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Forced Marriage: the Evolution of a New International Criminal Norm

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Abstract

For the first time in international criminal law, forced marriage was recognised by the Appeals Chamber of the Special Court for Sierra Leone as a distinct crime against humanity. Setting it apart from other offences such as sexual slavery, the court acknowledged the gravity of the suffering caused to women and young girls by giving it a definition which captures the complexity and entirety of the criminal conduct. By tracking the evolution of this new offence through the case law of the Special Court, it is argued that there is a unique crime of forced marriage which, should it be allowed to do so, has the potential to progress into a category of offence which adequately captures the trauma experienced by bush wives both in Sierra Leone and beyond.

1. Introduction

Following World War II, considerable and praiseworthy efforts have been made to ensure that those responsible for perpetrating crimes against women and girls during times of war are no longer immune from prosecution. This is reflected both in the 1998 Rome Statute of the International Criminal Court (the 'Rome Statute'), which contains specific provisions relating to gender-based crimes against humanity,¹ as well as in the case law of the *ad hoc* international tribunals. The International Criminal Tribunal for Rwanda (ICTR) is one such tribunal. Established following the Rwandan genocide, it has handed down a number of judgments in relation to gender-based offences. For example, in *Akayesu*,² the ICTR found that rape could constitute an act of genocide. Moreover, the court gave a broad definition of 'sexual violence' which meant that ordering a woman to undress and perform gymnastics in a public courtyard could be included in this category of crimes.³

Despite these advances in the prosecution of gender-based crimes, not all such offences have been met with prosecution at the ICTR. There is evidence that during the Rwandan genocide, some Tutsi women were abducted by the members of the *Interahamwe* (the trained Hutu youth militia) and kept as 'wives' for the purposes of sexual violence and domestic slavery.⁴ Many women remain trapped in these

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¹ See, for example, Art 7(1)(g) of the ICC Statute.

² *Prosecutor v Akayesu* (Case No. ICTR-96-4-T), Judgment, 2nd September 1998.

³ MS Kalra, 'Forced Marriage: Rwanda's Secret Revealed' (2001) 7 UC Davies J Int'l L & Pol'y 197, 200.

⁴ Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (September 1996) 33-37 <www.hrw.org/legacy/reports/1996/Rwanda.htm> accessed 12 June 2012.

marriages, both because of the stigma attached to those who have been the 'wives' of combatants and the security that they receive (such as food and protection) by staying with their 'husbands'.⁵ The practice of abducting and keeping wives in the above circumstances has now come to be understood under international law as forced marriage. However, such a charge remains absent from the Statute of the International Criminal Tribunal for Rwanda (the 'ICTR Statute')⁶ and its indictments. In calling for the recognition of forced marriage by the ICTR, Kalra notes that without acknowledging the crime there is little hope that the practice will stop.⁷ With evidence of forced marriages in other conflict zones such as Mozambique,⁸ Uganda,⁹ the Democratic Republic of the Congo (DRC),¹⁰ Cambodia¹¹ and Sierra Leone,¹² this warning is far from empty.

This paper will focus primarily upon the phenomenon of forced marriages which occurred during the civil war in Sierra Leone. As in Rwanda, forced marriages formed part of the violence against women during the war. Despite widespread evidence of this practice, its condemnation remains absent in the text of the Statute of the Special Court for Sierra Leone (the 'SCSL Statute').¹³ However, in a groundbreaking indictment, the Office of the Prosecutor (OTP) made clear its intentions to end the impunity of 'bush husbands' by setting out the charge of forced marriage under Article 2(i) of the SCSL Statute.¹⁴ This is an important and laudable step forward in the prosecution of gender-based crimes under international law. The previous Chief Prosecutor of the Special Court for Sierra Leone, David Crane, emphasised this in a press statement made regarding the new charges:¹⁵

The Office of the Prosecutor is committed to telling the world what happened in Sierra Leone during the war, and gender crimes have been at the core of our cases from the beginning. These new charges recognise another way that women and girls suffered during the conflict.

⁵ *ibid.* See specifically the testimonies of Monique and Venautie, 37 and Kalra (n 3) 202.

⁶ UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994 <<http://www.unhcr.org/refworld/docid/3ae6b3952c.html>> accessed 12 June 2012.

⁷ Kalra (n 3) 220.

⁸ BA Toy-Cronin, 'What is forced marriage? Towards a definition of forced marriage as a crime against humanity' (2010) 19 Colum J Gender & L 539, 559.

⁹ *ibid* 561; See Amnesty International, *Uganda: "Breaking God's Commands": the Destruction of Childhood by the Lord's Resistance Army* (September 1997)

<<http://www.amnesty.org/en/library/asset/AFR59/001/1997/en/e3d1420e-ea53-11dd-965c-b55c1122d73f/afr590011997en.pdf>> accessed 12 June 2012.

¹⁰ M Frulli, 'Advancing International Criminal Law: the Special Court for Sierra Leone recognizes forced marriage as a "new" crime against humanity' (2008) 6 J Int Criminal Justice 5 1033, 1041.

¹¹ See N Jain, 'Forced marriage as a crime against humanity: problems of definition and prosecution' (2008) 6 J Int Criminal Justice 5 1013, 1022-1025.

¹² See Human Rights Watch, *"We'll Kill You If You Cry" Sexual Violence in the Sierra Leone Conflict* (January 2003) <<http://www.hrw.org/en/node/12376/section/1>> accessed 12 June 2012.

¹³ UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002 <<http://www.unhcr.org/refworld/docid/3dda29f94.html>> accessed 12 June 2012.

¹⁴ This encompasses crimes against humanity and other inhumane acts.

¹⁵ Toy-Cronin (n 8) 564.

The suffering of women in Sierra Leone was recognised in the decision of the Armed Forces Revolutionary Council (AFRC) Appeals Chamber,¹⁶ which saw the court overturn a previous Trial Chamber and find forced marriage to be an international criminal offence.¹⁷ The decision provides hope for women in other conflict zones who have been subjected to forced marriage.

The aim of this paper is to demonstrate that the AFRC Appeals Chamber was correct in defining forced marriage as a crime against humanity. Although it has been argued by some commentators that forced marriage is entirely subsumed by the crime of sexual slavery, this paper will contend that the crime of forced marriage is distinguishable from sexual slavery and is a distinct crime in and of itself. In doing so, it will be argued that the criminalisation of this conduct reflects the need for ongoing flexibility in international criminal law as it seeks to combat those behaviours, old and new, which offend against the conscience of humanity.

2. Background to the Sierra Leone Conflict

Following independence from the United Kingdom in 1961, the West African nation of Sierra Leone was governed under a multi-party democracy. At the outbreak of civil war in 1991, the country was under the control of one party, the All People's Congress (APC) and despite an abundance of natural resources, was impoverished, in a state of economic crisis and its institutions were in complete disarray.

It was into this environment of discontent that in March 1991 an armed militia group calling itself the Revolutionary United Front (RUF), backed by Liberian warlord Charles Taylor, invaded Sierra Leone from neighbouring Liberia with the intention of overthrowing the APC's government. When it first came into existence, the RUF was comprised primarily of students frustrated by the state of affairs in their country, along with disaffected youth from both Freetown and the outlying mining areas. However, as the group gained more control, it pressurised and even abducted civilians, including children, to increase its ranks.¹⁸ The militia operated under the leadership of an ex-Sierra Leone Army (SLA) officer named Foday Sankoh and alongside other rebel groups¹⁹ and pro-government forces,²⁰ were responsible for the ensuing violence and bloodshed that plunged Sierra Leone into a decade-long civil war.

The emergence of a second rebel group in May 1997 resulted in the newly elected President Kabbah being driven into exile following a coup led by a group calling itself the Armed Forces Revolutionary Council (AFRC). This group comprised

¹⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (Case No. SCSL-04-16-A), Appeals Chamber Judgment, 22nd February 2008. Hereinafter, the 'AFRC Appeals Chamber Judgment'.

