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Force & Marriage

Haenen, I.E.M.M.

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ABBREVIATIONS

ABCP	Anti-social Behaviour, Crime and Policing Bill 2013–14
ACVZ	Dutch Advisory Committee on Migration Affairs
AFRC	Armed Forced Revolutionary Council
CDF	Civil Defence Forces
CFREU	Charter of Fundamental Rights of the European Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPK	Communist Party of Kampuchea
CPS	Crown Prosecution Service
CivC	(Dutch) Civil Code
CriC	(Dutch) Criminal Code
CCriP	(Dutch) Code of Criminal Procedure
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
EoC	Elements of Crimes
FMCPA	Forced Marriage (Civil Protection) Act 2007
FLA	Family Law Act 1996
FMPO	Forced marriage protection order
FMU	Forced Marriage Unit
GAOR	General Assembly Official Records
GBV	Gender-based violence
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
IKWRO	Iranian Kurdish Women's Rights Organisation
ILC	International Law Commission
LRA	Lord's Resistance Army
MCA	Matrimonial Causes Act 1973
NGO	Non-governmental organization
NJ	Nederlandse Jurisprudentie (Dutch case law)

Abbreviations

PPS	Prosecution Service
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
STD	Sexually transmitted disease
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	General Assembly of the United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council

GENERAL INTRODUCTION

*I begin to sing of rich-haired Demeter, (awesome) goddess –
of her and her trim-ankled daughter whom Aidoneus (Hades) rapt away,
given to him by all-seeing Zeus the loud-thunderer.¹*

1. THE TOPIC AND THE CENTRAL QUESTION

1.1. THE CENTRAL QUESTION

‘Marriage shall be entered into only with the free and full consent of the intending spouses.’ Article 16(2) of the Universal Declaration of Human Rights is clear about how it should be. Yet the words ‘I do’ are not always spoken out of free will: some marriages are the result of deception, manipulation, threats or physical abuse – practices that are generally not associated with the term ‘marriage’. This book is about a phenomenon known as forced marriage: a marriage (i.e. a marital or marital-like association), which at least one of the partners entered into against their will as a result of some form of coercion exerted by another party.² More specifically, this research focuses on the criminalisation of this practice on two different levels: the field of Dutch criminal law and the field of international criminal law, with a particular focus on the Rome Statute of the International Criminal Court.

The study revolves around the following central question:

Should forced marriage be criminalised under Dutch and international criminal law, and if so, how?

¹ First sentence of the Homeric ‘Hymn to Demeter’. The hymn tells the story of Demeter, whose daughter Persephone was abducted by and forced into a marriage with Hades. English translation: H.G. Evelyn-White, *Hesiod, the Homeric Hymns, and Homerica*, Harvard: Harvard University Press (Loeb Classical Library) 1914.

² This preliminary definition of forced marriage will be tested in subsequent chapters and will be applied to several situations that *prima vista* seem to be relevant for this definition. If necessary, the working definition will be reformulated at the end of Part I of this book. Also: see Chapter 1, paragraph 4 for definitional issues.

This research question is divided into three sub-questions:

1. What does the phenomenon of forced marriage entail?
2. What is the doctrinal basis for criminalisation under Dutch criminal law and international criminal law and what are the differences and similarities between these two levels?
3. What is the current legal framework for dealing with forced marriages under Dutch criminal (and civil) law and international criminal law and what are the differences and similarities between these two levels?

The central question can be answered after these three questions have been addressed.

1.2. NATIONAL CRIMINAL LAW: A COMPARISON BETWEEN THE NETHERLANDS AND ENGLAND

In 2008, almost 3,500 cases concerning forced marriage took place in Germany and in the same year,³ between 5,000 and 8,000 cases concerning forced marriage occurred in England.^{4,5} Forced marriages are also a daily reality in the Netherlands. There are no hard statistics on the prevalence of forced marriages in the Netherlands, but the Dutch Minister of Social Affairs believes that each year, hundreds of people are forced to marry against their will.⁶

Over the past years, several European countries, such as Norway, Belgium, Germany, Scotland and England have responded to the practice of forced marriage by turning it into a distinct criminal offence. In the Netherlands, the act of forcing someone to enter into a marriage against their will is a criminal act that *prima vista* falls within the ambit of several general offences, such as coercion (Article 284 Dutch Criminal Code). Yet there have been debates about separately criminalising forced marriage and thereby following the example of neighbouring countries. This gives rise to the question of whether this would be

³ Mirbach *et al.* 2011, pp. 22 and 28–29. According to the study, forced marriages cover those situations in which at least one of the spouses was forced to enter into a formal or informal (so including those conjugal associations entered into through a religious or social ceremony) marriage as a result of the exercise of force or threat of appreciable harm, and this spouse either did not dare to resist or refuse the marriage, or found that no consideration was given to his refusal. See Chapter 2, paragraph 2.1.

