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# Forced Marriage: A “New” Crime Against Humanity?

Jennifer Gong-Gershowitz\*

## I. INTRODUCTION

In February 2008, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) became the first international criminal tribunal to recognize “forced marriage” as a separate or distinct crime.<sup>1</sup> In this landmark case, *Prosecutor v. Brima, Kamara and Kanu*, also known as the AFRC trial, the Trial Chamber held that the evidence of forced marriage in the Sierra Leone conflict was completely subsumed by the crime of sexual slavery but found the defendants, three Armed Forces Revolutionary Council (“AFRC”) leaders, guilty of war crimes and crimes against humanity, including murder, rape, sexual slavery, and conscription of child soldiers.<sup>2</sup> Alex Tamba Brima and Santigie Borbor Kanu were sentenced to fifty years in prison, and Brima Bazzy Kamara was sentenced to forty-five years. However, the Appeals Chamber reversed the Trial Chamber’s dismissal of the forced marriage charge, ruling that, contrary to the majority view of the trial chamber, forced marriage was distinct from the crime of sexual slavery under the category of “Other Inhumane Acts,” which are recognized as crimes against humanity under customary international law.<sup>3</sup>

The AFRC Appeals Judgment was widely hailed by non-governmental organizations and scholars alike as a breakthrough in the recognition of gender crimes.<sup>4</sup>

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<sup>1</sup> Although the Appeals Chamber in the AFRC trial recognized “forced marriage” as a distinct crime against humanity, it declined to enter new convictions. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-A, Judgment, ¶ 202 (Feb. 22, 2008) [hereinafter AFRC Appeals Chamber Judgment]. A year later, on February 25, 2009, the SCSL entered the first convictions for the crime of forced marriage against three senior Revolutionary United Front (RUF) commanders. This case, officially titled *Prosecutor v. Sesay, Kallon and Gbao*, has been commonly referred to as the “RUF trial.” *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, (Mar. 2, 2009) [hereinafter RUF Trial Chamber Judgment].

<sup>2</sup> *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Judgment, (June 20, 2007) [hereinafter AFRC Trial Chamber Judgment].

<sup>3</sup> AFRC Appeals Chamber Judgment, *supra* note 1.

<sup>4</sup> See, e.g., Donald Steinberg, Op-Ed., *Make Forced Marriage a Crime Against Humanity: The UN Must Protect Conflict Zone “Bush Wives,”* CHRISTIAN SCI. MONITOR, June 9, 2008, at 9 (“Labeling forced marriage a crime against humanity ... allows the international community to step in and prosecute whether

This reaction is not surprising given the impunity with which perpetrators throughout history have committed sexual violence in armed conflicts all over the world. Indeed, thousands of women and girls were abducted by rebels and subjected to constant sexual violence during the decade-long civil war in Sierra Leone.<sup>5</sup> Abducted women and girls were assigned “husbands” and forced to become the husbands’ sex slaves.<sup>6</sup> In addition to suffering horrific sexual violence, victims were also made to perform forced labor such as cooking, washing, carrying loads, and farming.<sup>7</sup> These atrocities were committed against Sierra Leonean women and girls on a massive scale. In 2002, Physicians for Human Rights (“PHR”) calculated that as many as 215,000 to 257,000 women and girls may have been subjected to sexual violence in the conflict period.<sup>8</sup> According to field research conducted in 2000 under a project co-funded by the UN mission in Sierra Leone, seventy-three percent (73%) of women interviewed (twenty percent of whom were girls between six and seventeen years old) reported having experienced human rights abuses; forty-seven percent (47%) reported having been raped; and twenty percent (20%) reported having been gang raped.<sup>9</sup> Forty-one percent (41%) of the interviewees reported having been abducted, and three percent said they were forced to marry their abductor.<sup>10</sup>

Although statistics alone cannot adequately portray the extreme brutality of the violence committed against women by all parties to the Sierra Leone conflict, they do serve to underscore the magnitude of the atrocities at issue in the trials of the SCSL. In light of those atrocities, this paper acknowledges the need for a judgment to express the moral outrage felt by the international community and, most importantly, by the victims of these heinous crimes. However, this paper challenges the SCSL definition of forced marriage as a “new” crime under international humanitarian law. Contrary to acknowledging the victims’ suffering, the AFRC Appeals Judgment, by distinguishing the crime of forced marriage from the crime of sexual slavery, has the ironic effect of minimizing the sexual violence and enslavement that were the principal features of forced marriages in the Sierra Leone conflict. As a result, the decisions of the Special Court for Sierra Leone may actually undermine the recognition of forced marriage as a serious violation of human rights in peacetime and a crime akin to modern-day slavery in the context of war.

In an effort to end the impunity with which perpetrators commit sexual violence, to provide justice for victims, and to give a legal definition to unspeakable atrocity,

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or not local laws and legal authorities wish to pursue the cases.”). See also Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime against Humanity*, 6 J. INT’L CRIM. JUST. 1033, 1033 (2008) (“This decision is to be welcomed because the practice of forced marriage is not adequately described by existing categories of sexual crimes.”).

<sup>5</sup> HUMAN RIGHTS WATCH, “WE’LL KILL YOU IF YOU CRY”: SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT, Vol. 15, No. 1 (A), (Jan. 2003), available at <http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf> [hereinafter WE’LL KILL YOU IF YOU CRY].

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 25-26 (citing PHYSICIANS FOR HUMAN RIGHTS, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE: A POPULATION-BASED ASSESSMENT 3-4 (2002) available at <http://physiciansforhumanrights.org/library/documents/reports/sexual-violence-sierra-leone.pdf>).

<sup>9</sup> U.N. CHILDREN’S FUND [UNICEF], THE IMPACT OF CONFLICT ON WOMEN AND GIRLS IN WEST AND CENTRAL AFRICA AND THE UNICEF RESPONSE 7, (2005), available at [http://www.unicef.org/publications/files/Impact\\_final.pdf](http://www.unicef.org/publications/files/Impact_final.pdf).

<sup>10</sup> *Id.*

prosecutors have pushed the envelope. In so doing, the jurisprudence of the international criminal tribunals has slowly begun to more accurately reflect the wide-ranging gender crimes committed in situations of armed conflict. However, in the face of atrocity, a court of law must provide the necessary detachment to faithfully apply the law to the applicable facts on a case-by-case basis.<sup>11</sup> In the AFRC trial, the facts supported a charge and conviction of the defendants for the crime of sexual slavery as provided by statute. By reaching to define a “new” crime of forced marriage subsumed under “Other Inhumane Acts,” the AFRC Appeals Judgment raised a host of contextual issues that may have problematic implications for future prosecutions by other international criminal tribunals and, perhaps more importantly, failed to enhance the understanding of conflict-related violence against women and girls.

Following the introduction, this paper is divided into five parts. The first part discusses the findings of the Sierra Leone Truth and Reconciliation Commission and the AFRC Trial, and it describes the Sierra Leonean civil war and the events leading up to the creation of the Special Court for Sierra Leone (SCSL). The second part explores a few key decisions of the ad hoc tribunals for the Former Yugoslavia and Rwanda to provide a comparison to the approach taken by the SCSL in response to crimes of sexual violence. The third part is divided into two subparts. The first subpart examines the rationale of the AFRC Trial Chamber, which declined to recognize forced marriage as a new crime against humanity, and then critically analyzes the AFRC Appeals Chamber’s decision to recognize “forced marriage,” arguing that the Chamber’s reasoning distorts the distinctions between sexual slavery and forced marriage during armed conflict. Thereafter, the second subpart discusses the RUF Trial Judgment and the problems inherent in its application of the vague standard articulated by the AFRC Appeals Chamber for the crime of “forced marriage.” Finally, the fourth and fifth parts argue for a clear definition of the crime of sexual slavery defined broadly to encompass a “forced conjugal association,” or alternatively, for the inclusion of evidence of forced marriage as an aggravating factor in sentencing for crimes of sexual violence.