¹⁷ *ibid* 195-196.

¹⁸ V Oosterveld and DJ Bederman, 'Prosecution v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao' (2010) 104 Am J Int'l L 1 73, 74.

¹⁹ Such as the Armed Forces Revolutionary Council (AFRC) and the West Side Boys, a splinter AFRC group.

²⁰ Including the Civil Defence Forces (CDF), which was an amalgamation of local pro-government militias.

soldiers of the Sierra Leone Army (SLA)²¹ and it entered into a power sharing arrangement, for a brief time, with the RUF. Finally, in January 1999, a battle for the capital Freetown marked the peak of the war. Escalating aggression at the hands of RUF and AFRC forces as they tried to recapture the capital led the international community to pressurise the still exiled President Kabbah into signing the Lomé Accord, a peace agreement with the rebel groups.²² However, deadlines and ceasefire obligations set by the Lomé Accord were not kept and in May 2000 a number of RUF units, who were refusing to disarm, attacked and abducted five hundred UNAMSIL²³ staff and military observers. This led to a complete breakdown of the ceasefire and once again Sierra Leone was thrown into chaos with fighting erupting across the country. Although a second ceasefire agreement was signed in November 2000, peace was not officially declared until January 18, 2002.

In order to re-establish justice, end impunity and effect reconciliation, President Kabbah wrote to the United Nations Security Council to request the establishment of a court to try those responsible for crimes committed during the war. The Security Council responded positively to this request,²⁴ leading to the creation of the Special Court for Sierra Leone (SCSL) – the first *ad hoc* international tribunal to be established in a country where the conflict occurred.²⁵ It was charged with the task of prosecuting those who bore the ‘(...) greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law’.²⁶ The tribunal started work in December 2002 and since its inception it has issued indictments against leading members of the AFRC and RUF militias as well as the pro-government CDF forces.²⁷

The conflict in Sierra Leone was characterised by the indiscriminate violence by both sides, not just towards one another but also towards non-combatants.²⁸ These attacks included, but were not limited to: brutal abductions, murder, rape, sexual slavery, forced labour, mutilations, amputations, the use of children as soldiers, the wanton destruction of property and forced marriage.²⁹ Gender-based violence was a defining feature of this conflict. A report undertaken by Physicians for Human Rights (PHR) indicates that as many as 64,000 woman and girls experienced sexual

²¹ Under the leadership of Johnny Paul Koroma.

²² The Lomé Accord led to a new power sharing agreement between the RUF and President Kabbah’s government, establishing the RUF as a political party. It also provided amnesty for atrocities committed by the RUF (with the exception of the AFRC who were not a party to the Lomé Accord) and the deployment of a United Nations peace-keeping operation, United Nations Mission in Sierra Leone (UNAMSIL).

²³ See n 22.

²⁴ See UN Security Council Resolution 1315 (2000).

²⁵ The International Criminal Tribunal for the former Yugoslavia (ICTY) sits at The Hague and the International Criminal Tribunal for Rwanda (ICTR) sits in Arusha, Tanzania. The SCSL is based in Freetown, Sierra Leone.

²⁶ SCSL Statute, Art 1.

²⁷ William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 39.

²⁸ J Gong-Gershowitz, ‘Forced Marriage: A “New” Crime Against Humanity?’ (2009) 8 Nw U J Int’l Hum Rts 53, 56.

²⁹ See Human Rights Watch, *Shattered Lives* (n 4).

violence during the conflict in Sierra Leone.³⁰ As part of this gender-based violence, women and girls were frequently abducted by rebels and assigned 'husbands' in an arrangement known as 'bush marriage'. As described above, this phenomenon involved women being forced to cook, clean and carry their husband's belongings as well as being raped, being forced to abort pregnancies and bearing and rearing children.³¹ Women trapped in these sham marriages were often afforded a certain degree of protection from rape by other soldiers, but this benefit was outweighed by the severe mental, psychological and physical suffering that these 'bush wives' had to endure.³²

As part of the overall aim to end the impunity from prosecution of the perpetrators, the OTP of the SCSL sought to criminalise this practice by including in the AFRC, Civil Defence Forces (CDF) and RUF indictments a new charge of 'forced marriage'.³³ The charge was added successfully to the AFRC and RUF indictments but, despite evidence of sexual violence, was not added to the list of charges being brought against CDF indictees.³⁴ At trial, the prosecution failed to convince the court of the merits of the new charge and, for reasons which will now be discussed, chose to reject the charge of forced marriage.

3. The Decisions of the SCSL

A. Introduction

To date, three judgments have been issued by the SCSL which address forced marriage. The case law begins with the AFRC Trial Chamber's³⁵ rejection of the charge on the basis that the crime could not be distinguished from that of sexual slavery. The Appeals Chamber overturned this ruling, deeming the trauma and stigma caused by a 'forced conjugal association' grave enough to constitute a separate, distinguishable crime against humanity of forced marriage.³⁶ Following the AFRC trials, for the first time in history, the RUF Trial Chamber convicted individuals accused of forced marriage. These convictions were upheld on appeal. The recent trial of the former President of Liberia, Charles Taylor, is also significant here. Although there was no explicit charge of forced marriage in the indictment against him, evidence relating to the practice was heard during court proceedings.

³⁰ Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone, A Population Based Assessment* (June 2002) 8 <<http://physiciansforhumanrights.org/library/reports/war-related-sexual-violence-sierra-leone-2002.html>> accessed 12 June 2012.

³¹ AFRC Appeals Chamber Judgment [190].

³² *ibid.*

³³ SCSL Statute, Art 2(i).

³⁴ André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Volume IX: The Special Court for Sierra Leone 2003-2004* (Hart Publishing 2006) 279.

³⁵ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (Case No. SCSL-04-16-T), Trial Chamber Judgment, 20th June 2007. Hereinafter, the 'AFRC Trial Chamber Judgment'.

³⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*. (Case No. SCSL-04-16-A), Appeals Chamber Judgment, 22nd February 2008. Hereinafter, the 'AFRC Appeals Chamber Judgment'.

By examining the abovementioned cases, this section aims to demonstrate the following: firstly, how the new offence of forced marriage has evolved; secondly, why the offence is distinctive; and thirdly, the remaining problems that the courts must address if the offence is to be formulated correctly.

B. The AFRC Trial Chamber Judgment

The AFRC was an anti-government militia formed in 1997 after a successful coup led by officers of the SLA against the elected government of President Kabbah. Like the RUF, the AFRC claimed to be intent on restoring democracy and freedom to the people of Sierra Leone.³⁷ Three of the highest-level leaders involved in AFRC activities during the war were singled out for indictment by the OTP: Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu.³⁸ These individuals were arrested in 2003 and were convicted at trial of 11 of the 14 counts listed in the indictment. The convictions resulted in prison sentences of 50 years for the first and third accused (Brima and Kanu) and 45 years for the second accused (Kamara). Significantly, however, none of the indictees were successfully prosecuted for the new charge of forced marriage.

The factual circumstances of forced marriages in Sierra Leone were outlined by the Trial Chamber. The court described the way in which many women, often following violent abductions, were forcibly assigned to men or boys for whom they were expected to undertake domestic duties such as cooking, cleaning and carrying loads. The women, who were labelled as 'wives', were also abused sexually by their 'husbands' and lived in an environment of fear. They were warned that they would be severely punished or killed if they did not submit to the wishes of their husband or show them loyalty.³⁹ In addition to physical traumas experienced as a result of the sexual abuse, many of these so-called 'bush wives' suffered severe consequences to their sexual health including the contraction of HIV, neither of which, due to the lack of health care provision in the bush, could be attended to.⁴⁰ These women were also forced to bear and rear children.⁴¹ Far from the usual mutual obligations to be expected in a marriage relationship, bush wives were afforded little reciprocity, although, as mentioned above, they were sometimes protected from sexual violence at the hands of other soldiers and had better access to food supplies.⁴² Combined with the conferral of a status of marriage in a threatening or coercive environment, it is these elements that make up the crime of forced marriage. This is reflected in the Prosecution's submissions, which stated that the crime,⁴³

³⁷ *ibid* 169.