⁴ Kazimirski *et al.* 2009, pp. 24 and 28. Note that both studies concern forced marriages that had already taken place, as well as situations that could potentially result in a forced marriage.

⁵ Where this book refers to 'England', the jurisdictions of both England and Wales are implied, unless explicitly stated otherwise.

⁶ G. Herderscheë, 'Steviger aanpak "honderden gedwongen huwelijken"', *De Volkskrant* 7 June 2013 (available at <www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3454111/2013/06/07/Steviger-aanpak-honderden-gedwongen-huwelijken.dhtml> last accessed December 2013).

opportune. Should forced marriages be codified as a distinct offence in Dutch criminal law? Or are there other adequate (legal) alternatives for dealing with this phenomenon? For the purpose of answering these questions, a legal comparison will be made with England.⁷ This legal comparison runs through the book like a red thread.

A comparison with England is interesting, because, after first explicitly deciding not to criminalise forced marriage (in 2005) and instead adopting a civil law approach, the English government decided in 2012 to create a specific offence of forced marriage to supplement the civil law framework. The reasons the English government gave for creating specific criminal legislation are analysed and compared with the arguments used in Dutch debates on the criminalisation of forced marriage. The catalogue of legal(-political) arguments that arises from the comparison will assist in determining the desirability of (separate) criminalisation in the Netherlands. The main focus of this book is the criminal law, but because of the partly civil law approach to forced marriages in England, the research also describes, compares and evaluates civil law aspects. The English civil law framework that was specifically created for dealing with forced marriages will be analysed and compared to the Dutch civil law framework in order to determine whether it is necessary to implement additional civil law instruments in the Netherlands.

1.3. INTERNATIONAL CRIMINAL LAW: A SPECIFIC FOCUS ON SIERRA LEONE AND CAMBODIA

The taking of brides by the victors is a common occurrence during conflicts. There are reports of forced marriages taking place during the conflicts in *inter alia* Rwanda, Uganda, Darfur, the Central African Republic and the Democratic Republic of Congo.⁸ But this practice was especially rife during the civil war in Sierra Leone and under the rule of the Khmer Rouge in Cambodia; two situations that will be highlighted in this book. In Sierra Leone, thousands of women and girls were abducted by rebels and forced into so-called bush marriages with their abductors. In Cambodia, the Khmer Rouge allegedly forced thousands of men and women to marry as part of a strategy to obtain control over people's sexuality and to facilitate population growth.

The research question is ultimately concerned with the criminalisation of forced marriage in the Rome Statute, but there are three reasons for the specific focus on Sierra Leone and Cambodia – two situations that are not dealt with by the International Criminal Court (ICC) but by other (internationalised) courts –

⁷ See *infra* paragraph 2 for the method of legal comparison.

⁸ See M. Bastick, K. Grimm & R. Kunz, *Sexual Violence in Armed Conflict. Global Overview and Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces 2007.

in this book. First, the forced marriages that took place during these conflicts have been well-documented and researched, meaning there exists a wealth of information, as opposed to forced marriages that occurred during other conflicts, such as in Kenya and the Central African Republic. Secondly, the Special Court for Sierra Leone has issued several ground-breaking decisions and judgements regarding (the criminality and legal qualification of) forced marriages.⁹ Thirdly, because the Sierra Leonean and Cambodian forced marriages are different in many aspects, the two situations make for an interesting comparison.

