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Untangling Sex, Marriage, and Other Criminalities in Forced Marriage

Frances Nguyen*

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Abstract

Over the past few decades, particularly with the rise of international criminal tribunals, there has been increased criminalization and greater awareness in gender and sex-based crimes among the international community. Crimes such as sexual slavery, enslavement, or rape have been successfully prosecuted under international law. Yet despite the increased recognition in the prohibition of sex and gender-based crimes, forced marriage remained marginalized until 2008, when the Special Court of Sierra Leone formally recognized forced marriage as an international crime. However, since the SCSL's ruling, no other criminal tribunal to date has successfully enforced and prosecuted perpetrators for committing forced marriage. This is particularly troubling considering the widespread reports of forced marriage in other States, such as Uganda and Cambodia. Part of the challenge stems in the SCSL's legal ruling which categorized forced marriage as an 'other inhumane act' under 'crimes against humanity'. This categorization is puzzling considering forced marriage often entails acts of sexual violence and disproportionately affects young women and girls. In addition, forced marriage is frequently compared to sexual slavery and arranged marriage, which poses more challenges for courts to distinguish forced marriage as a unique crime. Thus, this contribution calls for the increased criminalization and awareness of forced marriage as a sex and gender-based crime that is on par with other similar prohibited acts, including sexual slavery, enslavement, rape, and forced pregnancy. Case studies will be examined, such as Sierra Leone, Uganda, and Cambodia. Sierra Leone is examined due to the SCSL's seminal ruling on forced marriage. Cambodia is discussed because of the legal challenges presented before the Prosecutors at the Extraordinary Chambers in the Courts of Cambodia, especially as they try to convict the accused of alleged acts committed over three decades ago. Lastly, Uganda is observed to analyze why despite widespread reports, the ICC is not prosecuting senior militia leaders of forced marriage. These three cases seek to illustrate the complexities and difficulties in prosecuting forced marriage and also to analyze the definition and legal nuances behind forced marriage. In doing so, a better understanding is developed and raises awareness as to why forced marriage must be on the forefront in international criminal law to prosecute and convict perpetrators who are committing an egregious crime.

A. Introduction

From 1991 to 2002, Sierra Leone was embroiled in a civil war, which resulted in 70,000 casualties and the displacement of 2.6 million people.¹ While massive atrocities were prosecuted by the Special Court for Sierra Leone (SCSL), forced marriage remained a neglected problem until 2008.² That changed when the Appeals Chamber in *Prosecutor v. Brima and Others* identified forced marriage as a crime against humanity under Article 7 (1) (k) of the *Statute of the SCSL* for ‘other inhumane acts’.³ A year later, in *Prosecutor v. Sesay and Others*, the Appeals Chamber upheld the Trial Chamber’s ruling on the conviction of forced marriage.⁴

While the decisions in Sierra Leone were a major step in advancing the proscriptions against gender-based crimes, case law remains insufficient in addressing forced marriage as a crime against humanity. Other than Sierra Leone, no other tribunal to date has prosecuted suspects accused of forced marriages. Furthermore, the International Criminal Court (ICC) has not codified forced marriage as a crime against humanity under Article 7 of the *Rome Statute*.⁵ The lack of enforcement in subsequent case law and by the ICC demonstrates a lacuna in international law concerning forced marriage. To close the gap, the definition of forced marriage should be enumerated as a crime against humanity, so the prohibition thereof can solidify its robust status as a *jus cogens* norm and become an international crime recognized under customary international law. While advocates of criminalizing forced marriage believe it should be listed under ‘other inhumane acts’ of the *Rome Statute*, the crimes categorized in this article do not match the severity of forced marriages.⁶ Due to the unique, multilayered nature of the crime and the combination of sexual and non-sexual elements, forced marriage should be enumerated under ‘crimes against humanity’. By listing forced marriage as a distinct crime under ‘crimes against humanity’, it will help make the prohibition a part of customary international law and

¹ M. Kaldor *et al.*, *Evaluation of UNDP Assistance to Conflict-Affected Countries* (2006), 71.

² *Prosecutor v. Alex Temba Brima and Others*, Judgment, SCSL-2004-16-A, 22 February 2008, 65, para. 199 [Prosecutor v. Brima and Others, Appeals Chamber Judgment].

³ *Ibid.*, 66, para. 202.

⁴ *Prosecutor v. Issan Hassan Sesay and Others*, Judgment, SCSL-04-15-A, 14 October 2009, 259, 303 & 394, paras 726, 849 & 1104 [Prosecutor v. Sesay and Others, Appeals Chamber Judgment].

⁵ *Rome Statute of the International Criminal Court*, 17 July 1998, 2197 UNTS 3 [Rome Statute].

⁶ *Ibid.*, Art. 7 (1), 93.

develop its status as a *jus cogens* norm. In doing so, the universal recognition of forced marriage by the international community will gain ground, thus properly according the victims justice and effectively punishing the perpetrators.

Forced marriage is a complicated subject. The multilayered acts of brutality frequently overlap with sexual slavery, enslavement, rape, and arranged marriage.⁷ This can create confusion, leading scholars, courts, and legal practitioners to either disregard forced marriage or shelve it into the category of ‘other inhumane acts’ under ‘crimes against humanity’. A substantive discussion is necessary to elaborate upon the meaning of forced marriage and distinguish it from other enumerated crimes in the *Rome Statute*. The purpose of this contribution is to facilitate a proper discussion and address the legal complexities of forced marriage. More importantly, this article is also calling for a robust recognition of forced marriage as an international crime. Instead of putting forced marriage under the rubric of ‘other inhumane acts’, it should be placed alongside the enumerated crimes of sexual slavery, enslavement, and rape as a crime against humanity.

B. Road Map

Section C. discusses the spectrum of scholarship on forced marriage, from theories qualifying this crime as ‘other inhumane act’ to sexual slavery.⁸ Section D. examines the statutory framework of crimes against humanity in the *Rome Statute*.⁹ This part looks at the meaning of crimes against humanity, followed by a definition of ‘other inhumane acts’, a residual catch-all category of criminal acts not referenced under ‘crimes against humanity’.¹⁰ Section E. focuses on forced marriage during armed conflict. Forced marriage should be recognized as an international crime, whether it occurs during violent hostilities or during peace. However, if forced marriage happens during war, the legal analysis

⁷ M. Frulli, ‘Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime Against Humanity’, 6 *Journal of International Criminal Justice* (2008) 5, 1033, 1036: “First, forced marriage, as described not only by the victims but also by numerous experts who were asked to give their opinion on this practice, is a *multi-layered crime*.”

⁸ P. Viseur Sellers, ‘Wartime Female Slavery: Enslavement?’, 44 *Cornell International Law Journal* (2011) 1, 115, 138 [Viseur Sellers, Wartime Female Slavery], asserts the SCSL’s ruling on forced marriage creates legal ambiguity because forced marriage is a form of enslavement.

⁹ International Criminal Court (ICC), *Elements of Crimes* (2011), 5-12 [ICC, Elements of Crimes].

¹⁰ *Ibid.*, 12.

changes due to the 1949 *Geneva Conventions*.¹¹ The *Geneva Conventions* regulate the conduct of armed conflicts and seek to limit its effects by protecting people who are not taking part in hostilities.¹² Since victims of forced marriage are not participating in combat, the *Geneva Conventions* would protect them during an armed conflict. Therefore, the application of international humanitarian law carries greater legal authority and enhances the prohibition of forced marriage. Hence, the *Geneva Conventions* can greatly strengthen the victims' case.

Sierra Leone and Uganda are examples of forced marriage which took place during armed conflict. In section F., Sierra Leone is discussed because of its seminal recognition and prosecution of forced marriage. In Sierra Leone, rebel groups such as the Armed Forces Revolutionary Council (AFRC) and Revolutionary United Front (RUF) pillaged villages and forced young women to marry their soldiers and/or commanders to serve their domestic and sexual needs under the 'legal' veneer of an exclusive and conjugal union.¹³ Likewise, as explained in section G., which focuses on Uganda, the situation was similar in that the Lord's Resistance Army (LRA) would abduct young women and force them to marry their ranking officers.¹⁴ The circumstances of geography, armed conflict, temporal and social factors illustrate how similar Uganda is to Sierra Leone with one significant exception. Whereas Sierra Leone has made an active effort to designate forced marriage as a crime against humanity, Uganda and the *Rome Statute* have not.¹⁵ Despite the widespread reports of forced marriage, the situation in Uganda highlights how the international community has failed to sufficiently recognize or prosecute forced marriage as an international crime.

¹¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 [Geneva Convention II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 [Geneva Convention III]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 [Geneva Convention IV]; *Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 [Protocol I to the Geneva Conventions].

¹² H.-P. Gasser & D. Thürer, 'Geneva Conventions I-IV (1949)', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IV (2012), 386, 386, para. 1.

¹³ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 65-66, paras 199-200.

¹⁴ K. Carlson & D. Mazurana, *Forced Marriage Within the Lord's Resistance Army, Uganda* (2008), 4.