## II. BACKGROUND

To examine the new crime against humanity as fashioned by the SCSL, it is first important to put the evidence adduced by the prosecution in support of its forced marriage charge in the context of the conflict in Sierra Leone. Sierra Leone is a coastal West African nation with a population of 4.5 million people from sixteen different ethnic groups. Civil war erupted on March 23, 1991 when an armed opposition group known as the Revolutionary United Front (“RUF”) crossed the border from neighboring Liberia

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<sup>11</sup> Along these lines, Justice Robertson of the SCSL emphasized the need for international law judges to resist the temptation to circumvent the principle of *nullum crimen sine lege* (“no crime without law”), which is the international criminal law equivalent of the prohibition against retroactive legislation. *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision, (May 31, 2004) (dissenting opinion of Justice Robertson on the Preliminary Motion Based on Lack of Jurisdiction), reprinted in BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT, 825, 836-837 (2007). In the *Norman* Case, Justice Robertson further explains that “it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a house-hold phrase, but it serves as some protection against the lynch mob.” *Id.* at 837.

into the town of Bomaru to overthrow the government of Joseph Saidu Momoh and the All People's Congress (APC), which had ruled Sierra Leone since 1968.<sup>12</sup>

Backed by Liberian warlord Charles Taylor and funded by now-infamous "blood diamonds," the RUF incursion into Bomaru marked the beginning of a decade of violence that devastated the country. The bloody civil war became internationally notorious for appalling brutality against civilians. Reports emerged of indiscriminate mutilations, abductions of women and children, recruitment of child soldiers, rape, sexual slavery, gratuitous killings and wanton destruction of villages and towns. Many civilians were abducted and forced to work in the country's abundant diamond, bauxite, and titanium mines. The tactics used by the RUF and AFRC rebels formed part of a campaign to terrorize civilians and thereby force the government to surrender power. As the Sierra Leone Truth and Reconciliation Commission aptly recounted, "this was a war measured not so much in battles and confrontations between combatants as in attacks upon civilian populations."<sup>13</sup>

The war reached its peak when RUF and AFRC rebels launched a major offensive that destroyed much of the capital in January 1999. The battle for Freetown and the ensuing three-week rebel occupation marked the most intensive and concentrated period of atrocities in the civil war.<sup>14</sup> Government and the Economic Community of West African States Monitoring Group ("ECOMOG") forces drove the RUF and AFRC out of Freetown in February 1999.<sup>15</sup> As they retreated, the rebels abducted thousands of civilians, whom they forced to carry looted goods and ammunition, perform hard labor, and fight.<sup>16</sup> Abducted women and girls were repeatedly raped and subjected to other forms of sexual violence, as they had been since the very beginning of the war. Women and girls suffered a variety of abuses throughout the duration of their captivity, which often lasted years, including sexual slavery, forced labor and forced pregnancy.<sup>17</sup> In many cases, these crimes led to the phenomenon known as "bush wives," which is discussed in depth below.<sup>18</sup>

In the months following the January 1999 invasions, negotiations between the Sierra Leone Government and rebel factions, in which the AFRC did not participate, led to the Lomé Peace Accord, signed in Togo on July 7, 1999. The Accord resulted in a ceasefire and a power sharing agreement between the government led by Ahmad Tejan Kabbah, and the RUF.<sup>19</sup> Despite the presence of a UN peacekeeping force, known as the United Nations Assistance Mission in Sierra Leone (UNAMSIL), the RUF and AFRC continued to terrorize the civilian population in the north and east, which remained under their control. Moreover, "the peace process was marred by cease-fire violations, missed

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<sup>12</sup> See TRUTH & RECONCILIATION COMMISSION, REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION: WITNESS TO TRUTH, Vol. 2 (2004).

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See WE'LL KILL YOU IF YOU CRY, *supra* note 5, at 12.

<sup>15</sup> *Id.* As of mid-1998, the ECOMOG forces in Sierra Leone were composed of approximately 12,500 troops predominantly from Nigeria, bolstered by forces from Guinea, Gambia, Ghana, and Niger. *Id.* at 11-12.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 25.

<sup>18</sup> See discussion *infra* Part IV.

<sup>19</sup> Then in exile, Kabbah had been elected President in March 1996, but was overthrown fourteen months later in a coup led by Major Johnny Paul Koroma of the AFRC.

deadlines and infighting among rebel ranks.”<sup>20</sup> In May 2000, the RUF captured over 500 UNAMSIL peacekeepers and military observers, after which the ceasefire broke down completely and fighting erupted throughout the country. Hostilities intensified again, along with the human rights abuses committed by all parties to the conflict, though pro-government forces participated on a smaller scale. Following yet another ceasefire agreement between the government and RUF in November 2000, the human rights situation slowly began to improve as UNAMSIL expanded its forces to 17,500 military personnel.<sup>21</sup> On January 18, 2002, the disarmament and demobilization process was declared complete, and the civil war officially ended.

As part of the reconstruction process, the SCSL was created by agreement between the United Nations and the government of Sierra Leone to prosecute those “who bear the greatest responsibility for serious violations of international humanitarian law.”<sup>22</sup> The initial indictments against AFRC leaders each contained seventeen counts of crimes against humanity, violations of common Article 3 to the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law.<sup>23</sup> Pursuant to the prosecution’s request for leave to amend the Consolidated Indictment, acts of forced marriage as adduced by the prosecution were added as a new Count 8 of “Other Inhumane Acts” under Article 2(i) of the SCSL Statute.<sup>24</sup> As discussed below, Justice Julia Sebutinde examined the decision of AFRC Trial Chamber I to grant leave in her concurring opinion to the AFRC Trial Judgment.

### III. THE AD HOC TRIBUNALS’ APPROACH TO CRIMES OF SEXUAL VIOLENCE

Notwithstanding that rape and other forms of sexual violence against women during armed conflict have been prohibited under international law for over a century, rape “remains the least condemned war crime, according to the UN Special Rapporteur on violence against women.”<sup>25</sup> Common Article 3 to the Geneva Conventions implicitly condemns sexual violence through its prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>26</sup> Yet, despite the prevalence of sexual violence during the Second World War, rape was not prosecuted at any of the Nuremberg

<sup>20</sup> WE’LL KILL YOU IF YOU CRY, *supra* note 5, at 13-14.

<sup>21</sup> *Id.* at 14.

<sup>22</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 1, U.N. Doc. S/2002/246, (Jan. 16, 2002), *available at* <http://www.specialcourt.org/documents/Agreement.htm>.

<sup>23</sup> AFRC Trial Chamber Judgment, *supra* note 2, ¶ 4.

<sup>24</sup> *Id.* ¶¶ 6, 7.

<sup>25</sup> WE’LL KILL YOU IF YOU CRY, *supra* note 5, at 54 (quoting U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women*, at 64, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994)).

<sup>26</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3(1)(c), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Common Article 3*]. (Common Article 3 and Article 4 of Protocol II, which govern internal armed conflict, as opposed to an international armed conflict, applied to the civil war in Sierra Leone.). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), art. 4(2)(a) and (e), June 8, 1977, 1125 U.N.T.S. 609 (Article 4 of Protocol II expressly forbids “violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment” and “outrages upon personal dignity, in particular humiliating and degrading treatment, rape and enforced prostitution and any other form of indecent assault.”).

trials. Almost fifty years later, the efforts of a handful of women's rights advocates in response to reports of widespread sexual violence in the conflicts in the former Yugoslavia and Rwanda helped lead to the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda ("ICTR") (hereinafter "the *ad hoc* tribunals") to try offenders.<sup>27</sup> The statutes of the *ad hoc* tribunals explicitly enumerate rape among the constitutive acts for crimes against humanity.<sup>28</sup> Although both tribunals have played a key role in setting precedents for the prosecution of sexual violence, an in-depth examination of the jurisprudence of the *ad hoc* tribunals is beyond the scope of this paper. However, a few cases have particular relevance to the discussion on the AFRC and RUF trials that follow and thus are highlighted here.

Rape was expressly defined for the first time under international law in the landmark case of *Prosecutor v. Akayesu*, wherein Trial Chamber I of the ICTR held that rape is "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>29</sup> The *Akayesu* judgment also provided a legal definition of sexual violence as any act of a sexual nature committed on a person under coercive circumstances, including but not limited to a physical invasion of the body, penetration, and physical contact.<sup>30</sup> Thus, the ICTR defined sexual violence broadly to encompass a wide range of acts.

Although observers generally welcomed it as a positive step toward the full recognition of conflict-related sexual violence, the *Akayesu* judgment was not without genuine criticism. For example, Rhonda Copelon, a noted scholar on international human rights law and gender justice, questioned the conceptualization of rape as genocide.<sup>31</sup> Specifically, Copelon challenges the notion of "genocidal rape" as a unique or incomparable form of rape, stating, "... to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again."<sup>32</sup> Another commentator criticized the Office of the Prosecutor (OTP) of the ICTR for failing to charge forced marriage as a crime of sexual violence.<sup>33</sup> Monika Satya Kalra cites the testimony of witness NN in the *Akayesu* trial as an example of a crime that should have been charged as forced marriage rather than rape.<sup>34</sup> Kalra notes that Witness NN testified that her life was spared when a member of the *Interahamwe*, the Hutu's

<sup>27</sup> See generally VAN SCHAACK & SLYE, *supra* note 11, at 729.

<sup>28</sup> The following acts, when committed as part of a widespread or systematic attack against a civilian population, constitute crimes against humanity: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts. Updated Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5, U.N. Doc S/RES/827 (May 19, 1993), [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

<sup>29</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) [hereinafter *Akayesu* Judgment].

<sup>30</sup> *Id.*

<sup>31</sup> Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in a Time of War*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 199, 204 (Julie Peters & Andrea Wolper eds., 1995).

<sup>32</sup> *Id.*

<sup>33</sup> Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. DAVIS J. INT'L L. & POL'Y 197 (2001).

<sup>34</sup> *Id.* at 202, 203.

trained youth militia, claimed her as his wife.<sup>35</sup> To date, however, there have been no separate prosecutions for the crime of forced marriage in the ICTR.