Irrespective of the high prevalence of forced marriages in conflict situations, the practice is not a specific crime under international criminal law, in the sense that it is not separately criminalised in any of the statutes of the international criminal tribunals, the internationalised courts or the ICC. Instead, it is prosecuted under the umbrella of existing crimes. In 2008, the Special Court for Sierra Leone (SCSL) became the first international criminal court to recognise that forced marriage can constitute a crime against humanity, charged as an ‘other inhumane act’.¹⁰ The judgements of the SCSL may influence the activities of the ICC seeing as forced marriages occurred on a large scale in the majority of the situations that are currently before the ICC, including the Democratic Republic of Congo, the Central African Republic and Darfur. As will be demonstrated in Chapter 3, the forced marriages that took (and take) place during these situations bear many similarities with the forced marriages that took place during the civil war in Sierra Leone. This makes the Sierra Leonean case study of particular relevance for the criminalisation of forced marriage in the Rome Statute.

Forced marriage is a multi-layered practice which may result in or be accompanied by acts that are already recognised as crimes under international law, such as rape, forced pregnancy, torture, sexual slavery and forced labour. However, forced marriage also encompasses a violation of the rights to self-determination and individual autonomy, more specifically, the imposition of marital status by coercion, an act that is not criminalised as such under international criminal law. The gravity of this practice begs several questions. Should this act be included as a separate offence in the Rome Statute? If so, should it be categorised as a crime against humanity, or perhaps as a war crime or (also) as an act of genocide?¹¹

⁹ At the start of this research, it was expected that (before the completion of the research) the Extraordinary Chambers in the Courts of Cambodia (ECCC) would issue at least one judgement dealing with the forced marriages that were orchestrated by the Khmer Rouge in the 1970s. Unfortunately, the completion strategy of the ECCC has caused severe delays in the proceedings and the first judgement concerning forced marriage is not expected for several years (see Chapter 8).

¹⁰ AFRC Appeal Judgement, paras. 199–200.

¹¹ The crime of aggression is not included in this study because it is manifestly different from the other three core crimes. Aggression concerns the responsibility of states for unlawful aggressive acts. It is a crime that can only be committed by leaders and high-level policy makers and it concerns the law governing the recourse to conflict (Cassese *et al.* 2013, p. 136). Pursuant to Article 8bis(2) Rome Statute, an act of aggression means ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State,

Maybe forced marriage should not be codified as a distinct offence: perhaps it is caught by the definitions of enslavement and/or sexual slavery. This research aims to answer these questions.

1.4. COMPARISON BETWEEN THE NATIONAL AND INTERNATIONAL LEVEL OF CRIMINALISATION

The reasons for including national as well as international criminal law into this research need some elaboration. As stated, forced marriages take place in times of peace as well as in times of conflict. There is considerable divergence between times of peace and conflict as regards the circumstances surrounding forced marriages, the degree of coercion that is used and the possible consequences of the phenomenon.¹² Nevertheless, in essence, forced marriages *prima facie* concern the same behaviour in both situations: coercion used to make a person enter into a marital(-like) association against that person's will. Because of the prevalence of forced marriages in and out of conflict, questions regarding the criminalisation of this practice have arisen both on the level of international and national criminal law. Studying the doctrinal foundations of criminalisation on these two levels can result in new insights into criminalisation issues.

2. OUTLINE AND METHODOLOGY

2.1. OUTLINE

This book consists of four parts. Part I addresses the first sub-question: in this part forced marriage is described and defined. The concepts of marriage, force and coercion are analysed and explained (Chapter 1) and the causes and consequences of the practice of forced marriage as it takes place in the Netherlands and England (Chapter 2) and in conflict situations (Chapter 3) are discussed and compared. Part II focuses on sub-question 2 and puts forward several criteria for criminalisation that can be used when assessing whether or not a certain act should be (separately) criminalised under Dutch and international criminal law. First, Dutch and English theories of criminalisation are used to extract a set of criteria for criminalisation on the level of national criminal law (Chapter

or in any other manner inconsistent with the Charter of the United Nations' (Article 8bis(1) Rome Statute – see Resolution 6 of the Review Conference, 13th plenary meeting, 11 June 2010). Examples of acts of aggression are the invasion, attack or bombardment by the armed forces of a state of the territory of another state (Resolution 6 of the Review Conference, 13th plenary meeting, 11 June 2010). As stated by Cryer *et al.* '(a)ggression provides an *occasion* for the commission of other crimes' (Cryer *et al.* 2010, p. 317). Seeing as forced marriage cannot constitute an act of aggression, the crime of aggression is not relevant to this research.

¹² This will be demonstrated in Chapter 3, paragraph 7.