³⁸ The whereabouts of the key leader of the AFRC, Johnny Paul Koroma, are unknown and he is presumed to be either dead or missing: see Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support* (September 2004) 11 <<http://www.hrw.org/en/node/11983/section/1>> accessed 12 June 2012.

³⁹ AFRC Trial Chamber Judgment [1455] – [1458].

⁴⁰ AFRC Trial Chamber Judgment, Separate Concurring Opinion of Justice Sebutinde [15].

⁴¹ *ibid* [10].

⁴² AFRC Trial Chamber Judgment, Partly dissenting opinion of Justice Doherty [30].

⁴³ AFRC Trial Chamber Judgment [216].

(...) consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.

Viewed from this perspective, forced marriage consists of a package of separate criminal offences that can be listed under two distinct headings: (i) sexual offences (such as forced pregnancy, rape, and sexual slavery); and (ii) non-sexual offences (including abduction, enslavement, forced labour, humiliating or degrading treatment and violence to life and health). These elements of the crime of forced marriage are, in and of themselves, well established as offences in international criminal law.

However, a definition of the forced marriage that ends here, according to the Trial Chamber, reflects best the crime of sexual slavery rather than a distinct offence of forced marriage.⁴⁴ The court was also concerned that given the sexual violence inherent in a forced marriage, the charge should not appear under 'other inhumane acts' but would be better placed under Article 2(g) of the SCSL Statute. This provides for the prosecution of the crime of sexual slavery and 'any other form of sexual violence'. Noting this, the court ruled that the charge of forced marriage was entirely subsumed within the crime of sexual slavery and that '(...) there is no lacuna in the law that would necessitate a separate crime of "forced marriage" as an "other inhumane act"'.⁴⁵ When the definitive elements of the crime of forced marriage are left here, charging the conduct as sexual slavery is the appropriate course of action. However, it is submitted that the charge of forced marriage is better suited to address the plight of the many women who were trapped in these associations as there is more to a forced marriage than can be encapsulated by the crime of sexual slavery alone.

Sexual slavery was first codified as a crime against humanity in the Rome Statute. The wording of Article 2(g) of the SCSL Statute largely reflects this codification.⁴⁶ Prior to this, the charge had been developed by *ad hoc* international tribunals, including the ICTY, in particular in the case of *Kunarac*.⁴⁷ In this case, the accused was found guilty of the crimes of abduction, enslavement and rape of two Muslim girls who were held in an abandoned house. The ICTY took into account the following factors in considering whether or not the accused was guilty of enslavement:⁴⁸

(...) 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.

⁴⁴ Sexual Slavery was prosecuted for the first time by the SCSL.

⁴⁵ AFRC Trial Chamber Judgment [713].

⁴⁶ Schabas (n 27) 212.

⁴⁷ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Case No. IT-96-23-T & IT-96-23/1-T), ICTY Trial Chamber Judgment, 22nd February 2001 [742]. Hereinafter, the 'Kunarac Trial Chamber Judgment'.

⁴⁸ Gong-Gershowitz (n 28) 59 (original emphasis).

The Rome Statute's Elements of Crime relating to sexual slavery largely reflect what is noted above:⁴⁹

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 caused such person or persons to engage in one or more acts of a sexual nature; and
3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.

By noting the firmly established principles regarding the crimes of enslavement and rape developed by the ICTY and ICTR,⁵⁰ and drawing upon the Elements of Crimes of the Rome Statute,⁵¹ the Trial Chamber concluded that there was not '(...) one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery'.⁵² The court found that use of the label 'wife' in such a context was an indicator of ownership over a woman rather than one which connoted the mutual obligations expected of a marital relationship.⁵³ This term could be conferred at the whim of the perpetrator.⁵⁴ The reasoning expressed by the Trial Chamber thus far is consistent with the crime of sexual slavery as there was evidence of the exercising of ownership and sexual violence. However, both factors are also characteristic of a forced marriage.

The court found that evidence of bush wives being forced to carry out 'conjugal duties' such as cooking and cleaning should not be characterised as facets of a marriage relationship. Rather, they were to be classified as forced labour, providing the element of control required for sexual slavery. This reflects the reasoning of the ICTY in *Kunarac*, where the Trial Chamber heard evidence that the women were forced to carry out domestic chores over and above the sexual violence that they were subjected to.⁵⁵ There, the court held that this meant the women were being treated as the personal property of their captors and that being forced to carry out domestic duties amounted to enslavement.⁵⁶

Some critics believe that the Trial Chamber adopted the correct stance by applying the reasoning of the ICTY in *Kunarac* to the circumstances surrounding bush wives.⁵⁷ Toy-Cronin argues that classifying gender-stereotyped duties such as

⁴⁹ International Criminal Court, *Elements of Crimes*
< http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf > accessed 12 June 2012.

⁵⁰ AFRC Trial Chamber Judgment [706].

⁵¹ *ibid* [708].

⁵² *ibid* [710].

⁵³ *ibid* [711].

⁵⁴ *ibid*.

⁵⁵ *Kunarac* Trial Chamber Judgment [742].

⁵⁶ *ibid*.

⁵⁷ Toy-Cronin (n 8).

cooking, cleaning and child rearing as conjugal duties is '(...) not only unpersuasive but is also regressive, rather than progressive, in the development of feminist international criminal law.'⁵⁸ She goes on to conclude that the primary purpose of sexual slavery is not changed by the existence of conjugal duties.⁵⁹ There are also those who maintain that to focus on the non-sexual aspects of a forced marriage undermines the trauma caused by the sexual violence that these women are subjected to.⁶⁰ Accordingly, they argue that the crime is encapsulated best under the charge of sexual slavery because ultimately this is the purpose for which the women were held.

When taken in their purest form, both arguments relate to a concern that any distinction between forced marriage and sexual slavery will be blurred by the inclusion of conjugal duties within a definition of the former. While it is true to say that there are elements of sexual slavery and enslavement common to what occurs within a forced marriage, this should not prevent the creation of a new offence. The reasons are twofold: first, as far as over-emphasising the non-sexual elements is concerned, the converse is also true. It has been said that by defining forced marriage as sexual slavery, too little weight was given to the '(...) substantial nonsexual, but gendered, elements of forced marriage.'⁶¹ It is wrong to presume that gender-based offences are purely sexual – the multi-layered nature of forced marriage is evidence of this. Recognising forced marriage as an 'other inhumane act' is appropriate as it does justice to the full nature and weight of the crime and gives due credence to the equally demeaning non-sexual aspects of forced marriage.⁶²

Secondly, international criminal law can cater for the possibility of two crimes bearing similar resemblance. Jain demonstrates this whilst discussing the similarities between enslavement and sexual slavery:⁶³

(...) overlaps between crimes recognized under existing international law already exist, for example between the crimes against humanity of murder and extermination, or between the crimes against humanity and war crimes of torture and rape. While enslavement captured the profound deprivation of liberty characteristic of sexual slavery, it did not sufficiently emphasise the sexual violence vital to the crime.

Therefore, there is an established precedent in international law which permits a certain degree of similarity between offences. Moreover, there is also one aspect particular to forced marriage that is 'not sufficiently emphasised' by the charge of sexual slavery – the physical, mental and psychological trauma experienced by women because of the label 'wife'. The Trial Chamber was of the opinion that no evidence had been adduced to show that either physical or mental trauma had been

⁵⁸ *ibid* 570.