Similarly, the ICTY has found that sexual violence can constitute a crime against humanity, but prosecutions have generally been limited to acts, such as rape and enslavement, that are explicitly proscribed by statute.<sup>36</sup> For example, in *Prosecutor v. Kunarac*, the Trial Chamber found the abduction, rape, and confinement of two Muslim girls in an abandoned house in Trnovace to be a form of enslavement, which the Trial Chamber defined as “the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>37</sup> In determining whether the defendants were guilty of enslavement, the Trial Chamber listed the following factors to be taken into consideration: 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 labor.<sup>38</sup>

In finding the defendant, Dragoljub Kunarac, guilty of rape and enslavement as crimes against humanity, the Trial Chamber noted the duration of the captivity as well as other evidence tending to show that the accused asserted a right of ownership over the victim, who was identified in the trial judgment as FWS-191. In July 1992, FWS-191 was about seventeen years old when she was captured with her family in the area of Ulog.<sup>39</sup> FWS-191 was brought to a school in Kalinovik where about 130 or 140 Muslim civilians from Gacko were being held.<sup>40</sup> About one month later, she was taken, together with two other girls, to a house in Trnovace by Kunarac, nicknamed “Gaga,” and other soldiers in uniform.<sup>41</sup> FWS-191 spent roughly five to six months in the Trnovace house.<sup>42</sup> The Trial Chamber found that, during the time of her detention, FWS-191 was constantly raped by Kunarac who “reserved [her] for himself.”<sup>43</sup> As evidence of Kunarac’s assertion of exclusivity (i.e., ownership) over FWS-191, the Trial Chamber emphasized that other soldiers were forbidden to rape her.<sup>44</sup> Evidence such as having to “obey all demands” of the accused and having to “do household chores” was highlighted as proof of the complete control that Kunarac exercised over the life of FWS-191.<sup>45</sup> FWS-191 testified that “[s]he felt like she was [Kunarac’s] property.”<sup>46</sup> In the Trial Chamber’s view, the fact that FWS-191 was given keys to the house at some point did not undermine evidence of control because she had nowhere to go and no place to hide.<sup>47</sup>

As discussed below, with the exception of the label “wife,” the circumstances establishing the crime of rape and enslavement in *Kunarac* by the ICTY are closely analogous to the phenomenon of “bush wives” in the Sierra Leone conflict.

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<sup>35</sup> *Id.* at 202.

<sup>36</sup> See ICTY Statute, *supra* note 28, art. 5 (c) and (g).

<sup>37</sup> *Prosecutor v. Kunarac et al.*, Case No. IT-96-23T & IT-96-23/1-T, Judgment, ¶ 539 (Feb. 22, 2001).

<sup>38</sup> *Id.* ¶ 543. (emphasis added).

<sup>39</sup> *Id.* ¶ 254.

<sup>40</sup> *Id.* ¶ 255.

<sup>41</sup> *Id.* ¶¶ 255, 256.

<sup>42</sup> *Id.* ¶ 262.

<sup>43</sup> *Id.* ¶ 728.

<sup>44</sup> *Id.* ¶ 741.

<sup>45</sup> *Id.* ¶ 728.

<sup>46</sup> *Id.* ¶ 264.

<sup>47</sup> *Id.* ¶ 740.



## IV. CRITICAL ANALYSIS OF THE “FORCED MARRIAGE” FINDINGS BY THE SCSL

A. *The AFRC Judgments*

There are several problematic aspects of the AFRC judgments by both the Trial and Appeals Chambers. First, by failing to adequately address the non-sexual elements of the forced marriage charge, the Trial Chamber demanded further action by the prosecutor to address the distinct trauma experienced by women as a consequence of being forcibly “married.” However, as discussed below, the non-sexual elements outlined by the various opinions in the AFRC judgments have for the most part been recognized as acts that can form the basis of the crime of enslavement.<sup>48</sup> In fact, once the elements of sexual slavery are removed, only the label – wife – remains to distinguish between the crime of sexual slavery as defined by the AFRC Trial Judgment and the “new” crime of “forced marriage” recognized for the first time by the Appeals Chamber of the SCSL.

Indeed, the most fundamental flaws in the logic of the AFRC Judgments lie in their muddy distinctions between arranged and forced marriage on the one hand and between forced marriage and sexual slavery on the other. With respect to the former, both the Partly Dissenting Opinion of the Trial Chamber as well as the Appeals Chamber put undue emphasis on parental consent as the key factor distinguishing arranged marriage in peacetime and forced marriages during armed conflict. This raises a variety of troublesome issues discussed below, including inconsistency with the definition of “forced marriage” under international human rights law. With respect to the distinction between conflict-related forced marriage and sexual slavery or enslavement, the AFRC Appeals Judgment exaggerated the significance of so-called “conjugal duties” such as cooking and cleaning to support its conclusion that “forced marriage” is *not* predominantly a sexual crime. In so doing, the Appeals Chamber effectively incorporated centuries-old gender stereotypes of women’s work into the jurisprudence of international humanitarian law.

This simply cannot and should not be the enduring legacy of the horrific suffering of women in armed conflict. Patriarchal gender stereotypes are all too often used to reinforce the secondary status of women throughout society in all parts of the world. Gender discrimination enables gender violence. In the context of armed conflict, the international criminal tribunals must not validate discriminatory notions of marriage that contribute to violence, but rather they must call it what it is – sexual slavery or enslavement.

1. The AFRC Trial Judgment

Article 2 of the Statute for the SCSL (hereinafter “the Statute” or “SCSL Statute”) defines the crimes against humanity for which the SCSL has jurisdiction, including the following crimes of sexual violence: “rape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*.”<sup>49</sup> Additionally, with respect to crimes against humanity, the SCSL also has the power to prosecute the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, persecution, and “*other*

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<sup>48</sup> See *id.* ¶ 539.

<sup>49</sup> Statute of the Special Court of Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138, art. 2(g), *available at* <http://www.specialcourt.org/documents/SpecialCourtStatuteFinal.pdf> [hereinafter Special Court Statute].

*inhumane acts.*<sup>50</sup> In both the AFRC and RUF indictments, “forced marriage” was charged as a separate crime against humanity under Article 2(i), other inhumane acts, and was the primary focus of the forced marriage analysis in the AFRC Judgments. Although both AFRC Judgments recognize Article 2(i) as a residual clause designed to cover a broad range of underlying acts not explicitly enumerated in Article 2(a)-(h) of the Statute, the Trial Chamber found that the offence of “other inhumane acts” must logically apply only to acts of a non-sexual nature in light of the exhaustive category of sexual crimes set forth in Article 2(g), which includes a catchall for “any other form of sexual violence” not expressly listed. Under the well-established rules of statutory construction as well as treaty interpretation, this would appear to be a proper reading of the Statute.<sup>51</sup> As noted by the ICTY in *Tadic*, the “rule of effectiveness” is an “elementary rule of interpretation that one should not construe a provision... as if it were superfluous.”<sup>52</sup>

In addition to the chapeau requirements applicable to all crimes against humanity, the Trial Chamber, citing the Elements of Crimes of the Rome Statute, adopted the following additional elements of the crime of “other inhumane acts”: (1) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (2) the act was of a *gravity* similar to the acts referred to in Article 2(a) to (h) of the statute; and (3) the perpetrator was aware of the factual circumstances that established the character or gravity of the act.<sup>53</sup> For reasons that follow, the Trial Chamber did not need to decide the question of whether the crime of “forced marriage” as defined by the prosecution would meet the foregoing requirements because the charge was dismissed on other grounds.<sup>54</sup>

According to the prosecution’s definition, its “new” crime against humanity of forced marriage “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.”<sup>55</sup> Read literally, under this definition of forced marriage, a crime against humanity could arguably be found the moment an accused uses the term “wife.” In other words, a declarative act alone, if intended to “confer a status of marriage,” would constitute a violation of international criminal law. Given that this would surely fail to meet the gravity test set forth above, the definition of the crime must necessarily imply acts in addition to those solely intended to confer marital status. For example, the prosecution argued that, “even if a forced marriage usually involves sex, it has its own

<sup>50</sup> *Id.* art. 2(a)-(f), (h) and (i) (emphasis added).

<sup>51</sup> See AFRC Trial Chamber Judgment, *supra* note 2, ¶ 697 (emphasis added).

<sup>52</sup> Prosecutor v. Dusko Tadic, Case No. IT-94-I, Judgment, ¶ 284 (July 15, 1999). See also Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

<sup>53</sup> See AFRC Trial Chamber Judgment, *supra* note 1, ¶ 698 (emphasis added).

<sup>54</sup> However, in its discussion, the Trial Chamber did address the question of whether, standing alone, the use of the term “wife” would be sufficient to meet the gravity test for a crime against humanity of ‘other inhumane acts.’ Simply put, in the Trial Chamber’s opinion, the answer is no. The court stated, “[n]ot one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental.... [H]ad there been such evidence, it would not *by itself* have amounted to a crime against humanity, since it would not have been of similar gravity to the acts referred to in Article 2(a) to (h) of the Statute.” *Id.* at ¶ 710 (emphasis added).

