

DYING FOR THE BONDS OF MARRIAGE: FORCED MARRIAGES AS A WEAPON OF GENOCIDE

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I. INTRODUCTION

Many thought, no doubt, that the horrors of the Second World War—the camps, the cruelty, the extermination, the Holocaust—could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time—this decade even—has shown us that man's capacity for evil knows no limits. Genocide—the destruction of an entire people on the basis of ethnic or national origins—is now a word of our times. It is also a heinous reality that calls for a historic response.

-Kofi Annan¹

For centuries, women were regarded as the “spoils of war”. Rape and sexual violence against women were seen as inevitable consequences of armed conflict and their occurrence was not effectively regulated or prevented. However, the last few decades have witnessed huge advances in the field of gender rights and the protection of women in war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have successfully prosecuted sexual violence as war crimes, crimes against humanity, methods of torture and forms of enslavement and persecution. The Rome Statute of the International Criminal Court (Rome Statute) also recognises and prosecutes sexual violations. According to the Rome Statute, the International Criminal Court has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and the crime of aggression.² These crimes are separate and distinct from one another because they each have different requisite elements for establishing guilt, different purposes

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1 Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT'L L.L. 363, 364-365 (1997).

2 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Rome, It., June 15-17, 1998; *Rome Statute of the International Criminal Court*, art.5(1), U.N. Doc. A/CONF.183/9* (July 17, 1998) [hereinafter *Rome Statute*].

and different levels of social stigma.³ The Rome Statute explicitly acknowledges persecution based on gender as a crime against humanity, and it is the first international treaty to officially recognise crimes such as sexual slavery, forced prostitution, forced pregnancy and forced sterilization.⁴ In addition, the ICTR *Akayesu* judgment is a watershed case because it provided the first international tribunal definition of rape. Moreover, the *Akayesu* judgment recognised that rape and sexual violence could be used as tools of genocide.⁵ Furthermore, the Special Court for Sierra Leone acknowledged that forced marriages constitute legally recognizable crimes against humanity in the *AFRC Trial* and the *RUF Trial*.⁶ These developments represent great progress in the effort to recognise and prosecute serious sexual violations perpetrated during conflict situations. Yet, many serious abuses remain outside the purview of or are not fully recognised in international and national law. Forced marriages are an example of a grave violation of basic human rights that has only recently received legal recognition.

It is crucial to separate forced marriages from arranged marriages, which are a part of many cultures.⁷ Forced marriages can take different forms. Generally, forced marriages occur in wartime and involve a woman or girl being abducted and declared the “wife” of her captor without her consent or her family’s consent. In these “marriages” the woman is normally subjected to rape, forced impregnation, sexual slavery and sexual violence.⁸

Although forced marriages have recently been recognised as a crime against humanity, this Article contends that this recognition is limited and does not address the gravity of forced marriages. Instead, this Article mirrors and extends the *Akayesu* decision. The Trial Chamber in *Akayesu* held that rape and sexual violence could be used as tools of genocide.⁹ In a similar vein, this Article argues that forced marriages can also be a form of genocide. It is important that forced marriages are recognised as a form of genocide because genocide has different criminal elements than crimes against humanity and, moreover, genocide serves a different

3 See *Rome Statute*, *supra* note 2, at arts. 6-8 for the elements of the crimes of genocide, crimes against humanity and war crimes.

4 *Id.* at arts. 7(1)(g)-(h), 7(1)(g), 8(2)(b)(xxii).

5 Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 596-8, 688 and 731 (Sept. 2, 1998).

6 Prosecutor v. Brima, Case No. SCSL 04-16-A, Judgment, ¶¶ 181-203 (Feb. 22, 2008); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment ¶¶ 1461 (Mar. 2, 2009).

7 Nancy Foner, *The Immigrant Family: Cultural Legacies and Cultural Changes*, 31 INT’L MIGRATION REV. 961, 964 (1997) (analysing the impact that immigration has on the immigrant family and their culture, including its impact on the South Asian cultural practice of arranged marriages).

8 See generally *Sesay*, Case No. SCSL-04-15-T, Judgment.

9 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731.

purpose than crimes against humanity. The purpose of the crime of genocide is to protect particular groups from extermination or attempted extermination, whereas the purpose of crimes against humanity is to protect the civilian population from persecution.¹⁰ If forced marriages have been used as an instrument for the extermination of a group, then it is essential that they are correctly prosecuted and the true nature of the offence acknowledged. While forced marriages may not be used in every genocide campaign, it is crucial that the avenues for prosecution exist when they have been used as a method of extermination or attempted extermination.

Part II of this Article sets out how forced marriages fulfil the requisite components of genocide, even though they are not expressly enumerated within the Genocide Convention. In order to demonstrate that forced marriages fulfil the necessary elements for genocide, the Article focuses predominantly on the practice of forced marriages during the Rwandan genocide. This is for illustrative purposes only and, once established, the principle can be extended to other geographical locations. With regards to Rwanda, it is important to note that sexual violence, such as forced marriages, was just one of the methods employed in the genocide. Yet, although it was only one of the methods used, it was particularly destructive and must be addressed. The practice has also occurred in several other countries, such as Uganda, Angola, Sierra Leone and Cambodia.¹¹ Moreover, it is likely to remain a feature of armed conflict unless necessary steps are taken. Part III of this Article addresses what is required to prevent forced marriages from occurring during future armed conflicts. It outlines crucial remedies and reforms. This involves legal, economic, social, political and cultural reforms. This Article seeks to draw attention to the largely unrecognised practice of forced marriages as an instrument of genocide and, thus, a ‘heinous reality that calls for a historic response’.¹²

II. FORCED MARRIAGES AS A FORM OF GENOCIDE

The killing, torture, mutilation, sexual abuse and degradation of fellow human beings with the intention of destroying those people, in whole or in part, has received widespread

10 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 469.

11 Katherine Iliopoulos, *Sierra Leone Rebels Guilty of Crimes against Humanity Crimes of War Project* (Feb. 26, 2009), available at <http://www.crimesofwar.org/onnews/news-sierra4.html>.

12 Annan, *supra* note 1, at 364-365 (referring to genocide in general as a ‘heinous reality’ and not particularly forced marriages as a form of genocide).

condemnation from the international community. On December 9, 1948, the General Assembly of the United Nations unanimously adopted the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹³ Every related subsequent international treaty has adopted verbatim Article II of the Genocide Convention, which stipulates the conditions necessary for an act to qualify as a form of genocide.¹⁴

Article 6 of the Rome Statute defines genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁵

Consistent with this definition of genocide, there are three main criteria necessary for an act to qualify as a crime of genocide: the act must fit within one of the enumerated offences; the act must be directed against a national, ethnic, racial or religious group; and the act must be committed with the intent to destroy the group in whole or in part. This Article illustrates that forced marriages fulfil each of those elements.

A. ENUMERATED ACTS

In order to constitute genocide, it is only necessary for the action to come within the parameters of one of the enumerated acts. The practice of forced marriage is capable of satisfying acts (b), (c) and (d): causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about the group's physical destruction and; imposing measures to prevent births. While enumerated acts (b), (c) and (d) are the focus of this

¹³ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(A) (III) A, U.N. Doc. A/Res/260(III) (Dec. 9, 1948) [hereinafter *Genocide Convention*].