⁵⁹ *ibid* 571.

⁶⁰ Gong-Gershowitz (n 28) 75.

⁶¹ V Oosterveld and A Marlowe, 'Prosecution v Alex Tamba, Brima Bazzy Kamara & Santigie Borbor Kanu; Prosecution v Moinina Fofana & Allieu Kondewa' (2007) 101 Am J Int'l L 848, 854.

⁶² Jain (n 11) 1030.

⁶³ *ibid* 1029.

caused to victims because of the use of the title 'wife'.⁶⁴ Even if such evidence was available, the court did not believe that it could constitute a crime against humanity as it would not be of a gravity similar to other offences referred to under Article 2(a) to (h) of the SCSL Statute.⁶⁵

The separate concurring opinion of Justice Sebutinde and the partly dissenting opinion of Justice Doherty, although ultimately drawing different conclusions on the viability of a separate offence of forced marriage, both develop the effect of the imposition of the label 'wife' and shed some light on whether or not the latter reasoning of the Trial Chamber is correct.

(i) The label of 'wife': partly dissenting opinion of Justice Doherty

Justice Doherty believed that the charge of forced marriage could be considered as a separate crime against humanity under 'other inhumane acts'. In her dissenting opinion, she drew particular attention to how the use of the label 'wife' along with the expectation that the woman carry out 'conjugal duties' caused mental, physical and moral suffering to the victim.⁶⁶ The stigma attached to those who have been bush wives often led to the victim being rejected by both their families and communities thus affecting their '(...) ability to reintegrate into society and thereby prolonging their mental trauma.'⁶⁷ Coulter notes that often, '(...) people feared that rebel women could become violent and wreak havoc in the community' and so such women were marginalised and excluded from their communities.⁶⁸ This is also reflected in a report by Human Rights Watch:⁶⁹

(...) [bush wives] are often not able to return to their villages out of fear, lack of funds and social stigma, especially if they have given birth to children fathered by rebels. The women are therefore often forced to remain in situations in which they are vulnerable to continuing abuse.

This demonstrates that the stigma inherent with being labelled 'wife' by a rebel is real, as is the suffering it causes. This kind of suffering is generally not present in cases of enslavement such as *Kunarac* which, although sharing elements such as forced labour with forced marriage, do not have this added element of forced conjugal association and the stigma which flows from it. Justice Doherty noted this factor in her opinion as something which differentiates forced marriage from sexual slavery.⁷⁰

Aside from the stigma caused by association with bush husbands, it is also apparent that use of the term 'wife' was both manipulative and strategic.⁷¹ It is

⁶⁴ AFRC Trial Chamber Judgment [710].

⁶⁵ *ibid.*

⁶⁶ AFRC Trial Chamber Judgment, Partly dissenting opinion of Justice Doherty [48].

⁶⁷ *ibid.*

⁶⁸ Chris Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Cornell University Press 2009) 210.

⁶⁹ Human Rights Watch, "We'll Kill You If You Cry" (n 12) 44-45.

⁷⁰ AFRC Trial Chamber, Partly dissenting opinion of Justice Doherty [50].

⁷¹ Similar conclusions were drawn by the RUF Trial Chamber: see Oosterveld and Bederman (n 18) 80.

submitted that the Trial Chamber and Justice Sebutinde erred in their conclusions when they found that the relationship between bush wife and husband was one of owner-slave rather than husband-wife. Evidence given by the Prosecution Expert Witness, as cited in the opinion of Justice Sebutinde, is instructive in this respect:⁷²

The use of the term “wife” by the perpetrator was deliberate and strategic. The word “wife” demonstrated a rebel’s control over a woman. His psychological manipulations of her feelings rendered her unable to deny him his wishes. “Wife” showed that the woman belonged to a man and could not be touched by another.

Therefore, while there are elements of ownership being exercised by rebels when using the term ‘wife’, it is also clear that such relationships can be described, in the cultural context of Sierra Leone, as husband-wife relationships.⁷³ The Trial Chamber’s definition of marriage as one which involves mutual obligations⁷⁴ was distinctly western and would have little currency in Sierra Leone where for a women to be married meant being ‘totally obedient’ and ‘belonging’ to her husband.⁷⁵ Toy-Cronin criticises this view of the Trial Chamber, stating that,⁷⁶

(...) in recognising that the relationship of husband-wife is tantamount to owner-slave, it fails to acknowledge that victims conferred the label of “wife” experience effects that are distinct from those suffered by victims of slavery not given this label.

It is because of the label wife that these women felt obligated to carry out the tasks demanded of them as they were under the authority of their bush husbands in a relationship which perversely reflects that of a traditional Sierra Leonean marriage. This psychological manipulation is absent in cases of sexual slavery where women are kept primarily for the purpose of sexual violence and ancillary to this, forced labour. Forced marriage can be distinguished here from sexual slavery as women did not carry out the demands required of them because of an owner-slave relationship but because carrying out such duties was a cultural expectation of marriage. These women were trapped in an unbearable situation. On the one hand, they felt obligated to carry out conjugal duties because they were afraid and it was also what society expected of them in a marriage. On the other hand, however, they knew that the relationship they were trapped in was a sham but potentially it was this relationship which was keeping them alive.

However, some commentators maintain that the Trial Chamber’s decision not to focus upon the marriage aspect of the bush wife and husband association was correct. For example, it has been suggested that ‘(...) the phenomenon of “bush wives” during the civil war in Sierra Leone does not resemble any form of marriage,

⁷² AFRC Trial Chamber Judgment, Separate Concurring Opinion of Justice Sebutinde [13].

⁷³ Toy-Cronin (n 8) 575.

⁷⁴ AFRC Trial Chamber Judgment [711].

⁷⁵ Coulter (n 68) 79-80.

⁷⁶ Toy-Cronin (n 8) 576.

whether forced or arranged, in any meaningful way.’⁷⁷ Gong-Gershowitz is criticising the distinction drawn by the Justices between arranged marriages during peace-time and forced marriages occurring during a time of conflict and is, therefore, suggesting that what occurred in Sierra Leone is better described as sexual slavery rather than forced marriage because there was no ‘marriage’ at all. Viewed from this perspective, drawing comparisons with marriage is seen as unhelpful because it does not encapsulate the sexual violence experienced by bush wives.

The gravity of the psychological and mental suffering that bush wives experience in a forced marriage relationship - precisely because of the sham marriage arrangement - is omitted entirely by such reasoning. It also precludes the possibility that sexual violence can be captured by a crime categorised as an ‘other inhumane act’. If the prosecution of those responsible for crimes against humanity is to be effective then the crime must be described in a manner that is understood by victims. David Crane, the first Chief Prosecutor at the SCSL noted that, ‘(...) justice not appreciated or understood by victims may not be justice at all, and this can impact how that justice brings peace and stability to a region.’⁷⁸ He goes on to say that we should, ‘[b]eware of the cookie-cutter approach to international justice - it may hinder peace and not enhance it’.⁷⁹ It is submitted that the injustices suffered by bush wives are best remedied by prosecuting the conduct used by the perpetrators to cause the suffering. For women in Sierra Leone, this suffering occurred under the guise of marriage, one which purposefully reflected Sierra Leonean ideals. The term forced marriage, therefore, better reflects the suffering of women as it encapsulates all aspects of the conduct, including sexual violence. It also does not undermine the trauma caused by other aspects of the offence by emphasising one element of the crime over another.

The stigma attached to ‘wives’ coupled with the expectation that they carry out conjugal duties - and the physical trauma that such duties inflict - is tantamount to the gravity required of a crime against humanity and is unheard of in the jurisprudence of sexual slavery cases. This idea of ‘stigma’ and the consequences of conjugal association were to prove decisive in the decision of the Appeal Chamber to overturn the reasoning of the Trial Chamber and find that forced marriage did indeed constitute an ‘other inhumane act’ under Article 2(i) of the SCSL Statute.