<sup>55</sup> *Id.* ¶ 701.

distinctive features and is sufficiently serious to qualify as an inhumane act.”<sup>56</sup> This begs the question of whether there are ever conflict-related forced marriages that do not involve sex, or more accurately, rape. Another related question raised by this seemingly open-ended definition is whether there are “distinctive features” to forced marriages other than the label and, if not sex, what they are.

The answer to this question is the root of the problem with the characterization of conflict-related “forced marriage” as a crime against humanity separate from the crime of sexual slavery or enslavement. In attempting to identify the so-called “distinct elements” of forced marriage, the prosecution, and later the AFRC Appeals Chamber, resorted to stereotypical examples of the “tasks attached to a marriage” that, under the crimes of sexual slavery and enslavement, are properly characterized as evidence of forced labor.

In rejecting the prosecution’s submission, the Trial Chamber held that the evidence adduced by the prosecution as proof of “forced marriage” as an “other inhumane act” went to prove elements subsumed by the crime of sexual slavery under Article 2(g) of the Statute.<sup>57</sup> For the crime of sexual slavery, the Trial Chamber relied on the elements set forth in the Rome Statute, which are: (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.<sup>58</sup> Additionally, the Trial Chamber emphasized that the above definition incorporates the jurisprudence of the ICTY and ICTR, including the *Kunarac* case wherein, as previously discussed, the accused was “convicted of enslavement as a crime against humanity for holding girls in slavery-like conditions for the purpose of sex.”<sup>59</sup>

Likewise, in the AFRC trial, the Trial Chamber reasoned that the evidence of “so-called ‘forced marriages’ involved the forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they attacked and moved through various districts.”<sup>60</sup> Moreover, the court found that “[t]he evidence showed that the relationship of the perpetrators to their ‘wives’ was one of ownership and involved the exercise of control ... including control of the victims sexuality, her movements and her labour; for example, the ‘wife’ was expected to carry the rebel’s possessions ... to cook for him and to wash his clothes.”<sup>61</sup> Notably, in the Trial Chamber’s analysis, duties such as cooking and cleaning are not characterized as essentials of marriage, but as evidence of forced labor tending to prove the element of control as in the *Kunarac* decision by the ICTY. The use of the term “wife” was viewed by the Trial Chamber as proof of the perpetrator’s intent “to exercise ownership over the victim, and not intent to assume a marital or quasi-marital status with the victim in the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* ¶¶ 704, 711.

<sup>58</sup> *Id.* ¶ 708 (citing Rome Statute Elements of Crimes, art. 7(1)(g)-2, July 17, 1998, 2187 U.N.T.S. 90).

<sup>59</sup> *Id.* ¶ 709 (construed in *Prosecutor v. Kunarac et al.*, Case No. IT-96-23T & IT-96-23/1-T, Judgment, pp.10-11 (Feb. 22, 2001)).

<sup>60</sup> *Id.* ¶ 711.

<sup>61</sup> *Id.*

sense of establishing mutual obligations inherent in a husband wife relationship.”<sup>62</sup> In light of the foregoing, the AFRC Trial Chamber found, by a majority, that “there is no lacuna in the law which would necessitate a separate crime of ‘forced marriage’ ....”<sup>63</sup> The Chamber thus dismissed Count 8 of the Indictment as redundant.

Through its decision to reject the forced marriage charge, the Trial Chamber implicitly made a clear distinction between the phenomenon of “bush wives” in the Sierra Leone conflict and the practice of arranged marriages in peacetime. In so holding, the AFRC Trial Judgment avoided muddying the waters by refusing to create blurry categories of crimes against humanity based on sexual violence. Although the perpetrators of violence use the pretext of marriage quite possibly to avoid charges of rape and sexual slavery, a conviction on those grounds provides the most faithful accounting of the crimes inflicted against thousands of women and girls in Sierra Leone and in other conflicts throughout the world.

Indeed, an examination of the evidence relied on by the Trial Chamber in connection with its decision to enter convictions on sexual slavery lends additional support for the AFRC Trial Judgment as the better-reasoned approach.<sup>64</sup> A twelve-year-old girl, referred to as Prosecution Witness TF1-094 in the judgment, was with her parents in the village of Bamukura, Koinadugu District in August 1998 when rebels attacked the village.<sup>65</sup> The rebels killed her parents and, when one of them threatened to kill her, a rebel named Andrew intervened and said he would “save her.”<sup>66</sup> The witness testified that “if you were saving somebody ... you would not rape that person.”<sup>67</sup> However, “Andrew captured the witness, brought her to Yamadugu and raped her there.”<sup>68</sup> Subsequently, “Andrew continued to rape her,” and within a month of her abduction, she became pregnant.<sup>69</sup> In addition, the witness “had to do his laundry and other chores.”<sup>70</sup> During the approximately four to five months that the witness was held captive, she testified that Andrew considered her to be his ‘wife.’<sup>71</sup> The Trial Chamber found the foregoing facts “all indicative of the deprivation of her liberty and the exercise of ownership over her person by ‘Andrew’ which together with acts of sexual violence ... satisfies the *actus reus* and *mens rea* elements of the crime of sexual slavery.”<sup>72</sup>

Another prosecution witness, referred to as TF1-133, testified that “[a]ll the women who were captured at the same time as [her] were given to ‘men’ as their ‘wives’ which meant that the women had to have sex with the men.”<sup>73</sup> In addition, “[s]he laundered clothes and washed dishes.”<sup>74</sup> As further evidence of the exclusive ownership

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ¶ 713.

<sup>64</sup> For technical reasons not discussed here, convictions based on sexual slavery were entered under “outrages upon personal dignity” prohibited under Common Article 3 of the Geneva Conventions. *See* Special Court Statute, *supra* note 49, art. 3(e).

<sup>65</sup> AFRC Trial Judgment, *supra* note 2, ¶ 1077.

<sup>66</sup> *Id.* ¶ 1078.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 1079 (internal quotations omitted).

<sup>69</sup> *Id.* ¶ 1080.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶ 1113.

<sup>72</sup> *Id.* ¶ 1114.

<sup>73</sup> *Id.* ¶ 1118.

<sup>74</sup> *Id.*

relationship, the Trial Chamber noted that certain rebel leaders “made a law that whoever was given a woman would be the sole owner over her and that a man should not covet his colleague’s wife.”<sup>75</sup> Again, as in the case of Witness TF1-094, the Trial Chamber properly characterized cooking and cleaning duties as forced labor and regarded the labeling of women as “wives” in this context to be “a label of possession,” not a marital status.<sup>76</sup> Thus, the Trial Chamber found that the elements of sexual slavery had been established. One month following the judgment, on July 19, 2007, Brima and Kanu were sentenced to 50 years in prison and Kamara 45 years.

Immediately following the AFRC Trial Judgment, Chief Prosecutor Stephen Rapp announced his intention to appeal the decision, which he called “formulistic.”<sup>77</sup> According to the Institute for War & Peace Reporting (IWPR), Rapp argued that forced marriage should not be viewed unequivocally as a sex offence. Rapp insisted the experience of “bush wives” in Sierra Leone was unlike that of women who were kidnapped and forced into sexual slavery for troops during the Japanese occupation of Korea in World War II who are often referred to as “comfort women.”<sup>78</sup> In his view, “[bush wives] were conscripted into a marital relationship, with all that that entails, which is more than being a comfort woman or a rape victim.”<sup>79</sup> Based on these and other similar statements he made to IWPR, it appears that Prosecutor Rapp believes that the only way to vindicate the psychological damage caused by the non-sexual elements of “forced marriage” is to recognize it as a separate crime against humanity under international criminal law.

However, as discussed below, not all human rights violations amount to crimes against humanity. Given the horrific facts of the AFRC trial, this might seem incomprehensible. Nonetheless, the law must make sense notwithstanding the facts of any one particular case. Once the sexual elements of forced marriage are removed, what is left is the label of “wife” and so-called “conjugal duties” such as cooking and laundering clothes. When such duties are forced upon women, they impose a demeaning servile status that, under certain circumstances, constitutes a violation of fundamental human rights. In the context of armed conflict, however, the critical question is whether these elements alone necessitate the recognition of a new crime against humanity. The AFRC Appeals Chamber answered that question in the affirmative. What remains to be seen is whether the ICC will follow that precedent.

## 2. Separate Concurring Opinion of Justice Julia Sebutinde

The Separate Concurring Opinion of Justice Julia Sebutinde (hereinafter “AFRC Concurrence”) is highlighted here because it offers the most thoughtful analysis of the distinction between early or arranged marriages in peacetime and “forced marriages” during armed conflict. Although she agreed fully with the findings and disposition of the AFRC Trial Judgment, Justice Sebutinde wrote separately to more fully examine the

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<sup>75</sup> *Id.* ¶ 1122.

<sup>76</sup> *Id.* ¶ 1126.

