3) A ROSE IS A ROSE IS A ROSE: IMPLICATIONS OF THE TITLE “FORCED MARRIAGE”

The third and final section of this paper will examine certain implications of naming this practice, *marriage*. This section illustrates that the mere use of this term to name the practice raises certain connotations associated with marriage based on culture, gender, sexual orientation, and age, along with the term’s association with the private sphere. Through these queries, the author explores the potential effects of the connotations of this term in relation to future prosecutions of forced marriage.

(i) Can naming this practice, forced *marriage*, have implications based on culture?:

In the AFRC case, the Appeals Chamber in part defined forced marriage as a practice in which the “wife” is forced to take part in traditional domestic tasks,¹⁴⁰ including cooking, cleaning, and bearing children. Such a division of household labor is common in the traditional Western model of marriage, where women are responsible for the majority of housework.¹⁴¹ This model of forced marriage, however, is not a representative model of all forms of marriages in all cultures.¹⁴² Rather, varying cultures may define the dominant models of marriage in distinct ways.¹⁴³

To illustrate, under the Khmer Rouge regime in Cambodia, women and men were coerced into a marriage. This form of marriage, however, did not feature the same characteristics as the traditional model of marriage.¹⁴⁴ In Cambodia, forced marriages were carried out as a matter of state policy, where the state chose each spouse, and forcibly married the two spouses in a public ceremony. Soon after the public marriage ceremony, each spouse was separated and sent to work in different areas.¹⁴⁵ Forced marriages in Cambodia therefore did not feature characteristics of the traditional marriage, since the “wife” and “husband” did not cohabit with each other, nor was the “wife” responsible for housework duties. Nevertheless, this form of marriage is undoubtedly categorized as a forced one since it did not feature consent and was carried out in a widespread and systematic attack on a civilian population. As such, forced marriages in Cambodia should be prosecuted as a crime against humanity.

Therefore, models of marriages vary according to state jurisdictions, religious convictions, and cultures. These models also change dramatically over time as well. With the myriad forms of marriages, a single and static model of forced marriage should not be adopted, especially a traditional Western model where the wife is primarily responsible for the housework. Such a definition of marriage runs the risk of overlooking clear situations of forced marriage that do not feature such characteristics, as illustrated with the example of Cambodia.

¹⁴⁰ *AFRC Appeals Judgment*, *supra* note 1, para. 190. See also *RUF Appeals Judgment*, *supra* note 5, para. 858.

¹⁴¹ B.A. Shelton, & D. John, *The Division of Household Labor*, 22 ANN. REV. SOC. 299, 299 (1996).

¹⁴² *Id.* at 310.

¹⁴³ Jain, *supra* note 6, at 1020; Scharf & Mattler, *supra* note 27, at 22-23.

¹⁴⁴ Jain, *supra* note 6, at 1025.

¹⁴⁵ *Id.* at 1024-25.

This author therefore encourages an adoption of an expansive and broad definition of marriages, taking into account varying cultural and religious contexts.

(ii) Can naming this practice, forced *marriage*, have implications based on gender?:

Related to the argument above, standard and static definitions of marriage may also run the risk of, not only failing to take into account varying cultural contexts, but also varying gender roles within a marriage. In an earlier discussion on forced marriage, Nowrojee warned, when prosecuting the crime of forced marriage, “[t]he Prosecutor and the Court should take care that patriarchal gender stereotypes of a wife’s role, such as household cooking and cleaning, are not inadvertently incorporated into jurisprudence.”¹⁴⁶ Nevertheless, current academic scholarship has displayed such stereotypical definitions of marriage, containing a woman’s role to traditional household tasks. For example, two authors state, “[i]n a forced marriage, the perpetrator extracts the privileges *normally* expected within a marital relationship – sexual congress, labor, child bearing, child rearing, fidelity, obedience . . . – from ‘wives’.”¹⁴⁷ These authors, therefore, use traditional notions of gender roles within a marriage, namely women’s sexual and domestic roles, to universally define forced marriage.