¹⁵ *Rome Statute*, Art. 7 (1), *supra* note 5, 93.

Sierra Leone and Uganda are similar in terms of how forced marriage was implemented. Cambodia, which is discussed in section H., is different in several significant ways. Unlike Sierra Leone and Uganda, where forced marriages occurred during armed conflict and the perpetrators were non-state actors, in Cambodia, forced marriage was enforced by the State, the government of the Khmer Rouge, and did not occur during armed conflict, as legally understood and defined.¹⁶ Also, whereas the victims in Sierra Leone were ‘bush wives’ or primarily young women and girls, both men and women were harshly affected by the Khmer Rouge’s marriage policy.¹⁷ Thus, Cambodia reveals how forced marriage can be expansively interpreted and how the crime can apply in various circumstances. Ultimately, while the situation in Cambodia was different from Sierra Leone and Uganda, the control the perpetrators had over their victims was similar and illustrates the universal brutality of forced marriage.

Section I. refines the meaning of it by making distinctions between forced and arranged marriage. There is extensive overlap between these types of marriages but the differences are important to illustrate why forced marriage should be recognized as an international crime and arranged marriage should not. Section J. also explores the definition of forced marriage by noting the differences between forced marriage and sexual slavery. The contrasts are essential to demonstrate why forced marriage should be recognized as a crime against humanity. Otherwise, the criminalization of forced marriage will dissipate and remain enveloped under the rubric of sexual slavery, which is what the Trial Chambers initially ruled in Sierra Leone.¹⁸ By noting the dissimilarities of both arranged marriage and sexual slavery compared to forced marriage, a comprehensively better definition can develop and will add greater depth to what the Appeals Chamber set out in *Brima and Others*.¹⁹

¹⁶ N. Jain, ‘Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution’, 6 *Journal of International Criminal Justice* (2008) 5, 1013, 1024, discusses the distinctions of forced marriage from other sex and gender-based crimes to elucidate the meaning of forced marriage.

¹⁷ B. A. Toy-Cronin, ‘What is Forced Marriage? – Towards a Definition of Forced Marriage as a Crime Against Humanity’, 19 *Columbia Journal of Gender & Law* (2010) 2, 539, 539-572, discusses that in order forced marriage to be recognized, it should be limited to the conferral of the status of the marriage and the ongoing effects of the victim. See also Frulli, *supra* note 7, 1037.

¹⁸ *Prosecutor v. Alex Tamba Brima and Others*, Judgment, SCSL-2004-16-T, 20 June 2007, 220, para. 713 [Prosecutor v. Brima and Others, Trial Chamber Judgment].

¹⁹ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 196 (in particular).

Section K. explains what *jus cogens* is and ties into how the recognition of forced marriage as a crime against humanity will enable the prohibition of forced marriage to become a *jus cogens* norm. Section L. provides an overview of customary international law and explains how forced marriage's inclusion will make significant inroads in its legal and statutory development. Section M. looks at slavery and how the prohibition against slavery became a *jus cogens* norm. Moreover, tying in slavery to forced marriage, and focusing on how the enslavement aspect creates the confined and deprived conditions for the victim, strengthens the argument that the criminalization of forced marriage should be a *jus cogens* norm. Section M. also looks at the evolution of rape from its initial status as an unspecified and unlabeled crime to its inclusion as a customary law. Rape was originally viewed as a vague crime and was not enumerated in any treaties, much like forced marriage is today. Thus, the jurisprudence of rape can serve as a successful prototype for forced marriage and show how the latter can jump out of the 'other inhumane acts' rubric to achieve full-fledged recognition as an international crime under customary law. By having the prohibition of forced marriage become a *jus cogens* norm and its criminalization be included in customary international law, the international community will commit to greater enforcement and greater attention to the victims' justice.

C. Scholarship on Forced Marriage

Overall, most of the literature asserts forced marriage should be a crime against humanity, but believes it should be contained in the 'other inhumane acts' category.²⁰ Scholars, such as Micaela Frulli, offer important insight in defining and describing the complexity of forced marriage.²¹ However, despite such informed analysis, forced marriage needs to be more fully recognized for its multilayered nature and continual brutality.²² Thus, it needs to be listed alongside rape, torture, and enslavement as an enumerated crime against humanity. Only in doing so will there be robust recognition for forced marriage to garner status as a *jus cogens* prohibition and become part of customary international law. Most importantly, it will help the victims by according them justice and

²⁰ Frulli, *supra* note 7, 1036.

²¹ *Ibid.*, 1033-1042.

²² *Ibid.*, 1036; J. Gong-Gershowitz, 'Forced Marriage: A "New" Crime Against Humanity?', 8 *Northwestern University Journal of International Human Rights* (2009) 1, 53, 66: "Moreover, what distinguishes forced marriage in armed conflict from forced marriage in peacetime is not the absence of parental consent but rather the brutality of the violence and the scale of the crimes."

make significant progress in healing them and their local communities. The scholarship on forced marriage is varied in debate and reasoning. Scholars like Valerie Oosterveld acknowledge the multilayered complexity of gender-based crimes like forced marriage, which may include sexual and non-sexual aspects.²³ The sexual component has divided scholars on whether forced marriage should be included as an enumerated crime against humanity,²⁴ or whether it should be subsumed within the subcategory of sexual slavery.²⁵ The courts in Sierra Leone were also divided on this issue. The Trial Chamber found the prosecution's evidence of forced marriage proved elements of sexual slavery under Article 2 (g) of the *Rome Statute*.²⁶ Afterwards, the Appeals Chamber overturned the Trial Chamber's ruling and noted forced marriage was a distinct crime from sexual slavery and included it under the 'other inhumane acts' category of crimes against humanity.²⁷ The difference in opinions exemplifies the sharp debate concerning forced marriage.

One example that illustrates the differing opinions on forced marriage is sexual slavery. Some of the elements in forced marriage are akin to sexual slavery. Both sexual slavery and forced marriage contain an element in which the perpetrator forces an association over the victim and causes deprivation of the victim's physical liberty.²⁸ Also, a sexual act is required to prosecute and convict

²³ V. Oosterveld, 'Lessons From the Special Court of Sierra Leone on the Prosecution of Gender-Based Crimes', 17 *American University Journal of Gender, Social Policy & the Law* (2009) 2, 407, 409. She discusses how gender-based crimes can serve as evidence of crimes against humanity, including seemingly gender-neutral crimes. *Ibid.*, 410 *et seq.*

²⁴ Frulli, *supra* note 7, 1033-1042; Jain, *supra* note 16, esp. 1032.

²⁵ Gong-Gershowitz, *supra* note 22, 54; K. 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 *Columbia Journal of Gender & Law* (2006) 3, 551, discussing the Special Court of Sierra Leone's decision to recognize force marriage as an international crime, but did not go as far to find sexual slavery violated a woman's sexual autonomy within a customary marriage.

²⁶ *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 220, para. 713.

²⁷ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64 *et seq.*, paras 197 *et seq.* See *Rome Statute*, Art. 7 (1) (k), *supra* note 5, 93.

²⁸ ICC, *Elements of Crimes*, *supra* note 9, 8: Under sexual slavery, "[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty". See also *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64: "[F]orced marriage [...] compels a person by force, threat of force, or coercion to serve as a conjugal partner [...]."

a perpetrator for sexual slavery.²⁹ While a sexual act is not a requirement to criminalize forced marriage, it almost always happens.³⁰ Even though sex is not dispositive in forced marriage and should not be viewed through the prism of sexual slavery, some scholars believe otherwise. Jennifer Gong-Gershowitz fears placing forced marriage under the category of ‘other inhumane acts’ will have “the ironic effect of minimizing sexual violence and enslavement” because forced marriage might shield the perpetrator through the purported veneer of marriage since it is a legitimate social institution.³¹ She argues forced marriage should be recognized explicitly as a particular form of sexual slavery.³² Karine Bélair thinks that, while the Trial Chamber’s decision in Sierra Leone was important in identifying forced marriage as a form of sexual slavery, they also did not go far enough.³³ She argues sexual slavery could take place in the framework of customary marriage, if and when a women’s sexual autonomy is violated.³⁴ Despite their differences in legal analysis, Gong-Gershowitz and Bélair believe forced marriage should be framed under sexual slavery. In contrast, Patricia Viseur Sellers asserts forced marriage should neither be placed in the ‘sexual slavery’ or ‘other inhumane acts’ category.³⁵ Instead, Sellers argues forced marriage should be viewed as a crime of enslavement.³⁶

Whereas Sellers examines the slavery component of forced marriage, Bridgette Toy-Cronin places emphasis on its *prima facie* elements.³⁷ Toy-Cronin thinks forced marriage should only be recognized if it is limited to the conferral of the status of marriage.³⁸ She believes crimes that occur as a result of forced

²⁹ See ICC, *Elements of Crimes*, *supra* note 9, 8: “The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.”