¹⁴ See e.g., Permanent Representative of Rwanda to the United Nations, Letter dated Sept, 28, 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/1115 (Sept. 29, 1994); Rome Statute, *supra* note 2, at art. 5(1).

¹⁵ Rome Statute, *supra* note 2, at art. 5(1); see also Genocide Convention, at art. II.

Article, forced marriages could potentially satisfy both (a) and (e), depending on the circumstances.

1. Causing Serious Bodily or Mental Harm to Members of the Group

Definition:

The ICTR Trial Chamber defined ‘serious bodily and mental harm’ to include ‘acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.’¹⁶ Furthermore, the Trial Chamber held that the harm inflicted does not necessarily have to be ‘permanent and irremediable.’¹⁷ With regards to forced marriages, the “wife” is subjected to rape and to grave physical and psychological abuse.

Rape

In these “marriages”, the “wife” is the regular victim of rape. The testimonies of “wives” clearly indicate that these women are subjected to rape and sexual violation.¹⁸ Indeed, they are often forced to bear the children of their rapist and live in the forced intimacy of married life.¹⁹ The “wives” are often threatened with death if they refuse to engage in sexual relations with their “husband” or if they attempt to escape.²⁰ Furthermore, the women are coerced into these sexual acts through psychological control and fear. The women have been violently abused and have watched their families and communities be massacred and are placed in a state of prolonged fear.²¹ In addition, the women often believe that they have to submit to the

16 Prosecutor v Musema, Case No. ICTR 96-13-T, Judgment and Sentence, ¶ 156 (Jan. 27, 2000). The Rome Statute’s Elements of Crime stipulate that ‘serious bodily and mental harm’ includes ‘acts of torture, rape, sexual violence or inhumane and degrading treatment.’ See Elements of Crimes ICC-ASP/1/3, Art 6(b) ¶ 1 n 3.

17 Akayesu, Case No. ICTR 96-4-T, Judgment, at ¶ 502.

18 See Prosecutor v Brima, Case No. SCSL-04-16-T Judgment, at ¶ 70 (June 20, 2007); *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, HUM. RTS. WATCH 27-32 (Sept. 24, 1996) [hereinafter *Shattered lives*]; Barbara Bedont *Gender-Specific Provisions in the Statute of the International Criminal Court*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 198-99 (Flavia Lattanzi & William Schabas eds., 1999); see generally Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slave-like Practices during Armed Conflicts*, Comm’n on Hum. Rts., U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000); see generally “*Breaking God’s Command*”: *The Destruction of Childhood by the Lord’s Resistance Army*, AMNESTY INT’L (Sept. 17, 1997), available at <http://www.amnesty.org/en/library/asset/AFR59/001/1997/en/e3d1420e-ea53-11dd-965c-b55c1122d73f/af590011997en.pdf>.

19 Brima, Case No. SCSL 04-16-A, Judgment, at ¶¶ 199-200; Sesay, Case No. SCSL 04-15-T, Judgment, at ¶ 1413.

20 *Shattered Lives*, supra note 18, at 1, 58; see generally Sesay, Case No. SCSL 04-15-T, Judgment, at ¶ 1412.

21 Brima, Case No. SCSL-04-16-A, Judgment, at ¶ 199.

sexual demands or else they will no longer be regarded as the “wife” of the rebel and will be subjected to further and potentially worse abuse by other rebels, such as gang rapes.²²

Rape is one of the worst forms of physical abuse because it ‘strikes at the very core of human dignity and physical integrity.’²³ Rape causes both physical and psychological pain and suffering. The psychological suffering may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.²⁴ However, rape does not only inflict serious physical and mental harm upon the individual victim; it also inflicts grave harm to the community.²⁵ The Trial Chamber in *Akayesu* recognised rape and sexual violence ‘as instruments of genocide based primarily on the physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community.’²⁶ Furthermore, the Chamber recognised that this practice took place in Rwanda and explicitly acknowledged that ‘sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.’²⁷

Sexual abuse may be directed towards women as a group because ‘to rape a woman is to humiliate her community.’²⁸ The abuse acts as a means of communication between the males. It signals the totality of defeat, as the men were unable to protect “their” women.²⁹ The Rwandan culture places huge value on the chastity of the women and places the men in the role of protector.³⁰ Hence, rape and sexual violence are forms of humiliation in Rwandan culture. Indeed, rape is often considered to be a fate worse than death.³¹ Rape and sexual violence unite feelings of hatred, superiority, vengeance and pride for the perpetrating

22 *Shattered Lives*, *supra* note 18, at 27-32.

23 Prosecutor v Delalić, Case No. IT-96-21-T, Judgment, at ¶ 495 (Nov. 16, 1998). Hazim Delalić was the commander of the Čelebići prison-camp. *Id.* He was convicted of wilful killings, torture, wilfully causing great suffering or serious injury, and inhumane treatment. *Id.*

24 Kelly D Askin *Prosecuting Wartime Rape And Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J INT’L L. 288, 323 (2003).

25 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731.

26 Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 228 (2000).

27 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731.

28 Radhika Coomaraswamy, *Of Kali Born: Violence and the Law in Sri Lanka*, in FREEDOM FROM VIOLENCE: WOMEN’S STRATEGIES FROM AROUND THE WORLD 49 (Margaret Schuler ed., 1992).

29 Eileen Meier, *Prosecuting Sexual Violence Crimes During War: New Possibilities for Progress*, 10 INT’L LEGAL THEORY 83, 87 (2004).

30 For an insight into the Rwandan culture and the female gender’s position in particular see Villia Jefremovas, *Loose Women, Virtuous Wives, and Timid Virgins: Gender and the Control of Resources in Rwanda*, 25 CAN. J. AFR. STUD. 378 (1991). For specific reference to chastity and the role of men as protectors refer to page 383.

31 Askin, *supra* note 24, at 321.

community.³² Furthermore, rape is intended to humiliate, shame, degrade and terrify the victim community.³³ The ICTR acknowledged this by stating that ‘sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself’.³⁴

Thus, the rape and sexual abuse of the “wife” take on two dimensions. Firstly, the rape inflicts serious bodily and mental harm upon the woman as a primary victim.³⁵ Secondly, the sexual violations destroy the community itself. In this way, the rape of women of a particular group, even under the guise of a “marriage”, is a tool to commit genocide.³⁶

Physical and Psychological Harm

Although rape and sexual violence are critical instruments for inflicting ‘serious physical and mental harm’ in forced marriages, they are not the only means employed. The “husbands” exercise complete control and domination over their women, and often subject them to physical abuse.³⁷ From the outset, women subjected to these “marriages” are placed in a confusing and precarious situation with grave physical and psychological consequences. The women are beaten, psychologically oppressed and forced to live in prolonged fear.³⁸ While in many instances, their “husbands” will have saved their lives through these coerced marriages, these men are also responsible for inflicting physical, sexual and psychological brutality upon them and their respective communities. Furthermore, in many cases the men have murdered the woman’s family and members of their community or even forced these women to do so.³⁹ Moreover, the woman must endure the social stigma attached to women who have been raped in a patriarchal society. This is heightened in the case of forced marriages as the woman is seen as a “collaborator” with the enemy.⁴⁰ Her own community may reject her, in the belief that she married their persecutor in order to save her own life, thus betraying them.⁴¹

32 Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT’L L. 326, 328 (1994).