<sup>77</sup> See Katy Glassborow, *Forced Marriage Appeal May Influence ICC*, July 24, 2007, available at <http://iwpr.net/index.php?m=p&o=337374&s=f&apc>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

phenomenon of “bush wives” in the Sierra Leone conflict and its characterization as a crime under international criminal law.

First, Justice Sebutinde recalled the procedural history and decision of Trial Chamber I to grant the prosecution’s request for leave to amend the Indictment by adding a new Count 8 to “cater for alleged acts of Forced Marriage.”<sup>80</sup> In granting leave, Justice Sebutinde explained that Trial Chamber I classified the phenomenon of “forced marriage” within the Sierra Leonean conflict as a sexual or gender crime akin to rape, sexual slavery, or sexual violence. In fact, as noted by Justice Sebutinde, the prosecution introduced its forced marriage charge under “other inhumane acts” as part of the Indictment entitled “COUNTS 6-9: SEXUAL VIOLENCE.” Subsequently, in connection with the prosecution’s request for leave to introduce new evidence of forced marriages, “Trial Chamber I considered and rejected the proposition that sexual offenses including ‘forced marriages,’ do fall in the broad category of ‘other inhumane acts.’”<sup>81</sup> Quoting the decision of Trial Chamber I, Justice Sebutinde emphasized that the clear legislative intent behind the phrase “any other form of sexual violence” in Article 2(g) is the “creation of a category of offenses of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged as ‘other inhumane acts’ *offends against the rule against multiplicity and uncertainty*....”<sup>82</sup>

Justice Sebutinde then carefully examined the expert reports on “forced marriage” submitted by both the prosecution and the defense in support of her conclusion that “the phenomenon of forced ‘marriage’ during the Sierra Leone conflict bears all the hallmarks or characteristics of the crime against humanity of Sexual Slavery.”<sup>83</sup> Justice Sebutinde first considered the defense expert, Dr. Dorte Thorsen, who notably declined to write on the topic requested of her by the defense. As set forth in the AFRC Concurrence, Dr. Thorsen was “concerned with the long-term consequences of making straightforward links between complex social practices of arranging marriages ... and the coercion of women into being bush wives during the civil war in Sierra Leone.”<sup>84</sup>

Although she found Dr. Thorsen’s report only marginally relevant to the issue at hand, Justice Sebutinde was impressed with Dr. Thorsen’s rationale for drawing a clear distinction between peacetime customary or “forced marriages” and the situation in which women are abducted, raped, and forced into gender-specific forms of labor during armed conflict.<sup>85</sup> As Justice Sebutinde stated, “The latter relationships, whereby no marriage transactions have been made or ceremonies held, mimic peacetime situations in which forced marriage and expectation of free female labour are common practice. This stereotyped perception of women persists in war-time and puts such women at great risk of abduction and violence.”<sup>86</sup>

Indeed, the complex and varied distinctions between arranged marriages and forced marriages in peacetime depend on a variety of sociological factors that are best analyzed

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<sup>80</sup> Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-04-16, Judgment, ¶ 3 (June 20, 2007) (Sebutinde, J., separately concurring) [hereinafter AFRC Trial Chamber Concurrence].

<sup>81</sup> *Id.* at ¶ 5.

<sup>82</sup> *Id.* (emphasis added) (citation omitted).

<sup>83</sup> *Id.* ¶ 16.

<sup>84</sup> *Id.* ¶ 9, n.10.

<sup>85</sup> *Id.* ¶¶ 9-10.

<sup>86</sup> *Id.* ¶ 10.

under a rights-based framework, not under international criminal law. This is precisely why Dr. Thorsen's refusal to write a report outlining the history and practice of forced marriage in the West African region, as was requested by the defense, is so poignant. Dr. Thorsen was right to be concerned about making incongruent links or flawed distinctions between "marriages" during situations of armed conflict and traditional arranged marriages, which are prevalent in many parts of the world, including West Africa.

Following her analysis of Dr. Thorsen's report, Justice Sebutinde examined the report by prosecution expert Mrs. Zainab Bangura, who, like Dr. Thorsen, distinguished between customary early or arranged marriage in times of peace and "forced marriage" during armed conflict. In drawing her distinction, however, Bangura focused solely on the facts that, with respect to the latter, the "husband" did not seek parental consent and no official ceremony took place. According to her report, which Justice Sebutinde excerpted in part, Bangura's opinion is that "[t]he fundamental difference between an early or arranged marriage in times of peace and a forced 'marriage' during the war is that family members were not involved in the arrangement of the latter so-called 'marriage,' no official ceremony of any form took place and nor was the consent of the parents sought...."<sup>87</sup>

This distinction misses the point completely. "Forced marriages" can and do occur in times of peace. Matters such as parental consent and ceremony are not what distinguish an acceptable "arranged" marriage from a "forced marriage," which international human rights instruments like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) proscribe. The opportunity of the betrothed to consent to the marriage is the proper focus. However, this too is a distraction from the real issue, which is that the phenomenon of "bush wives" during the civil war in Sierra Leone does not resemble any form of marriage, whether forced or arranged, in any meaningful way. As described by Justice Sebutinde, that phenomenon was characterized by "the forceful abduction and holding in captivity of women and girls ('bush wives') against their will, for purposes of sexual gratification of the 'bush husbands' and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties)."<sup>88</sup> Women and girls were often subjected to torture and other horrific violence.<sup>89</sup> In Bangura's report, excerpted by Justice Sebutinde, Bangura emphasized that "[t]he word 'wife' demonstrated a rebel's control over a woman."<sup>90</sup> Moreover, Bangura writes, "'Bush wives' were constantly sexually abused, physically battered during and after their pregnancies, and psychologically terrorized by their husbands, who thereby demonstrated their control over their wives."<sup>91</sup>

Based on the additional insight gleaned from the expert reports, especially Bangura's, Justice Sebutinde concluded that the so-called "forced marriages" were properly characterized by the majority of the AFRC Trial Chamber as sexual slavery. However, as discussed below, the AFRC Appeals Chamber drew a very different conclusion from Bangura's report.<sup>92</sup>

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<sup>87</sup> *Id.* ¶ 11.

<sup>88</sup> *Id.* ¶ 12.

<sup>89</sup> For a detailed accounting of the violence committed against women and girls in the Sierra Leone war. See *WE'LL KILL YOU IF YOU CRY*, *supra* note 5.

<sup>90</sup> AFRC Trial Chamber Concurrence, *supra* note 80, ¶ 13.

<sup>91</sup> *Id.* ¶ 15.

<sup>92</sup> The Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ("Forced

### 3. The AFRC Appeals Judgment

On appeal, the prosecution argued that a majority of the Trial Chamber (Justice Doherty dissenting) made three errors with respect to its decision on “forced marriage.” First, the Chamber should not have held that the residual category of crimes against humanity, “other inhumane acts” under Article 2(i) of the Statute, should be confined to non-sexual acts. Second, the Chamber should not have held that the evidence adduced by the prosecution was not capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery. Third, the Chamber should not have dismissed Count 8 (forced marriage as “other inhumane acts”) as redundant on the grounds that the evidence is subsumed in the crime of sexual slavery and that there is no lacuna in the law that would necessitate a separate crime of forced marriage as “other inhumane acts.”<sup>93</sup>

On the first issue, the Appeals Chamber held that the residual provision in Article 2(i), “other inhumane acts,” includes sexual crimes.<sup>94</sup> In finding that the Trial Chamber erred in its more restrictive interpretation, the Appeals Chamber cited a wide range of criminal acts that have been recognized by other international tribunals as constituting “other inhumane acts.”<sup>95</sup> However, in its analysis, the Appeals Chamber failed to consider that the statutes of neither the ICTY nor the ICTR, upon whose decisions the Appeals Chamber relies, contain a comparable provision to Article 2(g) of the SCSL Statute. As previously discussed, Article 2(g) contains the catchall phrase “and *any other form of sexual violence*” after explicitly enumerating rape, sexual slavery, enforced prostitution and forced pregnancy as crimes against humanity.<sup>96</sup>

By contrast, in the ICTY and ICTR statutes, rape is the only sexual crime explicitly prohibited and, therefore, the decision to charge crimes such as forcing women to perform exercises naked as “other inhumane acts” makes sense.<sup>97</sup> These statutes do not contain a catchall phrase for crimes of sexual violence not expressly enumerated, as does the SCSL statute. The Appeals Chamber thus failed to address the rationale of the AFRC Trial Judgment in construing Article 2(i) as limited to non-sexual crimes in the context of the SCSL Statute. In light of the interpretive rules highlighted previously, the ICC should not render the residual provision superfluous by recognizing “forced marriage” under “other inhumane acts.”

Beyond questions of statutory construction, however, the more substantive issue is whether the nature of “forced marriage” in the Sierra Leone conflict was sufficiently distinct from sexual slavery. According to the prosecution, the key element distinguishing forced marriage from other forms of sexual crimes is “the appearance, the veneer of a conduct (i.e., marriage), by threat, physical assault or other coercion.”<sup>98</sup> The prosecution argued, apparently without citation or example, that “while acts of forced marriage may in certain circumstances amount to sexual slavery, in practice they do not

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Marriages”) is not discussed here, as her arguments were largely adopted by the AFRC Appeals Chamber Judgment. *See* AFRC Trial Chamber Judgment, *supra* note 2.