4), and next the field of international criminal law is studied with the purpose of finding a doctrinal basis for criminalisation in the Rome Statute (Chapter 5). The findings of these two exercises are compared in Chapter 6. Part III of this book centres on sub-question 3 and presents the legal framework with regard to forced marriages. Crimes codified in Dutch and English criminal law (Chapter 7) and international criminal law (Chapter 8) that may be relevant to the practice of forced marriage are discussed and analysed. In addition, different criminal, civil and administrative measures that could be used to deal with this practice are discussed. Part III also includes a two-level comparison between the legal frameworks of the Netherlands and England on the one hand and the national and international frameworks on the other hand (Chapter 9). The fourth and final part of this book contains the analysis and conclusions (Chapter 10).

2.2. METHODOLOGY

This book is based on traditional doctrinal legal research and the necessary information was drawn from three main sources: statutory law, case law and doctrine. For the delineation of the situation regarding forced marriages in the Netherlands and England, primary and secondary sources of law were used: criminal codes, Acts of Parliament and academic literature. The relevant case law of Dutch and English criminal courts was analysed and scholarly, governmental and NGO documents were used to obtain information on the historical, political, economic and social contexts, and the impact of forced marriages on those involved. In addition, several informal semi-structured interviews were held with victim-support charities, NGOs, people working within government departments and agencies and those with (professional) experience with forced marriage.¹³

The sources of international law are non-exhaustively enumerated in Article 38 of the Statute of the International Court of Justice. They are: treaty law, customary law, general principles of law and – as a subsidiary means for determining the law – judicial decisions and the writings of the most qualified authors. For the legal analysis in this book, first, the statutes of the ICC (i.e. the Rome Statute), the SCSL, the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) were analysed. The ICC's Elements of Crimes and Rules of Procedure and Evidence were also taken into account. The Elements of Crimes (EoC) more fully detail the crimes enumerated in the Rome Statute, but are not binding on the judges of the ICC; in accordance with Article 9(1) Rome Statute,

¹³ Interviews were conducted with employees of the Forced Marriage Unit (London), the Office of the Prosecutor (London), and the Iranian Kurdish Women's Rights Organisation. The transcripts of these interviews are on file with the author.

they 'shall assist the Court in the interpretation and application of articles 6, 7 and 8'. In addition, the relevant case law of the ICC, ICTY, ICTR, SCSL and the ECCC, and scholarly (legal) literature, such as handbooks, dissertations, commentaries and articles were consulted. The literature study was not limited to legal writings; where applicable, psychological and sociological publications were consulted, seeing as these disciplines offer quantitative and qualitative data concerning forced marriages and provide a clear perspective on the actual reality of this practice. Finally, NGO and UN reports, victim studies and sources of human rights law (such as the Slavery Convention, the Universal Declaration of Human Rights and the Convention on the Elimination of all Forms of Discrimination against Women) were consulted.

The comparative legal analyses of the Netherlands and England on the one hand and the level of national and international criminalisation on the other hand (Part III) are based on the method of legal comparison identified by Gorlé, Bourgeois, Bocken and Reyntjens: describing, juxtaposing, explaining and evaluating.¹⁴ First, the Dutch and English legal frameworks relating to forced marriages are described. Then, these legal frameworks are juxtaposed, filtering out the similarities and differences, which are subsequently explained. Finally, the results are evaluated: what is the best solution, is there a 'best' solution and what lessons can be learned from the foreign system? This exercise is repeated for the comparison between national criminal law and international criminal law.

3. EVALUATIVE FRAMEWORK: A TALE OF TWO THEORIES

This book's point of departure is a normative question: (how) should forced marriage be criminalised? In order to answer this question, an assessment framework consisting of several criteria or principles for criminalisation will be drafted. There are significant differences between international and national (Dutch) criminal law. As a result, the approach taken to select criteria for criminalisation for the two levels also differs. Therefore, the different fields of law are first studied separately and the criminalisation criteria that are distilled from these fields of law are then compared to each other. The reasons for choosing this approach instead of opting for one overarching criminalisation framework ought to be elucidated.