33 *Id.* at 328-329.

34 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 732.

35 Copelon, *supra* note 26, 228.

36 *Id.*

37 *Shattered Lives*, *supra* note 18, at 27.

38 Monika Satya Kalra, *Forced Marriages: Rwanda’s Secrets Revealed*, 7 U.C. DAVIS J. INT’L L. & POL’Y 197, 215 (2001).

39 *Shattered Lives*, *supra* note 18, at 20; Kalra, *supra* note 38, at 202.

40 *Shattered Lives*, *supra* note 18, at 3, 19 and 74; Kalra, *supra* note 38, at 203.

41 Kalra, *supra* note 38, at 203.

Therefore, these women suffer the psychological ordeal of being raped, being subjected to sexual violence and physical abuse and living in a state of constant fear. In addition, they must live with the trauma of losing one's family, being ostracised by one's community and being in the midst of the massacre of one's own people. Moreover, these women must endure all of the above while being forced to live in the intimate relationship of a marriage with the perpetrator of all these violations against her and her community.

Thus, forced marriages subject the "wife" to grave physical and psychological harm and these injuries are inflicted upon them through a variety of means. Furthermore, the harm inflicted affects not only the individual but also her role in society and the community itself. In this regard, the practice fulfils the criteria of 'serious bodily or mental harm' and, moreover, is an effective and especially brutal instrument of genocide.

2. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About Its Physical Destruction in Whole or in Part

The Trial Chamber in *Akayesu* held that this enumerated act should be interpreted as prohibiting 'methods of destruction by which the perpetrator does not immediately kill the members of the group, but which ultimately, seek their physical destruction.'⁴² In addition, the Trial Chamber provided an illustrative list of potential actions for the deliberate physical destruction of a group. These included a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirements.⁴³

Although forced marriages have not been previously recognised, the practice can fulfil this enumerated act. Firstly, forced marriages may be a method to prevent births within the communities that the perpetrators seek to eradicate. By preventing children from being born into a certain ethnic group, the perpetrators are ensuring the physical destruction of that group, at least in part. Secondly, the high value and esteem placed on virginity and chastity, especially in patriarchal societies such as Rwanda, creates a social stigma against the victim. This stigma often results in women being reluctant to seek help or to report the sexual abuse. In turn, 'their guilt and silence enforce and perpetuate the genocide.'⁴⁴ If women recount the violations to their family or community, they often encounter social backlash. It is reported that 'husbands no longer want to touch their violated wives, families reject daughters who

42 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 505.

43 *Id.* at ¶ 506.

44 Arden B. Levy, *International Prosecution of Rape in Warfare: Non-discriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L. J. 255, 266 (Spring 1994).

have been victimized, and women themselves, horribly traumatized, recoil from sexual conduct.⁴⁵ These victims have even been denied treatment for venereal diseases, refused counselling or denied abortions.⁴⁶ Thus, these women are often compelled into silence in order to evade social stigma, blame, shame and isolation. The physical and psychological injuries inflicted upon the women and the group combine with the women's ostracism from their community to bring about the physical destruction of the entire group.

Lastly, forced marriages bring about the physical destruction of the group through the transmission of fatal venereal diseases. The "wives" are often infected with sexual transmitted diseases, such as HIV.⁴⁷ The transmission of HIV and other sexual diseases is another example of rape being used as a method of destruction, albeit a slow and painful one.⁴⁸ The use of a disease is a very effective and gruesome form of genocide because it eradicates the procreators and perpetuates death for generations. In this way, the killing continues and endures.⁴⁹ Reports indicate that AIDS was intentionally used in Rwanda as a means to murder Tutsis, especially Tutsi women, in a deliberate and agonising manner.⁵⁰ Indeed, the Rwandan president stated that the former Hutu government purposely released AIDS patients in order to form battalions of rapists.⁵¹ Some of these Rwandan "wives" were as young as 10 years old when they are repeatedly raped and infected.⁵²

Thus, forced marriages bring about the physical destruction of a group through a variety of means. These include preventing births, physical and mental suffering, exclusion of "wives" from their community and perpetrating a slow death through the transmission of fatal diseases. While these methods will not immediately kill the members of the group, they ultimately seek to, and eventually will bring about the group's physical destruction.

45 See Jasmira Kuzmanovic, *Bosnian Woman's Wounds: Rape and a Child Fathered by Hate*, BOSTON GLOBE, Jan. 8, 1993, at 2; Judy Mann, *Report From the Front*, WASHINGTON POST, Jan. 15, 1993, at E3.

46 Anna Quindlen, *Is Rape of Bosnians a Sophisticated Form of Genocide?*, DALLAS MORNING NEWS, Mar. 17, 1993, at A27.

47 Kalra, *supra* note 38, at 210; *Shattered Lives*, *supra* note 18, at 3.

48 Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 354 (2003).

49 Peter Landesman, *A Woman's Work*, N.Y. TIMES MAG., Sept. 15, 2002, at 89, 116.

50 *Id.*; Nicole Itano, *How Rwanda's Genocide Lingers on for Women*, CHRISTIAN SCIENCE MONITOR (Nov. 27, 2002) available at <http://www.csmonitor.com/2002/1127/p08s01-woaf.html>.

51 Russell-Brown, *supra* note 48, at 354.

52 Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective*, at ¶ 45, Comm'n on Hum. Rts., U.N. Doc. E/CN4/2002/83/Add.2 (Feb. 11, 2002) [hereinafter *Special Rapporteur's Report 2002*].

3. Imposing Measures Intended to Prevent Births Within the Group

The Trial Chamber in *Akayesu* acknowledged that forced impregnation could be a measure intended to prevent births.⁵³ Forced marriages often result in forced impregnation.⁵⁴ Article 7(2)(f) of the Rome Statute defines forced pregnancy as the ‘unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out grave violations of international law.’⁵⁵

Forced marriages can fulfil this definition. The “wives” in these marriages are abducted and compelled to remain in the marriage for as long as the “husband” wants her, due to economic dependence, social stigma, fear, psychological oppression and duress as well as the threat of death or physical abuse.⁵⁶ In this way, the liberty of the “wives” is restricted and, thus, they are unlawfully confined.⁵⁷ In addition, the woman must be forcibly made pregnant. Rapes that do not result in pregnancy will not qualify.⁵⁸ However, ‘forcibly’ is not synonymous with violence or physical abuse. Instead, ‘violence, duress, detention, psychological oppression or abuse of power’ can suffice.⁵⁹ As previously discussed, the “wives” are regularly raped and forced into sexual acts with their “husbands”. Finally, the individual “husband” must intend to affect the ethnic composition of the population.

The Trial Chamber in *Akayesu* held that in patriarchal societies, where the ethnicity of the child is determined by the identity of the father, the forced impregnation of a woman of different ethnicity would constitute a tool of genocide by affecting the ethnic composition of the group.⁶⁰ Although, this theory does not comply with logic or science, as the child will

⁵³ *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 507. The Trial Chamber proclaimed that the act could include ‘sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages’. See also *Shattered Lives*, *supra* note 18, at 21-32.