However, as with cultural definitions of marriage, definitions of gender, and gender roles within a marriage, vary across cultures, religions, jurisdictions, and time periods. Gender, a complex and relational concept, is defined as the socially and culturally created category of shared meanings concerning the identities, roles, and responsibilities of maleness and femaleness.¹⁴⁸ Since gender roles are socially constructed, relations between men and women change over time and across cultures.¹⁴⁹ Therefore, a definition of a “wife’s” duties within a forced marriage based on a static interpretation of a woman’s role in a marriage does not take into account the fact that gender roles vary according to context.

Therefore, a broad and expansive definition of gender and gender roles within a marriage must be adopted when defining forced marriage.¹⁵⁰ Such a broad definition would, for example, include the form forced marriages took in Cambodia during the Khmer Rouge regime, where both “spouses” were coerced into the marital relationship, and neither party took part in traditional gender roles; the “wives” did not cohabit with their “husbands,” nor were they forcibly responsible for such “wifely” duties as cooking and cleaning.¹⁵¹ The varying and changing nature of gender roles within marriage must therefore be acknowledged in future prosecutions.¹⁵²

(ii) Can naming this practice, forced *marriage*, have implications based on sexual orientation?:

In addition to acknowledging the particular context of a forced marriage with regard to culture and gender, forced marriage should also have a broad and expansive definition that takes into account the sexual orientation of the parties involved. Current academic scholarship on forced marriage, however, has primarily defined marriage based on the assumption that marriage

¹⁴⁶ Nowrojee, *supra* note 95, at 102. See also Oosterveld, *supra* note 2, at 158.

¹⁴⁷ Scharf & Mattler, *supra* note 27, at 19 [emphasis added].

¹⁴⁸ Dina Anselmi & Anne Law, *Defining Sex and Gender*, in QUESTIONS OF GENDER: PERSPECTIVES AND PARADOXES 1, 2 (1998).

¹⁴⁹ Valerie Oosterveld, *Gender, Persecution and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT’L L. 49, 87-88 (2006).

¹⁵⁰ Scharf & Mattler, *supra* note 27, at 23.

¹⁵¹ Jain, *supra* note 6, at 1030-31.

¹⁵² Scharf & Mattler, *supra* note 27, at 22-23.

exists only between opposite sexes. For example, two authors assert, “[i]t is through the joining of the two spouses in marriage that a family is initially formed.”¹⁵³ Although not explicitly stated, this passage assumes a definition of marriage where the two spouses are of opposite sexes, and the purpose of marriage is to create a family by bearing and rearing children.

However, such opposite-sexed definitions of marriage run the risk of overlooking similar forced marriage-type situations that could arise in the future that do not exist between opposite sexes.¹⁵⁴ Although this is the form that the practice took in the context of Sierra Leone,¹⁵⁵ there may be similar forced marriage-type practices in future conflicts that exist between individuals of the same sex. By defining forced marriage as only between opposite-sex individuals, this definition limits the range of practices in which forced marriage can be used to prosecute,¹⁵⁶ thereby rendering invisible any forced marriage-type situations in the future that does not occur between opposite sexes.¹⁵⁷ A definition of forced marriage must therefore also include relations between same-sex individuals in order to accommodate the potentially changing nature of this practice.¹⁵⁸

(iv) Can naming this practice, forced *marriage*, have implications based on age?:

A definition of forced marriage must further take into account the age of the victim. During the Sierra Leonean conflict, for example, it is estimated that sixty percent of the girls involved with the fighting forces acted as “wives” in a forced marriage,¹⁵⁹ ranging in age from nine to nineteen.¹⁶⁰ As these figures suggest, “wives” in Sierra Leone were not only targeted due to their sex, but also due to their age. Despite this reality, some commentators describe “wives” merely as women, rendering invisible the large numbers of child “wives” in Sierra Leone. For example, two authors state, “thousands of women were abducted and forced to become the sexual partners of their captors.”¹⁶¹ In this passage, the authors narrowly focus on a single aspect of the “wife’s” identity, her sex, thereby rendering invisible the “wife’s” age.