³⁰ J. Moore, ‘In Africa, Justice for ‘Bush Wives’ (2008), available at <http://csmonitor.com/World/Africa/2008/0610/p06s01-woaf.html> (last visited 15 May 2014). Stephen Rapp, the chief prosecutor at the Special Court of Sierra Leone said, “[o]f course it [forced marriage] almost always involved sex, but it involved other things – an exclusive, essentially lifetime relationship under the control of a man, a demand that this individual [the wife] provide [...] household services, travel with the man, care for his needs, and everything else”.

³¹ Gong-Gershowitz, *supra* note 22, 54.

³² *Ibid.*, 65.

³³ Bélair, *supra* note 25, 606.

³⁴ *Ibid.*

³⁵ Viseur Sellers, ‘Wartime Female Slavery’, *supra* note 8, 135.

³⁶ *Ibid.*

³⁷ Toy-Cronin, *supra* note 17, 539-572.

³⁸ *Ibid.*, 539.

marriage, such as slavery, rape, or torture should be prosecuted separately.³⁹ If not, Toy-Cronin fears the perpetrator's aim will be fulfilled since his or her criminal conduct will be hidden under the protective cloak of the term 'marriage'.⁴⁰

Yet another scholar, Carmel O'Sullivan, believes the SCSL has achieved significant progress in recognizing forced marriage as a crime against humanity.⁴¹ However, O'Sullivan noted the recognition of forced marriage remains limited in addressing the scope and gravity of the crime.⁴² Furthermore, she argues forced marriage should be considered as a form of genocide since the act could be used as a method to exterminate a group.⁴³

Neha Jain refines the definition by noting forced marriage is distinct from arranged marriage and sexual slavery.⁴⁴ His work is important because much of the debate over the inclusion of forced marriage as a crime against humanity stems from the overlap between forced marriage and sexual slavery. By distinguishing forced marriage from sexual slavery, the concept becomes unique making it easier for forced marriage to be recognized by the ICC and other current and future tribunals. For example, Micaela Frulli notes the inclusion of forced marriage can be tremendously influential in how potential forced claims in these cases are adjudicated before other criminal tribunals, such as the ICC, and can greatly contribute to international criminal law jurisprudence.⁴⁵

To take forced marriage out of the 'other inhumane acts' category, the definition must be fleshed out to fully convey the scope and brutality of the act. According to the Appeals Chamber in the SCSL, "forced marriage involves a perpetrator compelling a person by force or threat of force, through words or conduct of the perpetrator, or those associated with him, into a forced conjugal association [...] resulting in great suffering, or serious physical or mental injury on the part of the victim".⁴⁶ The definition, which was first used by the Appeals Chamber, is a positive step in the jurisprudence of forced marriage. At the same time, the brief discussion in the Appeals Chamber decision also highlights the lacuna in international law. Thus, the Chamber's brief definition signifies

³⁹ *Ibid.*, 578.

⁴⁰ *Ibid.*

⁴¹ C. O'Sullivan, 'Dying for the Bonds of Marriage: Forced Marriages as a Weapon of Genocide', 22 *Hastings Women's Law Journal* (2011) 2, 271, discusses why forced marriage should be recognized as a method for genocide.

⁴² *Ibid.*, 271.

⁴³ *Ibid.*, 271-272.

⁴⁴ Jain, *supra* note 16, 1019-1020 & 1026-1027.

⁴⁵ Frulli, *supra* note 7, 1033.

⁴⁶ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

the need for more specificity and distinction in its characterization of forced marriage, to add what the Appeals Chamber set out in the *Brima and Others* case.⁴⁷

D. Forced Marriage as a Crime Against Humanity

According to the *Rome Statute*, a crime against humanity must contain the following elements:

1. The crimes are among the most serious crimes of concern to the international community as a whole.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁴⁸

Although forced marriage has been recognized in case law from the SCSL as an ‘other inhumane act’ under ‘crimes against humanity’, it has not been explicitly codified in the *Rome Statute*.⁴⁹ Thus far, the SCSL has been the first and only international tribunal court which has recognized and prosecuted forced marriage as a crime against humanity.⁵⁰

The way forced marriage is viewed affects how it is interpreted and applied under the *Rome Statute*.⁵¹ Depending how forced marriage is interpreted under the *Rome Statute*, it could be viewed in various ways.⁵² If forced marriage is viewed as a sexual crime, it could be construed as “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” under Article 7 (g).⁵³ For example, the Trial Chamber in Sierra Leone interpreted forced marriage as a predominantly sexual crime.⁵⁴ On the other hand, if forced marriage is not viewed as a predominantly

⁴⁷ Frulli, *supra* note 7, 1033-1034.

⁴⁸ ICC, *Elements of Crimes*, *supra* note 9, 5.

⁴⁹ B. van Schaack & R. C. Slye, *International Criminal Law and its Enforcement: Cases and Materials*, 2nd ed. (2010), 426.

⁵⁰ Frulli, *supra* note 7, 1034.

⁵¹ *Ibid.*

⁵² *Ibid.*, 1035.

⁵³ *Rome Statute*, Art. 7 (1) (g), *supra* note 5, 93.

⁵⁴ *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 217, para. 704.

sexual crime, it could be read as ‘other inhumane acts’ causing “great suffering, or serious injury to body or to mental or physical health” under Article 7 (k).⁵⁵

In addition to the required elements needed to establish crimes against humanity, other conditions for ‘other inhumane acts’ include:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act [...].
3. The perpetrator was aware of the factual circumstances that established the character of the act.⁵⁶

The conduct must also be of comparable gravity to torture or rape, meaning it must cause serious mental or physical suffering or constitute a grave attack on human dignity.⁵⁷ The purpose of the ‘other inhumane acts’ provision was to serve as a residual, catch-all clause.⁵⁸ Treaty drafters were mindful that it was not possible to list and include every conceivable crime.⁵⁹ In fact, it was acknowledged that doing so restricts and limits the ability to prosecute, and therefore weaken the *Rome Statute*.⁶⁰ This makes it more difficult to prosecute the perpetrators for crimes that were initially unthinkable, which explains why the provision incorporates broad and inclusive language.

To date, examples of ‘other inhumane acts’ have included the plunder of Jewish property,⁶¹ beatings and general inhumane treatment,⁶² and sexual violence in the form of forced public nudity.⁶³ These examples demonstrate how the ‘other inhumane acts’ clause serves as an inclusive category for other crimes

⁵⁵ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 198.

⁵⁶ ICC, *Elements of Crimes*, *supra* note 9, 12.

⁵⁷ *Prosecutor v. Clément Kayishema and Obed Rudzindana*, Judgment, ICTR 95-1-T, 21 May 1999, 60-62, paras 149-152.

⁵⁸ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 198.

⁵⁹ J. S. Pictet (ed.), *Commentary on the Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), 37, 54. See also *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-T, 3 March 2000, 80, para. 237 [Prosecutor v. Blaškić, Judgment].

⁶⁰ Pictet (ed.), *supra* note 59, 54. See also *Prosecutor v. Blaškić*, Judgment, *supra* note 59, 80, para. 237.

⁶¹ M. Lippman, ‘Crimes Against Humanity’, 17 *Boston College Third World Law Journal* (1997) 2, 171, 201.

⁶² *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-T, 7 May 1997, 275, para. 730.

⁶³ *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, 170, para. 697.

not specifically enumerated under ‘crimes against humanity’. However, putting forced marriage under the ‘other inhumane acts’ box diminishes the severity of the crime, especially in contrast with the other crimes previously listed. Crimes such as beatings and forced public nudity are heinous and should be included under ‘other inhumane acts’. However, forced marriage is a unique crime in terms of its combination of sexual and non-sexual factors. Because victims are forced into a conjugal union with their perpetrators or chosen spouses, they are vulnerable to being subjected to continuous physical, mental, and sexual abuse over a long duration of time.⁶⁴ The magnitude and duration of abuse and multilayered brutality under the veneer of ‘marriage’ illustrates why forced marriage should not be placed in the ‘other inhumane acts’ category.

In fact, such a classification fails to give this crime the recognition that it deserves. Indeed, this delays the criminalization of forced marriage from becoming a part of customary international law and will set it back from obtaining *jus cogens* status. For example, since the SCSL Appeals Chamber’s ruling, neither the ICC nor other tribunal courts have subsequently criminalized forced marriage.⁶⁵ Moreover, when the ICC issued warrant arrests for Joseph Kony and high-ranking officers of the LRA, forced marriage was not listed among the charged crimes, despite widespread reports of pertinent cases in Uganda occurring during armed conflict.⁶⁶ Instances such as these have led to an effect, where the crime is set aside and not taken into account because it is not at the top of the prosecutorial agenda.

E. Forced Marriage During Armed Conflict

Forced marriage should be recognized as an international crime, whether or not it occurs during armed conflict. If forced marriage does not occur during armed conflict, then it should be prosecuted as a crime against humanity as long as it occurs during a widespread or systematic attack against a civilian population. However, if forced marriage occurs in armed conflict, the analysis will change because of the application of international humanitarian law. Common Article 3 (a) of the 1949 *Geneva Conventions* states that parties are prohibited from committing “violence to life and person, in particular murder

⁶⁴ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 201.