⁵⁴ See *Shattered Lives*, *supra* note 18, at 21-32. However, as with all of the enumerated acts, it is the intention of the perpetrator that raises this crime to the level of genocide. Hence, it is necessary to distinguish between pregnancy as an ordinary consequence of rape and as a conscious policy to forcibly impregnate. Generally, the requisite intent can be inferred from the facts, such as mass and systematic rapes. However, individual intent would have to be determined on a case-by-case basis. See Siobhan Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L. J. 91, 125, 107 (1996).

⁵⁵ *Rome Statute*, *supra* note 2, at art. 7(2)(f).

⁵⁶ See *Shattered Lives*, *supra* note 18, at 30. Furthermore, the important period of confinement was held to be between conception and the time she can no longer terminate the birth. See Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 662-63 (2001). By virtue of being in a forced marriage, the woman is unable to terminate the pregnancy. *Id.*

⁵⁷ Jonathon M. H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 524 (2003).

⁵⁸ Boon, *supra* note 56, at 660.

⁵⁹ *Id.* at 660-61.

⁶⁰ *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 507.

carry as much of the “wife’s” genes as the “husband’s” genes, this perception is believed by the perpetrator, the victim and the communities.⁶¹ Thus, it is as effective as if it were true.⁶² Rwanda is a patriarchal society and the women targeted to be “wives” of the Hutu men were only Tutsi women. In these “marriages”, they were repeatedly raped and forced to bear the children of their Hutu “husbands”.⁶³ In this way, forced marriages compelled the “wives” to bear children of the rebels’ ethnicity and prevented them from bearing a child of their own ethnicity. Hence, the “husband” succeeded in strengthening his own group and weakening that of the victim.

In addition, rape and forced pregnancy may prevent births within a group due to the physical and psychological harm that they inflict upon the victim.⁶⁴ Following this sexual violation, a woman that was once capable of reproducing may refuse or be unable to procreate. In this way, rape may prevent births.⁶⁵ As previously discussed, the “wives” of forced marriages are often raped and forcibly impregnated. Thus, even if the “wife” escapes, she may be so psychologically or physically traumatised from the “marriage” that she cannot or will not procreate. Furthermore, she may also be ‘rejected or retreat from the males in [her] community, fracturing the family and splintering the social structure.’⁶⁶ Moreover, the mere presence of the children of the rebels’ ethnicity can further a cultural genocide, as their presence can cause strife and resentment within the community and serve as a constant reminder of oppression.⁶⁷

Thus, forced marriage effectuates the prevention of birth within a group, and therefore genocide, through numerous avenues. The practice forces the “wife” to bear the child of the rebel’s ethnicity and not one of her own. Furthermore, the woman is often unable or prevented from bearing a child of her own ethnicity, and thus the genocide plan is perpetrated even after the forced marriage or forced pregnancy ends.

61 Short, *supra* note 57, at 512-13; For an account of the perceptions of Tutsi families to the children of rape see *Shattered Lives*, *supra* note 18, at 81-82.

62 Short, *supra* note 57, at 512-514.

63 *Shattered Lives*, *supra* note 18, at 21-32.

64 Boom describes how forced pregnancy can lead to physical and mental trauma. See Boom, *supra* note 56, at 660; Short, *supra* note 57, at 523.

65 Akayesu, Case No. ICTR 96-4-T, Judgment, at ¶ 508.

66 Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415, 494 (1998).

67 Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethnic Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 375 (1998).

B. TUTSI ETHNICITY

The second main condition for an act to constitute genocide is that the act must be directed against a national, ethnic, racial or religious group. In order to define ‘a national, ethnic, racial or religious group’, the Trial Chamber in *Akayesu* interpreted the *travaux préparatoires* of the Genocide Convention. The Chamber concluded that the Genocide Convention intended to protect permanent and stable groups whose membership is determined ‘automatically, by birth, in a continuous and often irremediable manner.’⁶⁸ The perception of a distinct and separate Tutsi ethnicity is embedded in most official Rwandan documentation.⁶⁹ At the time of the genocide, it was mandatory for every Rwandan to carry an identity card signifying his or her ethnicity; that is, whether one was Hutu, Tutsi or Twa.⁷⁰ Furthermore, the law reinforced the different ethnicity as the Rwandan Constitution and national laws in place at the time of the genocide referred to the different ethnic groups.⁷¹ In addition, customary law required that the child take the ethnic lineage of the father and not the mother.⁷² All these factors contributed to and reinforced the belief that the Hutu, Tutsi and Twa were distinct ethnic groups whose membership was automatically determined at birth. Indeed, all the witnesses at trial testified ‘spontaneously and without hesitation’ as to their ethnic identity.⁷³ Thus, the Trial Chamber in *Akayesu* recognised the Tutsi as a separate ethnic group from the Hutu.⁷⁴

Therefore, although the distinct ethnicity was largely a product of choice and perception, as opposed to immutable characteristics,⁷⁵ the Tribunal determined that the Tutsi were a ‘stable and permanent’ group due to the deeply embedded belief in Rwanda that such ethnic division existed. Furthermore, one’s membership within the ethnic group was automatically decided at birth, in a continuous and often irremediable manner.

The condition that the act ‘must be directed against a national, ethnic, racial or religious group’ requires not only that the Tutsi be recognised as an ethnic group but also that the acts be directed against them. Thus, the act must be directed against one or several individuals,

68 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 511.

69 *Id.* at ¶¶ 170-71; ¶ 516, ¶ 702.

70 *Id.* at ¶ 702.

71 *Id.* at ¶ 170.

72 *Id.* at ¶ 171.

73 *Id.* at ¶ 702.

74 *Id.* at ¶ 516

75 Russell-Brown, *supra* note 48, at 370.

because such individual or individuals are members of a particular group.⁷⁶ The Tutsi in Rwanda were killed and persecuted not because of their individual identity but because of their membership in the Tutsi ethnic group. Women were targeted for forced marriages because they were women and because they were Tutsi.⁷⁷ Sexual abuse was perpetrated solely against Tutsi women, and Hutu women were only ever attacked if they were married and carrying the child of a Tutsi man.⁷⁸ Hence, it was their membership in the Tutsi ethnic group that was the basis for the grave sexual violations committed against them.

C. INTENT

The third condition of genocide is that the act must be committed with the intent to destroy the group in whole or in part.⁷⁹ This requirement of *dolus specialis*, or special intent, is the crucial element that distinguishes genocide from other crimes, such as war crimes or crimes against humanity. In addition, the prosecutor must prove two tiers of intent. First, the prosecutor must establish the intent to commit the underlying offence. Second, the prosecutor must establish the *dolus specialis*, that is, the underlying offence was perpetrated with the intent of destroying the targeted group in whole or in part.⁸⁰

Generally, it is evident that the “husband” intended to commit the underlying offences in forced marriages; that is, to rape, sexually abuse and force women into these “marriages”. The mere performance of the violation and the strong coercive methods employed by the perpetrators are strong indicators that the requisite intention was present. However, it is more problematic to prove the *dolus specialis* requirement, as it is a mental factor which is difficult or even impossible to determine.⁸¹ Yet, in the absence of this specific intent, an act cannot be classed as genocide, regardless of its degree of atrocity or heinous nature.⁸² Hence, in order

76 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 521.