Girls, however, should not be subsumed under the age-neutral category of ‘women’, but instead should be treated as a category of victims that require specific attention¹⁶² based on both

¹⁵³ *Id.* at 8-9.

¹⁵⁴ See Oosterveld, *supra* note 2, at 159.

¹⁵⁵ McKay & Mazurana, *supra* note 15, at 58.

¹⁵⁶ Mary Louise Adams, *Excerpts from The Trouble with Normal: Postwar Youth and the Construction of Heterosexuality*, in MAKING NORMAL: SOCIAL REGULATION IN CANADA 90, 97-98 (Deborah Brock ed., 2003); A. Prasad, *Reconsidering the Socio-Scientific Enterprise of Sexual Difference: The Case of Kimberly Nixon*, 24 CANADIAN WOMAN STUDIES 80, 82 (2005).

¹⁵⁷ Anselmi & Law, *supra* note 148, at 3; Eleanor MacDonald, *Critical Identities: Rethinking Feminism Through Transgender Politics*, in OPEN BOUNDARIES: A CANADIAN WOMEN’S STUDIES READER 380, 383 (Barbara Crow & Lise Gottell eds., 2005). See, e.g., *AFRC Appeals Judgment*, *supra* note 1, para. 196, where the SCSL Appeals Chamber described forced marriage as a situation in which the “perpetrator, through his words or conduct, or those of someone for whose actions he is responsible, compels a person [...] to serve as a conjugal partner.” As is apparent in this quotation, the SCSL Appeals Chamber assumed that the perpetrator is always a male, ignoring a situation where a female against another female could commit forced marriage. In fact, there is evidence, albeit scarce, of sexual violence committed against a female by a female, although not in a conjugal relationship. See Human Rights Watch, *supra* note 15, at 41-42.

¹⁵⁸ Nowrojee, *supra* note 95, at 102; Valerie Oosterveld, *supra* note 149, at 87-88.

¹⁵⁹ McKay & Mazurana, *supra* note 15, at 92.

¹⁶⁰ *Id.* at 93. See also Oosterveld, *supra* note 2, at 169.

¹⁶¹ Scharf & Mattler, *supra* note 27, at 4.

¹⁶² Anselmi & Law, *supra* note 18, at 6; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1246-50 (1991).

their sex *and* age in order to capture the full extent of the crime committed against them.¹⁶³ To illustrate, in Sierra Leone, girls were often more vulnerable to sexual assault than women because, if male perpetrators feared contracting HIV/AIDS or other sexually transmitted diseases, they sought younger girls with the belief that they were less likely infected.¹⁶⁴ In fact, female children were specifically targeted for sexual violence during the Sierra Leonean conflict.¹⁶⁵ Therefore, while it is true that women and girls share experiences of gender oppression, girls are sometimes further marginalized, not only by their gender, but also by their age.¹⁶⁶ Consequently, girls cannot have their experiences subsumed, and thereby made invisible, under the experiences of women under the age-neutral term, ‘women’.¹⁶⁷ A future prosecution of forced marriage, therefore, should also take into account the age of the victim if this factor is relevant in the context.