⁶⁵ Frulli, *supra* note 7, 1034.

⁶⁶ *Situation in Uganda in the Case of the Prosecutor v. Joseph Kony and Others*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05 (Pre-Trial Chamber II), 27 September 2005, 12-19, para. 42 [Prosecutor v. Kony and Others, Warrant of Arrest].

of all kinds, mutilation, cruel treatment, and torture”.⁶⁷ Common Article 3 (c) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”.⁶⁸ Thus, while the *Geneva Conventions* do not make an explicit reference to forced marriage, it is arguably banned under the former because it can be classified as an attack on a civilian based on cruel treatment and an outrage on personal dignity. Furthermore, under Article 75 of *Protocol I to the Geneva Conventions*, acts committed against civilians, such as enforced prostitution, any form of indecent assault, and outrages upon personal dignity, are prohibited.⁶⁹

Article 4 of *Protocol II to the Geneva Conventions* goes into greater detail. *Protocol II* bans “outrages of personal dignity, in particularly humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.⁷⁰ While the aforementioned provisions in the *Geneva Conventions* can be applied to forced marriage, *Protocol II* has wording with more direct application to forced marriage. Not only does *Protocol II* refer to and govern non-international armed conflict, but it is most explicit in outlining a ban on sexual assault. While forced marriage is not explicitly referenced, it could be applicable under the phrase “any form of indecent assault”.⁷¹ Although forced marriages can occur under international armed conflict, most if not all of the reported cases have occurred under internal hostilities. For example, in Sierra Leone and Uganda, the perpetrators of forced marriages were instigated by militia rebel groups within the country. In any case, the application of the *Geneva Conventions* and *Additional Protocols* under the analysis of forced marriage will not necessarily hinge on whether the conflict is international or domestic, but on whether forced marriage occurs during armed conflict.

If forced marriage does not occur during armed conflict, then, generally speaking, the *Geneva Conventions* do not apply. Since the *Geneva Conventions* would not apply, forced marriage would be framed as a crime against humanity

⁶⁷ *Geneva Convention I*, Art. 3 (a), *supra* note 11, 32; *Geneva Convention II*, Art. 3 (a), *supra* note 11, 88; *Geneva Convention III*, Art. 3 (a), *supra* note 11, 138; *Geneva Convention IV*, Art. 3 (a), *supra* note 11, 290.

⁶⁸ *Geneva Convention I*, Art. 3 (c), *supra* note 11, 34; *Geneva Convention II*, Art. 3 (c), *supra* note 11, 88; *Geneva Convention III*, Art. 3 (c), *supra* note 11, 138; *Geneva Convention IV*, Art. 3 (c), *supra* note 11, 290.

⁶⁹ *Protocol I to the Geneva Conventions*, Art. 75 (2) (b), *supra* note 11, 37.

⁷⁰ *Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 4 (2) (e), 1125 UNTS 609, 612 [Protocol II to the Geneva Conventions].

⁷¹ *Ibid.*

due to the severity and multilayered nature of the crime. While armed hostilities might increase the likelihood of forced marriage, such could occur at any time. No cultural gloss can excuse the violent nature of forced marriage. Victims must have ways to seek redress. Limiting forced marriage to being a crime exclusively under conditions of war will only narrow avenues for the victims to seek justice and provide a thicker shield for the perpetrators to get away with the act, particularly since it is cloaked with the status of ‘marriage’. While more legal factors will be added to the analysis if forced marriages occur during armed conflict, it does not wipe away the severity of the crime if it occurs during peace time. Thus, the prohibition of forced marriage should be recognized as a *jus cogens* norm and become part of customary international law, whether it is taking place during armed conflict or in times of peace.⁷²

F. Sierra Leone

In March 1991, a band of rebels supported by Liberian President Charles Taylor invaded Sierra Leone.⁷³ After years of fighting between the government and rebel groups, such as the AFRC and RUF, a peace agreement was signed in Abuja in May 2001 and led to a significant reduction in hostilities.⁷⁴ On 18 January 2002, President Kabbah officially declared that the civil war in Sierra Leone was over.⁷⁵

In 2003, the SCSL was established.⁷⁶ The Special Court was created by an agreement between the United Nations and the government of Sierra Leone.⁷⁷ On 20 June 2007, the Court issued its first verdicts in the trial of the AFRC

⁷² *Universal Declaration of Human Rights*, Art. 16 (2), GA Res. 217 (III), UN Doc A/RES/217, 10 December 1948 [Universal Declaration of Human Rights]: “Marriage shall be entered into only with the free and full consent of the intending spouses.” See also *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1964, Art. 1 (1), 521 UNTS 231, 234: “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”

⁷³ M. Kaldor & J. Vincent, ‘Evaluation of UNDP Assistance to Conflict-Affected Countries: Case Study Sierra Leone’ (2006), available at <http://web.undp.org/evaluation/documents/thematic/conflict/SierraLeone.pdf> (last visited 31 May 2014), 6.

⁷⁴ *Ibid.*, 6-8.

⁷⁵ *Ibid.*, 8.

⁷⁶ *Ibid.*

⁷⁷ *Statute of the Special Court for Sierra Leone*, SC Res. 1315, UN Doc S/RES/1315 (2000), 14 August 2000.

accused Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, all of whom were found guilty on 11 of 14 counts of war crimes and crimes against humanity.⁷⁸ The Trial Chamber did not find Brima, Kamara, and Kanu guilty of forced marriage as a crime against humanity.⁷⁹ The Trial Chamber found forced marriage to be completely subsumed by sexual slavery, a crime already listed as a crime against humanity under the *Rome Statute*.⁸⁰

On 22 February 2008, the Appeals Chamber found Brima, Kamara, and Kanu guilty of forced marriage as a crime against humanity under 'other inhumane acts'.⁸¹ This is in contrast to the Trial Chamber, which found forced marriage was subsumed by the crime of sexual slavery and that there was no lacuna in the law which would necessitate a separate crime.⁸² The Trial Chamber reasoned that the victims could not leave due to fear of persecution.⁸³ Thus, the captors had full control over the victims as their 'wives' and therefore had the intent to exercise their ownership rights over them.⁸⁴

The Appeals Chamber disputed the Trial Chamber's argument, stating the perpetrators' intent was not to exercise ownership over the victims as their 'wives', but to impose a forced conjugal associations, and therefore forced marriage was not primarily a sexual-based crime.⁸⁵ Examples the Appeals Chamber mentioned as conjugal duties include regular sexual intercourse, forced domestic labor (e.g. cleaning and cooking for the 'husband'), and forced pregnancy.⁸⁶ Although the Trial Chamber noted the victim could be passed on or given to another rebel at the discretion of the perpetrator, the Appeals Chamber remarked that unlike sexual slavery, forced marriage implies an exclusive relationship between the 'husband' and 'wife', and not one where the victim could be easily discarded to another rebel. In fact, the 'wife' could suffer harsh punishment if she broke away from this type of arrangement.⁸⁷ Hence, the Appeals Chamber was persuaded by the prosecution's argument that forced marriage is a crime against humanity

⁷⁸ *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18.

⁷⁹ *Ibid.*, 220, para. 713.

⁸⁰ *Ibid.*

⁸¹ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 202.

⁸² *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 220, para. 713.

⁸³ *Ibid.*, 218-219, para. 709.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, 62, para. 190.

⁸⁶ *Ibid.*

⁸⁷ *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 219-220, para. 711; *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 62, para. 195.

and is distinct from sexual slavery.⁸⁸ The case set a historic precedent in gender-based crimes by holding forced marriage as a distinct category of crimes against humanity under international criminal law.⁸⁹ Nevertheless, judicial progress is further needed so forced marriage is specified as an enumerated crime rather than an ‘other inhumane act’.

G. Uganda

In the late 1980s, a militia group, the LRA, led by Joseph Kony, was formed to fight against Ugandan President Yoweri Museveni’s forces, the National Resistance Army (NRA).⁹⁰ Since the 1990s, the LRA has systematically targeted and abducted females with the intent to forcibly marry them to commanders and fighters.⁹¹ Although the ICC issued a warrant for the arrest of Joseph Kony and other top-ranking military officers from the LRA in May 2005, Kony remains at large.⁹² Many of the criminal acts committed during forced marriage, which were prevalent in Sierra Leone, were also widespread in Uganda.

However, Uganda has not taken affirmative steps in recognizing forced marriage as a crime against humanity. In 2000, Uganda proposed the *Amnesty Act*, which would allow immunity for rebel soldiers in exchange for abandoning armed struggle against the State.⁹³ This immunity would deny the opportunity for the victims, families, and communities to address their grievances and see the perpetrators punished for their crimes, including forced marriage.