77 Short, *supra* note 57, at 516.

78 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731, ¶ 121.

79 In the case of forced marriages, it is very important to distinguish intent from motive. While the ‘husband’ may have forced individual Tutsi women into these ‘marriages’ for his own personal reasons, including sexual gratification, this does not mean that these personal reasons prevented the ‘husband’ from also acting with the intention that his actions would destroy the Tutsi people in whole or in part.

80 Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT’L L. 399, 400 (2001).

81 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 523.

82 See Hiram Abtahi & Philippa Webb, 1 THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES, 1375 (2008) (quoting the Brazilian delegate, Mr. Amado).

for forced marriages to be recognised as a tool of genocide, it is vital that the requisite intent of the “husband” to destroy the ethnic group in whole or in part is proven.

The Trial Chamber in *Akayesu* defined *dolus specialis* as a ‘specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.’⁸³ Given the difficulty in proving the subjective intent of a person in the absence of an express confession, the Tribunal has held that intention can be inferred from certain presumptions of facts.⁸⁴ Important indicators of genocidal intent for forced marriages include the performance of the act within the broader context of other violations perpetrated against the group, the widespread or systematic occurrence of the acts, the involvement of state or organisational policy and the exclusivity of the attack against the group.

1. Manifest Pattern

The Element of Crime for the Rome Statute stipulates that the act of genocide can take place in the context of a ‘manifest pattern of similar conduct directed against that group.’⁸⁵ This concept entails placing the individual’s actions against the victim within the wider context of other culpable violations directed against other members of the targeted group, whether these acts were committed by the same offender or by others.⁸⁶ Thus, to prove intent, it is sufficient if the individual acted with knowledge of the genocidal plan or pattern or with knowledge that the act could destroy the group.⁸⁷ During the Rwandan genocide, men were massacred; women and girls were killed, raped, mutilated and sexually enslaved; and children were killed and forced to be child soldiers or to labour.⁸⁸ Others were forced to flee their homes and their country in order to survive.⁸⁹ It was within this broader strategy that the practice of forced marriages was used as yet another tool of genocide. The guise of a “marriage” allowed the perpetrator to subject the group’s women to prolonged physical and psychological

83 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 498.

84 *Id.* at ¶ 523.

85 Int’l Crim. Court, *Elements of Crimes*, ICC-ASP/1/3, art 6. ‘Manifest pattern of similar conduct’ is an analogous concept to ‘constructive intent’. *Id.*

86 Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT’L L. 517, 532 (1999); *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 88.

87 Valerie Oosterveld, *The Context of Genocide*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 49 (Roy S. Lee ed., 2001).

88 For general information on the Rwandan genocide, see generally *Shattered Lives*, *supra* note 18, at 12-15; Adam Jones, *Case Study: Genocide in Rwanda, 1994 (1999-2002)* GENDERCIDE WATCH available at http://www.gendercide.org/case_rwanda.html (last visited Oct. 25, 2010).

89 For a detailed account see *Shattered Lives*, *supra* note 18.

suffering and effectively to tear apart the fabric of Tutsi society. This practice combined with the other methods of destruction to form a prevalent and stringent attempt to destroy the Tutsi group.

2. Widespread or Systematic

Another important indication of the intent to destroy the group is an extensive and organised attack against the group. While a ‘widespread or systematic’ attack is not a requisite condition for genocide,⁹⁰ it may be an indication of the perpetrator’s intent. Thus, the ‘widespread and systematic’ nature of an attack holds important evidentiary value.⁹¹

Reports on the Rwandan genocide found that forced marriages were commonplace and estimated that thousands of women were forced into marriages.⁹² In this way, the practice can be described as ‘widespread’. Indeed, it is estimated that 8.2 per cent of women and girls were forced to marry their abductors.⁹³ In addition, forced marriages were systematic in the sense that these acts were part of a wider plan, that is, the massacre of another group. It is well-documented that rape and the sexual acquisition of another group’s female population can be used as a weapon of war to generate mass fear, terror and the destruction of lives and societies.⁹⁴ In addition, sexual violence serves to intimidate, degrade, humiliate, discriminate against, punish, control and destroy a person.⁹⁵ In Rwanda, forced marriages and sexual violence against Tutsi women were systematically incorporated into the widespread attacks against the Tutsi group.⁹⁶ Human Rights Watch emphasised that administrative, military, political, and civilian authorities at the national and local levels encouraged the systematic sexual abuse of women and children to further the goal of destruction of the Tutsi.⁹⁷ Furthermore, the impunity surrounding the practice denotes that these violations were a premeditated strategy to use women and girls as weapons of war and to instil fear.⁹⁸

90 William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 39 (2d ed. 2004).

91 *Id.*.

92 See generally *Shattered Lives*, *supra* note 18, see generally *Special Rapporteur’s Report 2002*, *supra* note 52; see generally Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective*, ¶ 45, Comm’n on Hum. Rts. U.N. Doc. E/CN.4/2001/73 (Jan. 23, 2001) [hereinafter *Special Rapporteur’s Report 2001*]; see generally *Akayesu*, Case No. ICTR 96-4-T, Judgment.

93 *Special Rapporteur’s Report 2001*, *supra* note 92, at ¶ 44.

94 See Askin, *supra* note 24, at 288, 297-98.

95 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 687.

96 Kelly D. Askin, *Gender Crimes Jurisprudence in the ICTR*, 3 J. INT’L CRIM. JUST. 1007, 1012 (2005).

97 *Shattered Lives*, *supra* note 18, at 48.

98 *Id.* at 41.

Moreover, the systematic and organised nature of the attacks against the Tutsi women is a further indication that these were not isolated or opportunistic acts, but intentional.

Although it is the perpetrator's intentions, and not the number of victims, which is necessary to constitute genocide, there can be a strong correlation between the number of victims, the level of organisation, and the conclusion that the perpetrator intended to destroy the group in whole or in part.⁹⁹ Forced marriages were commonplace and there was a strong pattern in the regularity of their occurrence, which indicates that their commission was part of the overall policy of the rebel groups to demean and massacre another group. The widespread and systematic practice of forced marriages greatly aids the conclusion that the perpetrators must have intended that their acts destroy the group in whole or in part.

3. State or Organisational Policy

A 'state or organisational policy' is closely aligned to the 'systematic' occurrence of the acts. As with 'widespread or systematic', it is not part of the legal requirements of genocide to prove a state or organisational policy. However, such a policy provides strong evidence of the requisite intent to commit genocide. In addition, the knowledge and planning of high-ranking officials and leaders of a genocidal plan, in which sexual violence is integral, demonstrates that the widespread occurrence of these abuses was not solely opportunistic or an unfortunate incident of war, but was intentional. This proves the necessary genocidal intent for both the individual perpetrators and the leaders.¹⁰⁰

In Rwanda, forced marriages and other sexual violations were part of the overall state and organizational policy. The state can be directly linked to the sexual violation of women and girls. Government officials and the Rwandan Armed Forces actively participated in the commission of these violations.¹⁰¹ The Trial Chamber in *Kambanda* held that the government controlled the national policy and the police, and that high state officials participated in

99 Schabas, *supra* note 90, at 39.

100 *See Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 346 (The Trial Chamber recognised that superior responsibility is a well-established norm of international customary and conventional law. The superior should be held responsible as long as he knew or ought to have known that the act was about to be or had been committed and failed to take the necessary and reasonable step to prevent or punish the perpetrator. This is a significant clause because it allows the leaders to be prosecuted for forced marriages even if the individual "husband" escapes the preview of the international community).