It is also important to prosecute the alleged conduct as marriage and not sexual slavery in order that those perpetrating the offence do not see marriage as a loophole. In the context of events in Rwanda, Karla notes that by not addressing forced marriage as a criminal offence, the international community was failing to provide a deterrent for future cases.⁸⁰ She goes on to say that some combatants,⁸¹

(...) may claim women as wives, rape them, and submit them to various forms of physical and psychological violence with impunity. By not trying these

⁷⁷ Gong-Gershowitz (n 28) 66.

⁷⁸ DM Crane, “‘Back to the Future’ - Reflections on the Beginning of the Beginning: International Criminal Law in the Twenty-First Century’ (2008) 32 *Fordham Int’l L J* 6 1761, 1768.

⁷⁹ *ibid.*

⁸⁰ Kalra (n 3) 204.

⁸¹ *ibid.*

crimes, the international community sends a message that these acts are acceptable as long as they are done under the guise of marriage.

The above underlines the importance of targeting the described conduct as forced marriage rather than placing it in another category such as sexual slavery. In doing so, the courts make it clear that marriage is not to be used as a weapon of war.

Although the decision of the Trial Chamber proved instructive in some aspects,⁸² it is clear that the case was also a missed opportunity to advance the development of gender-based crimes under international law by acknowledging forced marriage as a separate offence.⁸³ This was to change on appeal, however, where the SCSL acknowledged for the first time the existence of forced marriage as a distinct crime against humanity.

C. The AFRC Appeals Chamber Judgment

Following the decision of the Trial Chamber, forced marriage was deemed to be entirely subsumed within the crime of sexual slavery and not an offence in its own right. The Appeals Chamber reversed this decision. In finding that forced marriage was distinguishable from sexual slavery, it ruled that,⁸⁴

(...) 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.

There were two distinguishing factors highlighted by the Appeals Chamber. Firstly, the physical, mental and psychological suffering that was caused to the victim as a result of being compelled by force, or threat of force, into a 'conjugal association'⁸⁵ and, secondly, the implied relationship of exclusivity that existed between a 'husband' and 'wife' which could lead to disciplinary consequences, including death, if breached.⁸⁶ Importantly, in deciding that forced marriage was a new offence under international law, the Appeals Chamber also confirmed that the required standards for conduct to be considered a crime against humanity under an 'other inhumane act' were met.⁸⁷ This is discussed in greater detail later in this paper.

The judgment marks a milestone in the development of the offence of forced marriage. However, difficulties arise in defining the *actus reus* of the crime. For example, the court heard arguments from the Prosecution which set out that forced marriage need not involve any sexual violence or, for that matter, forced labour.⁸⁸

⁸² Such as expanding understanding of the war crimes of the use and recruitment of child soldiers.

⁸³ Oosterveld and Marlowe (n 61) 857.

⁸⁴ AFRC Appeals Chamber Judgment [195].

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid* [197]-[202].

⁸⁸ See, for example, AFRC Appeals Chamber Judgment [178] and [189].

Such contentions can also be found in the partly dissenting opinion of Justice Doherty in the Trial Chamber's judgment,⁸⁹ posing the question of whether forced marriage is simply the assignation of the title of 'wife' and nothing more. Such reasoning is incompatible with the evidence that the suffering of the victim comes both from the stigma caused by the label 'wife' and the consequences that flow from it – 'the conjugal duties'. There was no evidence led by the Prosecution, nor is such evidence clear from other sources, which demonstrates that the two aspects of suffering can be separated. Where there were reports of forced marriage in Sierra Leone, there were also other elements such as forced labour and sexual violence.⁹⁰

In describing the circumstances which amounted to a forced marriage, the court implied that features such as violent abduction, forced domestic labour, rape and forced domestic pregnancy were integral elements of the crime.⁹¹ Similar reasoning can be found where the court discussed whether the crime merited classification as an 'other inhumane act'.⁹² This would suggest that the Appeals Chamber was content with holding that forced marriage was a multi-layered charge made up of both the conjugal association and the consequences that flow from it. This is important to establish as such a definition best captures the complete gravity of the suffering experienced by women and girls who were bush wives. However, further clarification of the Appeal Chamber's terminology of 'forced conjugal association' is necessary in order to establish precisely what makes up the elements of forced marriage. Such explanation is required if the charge is to avoid being labelled as 'sexual slavery plus'⁹³ and to dismiss outright the notion that the defining feature of the conduct of forced marriage is only the use of the label 'wife'.

The Appeal Chamber judgement marks a positive step in the evolution of this new offence. There are, however, still certain aspects of the definition of forced marriage which require clarification in order to ensure that the crime is not understated. This could happen were 'conjugal duties' to be removed from the description, or the trauma inherent in the label 'wife' underestimated. Without these distinguishing features of the offence, there is a risk of blurring forced marriage with the separate offence of sexual slavery.

D. The RUF Cases

The RUF were responsible for much of the violence that took place during the civil war in Sierra Leone and indictments were issued against three RUF leaders.⁹⁴ Among the eighteen charges brought against the accused were two separate charges for the crimes against humanity of sexual slavery and forced marriage.⁹⁵ All three indictees were found guilty of both sexual slavery and forced marriage and were convicted of

⁸⁹ AFRC Trial Chamber Judgment, Partly dissenting opinion of Justice Doherty [52].

⁹⁰ See, for example, the evidence of witnesses TF1-094 and TF1-133 in AFRC Trial Chamber Judgment [1113]-[1118].

⁹¹ AFRC Appeals Chamber Judgment [190].

⁹² *ibid* [199].

⁹³ Gong-Gershowitz (n 28) 70.

⁹⁴ The key leader of the RUF, Foday Sankoh, died of natural causes before he could be brought to trial.

⁹⁵ Forced marriage was, again, listed under 'other inhumane acts'.

these offences. This represented the first time in international law that there had been convictions for these two crimes. The Appeals Chamber upheld both the charges and the sentences imposed at trial.

The AFRC Appeals Chamber's definition of forced marriage as an act which involves the imposition of a 'forced conjugal status' upon a woman or girl⁹⁶ was followed in both RUF judgments.⁹⁷ The RUF Appeals Chamber also held that, as with sexual slavery, consent was not to be taken as a mitigating factor as, under the circumstances, genuine consent would always be impossible.⁹⁸ This emphasised the view of the AFRC Appeals Chamber that the benefits conferred upon women in forced marriages neither signifies consent nor vitiates the perpetrator's conduct.⁹⁹

It was hoped that the RUF judgments would clarify uncertainties left by the AFRC Appeals Chamber Judgment. For example, as stated above, the terminology of 'forced conjugal association' is without any clear definition at present. Also, it is not known whether forced marriage is to be categorised as a gender-specific offence or whether boys and men may be victims of forced marriages as well. A ruling on the latter would be particularly instructive in light of evidence that forced marriages took place in Cambodia under the oppressive reign of the Khmer Rouge. Unlike Sierra Leone and the rest of the African continent, in Cambodia both women and men were forced together into marriage relationships.¹⁰⁰ Jurisprudence from the SCSL in relation to this matter would be helpful for the Extraordinary Chambers in the Courts of Cambodia as they discern whether or not charges of forced marriage can be brought against the third parties who instigated them.

Unfortunately, these questions were not answered by the SCSL. In fact, Gong-Gershowitz fears that the RUF judgment at trial blurred the distinction between forced marriage and sexual slavery rather than further distinguishing the two.¹⁰¹

Far from clearing up any ambiguities left open by AFRC Appeals Judgment, the RUF judgment perpetuates the confusion by loosely applying the facts to one or both crimes without maintaining a clear distinction between the elements that must be proven for each. One possible reason for the lack of clarity in the RUF judgment is that the elements of the forced marriage crime are not readily discernible.