The ICC is not tackling forced marriages either. Of the numerous crimes committed in northern Uganda, only three crimes have been charged with respect to gender and sexual violence: sexual enslavement, rape under ‘crimes against humanity’, and rape under war crimes.⁹⁴ Compared to the robust criminalization of international crimes by the SCSL, the ICC has not made as much progress in the jurisprudence and prosecution of international criminal law.⁹⁵ In addition, because forced marriage is not enumerated specifically as a

⁸⁸ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 62, para. 195.

⁸⁹ Jain, *supra* note 16, 1013. See also Frulli, *supra* note 7, 1034.

⁹⁰ Carlson & Mazurana, *supra* note 14, 12.

⁹¹ *Ibid.*, 14 *et seq.*

⁹² *Prosecutor v. Kony and Others*, Warrant of Arrest, *supra* note 66. See also Carlson & Mazurana, *supra* note 14, 12.

⁹³ Carlson & Mazurana, *supra* note 14, 7.

⁹⁴ *Prosecutor v. Kony and Others*, Warrant of Arrest, *supra* note 66, 12-19, para. 42. See also Carlson & Mazurana, *supra* note 14, 44.

⁹⁵ Carlson & Mazurana, *supra* note 14, 6.

crime, it makes it more difficult for the ICC to indict senior leaders of the LRA for committing such act. Despite the SCSL's criminalization of forced marriage, neither the ICC nor Uganda have taken any steps to codify it as a crime, let alone recognize it as a crime against humanity. Despite the similarity in circumstances between Sierra Leone and Uganda, the lack of will from Uganda and the ICC demonstrates that forced marriage is failing to evolve in terms of its proper recognition as a crime against humanity.

Despite community outreach efforts by civil society groups and NGOs, the lack of effort in criminalizing forced marriage at the ICC for Uganda is hindering the victims' effort to reintegrate back into their homes and communities.⁹⁶ The deficiency of recognition by the ICC is also reflected in statistics in which Uganda is ranked 14th for early and forced marriage prevalence rates in the world with 46 percent of women being married before 18.⁹⁷ Oftentimes, victims become pregnant and are forced to carry their pregnancies to term.⁹⁸ When they return to their villages, their communities would shun them.⁹⁹ The victims were not only spurned because of their marriages to the perpetrators, but also out of the community's fears that the perpetrators would return and seek out their wives and children.¹⁰⁰ While there is no denying that discrimination exists among victims of sexual crimes, such as rape and sexual slavery, the stigma for victims of forced marriage is arguably greater because of the victim's marriage to the perpetrator.¹⁰¹ The consequences of forced marriage are incredibly difficult despite its variance across different circumstances and regions.

H. Cambodia

Forced marriages in Sierra Leone and Uganda were similar in terms of time frame, territory, and abuse committed by non-state actors. In contrast, forced marriage was applied differently during the Khmer Rouge's regime in Cambodia.¹⁰² From 17 April 1975 to 7 January 1979, the Khmer Rouge, a radical group of Maoists led by Pol Pot, took over Cambodia and proceeded to strip

⁹⁶ *Ibid.*, 13.

⁹⁷ United Nations Population Fund, *Marrying Too Young: End Child Marriage* (2012), 74.

⁹⁸ Carlson & Mazurana, *supra* note 14, 24.

⁹⁹ *Ibid.*, 26.

¹⁰⁰ *Ibid.*, 41.

¹⁰¹ *Ibid.*

¹⁰² Jain, *supra* note 16, 1024-1026.

all aspects of Cambodian culture and society down to its core.¹⁰³ Mass purges and killings led to 1.7 million estimated dead.¹⁰⁴ While extensive persecution occurred, approximately 400,000 Cambodians were forced into marriage.¹⁰⁵

Forced marriages in Cambodia were implemented differently than in Sierra Leone. In Sierra Leone, forced marriage was brought upon by the policies of the militia and rebel groups who encouraged their soldiers to force young women into marriage as their reward for fighting in combat.¹⁰⁶ Thus, it was not the government of Sierra Leone that imposed this policy, but it was enforced by rebel militia groups, where active hostilities were taking place.¹⁰⁷ In contrast, forced marriage was imposed by the Khmer Rouge, who represented the State of Cambodia, otherwise known at that time as Democratic Kampuchea.¹⁰⁸

Also, the implementation of forced marriage in Cambodia was different than in Sierra Leone. First, forced marriage in Sierra Leone mostly affected women and young girls in the country, and occurred more as a gender-related crime.¹⁰⁹ Male rebel soldiers would force young women into marrying them.¹¹⁰ Thus, females were primarily impacted as the victims.¹¹¹ However, in Cambodia, both men and women were coerced into marriage through random selection by

¹⁰³ *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, Preamble, 2329 UNTS 117, 118 [ECCC Agreement]. See also B. Kiernan, 'External and Indigenous Sources of Khmer Rouge Ideology', in O. A. Westad & S. Quinn-Judge (eds), *The Third Indochina War: Conflict Between China, Vietnam, and Cambodia*, 1972-79 (2006), 187, 189-190.

¹⁰⁴ K. M. Klein, 'Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia', 4 *Northwestern University Journal of International Human Rights* (2006) 3, 549, 549. The author discusses the legal problems with the ECCC due to the UN's agreement with the government of Cambodia to exercise local and international jurisdiction. *Ibid.*, 549-566.

¹⁰⁵ *Prosecutor v. Nuon Chea and Others*, Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC-OCIJ, 15 July 2009, 6, para. 9 [Prosecutor v. Nuon Chea and Others, Second Request Concerning Forced Marriage].

¹⁰⁶ Moore, *supra* note 30, 1.

¹⁰⁷ *Ibid.*

¹⁰⁸ Jain, *supra* note 16, 1024-1025.

¹⁰⁹ Moore, *supra* note 30, 1.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

the Khmer Rouge.¹¹² If the parties voiced dissent, they risked death.¹¹³ Many Cambodians were affected by forced marriage.¹¹⁴ In some instances, there were reports of Buddhist monks who were forced to disavow their celibacy, disrobe, and engage in sexual acts, all under the auspices of a forced marriage.¹¹⁵

In 2002, an agreement was reached between the United Nations and the government of Cambodia to establish a criminal tribunal to prosecute senior leaders of the Khmer Rouge for committing serious crimes based on Cambodian and international law.¹¹⁶ Despite widespread and systematic acts of forced marriage committed during the Khmer Rouge's reign, this issue was not raised as a relevant crime until the Civil Party made a request to the Office of the Co-Investigating Judges to look into allegations.¹¹⁷ In the Order, the Civil Party states:

“Forced marriages were clearly carried out as a matter of state policy. There were used statewide as a measure to weaken and attack Cambodian families, to produce more children to join ‘Angkar’s’ revolution, and to control sexuality and reproductive power. There were approximately 400.000 men and women married under the Khmer Rouge regime under the above-mentioned circumstances. Hence, the crimes were committed as part of a widespread and systematic attack against the civilian population.”¹¹⁸

The OCIJ granted the Civil Party's Request after receiving a Supplementary Submission by the OCP, and forced marriage was eventually included as an indicted crime against the Defendants in Case 002.¹¹⁹ The OCP focused on the coercive nature of forced marriage in addition to the lack of consent, noting that

¹¹² Toy-Cronin, *supra* note 17, 541.

¹¹³ B. Ye, ‘Forced Marriages as Mirrors of Cambodian Conflict Transformation’, 23 *Peace Review* (2011) 4, 469, 469.

¹¹⁴ Toy-Cronin, *supra* note 17, 545.

¹¹⁵ L. Crothers, ‘In Closing Statements, Horrors of Khmer Rouge Regime Laid Bare’, *The Cambodia Daily* (17 October 2013), available at <http://cambodiadaily.com/archive/in-closing-statements-horrors-of-khmer-rouge-regime-laid-bare-45304/> (last visited 15 May 2014).

¹¹⁶ *ECCC Agreement*, *supra* note 103.

¹¹⁷ *Prosecutor v. Nuon Chea and Others*, Second Request Concerning Forced Marriage, *supra* note 105, 3-4, para. 3.

¹¹⁸ *Ibid.*, 6, para. 9.

¹¹⁹ *Prosecutor v. Nuon Chea and Others*, Order on Request for Investigative Action concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC-OCIJ, 18

“[i]n the majority of cases [...] death threats were made, violence was used and people were even executed if they refused to marry. Many [...] state that they were too afraid to articulate their objection. [...] In some cases one party could request authorization to marry a person [...], but this does not detract from the element of coercion or force placed on the person [...]”.¹²⁰

Although forced marriage occurred under different circumstances in Cambodia, the facts indicate that it fits within the legal criteria and illustrates that the ECCC can make an effective argument against the accused for committing forced marriage. Regardless, forced marriage is still only prohibited as an other inhumane act at the ECCC.¹²¹ Similar to the SCSL, developing the jurisprudence for forced marriage will remain limited until it is specified as an enumerated crime against humanity. Thus far, closing arguments in Phase One of Case 002 have completed with verdicts expected to be made some time in 2014 concerning forced marriage and other international-based crimes.¹²²

I. Forced Marriage Is Distinct From Arranged Marriage

The considerable overlap between forced marriage and arranged marriage can create initial confusion. Forced marriage has been construed as an international crime that should be completely condemned by the international community, while arranged marriage is a custom that has been traditionally exercised for many centuries by many countries throughout the world and remains a widely practiced ritual. Both forms of marriages violate human rights to a certain degree, but crucial differences explain why forced marriage should be a crime against humanity and arranged marriage should not.