101 *See generally Akayesu*, Case No. ICTR 96-4-T, Judgment (Akayesu was a bourgemestre of Taba); *see generally* Prosecutor v. Semanza, Case No. ICTR 97-20-T, Judgment (May 15, 2003) (Semanza was the bourgemestre of Bicumbi); *see generally* Prosecutor v. Gacumbitsi, Case No. ICTR 01-64-T, Judgment (summary) (June 17, 2004) (Gacumbitsi was the bourgemeste of Rusumo). *See also Shattered Lives*, *supra* note 18, at 1, 20 (Role of the Rwandan Armed Forces).

meetings where the course of the massacre was actively followed.¹⁰² Furthermore, the State aided and encouraged the rebel groups in perpetrating these sexual violations. In Rwanda, the *Interahamwe* were civilian militia who partook in the genocide under the command of the army, and the government and the *Interahamwe*'s sexual violation of women was condoned and encouraged by authorities.¹⁰³ Soldiers and the national police assisted the militia by ordering people to stay in their houses, establishing roadblocks, confining targeted people to places where they could be more easily attacked and shooting people who tried to escape.¹⁰⁴

Moreover, as discussed, women are often used as weapons of war and are even regarded as the legitimate spoils of war.¹⁰⁵ The leaders of these organisations actively encouraged and orchestrated the violation and degradation of women and girls. State and organisational propaganda portrayed Tutsi women as arrogant and calculating 'seductress-spies bent on dominating and undermining the Hutu.'¹⁰⁶ Sexual violence against Tutsi women was seen as a means of dehumanising and subjugating all Tutsi and, indeed,¹⁰⁷ the leaders actively encouraged the genocide killers not to 'spare women and children'.¹⁰⁸ This gender-based hate propaganda against Tutsi women translated into the rape, sexual slavery and general abuse of Tutsi women and girls during the Rwandan Genocide.¹⁰⁹ The newspaper, *Kangura*, published this type of propaganda, and powerful government and military patrons supported it.¹¹⁰ The anti-Tutsi radio station, RTLM, contained National Revolutionary Movement for Development Party supporters.¹¹¹ Thus, these sexual violations were not simply isolated acts of individuals acting solely of their own accord, but violations orchestrated and encouraged by leaders and perpetrated by individuals. They were part of an overall policy.

The policy element is also reflected through the manner in which these attacks were carried out. Civilian areas were targeted, the men were quickly killed, and the women and girls were forced into "marriages" and sexual slavery, and were raped. Due to the widespread

102 See generally Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment (Sept. 4, 1998).

103 *Shattered Lives*, *supra* note 18, at 20, 24. Habyarimana and his extremist factions set up the *Interahamwe* to facilitate the "cleansing" of the Tutsi. See Alexandra Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN ST. L. REV. 349, 351 (2003).

104 *Shattered Lives*, *supra* note 18, at 48.

105 For an overview of the prevalence of rape in armed conflicts see Chinkin, *supra* note 32, 326-28.

106 *Shattered Lives*, *supra* note 18, at 18.

107 *Id.* at 2.

108 *Id.* at 41.

109 Leslie L. Green, *Gender Hate Propaganda and the Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 COLUM. HUM. RTS. L. REV. 733, 753 (2002).

110 *Shattered Lives*, *supra* note 18, at 17.

111 See Green, *supra* note 109, at 743 (arguing MRND was a Hutu-led political party).

occurrence of these violations, it is difficult to believe that the leaders of these organisations were unaware of it. The prevalence and public nature of these acts indicate that individual soldiers or rebels did not anticipate disciplinary action. Thus, the complicity of the fellow rebels, leaders and the state is insinuated.¹¹² Therefore, it is clear that the state not only condoned this type of violence, but also instigated and participated in them.

The genocide provision in the Rome Statute states that the perpetrator must intend to destroy the group ‘in whole or in part’.¹¹³ The clause in ‘whole or in part’ is interpreted as signifying a quantitative dimension.¹¹⁴ As discussed, forced marriages and sexual violations were carried out in a widespread and systematic manner and hence comply with the clause. However, the phrase ‘in whole or in part’ could also be interpreted as meaning that genocide can occur if a ‘significant part’ of the group is destroyed. ‘Significant part’ can be understood as persons within the group who hold ‘special significance’.¹¹⁵ If women were regarded as a group that holds ‘special significance,’ then the crimes committed exclusively against them, such as forced marriages and sexual slavery, could be recognised as ‘genocide’ by themselves.¹¹⁶ Within Rwanda, women are seen as holding ‘special significance’. They are the mothers and wives and they represent the home. Their destruction through sexual violence reaches beyond the immediate victim and acts as a means to destroy the entire community. Hence, their special significance and the impact that their destruction through sexual violence has on themselves and the community should be fully acknowledged.

Forced marriages and the sexual violation of Tutsi women were ‘not a mere side effect of the conflict, but rather an integral part of the genocidal campaign.’¹¹⁷ Therefore, it is difficult to believe that these crimes were committed without the knowledge and intent that these acts would destroy the Tutsi population.

112 *Shattered Lives*, *supra* note 18, at 20 states that these violations were committed with impunity.

113 *Rome Statute*, *supra* note 2, at art. 6..

114 Schabas, *supra* note 90, at 39. However, as noted in this book, many academics have criticised such an interpretation as it brings the condition of ‘quantity of victims’ into the genocide definition.

115 *Id.*

116 See Levy, *supra* note 44, at 280-81 (Levy states that because women tend to be viewed as a subgroup of their communities, violence against women may not always be regarded as affecting an entire group. Thus, while mass rape may be evidence of the crime of genocide, an international tribunal may not determine that rape, in and of itself, constitutes the international crime of genocide).

117 Green, *supra* note 109, at 734.

4. Targeted Based on Membership in a Group and not Individual Identity

Finally, the genocidal intent of the perpetrators can be discerned from the fact that only members of a particular group are subject to the attack. In *Jorgić*, the German Federal Court of Justice held that the perpetrators of genocide do not persecute a person in their capacity as an individual but rather in their capacity as a member of the persecuted group.¹¹⁸ In Rwanda, the genocidal plan was systematically executed against the Tutsi population, and the Hutu were largely spared. A vast majority of the victims of forced marriages, rape, sexual slavery and other sexual violations were Tutsi women.¹¹⁹ Indeed, the Trial Chamber in *Akayesu* acknowledged that sexual abuse was ‘systematic and perpetrated against all Tutsi women and solely against them.’¹²⁰ Generally, Hutu women, or Tutsi women who the rebels believed were Hutu, were spared these violations.¹²¹ Thus, Tutsi women were persecuted in their capacity as members of the Tutsi ethnic group and in their capacity as women. Since only Tutsi women were subjected to these abuses, it is clear that they were not random or isolated acts. Instead, these abuses were intentional and systematic.