(v) Can naming this practice, forced *marriage*, confine the practice to the private sphere?:

Feminist scholars have long brought attention to the gendered dichotomy drawn between the public and private spheres.¹⁶⁸ Under this dichotomy, the public realm of government, law, economics, and the workplace, where power and authority are primarily exercised, is regarded as the male sphere, while the private realm of the home, marriage, and children is regarded as the female sphere.¹⁶⁹ Direct state intervention into the private sphere, including marriage, has traditionally been regarded as inappropriate, therefore implying that the private sphere is immune from legal and state intervention.¹⁷⁰

Feminists have further consistently argued that this gendered dichotomy is partly responsible for the lack of attention to crimes directed at women and girls, as these concerns are often relegated to the private sphere, and therefore kept separate and distinct from the public sphere of the state and the law.¹⁷¹ Violence against women and girls that occurs within the private sphere, such as within the domestic home between private persons, is rarely prosecuted as compared to violence perpetrated within the public sphere.¹⁷² Indeed, many scholars agree that the international community has historically paid little attention to address sexual violence directed at women and girls in a conflict.¹⁷³

This author suggests that, by defining this practice as *marriage*, the invisibility of violence perpetrated against women and girls within the private sphere is at an increased risk since forced marriage may be regarded as a private matter between the individual parties involved. Moreover, the state, along with the courts and tribunals, might be hesitant to interfere

¹⁶³ Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN’S L.J. 115, 145-49 (1989).

¹⁶⁴ Park, *supra* note 27, at 322.

¹⁶⁵ Human Rights Watch, *supra* note 15, at 28-30.

¹⁶⁶ Park, *supra* note 27, at 321-22.

¹⁶⁷ *Id.* at 321. See also Oosterveld, *supra* note 149, at 86.

¹⁶⁸ See, e.g., Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991); Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda Dallmeyer ed., 1993).

¹⁶⁹ Charlesworth, Chinkin & Wright, *supra* note 168, at 625-26.

¹⁷⁰ *Id.* at 627.

¹⁷¹ *Id.* at 625.

¹⁷² *Id.* at 628-29.

¹⁷³ See, e.g., Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Court and Tribunals: 1993 to 2003*, 11 HUM. RTS. BR. 16 (2004); Frulli, *supra* note 6, at 1035; Nowrojee, *supra* note 95, at 85-86; Palmer, *supra* note 7, at para. 15.

within the confines of the private “marriage.” This name could therefore potentially further push the practice into the private, invisible experiences of women and girls, and therefore become under prosecuted, if prosecuted at all.¹⁷⁴ This author therefore urges the breakdown of the public-private distinction when investigating gender-based crimes such as forced marriage, instead focusing on violations in both the private and public spheres, but particularly in the private sphere where harm committed against women and girls is most often invisible, as is the case with forced arranged marriages as described above.¹⁷⁵

CONCLUSION:

Both before and after the AFRC case, there was general agreement in the international community that forced marriage is a specific and unique practice that must be prosecuted as a separately enumerated crime against humanity.¹⁷⁶ There was also general widespread agreement that forced marriage does not violate the *nullem crimen sine lege* principle.¹⁷⁷ In effect, the Appeals Chamber in the AFRC case largely repeated and confirmed this consensus. However, there remain other issues raised in this paper that remain shrouded in uncertainty and obscurity, as illustrated by the debate regarding the requirement of a nexus to armed conflict, along with the necessity to define forced marriage with regard to culture, gender, sexual orientation, and age. Without addressing these continuing uncertainties in the definition of forced marriage, the force of the precedent provided by the AFRC case, and subsequently by the RUF case, is potentially insufficient to prosecute future instances of forced marriages in other conflict, or potentially peacetime, circumstances. It is for this reason that the author urges the international community to begin to address these questions raised in this paper so that this crime may be prosecuted in a manner that may provide justice to *all* victims of forced marriage worldwide.

¹⁷⁴ Charlesworth, Chinkin & Wright, *supra* note 168, at 640.

¹⁷⁵ Engle, *supra* note 168, at 151.

¹⁷⁶ See, e.g., Frulli, *supra* note 6; Oosterveld, *supra* note 7; Palmer, *supra* note 7; Scharf & Mattler, *supra* note 27; Carlson & Mazurana, *supra* note 6.

¹⁷⁷ See, e.g., Frulli, *supra* note 6; Kalra, *supra* note 7; Scharf & Mattler, *supra* note 27.