Therefore, Gong-Gershowitz suggests that, '(...) the RUF judgment further muddies the waters and leaves this new crime against humanity without a coherent definition in international criminal law.'¹⁰² This argument is not without merit. The Trial Chamber failed to adequately differentiate between the two charges of sexual slavery

⁹⁶ AFRC Appeals Chamber Judgment [202].

⁹⁷ See, for example, *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case No. SCSL-04-15-T), Trial Chamber Judgment, 2nd March 2009 [1295]. Hereinafter, the 'RUF Trial Chamber Judgment'.

⁹⁸ *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case no. SCSL-04-15-A), Appeals Chamber Judgment, 26th October 2009 [734] and [736]. Hereinafter, the 'RUF Appeals Chamber Judgment'.

⁹⁹ AFRC Appeals Chamber Judgment [190].

¹⁰⁰ See Toy-Cronin (n 8) 549.

¹⁰¹ Gong-Gershowitz (n 28) 73.

¹⁰² *ibid* 75.

and forced marriage. Evidence for the two charges was heard together as the Trial Chamber considered them to be intertwined. This has been detrimental to the understanding of what defines a forced marriage. It is true that forced marriage is, '(...) a multidimensional, gender-based crime with sexual and non-sexual characteristics'¹⁰³ and evidence given by witnesses during the RUF trial, as in the AFRC trial, emphasises this. Considering evidence regarding sexual slavery, therefore, is inevitable when determining the charge of forced marriage. However, the difficulty with the structuring of the court's ruling becomes evident when conclusions are drawn from the evidence. For example, in the case of witness TF1-093, the court concluded: 'We therefore find that the "forced marriage" of witness TF1-093 constitutes sexual slavery and an 'other inhumane act', as charged under counts 7 and 8 of the indictment'. A similar conclusion was drawn regarding witness TF1-314, where the court reviewed the circumstances which demonstrated that against her will, the witness was abducted, forced into a marriage (which involved domestic chores and sexual intercourse)¹⁰⁴ and held under such circumstances which made her feel unable to escape as she feared for her life. The court concluded that the elements of sexual slavery and forced marriage had been met.¹⁰⁵

On the one hand, the bundling together of evidence relating to sexual slavery and forced marriage highlights the multi-faceted nature of the offence by demonstrating that it is made up of both sexual and non-sexual characteristics. However, by failing to distinguish clearly between where one offence begins and the other ends, not only are we still no closer to establishing what constitutes evidence of a 'forced conjugal relationship' but there is a danger that the charge of forced marriage could be viewed as duplicitous and repetitive. A clear definition of the concept of a forced conjugal relationship is essential if defendants are to know what it is they are being accused of and, therefore, how they can best defend themselves in the face of such accusations. Some commentators¹⁰⁶ have attempted to provide a working definition of the crime. However, any such definition must come ultimately from either the SCSL, another international tribunal or ideally from an amendment of the Rome Statute following approval and debate by the Coalition for the International Criminal Court as these are the primary sources of international criminal law.

The RUF cases proved progressive by highlighting the multi-dimensional nature of the offence, removing the need to examine the issue of consent and recording convictions for the charge for the first time. They also bring to the fore the plight of bush wives. However, the judgment failed to provide further clarification of certain key aspects of the offence, namely a definition of a 'forced conjugal association'.

¹⁰³ Oosterveld and Bederman (n 18) 80.

¹⁰⁴ RUF Trial Chamber Judgment [1460].

¹⁰⁵ *ibid* [1461].

¹⁰⁶ See, for example, Jain (n 11) 1031.

E. The Trial of Charles Taylor

The trial of Charles Taylor, former President of Liberia, represents another landmark in international criminal law. In this case, the court ruled that despite Taylor's position as an incumbent head of state at the time the indictment was issued, this was not a bar to his prosecution.¹⁰⁷ The trial has now concluded, with the Chamber finding Taylor guilty on all eleven counts.¹⁰⁸ The indictment against Taylor contained, amongst others, charges of sexual slavery, abductions and, in Count 8, the charge of 'other inhumane acts' cited as a crime against humanity, including mutilations and beatings.¹⁰⁹ No charge of forced marriage was brought against the former president.¹¹⁰ However, in his opening statement to the Trial Chamber, sitting at the ICC in The Hague, the prosecutor stated:¹¹¹

You will hear that Sierra Leonean women captured by the RUF or AFRC were forced to make strategic choices that no women should ever have to make. These women would seek to become attached to a single commander or fighter as a "bush wife" because this was the best way to limit the abuse they would suffer. The alternative was that [*sic*], and I quote a witness, "to be treated like a football in the field," being exposed to one rape after another perpetrated by many men without any consideration for health, feelings or lives.

Evidence was also heard during the trial relating to the use of women as 'jungle wives'¹¹² or 'bush wives'.¹¹³ This demonstrates that in the context of Sierra Leone, a discussion of offences committed against women such as rape and sexual slavery will inevitably lead to evidence of forced marriage. This emphasises that it is difficult to simply compartmentalise gender-based crimes into rape and sexual slavery as such offences are often complex in nature and will have many facets – both sexual and non-sexual. An indictment including the charge of forced marriage captures more effectively all of the elements of gender-based crime because sexual offences may have occurred within the wider context of a forced marriage rather than in isolation.

¹⁰⁷ M Pack, 'Developments at the Special Court for Sierra Leone' (2005) 4 Law & Prac Int'l Cts & Tribunals 171, 182.

¹⁰⁸ At the time of writing, the full judgement of the ICC had not been published. Only a summary version was available. As a result, a detailed analysis of the judgement and its reasoning was not possible. For further information on the decision of the court, see the SCSL website <<http://www.sc-sl.org/>> accessed 12 June 2012.

¹⁰⁹ *Prosecutor v Taylor* (Case No. SCSL-2003-01-T), Prosecution's Second Amended Indictment, 7 <<http://www.sc-sl.org/LinkClick.aspx?fileticket=Irn0bAAMvYM%3d&tabid=107>> accessed 12 June 2012.

¹¹⁰ *ibid.*

¹¹¹ *Prosecutor v Taylor* (Case No. SCSL-2003-01-T), Trial Chamber II, Transcript of Prosecution Opening Statement [63].

¹¹² *Prosecutor v Taylor* (Case No. SCSL-03-1-T), Trial Chamber, Transcript, April 23 2008, 8392 (line 23) – 8395 (line 19).

¹¹³ *Prosecutor v Taylor* (Case No. SCSL-03-1-T), Trial Chamber, Transcript, April 27 2010, 40104 (line 28) – 40105 (line 7) and 40111 (line 27) – 40112 (line 12).

Once the full judgment is available, it will be interesting to see how the Trial Chamber has distinguished the crime of sexual slavery from forced marriage, if indeed it has done so at all. As mentioned above, evidence of forced marriage has been led by the prosecution. If the Trial Chamber has used this evidence to support conviction for sexual slavery under Count 5 of the indictment, then this will blur the boundaries separating these two distinct crimes. This would be unhelpful in the evolution of forced marriage as a distinct and recognisable crime against humanity. Nevertheless, even without a charge of forced marriage in the indictment, the transcripts of the Taylor trial may still prove useful in clarifying certain aspects of forced marriage. Further systematic research of the Taylor transcripts is required and may allow for a clearer picture to be developed of how the crime of forced marriage is approached in court room practice. For example, what sort of evidence does the prosecution seek to draw out from a witness to establish whether forced marriage has taken place? Is it restricted solely to proving the trauma that the label 'wife' caused to the victim or will the prosecutor draw out evidence of conjugal duties as well and, if so, how then does the prosecutor seek to distinguish forced marriage from sexual slavery – if at all? Answers to these questions may allow for a better understanding of the term 'forced conjugal partnership' to be developed.