Individual intent needs to be determined on a case-by-case basis. However, the organised policy, the widespread and systematic occurrence and the exclusive targeting of Tutsi women imply that forced marriages, at least for some perpetrators, were committed with the *dolus specialis* to destroy the Tutsi group in whole or in part.

In accordance with the definition of genocide, forced marriages fall within at least one of the enumerated offences, were directed against the Tutsi based on their ethnicity and there is strong evidence that the practice was committed with the intent to destroy the group in whole or in part. Hence, forced marriages in Rwanda fulfil the conditions for genocide and constitute one of the most heinous crimes imaginable.

118 Prosecutor v. Jorgić, Federal Court of Justice, 1999 (Ger.) quoted in Antonio Cassese, INTERNATIONAL CRIMINAL LAW 66 (2d ed. 2008).

119 Russell-Brown, *supra* note 48, at 362.

120 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731.

121 Russell-Brown, *supra* note 48, at 362.

III. REMEDIES

A. LEGAL REMEDIES

In recent years there has been significant progress on the issue of gender crimes. The Rome Statute is the first international treaty to have a subcategory of crimes against humanity dedicated to gender violations. In addition, the International Criminal Tribunal for Rwanda recognised that rape could be used as a tool of genocide.¹²² Under current international criminal law, it is possible to prosecute forced marriages as a crime against humanity under a number of subcategories including rape, forced pregnancy and under other inhumane acts, as evidenced by a recent conviction in Sierra Leone.¹²³ The Special Court of Sierra Leone regarded forced marriages as crimes against humanity, which inflicted grave suffering and serious injury on the physical and mental health of the “wives”. Furthermore, the Court held that the perpetrators were aware of the gravity of their crimes.¹²⁴ Yet, there has not been a full recognition of the destructive nature of forced marriages. Forced marriages can also be used as a tool for the extermination or attempted extermination of a group. As discussed in this Article, there exist strong grounds to argue that the practice of forced marriages could be prosecuted as genocide. In Rwanda alone, forced marriages comply with the three main criteria of genocide: these “marriages” fit within a number of the enumerated acts, the acts are directed against a protected group and, although intent has to be determined on a case-by-case basis, there is evidence that a large number of the actors intended to destroy the targeted group in whole or in part through their actions.

However, some have questioned whether sexual violence and practices like forced marriages should be so prosecuted. Some scholars fear that an overemphasis on the genocide aspect may obscure sexual abuse that is not committed with a genocidal intent, and that such violations will become invisible.¹²⁵ Furthermore, they fear that focusing on genocidal sexual abuse would objectify the offence and that the crime would be seen primarily as a violation of the group and not the individual.¹²⁶ While these are valid concerns, they can be neutralised. Murder is recognised as a grave crime even if it is not committed with a genocidal intent. In a similar fashion, forced marriages and sexual abuse can be recognised as serious crimes, even

122 *Rome Statute*, *supra* note 2, at art. 7(1)(g); *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731.

123 *Sesay*, Case No. SCSL 04-15-T, Judgment, at ¶ 1297.

124 *Id.* at 1296.

125 See Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN’S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197, 199 (Julie Peters & Andrea Wolper eds., 1995).

126 *Id.*

if committed without genocidal intent. Indeed, as previously noted, forced marriages, committed without proof of genocidal intent, have already been prosecuted as crimes against humanity.¹²⁷ Furthermore, focusing on the connection between the individual victim's gender and ethnicity instead of only the groups' suffering presents a more realistic view of the victim's suffering and vulnerability. Genocidal sexual violence is not just about a woman's identity as a woman, but it is also about a woman's identity as a member of a particular group; both characteristics are important.¹²⁸

Moreover, recognition of forced marriages as a form of genocide will greatly aid its prevention and prosecution. There is a strong stigma attached to the crime of genocide. Thus, if forced marriages are recognised as a potential weapon of genocide, then the nature of the act committed would be acknowledged and the need for international intervention would be highlighted. Indeed, if forced marriages were so labelled, there would be a state obligation under customary international law to intervene. This state duty to intervene does not generally extend to crimes against humanity.¹²⁹ Hence, individual states and the international community would be compelled, at least in theory, to prevent these horrific crimes. Furthermore, classifying forced marriages as a tool of genocide would have a deterrent effect on its use and practice if there is a fear of prosecution. In this regard, recognising forced marriages as tools of genocide will not only be a step in preventing and prosecuting these violations but it will also be a recognition of the multidimensional nature of these acts.

Forced marriages encompass rape, forced impregnation, sexual slavery, and sexual violence and also coerces the women into an intimate "relationship" with their "husband". Hence, forced marriages cause prolonged physical and psychological injuries.¹³⁰ The women must endure these violations with no possibility of escape and no perceivable end to the abuse. This makes forced marriages uniquely heinous. Without international recognition and active prosecution, it is impossible to regulate, prosecute or prevent these atrocities. Since the international community has been reluctant to alter the definition of genocide,¹³¹ it is

127 See Sesay, Case No. SCSL 04-15-T, Judgment, at ¶ 1297.

128 Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 64-65 (1993).

129 Customary international law imposes a duty to intervene when genocide is taking place. No such duty exists when crimes against humanity occur. See Miller, *supra* note 103, at 362; Margaret A. Lyons, *Hearing the Cry Without Answering the Call: Rape, Genocide, and the Rwandan Tribunal*, 28 SYRACUSE J. INT'L L. & COM. 99, 121 (2001); Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L. J. 5, 5 (1994).

130 Kalra, *supra* note 38, at 202.

131 See Miller, *supra* note 103, at 349 (Many academics call for the genocide definition to be expanded to include modern forms of genocide).

important that forced marriages are seen as being encompassed in the definition through the enumerated acts, if not expressly enumerated itself.

However, although recognition of the offence is a crucial first step, it is only a first step. It is vital that adequate investigation and prosecution of forced marriages takes place. In the realm of investigation, this may require changes to interviewing methods, such as female interviewers and translators, so that the women feel more comfortable recounting the sexual violations inflicted upon them.¹³² Furthermore, it is vital that women are interviewed in the absence of their “husbands”, so that it is possible to ascertain if they freely consented to the marriage and if they want to remain with their husbands. If the woman does not want to stay with her “husband”, the need for adequate economic, social, political and cultural reforms becomes even more imperative. In the interim, it is vital that women’s shelters or alternative forms of accommodation are in place. In addition, these crimes must be prosecuted. Prosecution is a way to tell perpetrators, and possible perpetrators, that such acts are against the rules of humanity and will not be tolerated. Hence, prosecution may possibly deter such actions in the future. Prosecution also reinforces to the women that the blame and shame lies with the abuser, not her, and may even give the victim a sense of closure. Prosecution and recognition of these violations against women are essential in order for the atrocities that occurred in Rwanda to be overcome. In the words of Pope Paul VI ‘if you want peace, work for justice.’¹³³

B. ECONOMIC, SOCIAL, POLITICAL AND CULTURAL REFORM

To prevent the reoccurrence of sexual slavery and forced marriages, reform beyond the legal forum is needed. The vulnerability of women to sexual violations is based upon numerous interlinked facets. The perception of women as the “spoils” of war, their social status, their economic dependency, and their lack of involvement in political life all contribute to the vulnerability of women.¹³⁴ While the law must play a vital role in the prevention and

132 See *Shattered Lives*, *supra* note 18, at 44 (The judicial process, and hence Rwanda’s social recovery, was severely hampered by a lack of human and material resources).