<sup>93</sup> AFRC Appeals Chamber Judgment, *supra* note 3, ¶ 177.

<sup>94</sup> *Id.* ¶ 186.

<sup>95</sup> *Id.* ¶ 184.

<sup>96</sup> Special Court Statute, *supra* note 49, art. 2(g) (emphasis added).

<sup>97</sup> *See* ICTR Statute, *supra* note 28, art. 3; ICTY Statute, *supra* note 28, art. 5; Akayesu Judgment, *supra* note 29, ¶ 697.

<sup>98</sup> AFRC Appeals Chamber Judgment, *supra* note 3, ¶ 189.



always involve the victim being subjected to non-consensual sex or even forced domestic labour.”<sup>99</sup> The prosecution thus contended and the Appeals Chamber agreed that forced marriage is not a sexual crime.<sup>100</sup> Moreover, the Appeals Chamber reasoned that the perpetrators of forced marriages intended to impose a “forced conjugal association rather than exercise an ownership interest” over civilian women and girls.<sup>101</sup>

The Appeals Chamber then pointed to the same factual circumstances relied on by the majority and concurring opinions in the AFRC Trial Judgment to support its contradictory conclusion that forced marriage is not predominantly a sexual crime, but rather it is a “forced conjugal association.” For example, the Appeals Chamber explained that a rebel “wife” was forced to perform a variety of “conjugal duties,” including regular sexual intercourse, forced domestic labor such as cleaning and cooking, forced pregnancy, and child care.<sup>102</sup> In return, according to the Appeals Chamber, the rebel “husband” was expected to provide food, clothing, and protection to his “wife,” including protection from rape by other men. Notably, none of the witnesses whose testimony was set forth in the AFRC Trial Judgment referred to their captors as “husbands,” and victims universally characterized the so-called “regular sexual intercourse” as continued rape. Significantly, in *Kunarac*, the ICTY considered similar evidence of “protection” from rape by other men as demonstrating the elements of ownership and control necessary for the crime of enslavement. Likewise, in the context of the Sierra Leonean armed conflict, the distinguishing feature between acts of “forced marriage” and the crime of sexual slavery is not the conduct of the perpetrator, but merely the label of “wife.”

However, based on the same evidence, the Appeals Chamber was convinced that there is a distinction between a “forced conjugal association” and sexual slavery. In fact, the Appeals Chamber supported its decision to recognize the “forced marriage” charge based upon the same passage from Mrs. Bangura’s report that Justice Sebutinde cited to support the opposite conclusion. Additionally, the Appeals Chamber cited the Partly Dissenting Opinion of Justice Doherty in the AFRC Trial Judgment, which also relied on Bangura’s report, to conclude that victims suffered mental trauma because of the label “wife.” This alone, according to Justice Doherty, is sufficient to constitute a crime against humanity because “[t]he crime is concerned primarily with the mental and moral suffering of the victim.”<sup>103</sup> Justice Doherty reiterated that “the conduct contemplated as ‘forced marriage’ does not necessarily involve elements of physical violence such as abduction, enslavement or rape....”<sup>104</sup> The Appeals Chamber adopted this view as well.

Regardless of whether this definition of “forced marriage” rises to the level of a crime against humanity, Justice Doherty and the Appeals Chamber both ignored the Trial Chamber’s factual findings. As noted above, the Trial Chamber found that not one of the victims testified that “the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental.”<sup>105</sup> This is not to suggest, however, that such conduct did not amount to an egregious violation of human rights.

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ¶ 190.

<sup>102</sup> *Id.*

<sup>103</sup> Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-04-16-T, Judgment, ¶ 52 (June 20, 2007) (Doherty, J., dissenting in part).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* ¶ 710 (majority opinion).

Indeed, the Appeals Chamber acknowledged its agreement with Justice Sebutinde's Concurring Opinion on the point that traditionally arranged marriages involving minors violate certain international human rights norms such as CEDAW. By contrast, forced marriages during armed conflict that involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.<sup>106</sup> How to define the criminal conduct is where the two opinions disagree.

The Appeals Chamber found that no tribunal could reasonably have concluded that forced marriage was subsumed in the crime of sexual slavery because, though the two crimes share certain elements, there are also "distinguishing factors."<sup>107</sup> These factors were identified as: (1) words or conduct intended to compel a person by force or threat of force into a "forced conjugal association," and (2) a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of the "exclusive arrangement."<sup>108</sup> According to the Appeals Chamber, these distinctions imply that forced marriage is *not* predominantly a sexual crime.<sup>109</sup> Consequently, the Appeals Chamber found that "forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force or threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim."<sup>110</sup>

The Appeals Chamber, having defined the crime of forced marriage in a manner that, in its view, is distinct from sexual slavery, next turned to an assessment of whether forced marriage satisfies the level of gravity required for a crime against humanity of "other inhumane acts." In reaching its conclusion that acts of forced marriage were of similar gravity to several enumerated crimes against humanity, including enslavement, imprisonment, torture, rape, sexual slavery, and sexual violence, the Appeals Chamber cited evidence of physical and sexual violence that it previously asserted were not required for a finding of "forced marriage." Specifically, the Appeals Chamber found that the evidence before the Trial Chamber established that victims of forced marriage endured "physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty."<sup>111</sup> Thus, the Appeals Chamber completely avoided the most problematic feature of its definition of forced marriage – whether, standing alone, the perpetrator's act of labeling a victim his "wife" would meet the requisite gravity for a crime against humanity.

Indeed, by relying on evidence of physical and sexual violence to find that forced marriage satisfied the elements of "other inhumane acts," the Appeals Chamber further muddled the distinction between its new crime against humanity and sexual slavery, which is explicitly proscribed by statute. The Appeals Chamber's analysis of forced marriage actually amounts to "sexual slavery plus." Without the elements of sexual slavery, the crime of forced marriage as defined by the Appeals Chamber is, as a matter of fact, distinct only in the perpetrator's use of the term "wife."

<sup>106</sup> AFRC Appeals Chamber Judgment, *supra* note 1, ¶ 194 (citing AFRC Trial Chamber Judgment, *supra* note 2, ¶ 12 (Sebutinde, J., concurring)).

<sup>107</sup> *Id.* ¶ 195.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 196.

<sup>111</sup> *Id.* ¶ 199.

The second factor identified by the Appeals Chamber, namely the “exclusivity” factor, is more appropriately characterized as evidence of ownership or control, which is an element of sexual slavery or enslavement in the context of armed conflict. As identified by the ICTY in *Kunarac*, a perpetrator’s assertion of exclusivity can be indicative of enslavement, but it is only one of many factors that may be taken into consideration.<sup>112</sup> According to the AFRC Appeals Chamber, forced marriage, unlike sexual slavery, “implies a relationship of exclusivity.”<sup>113</sup> Although this may be a technical distinction or, as the Appeals Chamber asserts, a “distinguishing factor,” it does not necessarily follow that it amounts to a material difference. Even assuming that all conflict-related forced marriages are “exclusive,” this fact would more logically serve to identify a particular form of enslavement, not marriage. In other words, the fact that some women were enslaved and raped exclusively by one man as opposed to many does not fundamentally change the nature of the crime from sexual slavery to forced marriage. In peacetime, an “exclusive” relationship implies something entirely different than is meant here. During armed conflict, where women and girls are abducted, raped, and held captive, the word is simply out of place. Thus, the Chamber’s use of such benign terminology is misleading. Although the decision is unclear as to whether “exclusivity” is a required element of forced marriage, unless such evidence is offered as proof of ownership, it serves no meaningful purpose.

Although the use of the term “wife” is not necessarily a prerequisite for a finding of sexual slavery or enslavement, this sole distinction does not justify the recognition of an entirely new crime under international humanitarian law. The goal, to redress the particular suffering of women and girls who were labeled rebel “wives,” is not the problem. The problem is the Appeals Chamber’s approach to finding a solution. By drawing flawed distinctions, the Chamber unnecessarily clouded important differences between forced marriages that amount to violations of international human rights law from those that constitute crimes against humanity. Justice Sebutinde’s concurring opinion provided greater clarity to the crime of sexual slavery by elaborating on the distinction between early arranged marriages in times of peace and conflict-related forced marriage. The Appeals Chamber, by eliminating sexual violence from the definition of forced marriage to create a distinct crime, implicitly criminalized the actions of all parents worldwide who arrange marriages without the consent of their children. Bangura’s report, which both the Appeals Chamber and Justice Doherty relied on extensively, avoided this problematic issue by focusing on the fact that women and girls are abducted during armed conflict but not in the peacetime practice of arranged marriage with parental consent. Nonetheless, this distinction, relying on parental consent, directly contradicts established international human rights norms that define “forced marriage” as one conducted without the valid consent of *both parties* (the minors, not the parents) where duress is a factor.<sup>114</sup> As discussed in the recommendations that follow, there is an

<sup>112</sup> Prosecutor v. Kunarac, Case No. IT-96-23T & IT-96-23/1-T, Judgment, ¶ 543 (Feb. 22, 2001).