December 2009, 3 & 6, paras 2 & 17-18; *Prosecutor v. Nuon Chea and Others*, Closing Order, 002/19-09-2007-ECCC-OCIJ, 15 September 2010, 354-356, paras 1442-1447 [Prosecutor v. Chea and Others, Closing Order].

¹²⁰ *Prosecutor v. Chea and Others*, Closing Order, *supra* note 119, 355-356, para. 1447.

¹²¹ *Ibid.*, 354, para. 1441.

¹²² *Prosecutor v. Nuon Chea and Others*, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 002-19-09-2007-ECCC/TC, 26 April 2013, 70, dispositive section. See also L. Crothers, ‘As Trial Ends, KR Defendants Defiant to the Very Last’, *The Cambodia Daily* (1 November 2013), available at <http://cambodiadaily.com/featured-stories/as-trial-ends-kr-defendants-defiant-to-the-very-last-46446/> (last visited 15 May 2014).

Consent is an absolute and essential right within the context of marriage. Article 16 (2) of the *Universal Declaration of Human Rights* reads, “[m]arriage shall be entered into only with the free and full consent of the intending spouses”.¹²³ Consent is also an essential element to constitute a valid marriage under Article 23 of the *International Covenant on Civil and Political Rights*¹²⁴ and Article 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women*.¹²⁵ Furthermore, the then UN Secretary-General Kofi Annan, in his 2006 study on violence against women, defined forced marriage as one that “lack[s] the free and valid consent of at least one of the parties”.¹²⁶ Since the lack of consent is an important element in defining forced marriage, it is crucial to show how it in does not meet the threshold necessary to elevate arranged marriage as a crime against humanity.

While the level of consent is diminished in both kinds of marriage, consent in arranged marriages still exists from the main parties, albeit in a reduced capacity. Potential oppression can undoubtedly occur in arranged marriages. In this type of marriage, the spousal parties may be entirely subordinate to their families’ desires for their son or daughter to partake in a binding arranged marriage.¹²⁷ There might even be manipulation or emotional blackmail at play, with threats of abandonment or family excommunication if the son or daughter does not concede to the families’ wishes.¹²⁸ However, even though an arranged marriage has elements that violate existing norms of human rights, the fiduciary aspect, in which parents act on behalf of their son or daughter, still lends a certain degree of consent.¹²⁹ It is an indirect form of consent based on the fiduciary duty of the families, but one that nonetheless exists. In contrast, there is absolutely no real consent in a forced marriage.¹³⁰

Furthermore, arranged marriages are often found in the context of a private arrangement regarding the union of two families. It is a private act, which concerns a specific union that affects two individuals. In contrast, forced

¹²³ *Universal Declaration of Human Rights*, Art. 16 (2), *supra* note 72.

¹²⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 23 (3), 999 UNTS 171, 179.

¹²⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, 3 September 1981, Art. 16, 1249 UNTS 13, 20.

¹²⁶ UN General Assembly, *In Depth Study on all Forms of Violence Against Women: Report of the Secretary-General*, UN Doc A/16/122/Add.1, 6 July 2006, 40, para. 122.

¹²⁷ Jain, *supra* note 16, 1028.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

marriage can be a part of a widespread or systematic attack upon a civilian population.¹³¹ Such possibility must have been known or intended by the perpetrator.¹³² Thus, arranged marriage relates more to a private act between two specific individuals. In contrast, forced marriage is an institutionalized policy either created by the State, organizations, or groups that affect a wide swath of the civilian population, thus spilling out into the public sphere.

J. Forced Marriage Is not Simply Sexual Slavery

The Trial Chamber in Sierra Leone dismissed the prosecution's argument that forced marriage should be a crime against humanity under 'other inhumane acts' of Article 7 (1) (k).¹³³ Forced marriage was rejected as such because the evidence led in support of 'other inhumane' acts did not establish any offense distinct from sexual slavery.¹³⁴ According to the *Rome Statute*, sexual slavery under 'crimes against humanity' is when:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as 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.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹³⁵

At first blush, some of the elements listed in sexual slavery seem to strongly overlap with the definition of forced marriage.¹³⁶ Like sexual slavery, forced marriage involves the use of coercion or force to get the victim into a

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 220, 713.

¹³⁴ *Ibid.*

¹³⁵ ICC, *Elements of Crimes*, *supra* note 9, 8.

¹³⁶ Jain, *supra* note 16, 1029.

relationship with the perpetrator.¹³⁷ However, the Appeals Chamber found that forced marriage is distinct from sexual slavery.¹³⁸ Sexual slavery entails ownership of a person to engage in acts that are predominantly sexual in nature. In contrast, while forced marriage may include forms of sexual violence such as rape and enslavement, these were not dispositive as to whether forced marriages occurred or not.¹³⁹ Also, while forced marriage and sexual slavery have ownership of the individual in which the person's liberty is severely deprived, the method of acquiring possession of the victim is different.¹⁴⁰ In sexual slavery, ownership is obtained through "purchasing, selling, lending or bartering" the person.¹⁴¹ This element is dispositive in determining whether or not the slavery component of sexual slavery is fulfilled. In forced marriage, the ownership of a person through purchase, sale, or barter is not a required factor.¹⁴² Instead, the perpetrator acquires ownership of the victim through the coercive threat of marriage.¹⁴³

Nevertheless, the distinction between forced marriages and sexual slavery has caused considerable debate among the international courts and scholars as to whether there is a clear line between these crimes or whether forced marriage is subsumed within the category of sexual slavery. For example, Jennifer Gong-Gershowitz argues forced marriage should not be a separate category and should be placed within sexual slavery.¹⁴⁴ In fact, Gong-Gershowitz notes physical and sexual violence were the dominant features of crimes committed against young girls in Sierra Leone, not conjugal duties such as cooking and cleaning.¹⁴⁵ She voices concern that recognizing forced marriage will minimize the criminality of sexual violence and enslavement.¹⁴⁶ Gong-Gershowitz's concern is valid, in the sense that critics fear forced marriage might shield the perpetrators from being convicted of sexually violent crimes because their conduct occurred under the veneer of marriage.

¹³⁷ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 61 & 64, paras 189 & 195.

¹³⁸ *Ibid.*, 64, paras 195-196.

¹³⁹ Jain, *supra* note 16, 1019.

¹⁴⁰ ICC, *Elements of Crimes*, *supra* note 9, 8; *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

¹⁴¹ ICC, *Elements of Crimes*, *supra* note 9, 8.

¹⁴² *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

¹⁴³ *Ibid.*

¹⁴⁴ Gong-Gershowitz, *supra* note 22, 76.

¹⁴⁵ *Ibid.*, 68.

¹⁴⁶ *Ibid.*, 54.

However, forced marriage is a multilayered act and may entail both sexual and non-sexual elements, such as domestic servitude and conjugal duties, which are associated with marriage. Also, the public's perception of the victim in the marriage is significant. Whatever circumstances that fell upon the victim to marry the perpetrator, there is a prejudice that is associated with the victim because he or she is *married*. A bias exists because in essence, by being a part of the marriage, however sham or coerced it may be, the victim carries the burden of the institution of marriage on his or her shoulders. Thus, society is going to look at a married individual differently than a sexual slave.

While victims of sexual slavery or rape encounter discrimination due to the stigma associated with sexual violation, communities can still view the victim with more sympathy.¹⁴⁷ They can separate the violent acts of the perpetrator from the victim, who does not have a personal relationship with the perpetrator. Hence, if the victim was either engaged in an isolated incident with the perpetrator or enslaved by the perpetrator for chattel or sexual purposes, then communities can easily distinguish the victim from the perpetrator. However, a forced marriage connotes an exclusive conjugal union between the perpetrator and the victim, regardless of how the marriage began under coerced and violent circumstances.¹⁴⁸ Victims are subjugated to the perpetrators' violent whims and conjugal needs over a potentially long period of time. Thus, the longer the victim is involved with the perpetrator, the more intimately the victim is tied with the perpetrator, creating difficulties for communities to separate the victim from the perpetrator. Hence, it creates the unfortunate perception that the victim is collaborating with the enemy.¹⁴⁹

K. *Jus Cogens*

Under Article 53 *Vienna Convention of the Law of Treaties*, *jus cogens* is

“a preemptory norm of general international law [and] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and

¹⁴⁷ Carlson & Mazurana, *supra* note 14, 41.