133 M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L. J. 443, 468-69 (1999).

134 See Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 607 (1997) (Professor Berta Esperanza Hernandez-Truyol calls for the repositioning of the notion of sexual violence within a broader framework that considers and eradicates the (i) psychological, social and political subordination of women; (ii) male domination, female subservient and cultural and traditional practices and (iii) economic marginalization and subjugation of women.’

recognition of gender crimes, such as forced marriages, it is not solely capable of eradicating sexual violence against women. Re-education is a crucial step in the process of reform. This requires awareness building and training in the military that rape and sexual violence is unacceptable and that it will be prosecuted and punished.¹³⁵ The myth that women are the “spoils of war” and that sexual violence is inevitable must be shunned and respect for human dignity must be upheld.

An issue of the utmost importance is that the international community and national governments tackle the social stigma that surrounds victims of forced marriage, rape and sexual slavery. In a patriarchal society, a woman’s role is to be a mother and wife. This stereotype places huge value on a woman’s virginity, chastity and “purity”. Hence, once a woman is raped and abused, she is seen as “stained” and unsuitable for her traditional role of marriage.¹³⁶ In addition to the trauma of being sexually violated, the woman is made to feel guilty and believe that she has brought shame upon her family and community.¹³⁷ Indeed, her family and the community may even blame her.¹³⁸ In a large number of cases, the woman feels compelled to hide the abuse that has been inflicted upon her.¹³⁹ This can add further devastation and isolation even after the abuse has ended. Awareness campaigns, information centres, support groups and medical centres are all needed to assist victims of sexual abuse, and assure them that the guilt lies with the rapist and not with them.¹⁴⁰

In addition, victims of sexual slavery and forced marriages are often seen as “collaborators” with the enemy.¹⁴¹ This belief is particularly strong with regards to “wives” of enemy combatants.¹⁴² Their own communities deem these women to be traitors that collaborated with their community’s persecutors in order to save their own lives.¹⁴³ This attitude fails to

135 For re-education in the military and general population, *see generally* Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 *LAW & INEQ.* 601, 601-17 (1998).

136 For a study on the effect of rape in a patriarchal society, *see generally* Tsun-Yin Luo, “*Marrying My Rapist?! The Cultural Trauma Among Chinese Rape Survivors*”, 14 *GENDER & SOC’Y* 581 (2000).

137 *Shattered Lives*, *supra* note 18, at 2.

138 Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 *HOFSTRA L. & POL’Y SYMP.* 87, 90 (1999).

139 *See Shattered Lives*, *supra* note 18, at 25, 72; Kalra, *supra* note 38, at 202; Christopher W. Mullins, ‘*We Are Going to Rape you and Taste Tutsi Women*’: *Rape During the 1994 Rwandan Genocide*, 49 *BRIT. J. OF CRIMINOLOGY* 719, 725 (2009).

140 *Special Rapporteur’s Report 2001*, *supra* note 52, at ¶111.

141 *Shattered Lives*, *supra* note 18, at 3, 19, 74; Kalra, *supra* note 38, at 203.

142 Kalra, *supra* note 38, at 203.

143 *Id.*

recognise that the women have no control over their situation and in fact are being subjected to sexual slavery under the guise of “marriage”. These misconceptions must be addressed and the strong coercive control of the “husbands” shown, so that the families and communities realise that these women are not collaborators but the victims of serious violations with prolonged physical, mental, emotional and psychological injuries.

To dispel myths and to protect women in times of war, it is also necessary to address women’s social status. In countries such as Rwanda and Sierra Leone, women are often seen as second-class citizens.¹⁴⁴ As a result, violations of women’s rights are not accorded the same significance as the breaches of men’s rights. Equality is essential to the protection of women. This equality needs to be achieved on political, social and economic levels and women need to be integrated into these areas of life. The presence of women in the military and the government should act as an assurance that women’s issue are addressed. In addition, respect for women and their rights should develop.¹⁴⁵ Furthermore, the presence of women in vital decision-making roles will dramatically impede the creation and use of government policies and military objectives that target women for abuses, such as forced marriages.

In line with equality, it is crucial that women are given economic opportunities in order to ensure that they are not confined to the vulnerable role of second-class citizens. Equality and economic viability will empower women. With regards to forced marriages, the question of economics is imperative. Many women and young girls feel they have no choice but to remain with their “husbands” because they have been rejected by their own communities and have nowhere else to go.¹⁴⁶ Economically, they are completely dependent on their “husbands” and are hence compelled to stay.¹⁴⁷

Forced marriage is a complicated issue that encompasses many aspects including enslavement, rape, psychological and physical abuse and dependency. Just as the issue is complicated, so is the resolution. It is comprised of many different components including legal, social, economical, political and cultural reform. Some of the changes can be implemented immediately, such as legislative reform, whereas others will take time,

144 *Shattered Lives*, *supra* note 18, at 4, 69.

145 See Reynolds, *supra* note 135, at 614 (claiming that ‘the eradication of fraternities will further the goal of preventing rape’).

146 Kalra, *supra* note 38, at 202.

147 *Id.*

prolonged effort, and marked changes in attitudes and beliefs. However, to ensure equality, protection of fundamental human rights, and physical and mental integrity, all these legal, social, economical, political, and cultural reforms must be implemented. Sexual violence against women as an incident of war can be eradicated, but it will take concrete action and will.

IV. CONCLUSION

In the last decade, great progress has been made in the arena of gender crimes. Rape and sexual violence are no longer regarded as crimes committed against ‘family honour or rights’ or as an ‘attack on [the woman’s] honour’.¹⁴⁸ Instead, it is accepted that such violations are an attack upon the woman and inflict serious physical and psychological injury. The watershed case of *Akayesu* represents an impressive advancement. It represents the first instance an international criminal tribunal recognised rape as an instrument of genocide.¹⁴⁹ Furthermore, forced marriages have been successfully prosecuted as a crime against humanity.¹⁵⁰ Yet, forced marriages can also be used as an effective tool of genocide. Full recognition and active prosecution of this practice is needed. Without this, it is impossible to prevent future abuses and to bring the perpetrators of past offences to justice. There is little doubt, in the face of deeply embedded social practices, attitudes and beliefs that it will take more than legislative reform to bring about change. However, this does not mean that the law does not have a crucial role to play. The first step towards such change, towards equality and towards the prevention of the victimization of women during armed conflict is recognition. Hence, the international community must fully confront the practice of forced marriages to advance the process of change.

148 Hague Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287.

149 *Akayesu*, Case No. ICTR 96-4-T, Judgment, at ¶ 731.

150 *Sesay*, Case No. SCSL 04-15-T, Judgment, at ¶ 1461.