<sup>113</sup> AFRC Appeals Chamber Judgment, *supra* note 1, ¶ 195.

<sup>114</sup> See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 57, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002) (“Relentless pressure and emotional blackmail are used by parents and relatives to force the young girl into an unwanted marriage.... It is a violation of internationally recognized human rights standards and cannot be justified on religious or cultural grounds.”) (citing Universal Declaration of Human Rights, art. 16; Convention on the Elimination of All Forms of Discrimination against Women, art. 16;

alternative approach that would still provide an accurate picture of the criminal conduct without creating redundant crimes.

#### 4. Definitional Ambiguities

Another flaw in the Appeals Chamber's approach is that its definition of "forced marriage" as a crime against humanity is impossibly vague. As mentioned above, the distinct elements of forced marriage are essentially two-fold: a "forced conjugal association" that is "exclusive."<sup>115</sup> However, neither of those terms is defined, except arguably by implication in the chamber's explanation of what is excluded from the definition of the crime. For example, the Appeals Chamber makes clear that, in its view, forced marriage is not predominately a sexual crime.<sup>116</sup> Accordingly, it is logical to assume that rape is not required to establish a "forced conjugal association." But if words alone are sufficient to confer this supposed "conjugal association," it is unclear whether there is a minimum threshold of conduct required before criminal liability will attach. In short, it is unclear what constitutes the *actus reus* of forced marriage.

Without any definitive guidance from the Appeals Chamber, any attempt to ascertain an answer to that question becomes an exercise in futility. However, the following questions are illustrative of the problem: First, is it necessary for a perpetrator to use the term "wife?" If so, would the use of the term once be enough to confer a "conjugal association?" Second, is it necessary for a victim to perform stereotypical "conjugal duties" like cooking and cleaning? Third, is abduction required? Fourth, are there any temporal requirements such as length of captivity or duration of the "conjugal association?" Finally, does the relationship need to be bilaterally "exclusive," or is the exclusivity factor determined solely by reference to the victim? Although this list of questions is by no means exhaustive, it underscores the definitional problems attributable to the Chamber's undue emphasis on the pretext of "marriage" to define the nature of the relationship and, therefore, the crime itself. Indeed, if neither physical nor sexual violence were required, then the question of what conduct would satisfy the *actus reus* of forced marriage is completely open-ended. Moreover, the Chamber's use of ambiguous terms like "exclusivity" and "forced conjugal association" detract from the true nature of the crime and trivialize rather than vindicate the suffering of women and girls who were subjected to horrific physical and sexual abuse during their captivity.

Furthermore, by focusing on the non-sexual elements of forced marriage to justify the recognition of a new crime, the Appeals Chamber overlooked the significance of the AFRC Trial Judgment as the first-ever conviction in an international criminal tribunal for the distinct crime of sexual slavery. The specific offence of sexual slavery was included for the first time as a war crime and a crime against humanity in the Rome Statute of the ICC.<sup>117</sup> As discussed, Article 2(g) of the Statute of the SCSL also codifies the offence as a crime against humanity, and the Indictments before the Special Court were the first to specifically charge defendants with the crime of sexual slavery. Since the ICTY and

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General Recommendation No. 21 of the Committee on the Elimination of Discrimination against Women).

<sup>115</sup> AFRC Appeals Chamber Judgment, *supra* note 1, ¶ 195.

<sup>116</sup> *Id.* ¶¶ 190, 195.

<sup>117</sup> The Rome Statute art.7(1)(g) identifies sexual slavery as a crime against humanity and art. 8(2)(b)(xxii) identifies sexual slavery as a grave breach of the Geneva Conventions). Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

ICTR statutes do not include sexual slavery, acts that could be characterized as such have been prosecuted as enslavement in those courts. In *Kunarac*, for example, the ICTY convicted the accused of enslavement, rape, and outrages on personal dignity for having detained women for months and subjected them to rape and other sexual acts.<sup>118</sup> Unlike the more general crime of enslavement, which prohibits slavery for the purpose of physical labor, sexual slavery requires that the enslavement involve sexual acts.<sup>119</sup> Thus, sexual slavery is a specific form of enslavement that is used, often with impunity, as a tactic to humiliate, dominate, and instill fear in victims, their families, and their communities during armed conflict.<sup>120</sup>

As the first international tribunal to indict sexual slavery, the Appeals Chamber could have used the opportunity to affirm a definition of sexual slavery that encompasses the conduct involved in forced “marriage.” In her concurrence to the AFRC Trial Judgment, Justice Sebutinde was correct to emphasize that the acts of “forced marriage” that occurred within the Sierra Leonean conflict are in fact a form of sexual violence or sexual slavery.<sup>121</sup> Justice Sebutinde reasoned, rightly, that the sexual element inherent in these acts tends to dominate the other elements, such as forced labor.<sup>122</sup> In support, she cites the expert report of Mrs. Bangura, relied on by both the prosecution and the Appeals Chamber, which acknowledges that sexual abuse is an inherent component of forced “marriage,” and affirms that “bush wives” were subjected to constant sexual, physical, and psychological abuse.<sup>123</sup> With respect to the sole defining feature of a forced “marriage,” according to Mrs. Bangura, the word “wife” demonstrated a rebel’s control over a woman.<sup>124</sup> None of these facts were contested by the prosecution, which makes its characterization of “forced marriage” as *not* predominantly a sexual crime, which the Appeals Chamber adopted, all the more perplexing.

Indeed, under a straight application of the facts, the acts of “forced marriage” fit the required elements of sexual slavery without the unnecessary ambiguities created by defining a new crime.<sup>125</sup> First, the perpetrator (“husband”) exercised any or all of the powers attached to the right of ownership over his victim (“wife”), whereby not only was she held captive or not free to leave without fear of reprisal (deprivation of liberty), but

<sup>118</sup> Prosecutor v. Kunarac, Case Nos. IT-96-23T & IT-96-23/1-T, Judgment, ¶¶ 746-82 (Feb. 22, 2001).

<sup>119</sup> AFRC Trial Chamber Judgment, *supra* note 2, ¶ 705 (citing U.N. Econ. & Soc. Council [ECOSOC] Sub-Comm. on the Promotion and Protection of Human Rights, Contemporary Forms of Slavery, *Systemic Rape, Sexual and Slavery-like Practices During Armed Conflict*, Update to the Final Report, ¶ 51, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000)).

<sup>120</sup> RUF Trial Judgment, *supra* note 1, ¶ 156 (citing U.N. Doc. S/RES/1820 (June 19, 2008); ECOSOC Comm’n on Human Rights, Sub-Comm. on the Promotion and Protection of Minorities, Contemporary Forms of Slavery, *Systemic Rape, Sexual and Slavery-like Practices During Armed Conflict*, ¶¶ 7-19, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998); Update to the Final Report on Systemic Rape, Sexual and Slavery-like Practices During Armed Conflict, ¶ 20, E/CN.4/Sub.2/2000/21 (June 6, 2000); U.N. GAOR, Sub-Comm’n on the Promotion and Protection of Human Rights, Report of the United Nations High Commissioner for Human Rights, *Systemic Rape, Sexual and Slavery-like Practices During Armed Conflict*, ¶¶ 5-11, U.N. Doc. A/HRC/Sub.1/58/23 (July 11, 2006)).

<sup>121</sup> AFRC Trial Chamber Judgment, *supra* note 2, ¶ 6 (Sebutinde, J., concurring) (citing Prosecutor v. Brima, Case No. SCSL-04-16-T, Decision on Defense Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 14 (Sebutinde, J., concurring) (Mar. 31, 2006)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* ¶ 15.

<sup>124</sup> *Id.* ¶ 13.

<sup>125</sup> See Rome Statute of the International Criminal Court, Elements of Crimes, art. 7(1)(g)-2 (Sept. 9, 2002).

also she was forced to perform gender-specific forms of labor, including cooking, cleaning and washing clothes.<sup>126</sup> Second, without exception, the perpetrator regularly subjected his “wife” to sexual intercourse (rape) or forced her to engage in other sexual acts (sexual abuse) without her genuine consent.<sup>127</sup> Third, the perpetrator abducted and forcibly kept his “wife” in captivity and sexual servitude with the intent to hold her indefinitely in that state.<sup>128</sup> With respect to this *mens rea* element, a perpetrator’s use of the term “wife” could be offered as proof of intent to engage in acts of sexual slavery. Likewise, assertions of exclusivity may be considered as evidence of ownership or control. In sum, forced “marriage” in the context of armed conflict represents the perpetrator’s exercise of ownership over his “wife,” and when the exercise of ownership involves sexual acts, it constitutes sexual slavery. As currently defined by the Appeals Chamber, the separate crime against humanity of “forced marriage” belies coherent application, which the RUF Judgment discussed below illustrates.