Conversely, noting how the accused responds to allegations of forced marriage through his counsel may assist in developing an understanding of what defences can be used in charges of forced marriage. 'Consent' was dismissed as a defence by the RUF Appeals Chamber and so it will be interesting to consider what other methods the defence team may use to refute the charge. Could it be argued, for example, that the court should not permit evidence of forced marriage to be heard as a means of proving the charge of sexual slavery as forced marriage is an offence in its own right and such a charge does not appear on the indictment? Whilst such research may prove illuminating, it is ultimately limited in its capacity to develop the law in the area of forced marriage. Court transcripts do not carry the same weight as the final judgment of the court, which is the best authority on points of law. Since the indictment against Taylor contained no direct charge of forced marriage, the court has not dealt with this issue in its ruling. Therefore, until either the SCSL, or another international tribunal brings an indictment against an individual including a charge of forced marriage, the continued development of the crime will remain in limbo.

F. Conclusions

At the close of this section, two conclusions can be drawn. First, and most importantly, it is submitted that there exists a lacuna in the law which can be filled by the charge of forced marriage. The evolution of the case law of the SCSL demonstrates this by highlighting the trauma experienced by women trapped in 'forced conjugal associations'. Such plight is beyond the scope of a charge of sexual slavery alone. Although the two crimes share some common elements, there are a number of non-sexual distinguishing factors and these set the charge of forced marriage apart. In an effort to avoid 'cookie-cutter'¹¹⁴ justice, the SCSL has taken a

¹¹⁴ Crane (n 78) 1768.

bold stance in creating an offence which is tailored to meet the sufferings of women in Sierra Leone and properly acknowledges the crimes committed against them.

Secondly, of some concern is the lack of a clear definition relating to this new offence. There are still a number of vital questions to be answered in this respect. To that end, the next section of this paper will look at some of the outstanding issues caused by this before moving on to consider how forced marriage can continue to be developed within the body of international criminal law.

4. Principles and Rights

A. Introduction

In order to ensure that trials of war criminals do not resemble victor's justice, it is vital that certain rights of the defendant are safeguarded. Two of those rights are of particular importance when assessing the viability of a 'new' charge such as forced marriage. Firstly, the right of the accused to know the charges being brought against him,¹¹⁵ safeguarded by the principle of specificity, and secondly, the right not to be held criminally responsible for a crime which, at the time of commission, did not constitute a crime within the jurisdiction of the court.¹¹⁶ The latter is safeguarded by the general criminal law principle of *nullum crimen sine lege*¹¹⁷ or 'the principle of legality'.

This section will assess whether or not the new charge of forced marriage developed by the SCSL violates either of these important principles of international law, examining first the principle of legality before moving on to consider the principle of specificity.

B. The Principle of Legality

An important safeguard in criminal law, this principle ensures that individuals are protected from arbitrary laws created by the judiciary. There are two means of interpreting this principle: one which views it as a guiding moral ideal (favouring substantive justice) and the other which seeks its strict application (favouring strict legality and legal certainty). On the one hand, it is true that as international criminal law becomes more 'settled' there is less need for expansive interpretation and so, '(...) the full complement of the principle of legality can take root'.¹¹⁸ However, it is also the case that humanity continues to create new challenges for international criminal law to meet¹¹⁹ and, therefore, in the interests of achieving justice and ending impunity, a degree of flexibility is required in the application of the principle. This is

¹¹⁵ SCSL Statute, Art 4(a).

¹¹⁶ See, for example, ICC Statute, Art 22.

¹¹⁷ Literally meaning 'there is no crime without law'.

¹¹⁸ B Van Schaak, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 Geo L J 119, 192.

¹¹⁹ This was acknowledged by the AFRC Appeals Chamber Judgment [186].

recognised by the inclusion in the SCSL Statute of a residual category of 'other inhumane acts'¹²⁰ which allows for the prosecution of crimes against humanity that have not been expressly provided for by the SCSL Statute. In order to satisfy the principle of legality, forced marriage must be able to fit into this category.¹²¹

It is clear that forced marriage in Sierra Leone took place in the framework of a widespread and systematic attack against a civilian population with knowledge of the attack on the part of the perpetrator, thus meeting the general requirements of a crime against humanity. The AFRC Appeals Chamber also took the following into account:¹²²

(...) [The infliction of] great suffering, or serious injury to body or to mental or physical health;

(...) [they] are sufficiently similar in gravity to the acts referred to in Article 2(a) to Article 2(h) of the Statute; and

[t]he perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

The suffering caused to women trapped in forced marriages is indisputable and is set out in the previous section. The similarity of forced marriage to other offences under Article 2 of the SCSL Statute was made apparent by the AFRC Appeals Chamber, which highlighted that the '(...) acts described as forced marriage may have involved the commission of one or more international crimes such as enslavement, imprisonment, rape, sexual slavery, abduction among others.'¹²³ The gravity of these crimes is well established and as a result it can be presumed that the perpetrators knew that their conduct was criminal and that prosecution was to be expected.¹²⁴

One other means of discerning whether an offence is to be considered a crime against humanity under 'other inhumane acts' is to find guidance in international human rights conventions.¹²⁵ While it is true that such instruments condemn forced marriage, they also place emphasis on consent of the parties to a marriage.¹²⁶ However, the inherent danger on relying upon human rights conventions is that all marriages without consent will become criminalised. This would extend to arranged marriages which, although an infringement of human rights, are not an issue for international criminal law. This was made clear by Justice Sebutinde in her separate opinion as part of the AFRC trial judgment.¹²⁷ Perhaps it was for this reason that the AFRC Appeals Chamber chose not to consider international human rights instruments in determining whether forced marriage could be considered an 'other

¹²⁰ SCSL Statute, Art 2(i). Such a category can also be found in the ICC Statute at Art 7(1)(k) and as far back as the Nuremburg Charter at Art 6(c).

¹²¹ AFRC Appeals Chamber Judgment [197].

¹²² *ibid* [198].

¹²³ *ibid* [201].

¹²⁴ Frulli (n 10) 1040.

¹²⁵ Schabas (n 27) 225.

¹²⁶ See, for example, Universal Declaration on Human Rights, Art 16.

¹²⁷ AFRC Trial Chamber Judgment, Separate Concurring Opinion of Justice Sebutinde [12].

inhumane act'.¹²⁸ With the aforementioned requirements met, the AFRC Appeals Chamber was content to classify forced marriage as a crime against humanity under Article 2(i) of the SCSL Statute. In meeting these requirements, the 'new' offence does not violate the principle of legality as it forms part of customary law under 'other inhumane acts'.

C. The Principle of Specificity

This legal principle exists in order to ensure that those falling under prohibitions of law are aware of exactly which behaviours are allowed and which are not. It requires criminal rules to be detailed and precise so as to make clear the elements of the *actus reus* and requisite *mens rea* of the crime.¹²⁹ Specificity can be difficult to achieve in international criminal law, particularly with regards to indictments as often charges will concern a large number of victims and crimes that have been committed over a long period of time. In the case law examined above, issues of specificity arose both in regard to the amendment of the AFRC indictment in May 2004 and again following the AFRC Appeals Chamber judgment.

An indictment should be specific enough to allow the accused to defend himself adequately.¹³⁰ The amendment of any indictment must take into account the right of the accused to a fair trial which is enshrined generally under Article 17 of the SCSL Statute, particularly at Article 17(4)(a). This codifies the right of the accused, '(...) to be informed promptly and in detail in a language which he or she understands of the nature and cause of charges against him or her'. In May 2004, the AFRC indictment was amended by the SCSL to include the new charge of forced marriage. The defence alleged that there had been a breach of this principle by allowing the indictment to be amended and,¹³¹

(...) objected to all changes in the indictments, and in particular to the count relating to forced marriage, arguing that forced marriage was not a CAH, that bringing such a charge violated the principle of legality, and further that the proposed new crime was "too vague" to constitute "other inhumane acts".