¹⁴⁸ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

¹⁴⁹ Carlson & Mazurana, *supra* note 14, 41.

which can be modified only by a subsequent norm of general international law having the same character".¹⁵⁰

Thus, *jus cogens* is a mandatory norm of general international law from which no nation may exempt themselves of responsibility.¹⁵¹ No treaty or domestic law may deviate from a *jus cogens* norm unless it is amended by a subsequent norm of the same character.¹⁵² Modern examples of *jus cogens* prohibitions include genocide, piracy, slavery, and torture.¹⁵³ Thus, *jus cogens* can take a norm rooted in moral principle and transform a norm by giving it compelling universality, one which the international community has to value and protect.¹⁵⁴

Currently, there is no consensus as to how *jus cogens* is created.¹⁵⁵ Some scholars believe *United Nations Conventions*, scholarship opinions, and moral principles provide evidence of the existence of certain *jus cogens* norms.¹⁵⁶ Other scholars argue international treaties are required for *jus cogens* to come into existence.¹⁵⁷ While scholars are divided on how a *jus cogens* is developed, its transformative effect in turning a compelling principle into international law carries great weight. In fact, the enforcement of *jus cogens* can surpass treaties,

¹⁵⁰ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 53, 1155 UNTS 331, 344.

¹⁵¹ B. A. Garner (ed.), *Black's Law Dictionary*, 9th ed. (2009), 937.

¹⁵² *Report of the International Law Commission on the Work of Its Eighteenth Session*, Yearbook of the International Law Commission (1966), Vol. II, 24.

¹⁵³ See, e.g., D. Shelton, 'International Law and "Relative Normativity"', in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 141, 153-154. See also P. Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', 34 *Case Western Reserve Journal of International Law* (2002) 3, 287 [Viseur Sellers, Sexual Violence and Peremptory Norms], discussing why rape is not a *jus cogens*, despite increased recognition and enforcement as an international crime.

¹⁵⁴ See generally G. A. Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society', 28 *Virginia Journal of International Law* (1988) 3, 585, discussing how *jus cogens* is formed in international law. The author also discusses the conceptual limitations of *jus cogens*.

¹⁵⁵ E. A. Reimels, 'Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty – The U.S. Wants to Play the Human Rights Game, but Only if it Makes the Rules', 15 *Emory International Law Review* (2001) 1, 303, 332, discusses *jus cogens* and its role on international treaty law pertaining to juvenile death penalty.

¹⁵⁶ D. Adams, 'The Prohibition of Widespread Rape as a Jus Cogens', 6 *San Diego International Law Journal* (2005) 2, 357, 361 (note 20) with further references. The article discusses how widespread rape should become a *jus cogens*. *Ibid.*, 357-398.

¹⁵⁷ *Ibid.*, 361 (note 20) with further references.

leading to more widespread enforcement of crimes such as slavery and piracy. Thus, transforming forced marriage into a *jus cogens* prohibition will do much in spreading of its recognition as a monstrous act and will lead to greater enforcement against it as an international crime.

L. Customary International Law

Customary international law is the widespread practice of States derived from a sense of legal obligation, even in the absence of official legal documents or treaties.¹⁵⁸ Customary international law is a guide as to how States should conduct and operate themselves in the realm of international relations.¹⁵⁹ Customary international law requires evidence of two components, namely State practice and *opinio juris*.¹⁶⁰ *Opinio juris* can be found in resolutions of international organizations, leading scholarly writings on international law, UN practice, and treaty law.¹⁶¹ In addition, the sources for customary international law can include diplomatic relations between States, incidents between States, the practice of international organizations or agencies, State laws, decisions of State courts, and State military or administrative practices.¹⁶²

Forced marriage is recognized as prohibited by law in many States, indicating a widespread practice among the international community. For example, the criminal codes of Afghanistan, Austria, Ghana, Norway, and Serbia criminalize forced marriages.¹⁶³ Other countries such as Algeria, Belarus, Canada, Colombia, Estonia, Finland, Germany, Guatemala, Israel, Italy, Lithuania, Mauritius, Moldova, and the United Kingdom have enacted laws specifying that an act of forced marriage may be subject to criminal proceedings for other related crimes, such as human trafficking, sexual exploitation, abduction,

¹⁵⁸ See, e.g., L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (1979), 33.

¹⁵⁹ A. Y. Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law', 39 *Virginia Journal of International Law* (1999) 2, 303, 311. The article discusses slavery and its evolution in customary international law. *Ibid.*, 303-352.

¹⁶⁰ See, e.g., A. Kaczorowska, *Public International Law*, 4th ed. (2010), 35; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 24-27.

¹⁶¹ See, e.g., J. Klabbers, *International Law* (2013), 29.

¹⁶² See, e.g., A. Pellet, 'Article 38', in A. Zimmermann *et al.* (eds), *The Statute of the International Criminal Court of Justice: A Commentary*, 2nd ed. (2012), 731, 814, para. 217; T. Treves, 'Customary International Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. II (2012), 937, 942 & 947, paras 23 & 50 (for example).

¹⁶³ Jain, *supra* note 16, 1027.

prostitution, and rape.¹⁶⁴ Thus, the widespread practice of criminalizing forced marriage indicates the positive legal progression in its inclusion as part of customary international law. Yet, while States have made strides in criminalizing forced marriage, there is still a lacuna in international law in this regard. What can really establish forced marriage in becoming a definitive part of customary international law is for it to be included under a distinct, enumerated category as a crime against humanity. Although there remain obstacles for forced marriage to be listed as a crime against humanity, the legal development of rape in its inclusion as customary international law gives insight as to how forced marriage can be recognized as a crime against humanity.

M. Forced Marriage, Slavery, and Rape

Forced marriage, with its multilayered acts of brutality and the continuous state of domestic and sexual slavery, coercion, and abuse all committed under the ‘legitimacy’ of marriage creates great physical and mental suffering for the victim.¹⁶⁵ Furthermore, the perception of the individual’s marriage to the perpetrator, regardless of the subjugation into a conjugal union, creates prejudice toward the victim.¹⁶⁶ The victim is intimately associated with the perpetrator over a long duration of time, which leads to discrimination toward the victim upon return to the victims’ families, homes, and communities.¹⁶⁷ The heinous conduct of forced marriage makes it necessary to recognize it as a crime against humanity.

Due to its similarity to slavery, forced marriage should be recognized as a crime against humanity and should also be included in customary international law. Slavery, as defined in the 1926 *Slavery Convention*, “is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.¹⁶⁸ Moreover, the *Rome Statute* defines enslavement as a crime against humanity under Article 7 (1) (c) and Article 7 (2) (c) as such:

“The exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power

¹⁶⁴ *Ibid.* See also Human Rights Council, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, UN Doc A/HRC/4/23, 24 January 2007, 9, para. 20.

¹⁶⁵ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, 195.

¹⁶⁶ Carlson & Mazurana, *supra* note 14, 26.

¹⁶⁷ *Ibid.*, 26.

¹⁶⁸ *Slavery Convention*, 25 September 1926, Art. 1 (1), 60 LNTS 253, 263.

in the course of trafficking in persons, in particular women and children.”¹⁶⁹

The definition of slavery is similarly aligned with the definition of forced marriage. Forced marriage

“involves a perpetrator compelling a person by force or threat of force, through [...] words or conduct of the perpetrator, or [anyone] associated with him, into a forced conjugal association [...] resulting in great suffering [...] or serious physical or mental injury on the part of the victim”.¹⁷⁰

The act of compelling a person by force into a forced conjugal association is similar to the idea of exercising powers attaching the right of ownership over a person. By coercing a person into marriage, the perpetrator is essentially exercising ownership over the victim. Thus, slavery and forced marriage share an inherent commonality.

Slavery was one of the first international crimes to achieve *jus cogens* status.¹⁷¹ From the early 1800s onwards, more than seventy-five multilateral and bilateral conventions were signed and ratified to ban slavery and slave trade.¹⁷² However, the prohibition of slavery was not formally codified on a multilateral level until the 1926 *Slavery Convention* through the League of Nations.¹⁷³ Slavery has all but disappeared in the twentieth century, and that may well have made it possible for States to recognize the application of the theory of universal jurisdiction (to prosecute slave traders) to what has heretofore been essentially universally condemned.¹⁷⁴ Thus, the history of treaties and customary State practice demonstrates how slavery has evolved from a domestic crime into a *jus cogens* norm.

¹⁶⁹ *Rome Statute*, Art. 7 (1) (c) & (2) (c), *supra* note 5, 93-94.

¹⁷⁰ *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

¹⁷¹ A. T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, 49 *Virginia Journal of International Law* (2009) 4, 789, 799.

¹⁷² *Ibid.*, 799-800.

¹⁷³ *Ibid.*, 800.

¹⁷⁴ M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001) 1, 81, 112-115 (for example). The article generally discusses universal jurisdiction and how it is applied under *jus cogens* norms. *Ibid.*, 81-162.