### *B. RUF Trial Judgment*

Despite its problematic definition, the newly recognized crime against humanity of “forced marriage” was applied for the first time by a trial chamber of the SCSL on February 25, 2009. Roughly one year after the AFRC Appeals Judgment, the RUF Trial Chamber found three former members of the Revolutionary United Front (RUF), Hassan Sesay, Morris Kallon and Augustine Gbao, guilty of two separate crimes against humanity, sexual slavery and an “other inhumane act,” based on a pattern of conduct that the Trial Chamber broadly characterized as “forced marriage.”<sup>129</sup> The RUF Trial Chamber justified its decision to enter cumulative convictions for both crimes based on the “distinct” elements articulated by the AFRC Appeals Judgment.<sup>130</sup> However, in light of the flawed rationale for distinguishing between the two crimes in the first instance, the RUF Judgment is predictably incongruous as well.

Indeed, the RUF Judgment essentially conflates the forced marriage and sexual slavery charges, using the same facts interchangeably to support its findings on both counts. 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.

As discussed above, the AFRC Appeals Chamber identified a “forced conjugal association” as a key distinguishing factor for the crime of forced marriage, but it did not define that term explicitly. In the absence of explicit guidance from the Appeals Chamber, the RUF Trial Chamber concluded that “the imposition of a forced conjugal association” constitutes the *actus reus* of forced marriage.<sup>131</sup> The Chamber then found that the testimony by various witnesses that rebels “captured women and ‘took them as

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<sup>126</sup> See AFRC Trial Chamber Judgment, *supra* note 2.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See RUF Trial Chamber Judgment, *supra* note 1, ¶ 1293.

<sup>130</sup> *Id.* ¶ 2307.

<sup>131</sup> *Id.* ¶ 1295.

their wives” was enough to satisfy that element of the crime.<sup>132</sup> However, like the AFRC Appeals Chamber, the Trial Chamber did not elaborate on what constitutes a “forced conjugal association.” Instead, the Trial Chamber dispensed with the need to define it at all, stating, “[T]he phenomenon of ‘bush wives’ was so widespread throughout the Sierra Leone conflict that the concept ... was well-known and understood.”<sup>133</sup> Again, the RUF Trial Judgment avoided defining the crime with any particularity, which leaves unanswered whether the *actus reus* of “forced marriage,” namely a “forced conjugal association,” could ever be met under circumstances that do not amount to sexual slavery.

The Trial Chamber also noted that women who were “married” against their will were “forced to engage in sexual intercourse and perform domestic chores, and were unable to leave their ‘husbands’ for fear of violent retribution.”<sup>134</sup> The Trial Chamber then referred to sex and domestic labor as “conjugal duties.”<sup>135</sup> It is not clear whether the Trial Chamber considers these “conjugal duties” to be requisite elements for establishing a “forced conjugal association” or whether the *actus reus* of forced marriage could be established without the element of rape, as the Appeals Chamber suggests. Further muddying the waters, the Trial Chamber relied on these same facts to establish the required elements of sexual slavery. However, under the sexual slavery charge, the facts demonstrate the perpetrators’ intent to enslave women rather than to impose a “forced conjugal association.”<sup>136</sup>

Moreover, in connection with crimes of sexual violence committed in the Kailahun District, the Trial Chamber explained that the rebels’ use of the term “wife” was “deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions.”<sup>137</sup> Accordingly, the Trial Chamber acknowledged that the term “wife” is used not to confer marital status but rather to establish the perpetrator’s ownership over and enslavement of a victim. The prominence of sexual violence accompanying the crime is evidenced by the fact that victims were often raped prior to being labeled “wives.” For example, a ten-year-old girl, referred to as TF1-314 in the RUF Judgment, was abducted and raped twice before being “married” to a rebel Commander in Buedu.<sup>138</sup> Thereafter, she was forced to perform so-called “domestic chores” and to have “sexual intercourse” with her rapist throughout the duration of her four-year captivity.<sup>139</sup>

With respect to how the sexual violence is characterized, the Trial Chamber inexplicably modifies its verbiage once the child is “married,” though not without acknowledging the impossibility of her genuine consent. In particular, the Trial Chamber found that TF1-314 was “raped” prior to being “married” whereupon her continued rape by the same individual is then characterized as “sexual intercourse.” Another example of the Trial Chamber’s puzzling use of language occurs in connection with its findings on the abduction and rape of a victim referred to as TF1-093. Here, the Trial Chamber found that TF1-093 was forced into an “exclusive conjugal relationship” with a rebel known as

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* ¶ 1293.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* ¶ 1294.

<sup>137</sup> *Id.* ¶ 1466.

<sup>138</sup> *Id.* ¶ 1460.

<sup>139</sup> *Id.*

“Superman.”<sup>140</sup> Although the Trial Chamber offered no explanation for its departure from the Appeals Chamber’s “forced conjugal association” terminology, it attributed the same elements the Appeals Chamber described as “conjugal duties,” including cooking, doing laundry, and having sex to the victim’s status as a “wife.”<sup>141</sup> According to the Trial Chamber, by virtue of this “exclusive conjugal relationship,” Superman exercised the “rights of ownership over TF1-093.”<sup>142</sup> Thus, the Trial Chamber found that the elements of both sexual slavery and “forced marriage” had been established beyond a reasonable doubt.<sup>143</sup>

Throughout the RUF Judgment, the Trial Chamber essentially re-packaged the elements of forced marriage and sexual slavery in order to create distinctions between the two crimes that simply do not exist. Depending on the context, the Chamber used the term “wife” either to demonstrate the “exclusivity” factor required for forced marriage or to demonstrate the ownership factor required for sexual slavery. However, any identifiable difference between a sexual slave and a “wife” in the context of the armed conflict in Sierra Leone is immaterial at best. By failing to address these conceptual problems, the RUF Judgment further muddies the waters and leaves this new crime against humanity without a coherent definition in international criminal law.

## V. CONCLUSION

Forced marriage in the context of the armed conflict in Sierra Leone was sexual slavery or enslavement, and, as the majority and concurring opinions of the AFRC Trial Judgment held, “no lacuna in the law” necessitated the Appeals Chamber’s recognition of forced marriage as a new crime against humanity. Physical and sexual violence were the dominant features of the crimes committed against thousands of women and girls in Sierra Leone during the decade-long civil war, not “conjugal duties” such as cooking and cleaning. 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. The prosecution’s expert, Mrs. Bangura, rightly emphasized the distinction between peacetime arranged marriages and conflict-related forced marriages. However, the “bush wife” phenomenon in Sierra Leone in no way resembled any valid concept of “marriage” under any law, culture, tradition, or religion.

The crime of “forced marriage” set forth in the AFRC Appeals Judgment is so fraught with ambiguity that it adds little to advance the understanding of gender violence in armed conflict and clouds the distinctions between crimes against humanity under international humanitarian law. As evidenced by the RUF Judgment, the need to translate criminal violence into the language employed in the context of “forced marriage” results in the distortion of the true nature of the violence. In the final analysis, justice is better served by the faithful application of existing law. The elements of the crime of sexual slavery are succinctly set forth in both the Statutes of the SCSL and the ICC and should, therefore, be applied rigorously to vindicate the suffering of countless women and girls who are all too often enslaved during armed conflicts throughout the world. In

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<sup>140</sup> *Id.* ¶ 1463.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* ¶ 1464.



peacetime, the nuances that distinguish legitimate arranged marriages from forced marriages are better addressed under the rubric of international human rights law, through which culture and the rule of law interact to create social change over time.

## VI. RECOMMENDATIONS

To formally acknowledge the unique suffering of “bush wives” and other victims who are enslaved by their captors, conflict-related forced marriage should be recognized explicitly as a particular form of sexual slavery. The labeling of women and girls as “wives” could then be introduced as evidence of intent to show ownership, domination or control rather than as proof of intent to confer “conjugal status,” which implies mutual benefits and obligations that are completely absent. Since the crime of forced marriage as defined by the AFRC Appeals Judgment is more accurately characterized as “sexual slavery plus,” evidence of the forcible imposition of a “conjugal association” could be introduced as evidence of aggravating circumstances warranting an additional penalty during the sentencing phase.<sup>144</sup> This would address the prosecutor’s objective of ensuring that convictions “reflect the full culpability” of the accused, with the added benefit that it would avoid the pitfalls inherent in the judgments of the SCSL.

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<sup>144</sup> Although the substantive international criminal law treaties provide little guidance on sentencing, the ICTY elaborated on the factors to be considered in determining sentences in *Prosecutor v. Biljana Plavsic*, Case No. IT-00-39 & 40/1-S, Sentencing Judgment (Feb. 27, 2003). These factors include the severity of the crime, any aggravating circumstances, and any mitigating circumstances. With respect to aggravating circumstances, the *Plavsic* Trial Chamber recognized factors such as the vulnerability of the victims and the depravity with which the defendant treated them as important considerations in sentencing. *Id.* Therefore, the court has the opportunity to consider the impact on victims during the sentencing phase.