This criticism is not without weight as the AFRC indictment failed to clearly distinguish the facts which were to apply to each offence, charging five separate sex-based crimes under a single set of factual allegations.¹³² Without a specific set of material allegations at the outset, it is questionable as to whether or not the accused were given sufficient notice of the charges being brought against them.¹³³

The lack of clarity of the AFRC Appeals Chamber definition of forced marriage may have proved detrimental to the RUF indictees. These defendants

¹²⁸ AFRC Appeals Chamber Judgement [198].

¹²⁹ Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 41.

¹³⁰ Klip and Sluiter (n 34) 278.

¹³¹ Pack (n 107) 191.

¹³² C Rose, 'Troubled indictments at the Special Court for Sierra Leone: the pleading of joint criminal enterprise and sex-based claims' (2009) 7 J Int Criminal Justice 2 353, 368.

¹³³ *ibid* 369.

would not have been aware of what the charge of forced marriage was until the AFRC Appeals Chamber issued their judgment on 22nd February 2008, four years after the RUF Trial proceedings began.¹³⁴ It is difficult to conclude that the accused in the RUF Trial would have been able to adequately prepare their defence. They were only made aware of a (vague) definition of the offence late into proceedings and the indictment itself failed to distinguish clearly and specifically between conduct which was to be charged as forced marriage and that which was to be charged as sexual slavery.¹³⁵ However, bearing in mind the similarities that exist between the offences of sexual slavery and forced marriage, this lack of clarity should not have been completely problematic. The evolution of a clear definition of forced marriage in future judgments would provide Prosecutors with a distinct charge to indict those responsible for the practice of forced marriage, which would in turn allow those tasked with defending a more precise idea of what is to be defended.

D. Conclusions

It was important for the AFRC Appeals Chamber to set out exactly why the offence of forced marriage could be classified as an 'other inhumane act'. This meant that the court was acting under well-established customary law rather than out of moral abhorrence to the conduct. The SCSL was criticised for doing this by Justice Robertson regarding the criminalisation of the practice of recruiting and conscripting children as soldiers in the CDF cases. The principle of legality is an important safeguard in international criminal law but the flexibility afforded by the residual 'other inhumane acts' category has proved vital in ensuring the end of impunity for those who have turned marriage into a weapon of war - a challenge that, in the absence of an express forced marriage provision, a strict interpretation of the SCSL Statute could not adequately meet.

However, the lack of specificity and clarity surrounding precisely the sort of conduct envisaged by a 'forced conjugal association' may hamper the evolution of this offence. Descriptions of conduct particular to that which occurred in Sierra Leone, rather than a working definition, will provide little instruction to other courts and tribunals, such as the ICC, which may face the problem of forced marriage in very different contexts.¹³⁶

¹³⁴ The Special Court for Sierra Leone, 'The Prosecutor v Sesay, Kallon and Gbao' <<http://www.scs-l.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx>> accessed 12 June 2012.

¹³⁵ See *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case no. SCSL-04-15-T), Corrected Amended Consolidated Indictment, paras 54-60 <<http://www.scs-l.org/LinkClick.aspx?fileticket=papr39WF8TnM%3d&tabid=105>> accessed 12 June 2012.

¹³⁶ Rose (n 132) 371.

5. Recommendations

At present, the ICC has issued no indictments which include the charge of forced marriage. Evidence of forced marriage has, however, been heard in at least one of the cases presently before the ICC.¹³⁷ Amnesty International has noted the widespread practice of forced marriage in Uganda by the rebel group known as the Lord's Resistance Army (LRA).¹³⁸ In a positive development, ICC Prosecutors, as part of their on-going investigations into violations of international criminal law by the LRA, have indicated a willingness to charge those responsible for forced marriages, should such evidence become available. In a report by the International Centre for Transitional Justice (ICTJ), in the context of bringing such charges of forced marriage, a member of the ICC Prosecution team stated that,¹³⁹

(...) prosecutors knew the LRA called the girls "wives", but this was not evidence that forced marriage had taken place (...) ICC prosecutors now had more evidence in their files, leaving open the possibility that the further charges, including that of forced marriage, could be brought following the arrest of the suspects.

This comment highlights the cumulative nature of the charge of forced marriage. The labelling of 'wife' is not deemed enough on its own to bring a charge of forced marriage. It will be interesting to see what the Prosecution deems sufficient evidence which, when taken in conjunction with the labelling of 'wife', could amount to a charge of forced marriage in Uganda and whether or not such elements of the charge reflect the definition of forced marriage decided by the SCSL.

Unfortunately, forced marriage was absent from the agenda at the most recent Review Conference of the Rome Statute. In a report on the conference, the Women's Initiative for Gender Justice has called on *ad hoc* tribunals, special courts and the ICC to issue stronger and more consistent jurisprudence on forced marriage.¹⁴⁰ Without such a unified approach, any deterrent effect of the charge will be hampered. It must be made clear that forced marriage is not being condemned in Sierra Leone alone. An indictment issued including the charge by another tribunal or the ICC will send a clear message that the prosecution of forced marriage is not an anomalous product of the SCSL jurisprudence but is, in fact, part of a universal effort to end the impunity enjoyed by those who choose to put women through such suffering. Should ICC Prosecutors choose to include this charge on the indictments addressed to members of the LRA in Uganda, this would prove a positive step forward in the continued evolution and development of the criminalisation of forced marriage. Codification of

¹³⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Case no. ICC-01/04-01/07), ICC, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2008 [348] and [434]-[435].

¹³⁸ Amnesty International (n 9) 15-20.

¹³⁹ Katy Glassborow, 'ICC Investigative Strategy Under Fire' (*Institute for War & Peace Reporting*, 17th October 2008) < <http://iwpr.net/report-news/icc-investigative-strategy-under-fire> > accessed 12 June 2012.

¹⁴⁰ Women's Initiatives for Gender Justice, 'Advancing Gender Justice - A Call to Action' (Review Conference of the Rome Statute, 31 May – 11 June 2010) <<http://www.iccwomen.org/documents/Advancing-Gender-Justice-A-Call-to-Action-FINAL.pdf>> accessed 12 June 2012.

the offence into the Rome Statute would, however, certainly be the most efficient and pragmatic means of allowing the ICC to punish the offence. Perhaps this could be considered at the next Review Conference of the Rome Statute.

6. Conclusion

In establishing a new multi-faceted offence of forced marriage that suitably reflects the suffering of women and girls in Sierra Leone, the SCSL has displayed boldness and innovation without offending against the principle of legality. However, there remains a strong need for a clearer definition of the offence so as not to violate the right of a defendant to a fair trial. In distinguishing the conduct from sexual slavery, the SCSL drew attention to the grave trauma caused by the label 'wife' and the desperate psychological and physical consequences inherent in that title, both in terms of the conjugal duties expected of women and the stigma attached to them as a result of being bush wives.

Forced marriage continues to plague many conflict torn nations, particularly on the African continent. The SCSL has taken an important step forward in the prosecution of this kind of gender-based offence by condemning the practice and the door has been left open for other courts to do the same. This development demonstrates the readiness and ability of international criminal law to re-establish justice where its course has been perverted, even in the face of new challenges. The women of Sierra Leone who have suffered now have a voice in this new norm and it is imperative that women suffering elsewhere are given the same hope. The need cannot be stressed enough for the offence of forced marriage to be upheld in other international tribunals and at the ICC to ensure that this hope remains a reality.