Whereas forced marriage contains certain aspects of slavery, rape is not a required factor. Although rape can certainly occur within forced marriage, it is not dispositive to determine its existence. It is significant to note that while rape can be prosecuted as a war crime or as a crime against humanity committed on a widespread and systematic scale, it can also be prosecuted as a one-time act. In contrast, forced marriage often enables the perpetrators to continually force sexual and violent acts on their victims over a long duration of time because both parties are under the auspices of marriage. Thus, if rape can be prohibited as an international crime even if it only occurred once, then forced marriage should be an enumerated crime against humanity due to the continuous act and long duration of involvement the victim has with the perpetrator.

Unlike slavery, rape's progression as an international crime was more of a modern phenomenon. Historically, rape was used as an instrument of policy to inflict suffering upon a civilian population, particularly women.¹⁷⁵ During Second World War, Nazi and Japanese practices of forced prostitution and rape on a large scale became the most egregious examples of such policies.¹⁷⁶ After Second World War, despite the inclusion in the *Fourth Geneva Convention* and the *Additional Protocols*,¹⁷⁷ rape was not listed among the grave breaches subject to universal jurisdiction.¹⁷⁸ It was not until the widespread acts of rape in the former Yugoslavia during the 1990s that progress was made in recognizing rape as a prohibition under customary international law.¹⁷⁹ In 1998, the ICC included rape as a crime against humanity under the *Rome Statute*.¹⁸⁰ Rape is also considered of high importance as a prosecutorial strategy of the Office of the Prosecutor (OTP).¹⁸¹ The eventual recognition of rape as a crime against humanity illustrates how much rape has evolved from a private crime prosecuted under domestic law to its vaulted position as an international crime. Thus, the

¹⁷⁵ T. Meron, 'Rape as a Crime Under International Humanitarian Law', 87 *American Journal of International Law* (1993) 3, 424, 425.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Geneva Convention IV*, Art. 27, *supra* note 11, 306; *Protocol I to the Geneva Conventions*, Art. 76 (1), *supra* note 11, 38; *Protocol II to the Geneva Conventions*, Art. 4 (2) (e), *supra* note 70, 612.

¹⁷⁸ *Geneva Convention IV*, Art. 147, *supra* note 11, 388. See also Meron, *supra* note 175, 426.

¹⁷⁹ Meron, *supra* note 175, 425-427.

¹⁸⁰ *Rome Statute*, Art. 7 (1) (g), *supra* note 5, 93.

¹⁸¹ H. N. Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 12 *Human Rights Review* (2011) 1, 109, 109. The article compares the prosecution of rape between the ICTY and the ICTR and argues while the ICTY has shown a willingness to place rape of high importance to prosecute, the ICTR has not been as successful. *Ibid.*, 109-132.

inclusion of rape under the *Rome Statute* as a crime against humanity demonstrates how the prohibition of rape has progressed into customary international law.

Nevertheless, critics who assert forced marriage should not be recognized as a crime against humanity place too much emphasis on the sexual factor of it and do not give sufficient attention to the confined aspects of slavery in forced marriage. Also, despite the positive development that has been made in rape's inclusion as a crime under customary international law, rape arguably still is not recognized as a *jus cogens* prohibition.¹⁸² If the slow inclusion of rape as an international crime is any indication, focusing more on the sexual component of forced marriage will likely delay the process for the prohibition of the latter to become a *jus cogens* norm. On the other hand, the criminalization of slavery has always been recognized as a *jus cogens* norm alongside piracy. If forced marriage can be posited under the framework of slavery as opposed to rape, sexual slavery, or another form of a sexual crime, then a stronger and more compelling argument can be made for the prohibition of forced marriage to be recognized as a *jus cogens* norm.

In the end, what makes forced marriage dispositive as a crime against humanity and as a *jus cogens* prohibition is not necessarily rape or a sexual act, but based on the deprived liberties and confined nature of enslavement. It is through this lens that forced marriage can become a *jus cogens* prohibition and increase its legal recognition as an international crime. The criminalization of forced marriage will enable the courts to prosecute and convict the perpetrators. As a result, justice will be accorded to the victims, the stigma of forced marriage can be lifted from their shoulders, and hopefully communities will be better motivated to help reintegrate the victims back into society.

N. Conclusion

Putting forced marriage under the rubric of 'other inhumane acts' of crimes against humanity is not sufficient. In fact, while the SCSL established a courageous precedent in recognizing forced marriage as a crime against humanity, labeling the crime as an 'other inhumane act' has allowed forced marriage to remain in greater obscurity compared to other international crimes. In fact, even though the ICC has issued arrest warrants for Ugandan warlord Joseph Kony and his cronies, none of them have been prosecuted for forced marriage, despite widespread reports.¹⁸³

¹⁸² Visser Sellers, 'Sexual Violence and Preemptory Norms', *supra* note 153, 289.

¹⁸³ *Prosecutor v. Kony and Others*, Warrant of Arrest, *supra* note 66, para. 42.

To elevate forced marriage as an international crime, it must be labeled as such and recognized in the *Rome Statute* as a distinct enumerated category under ‘crimes against humanity’. Furthermore, it should also become a *jus cogens* prohibition. It is through these means that a ban on forced marriage will become part of customary international law and close the current lacuna under international criminal law. Thus, the criminalization of forced marriage will have widespread implications for the victims, such as Fatmata Jalloh. Fatmata Jalloh was selling pancakes off the side of a road when she was kidnapped and forced into marriage and endured sexual and physical abuse for two years.¹⁸⁴ Despite her horrifying ordeal, Jalloh is no longer associated with her perpetrator.¹⁸⁵ She has successfully recovered and is happily married.¹⁸⁶ For Jalloh, hearing the SCSL’s ruling that forced marriage is a crime against humanity, made her happy.¹⁸⁷ “Now they can try to abolish the thing [forced marriage],” she said.

Jalloh’s personal story ended with a happy marriage, but for many forced marriage victims, the path to rehabilitation and recovery is hindered by prejudices from their homes and communities for marrying their captors.¹⁸⁸ Unfortunately, in gender-based crimes such as forced marriage, female victims are still frequently misunderstood and marginalized not only by their local communities, but also by the international criminal legal system.¹⁸⁹ For example, the crime of forcing child soldiers to fight in combat has received widespread condemnation from the international community.¹⁹⁰ This has led to the creation of rehabilitation programs to allow the victims, who are predominantly young men and boys, to recover and heal after experiencing extensive physical and psychological trauma.¹⁹¹ Moreover, the SCSL convicted former Liberian President Charles Taylor for eleven counts of international crimes, including

¹⁸⁴ Moore, *supra* note 30, 1.

¹⁸⁵ *Ibid.*, 1.

¹⁸⁶ *Ibid.*, 2.

¹⁸⁷ *Ibid.*

¹⁸⁸ Carlson & Mazurana, *supra* note 14, 41.

¹⁸⁹ See H. Charlesworth & C. Chinkin, ‘The Gender of Jus Cogens’, 15 *Human Rights Quarterly* (1993) 1, 63, 65, argues under international law, *jus cogens* is not universal and its development has privileged the experiences of men over those of women, and it has provided a protection to men that is not accorded to women.

¹⁹⁰ K. Hill & H. Langholtz, ‘Rehabilitation Programs for African Child Soldiers’, 15 *Peace Review* (2003) 3, 279, 281-285, discusses how aid agencies have implemented solutions to rehabilitate child soldiers.

¹⁹¹ *Ibid.*

the forced recruitment of child soldiers.¹⁹² In contrast, since the SCSL's ruling in 2008 and last conviction in 2009, no subsequent court has prosecuted and convicted perpetrators for committing forced marriage.¹⁹³

The lack of prosecution is an unfortunate development for the victims of forced marriage. Whether it is through physical or sexual coercion, the perpetrator's control over the victim's bodily autonomy is devastating.¹⁹⁴ The most powerful tool to heal the victims after experiencing such devastation is empowerment. If more local communities established rehabilitation programs for forced marriage victims, then societies will progress in assisting the victims. Thus, the victims, who are predominantly young women and girls, can realize their self-worth and reclaim their personal autonomy. The local and international community has achieved success in socially reintegrating young men and boys back into their societies after fighting in combat as child soldiers.¹⁹⁵ After the years of hardship, pain, and trauma, the victims of forced marriage should receive as much treatment and respect as their male counterparts. This will create a powerful social weapon to combat forced marriage.

¹⁹² *Prosecutor v. Charles Ghankay Taylor*, Judgment, SCSL-03-1-T, 18 May 2012, 2475-2478, para. 6994. See also K. Ambos & O. Njikam, 'Charles Taylor's Criminal Responsibility', 11 *Journal of International Criminal Justice* (2013) 4, 789, 791.

¹⁹³ See *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2. See also *Prosecutor v. Sesay and Others*, Appeals Chamber Judgment, *supra* note 4, 259, para. 726 (for example).

¹⁹⁴ ICC, Elements of Crimes, *supra* note 9, 6 & 8; *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 65, para. 199.

¹⁹⁵ Hill & Langholtz, *supra* note 190, 281 & 284.