For one thing, it is important to understand the actual nature and background of the two fields of law: international criminal law, a mix of international law and criminal law, was created to deal with only the 'most serious crimes of concern

¹⁴ F. Gorlé, G. Bourgeois, H. Bocken & F. Reyntjens, *Rechtsvergelijking*, Brussels: E. Story-Scientia 1991, p. 28–30.

to the international community¹⁵ and does not aspire to be a complete code of all the offences in the world.¹⁶ Domestic criminal law systems, on the other hand, developed against a different background. At the time the (criminal) laws of most (European) states were codified – during the late eighteenth and early nineteenth century – a national criminal code was regarded as the exclusive source of criminal law applicable within the territory of a state.¹⁷ Therefore, it will not be surprising that there are some disparities between the systems of adolescent international criminal law and mature national criminal law. The biggest difference, obviously, is the substance and the quantity of criminalised conduct – four core crimes (crimes against humanity, war crimes, genocide and aggression) prohibiting only the most heinous of acts on the international level as opposed to a plethora of offences on the national level, ranging from very serious crimes, such as murder and rape, to minor offences, such as shop lifting and indecent exposure. Another difference concerns the aims of criminal law: aims of international criminal justice that are not recognised as goals of domestic criminal justice include post-conflict reconciliation and the telling of the history of a conflict.¹⁸ In addition, as a relatively new field of law, international criminal law does not have the same number of crystallised theories regarding the criminalisation process that domestic legal systems have; over the years, conduct was mostly criminalised on a spasmodic *ad hoc* basis.¹⁹

Because of the differences between national and international criminal law, two separate frameworks are formulated. The first pertains to Dutch criminal law and is presented in Chapter 4. In Dutch legal doctrine, extensive literature exists with regard to principles or criteria for criminalisation. These theories of criminalisation form the starting point for criminalisation under Dutch law and in line with the legal comparison interwoven throughout this book, literature on English criminalisation theories was also studied.

The second set of criteria for criminalisation concerns international criminal law and is constructed in Chapter 5. Seeing as no actual, established theories of international criminalisation exist, criteria for criminalisation are uncovered using an inductive approach. By studying the taxonomy of the core crimes in the Rome Statute and the structure of these different provisions coupled with their drafting history, several relevant criteria and stepping-stones emerge. As a result of this inductive approach, the chapter on international criminalisation bears more resemblance to a road map than to a framework and is considerably longer than the chapter on criminalisation under Dutch law.

¹⁵ Preamble (4) and (9) and Article 5 Rome Statute.

¹⁶ See Articles 10 and 22(3) Rome Statute.

¹⁷ Cryer 2008, p. 124.

¹⁸ Cryer *et al.* 2010, p. 22.

¹⁹ Saul 2008, p. 210.

4. SCOPE AND LIMITATIONS

4.1. THE SCOPE OF ‘FORCED MARRIAGE’

Forced marriage is a broad term. In general, a forced marriage can be said to consist of three stages: the stage leading up to the wedding, the actual celebration of the marriage, and subsequent marital life. Forms of coercion can be present during each of these stages. So depending on how it is defined, ‘forced marriage’ can include a multitude of acts, such as force relating to entering into a marriage, but also force with regard to remaining in the marriage – i.e. the absence of the possibility to divorce. An initially forced marriage can become voluntary over time; an initially voluntary marriage can become forced over time. As stated, in this book, the following (working) definition of forced marriage is adopted: a marriage at least one of the spouses entered into as a result of some form of coercion exerted by another party.²⁰ The definition thus refers to stages one and two described above – the pre-wedding and actual wedding stages – and therefore excludes cases of so-called marital captivity, where one or both of the spouses are not able to legally and/or religiously dissolve their marriage. Nevertheless, a marriage that was entered into against the will of at least one of the spouses may very well result in marital captivity.²¹ Therefore, this practice will be addressed in some chapters. The word ‘marriage’ in the definition does not exclude other (legal/social) conjugal-like associations such as civil or registered partnerships.

4.2. THE SCOPE OF ‘INTERNATIONAL CRIMINAL LAW’

Every handbook on international criminal law commences with a paragraph devoted to the term ‘international criminal law’.²² This is not only a logical, but also a welcome and necessary introduction to this field of law, as there exists some confusion as to what precisely constitutes an international crime due to the plethora of terms that are used: international crimes, international crimes *largo* and *stricto sensu*, crimes under international law, transnational crimes and *ius cogens* (international) crimes.²³ The distinction between international criminal law *largo sensu* on the one hand and *stricto sensu* on the other hand is the most common and useful dichotomy.²⁴ The former refers to treaty crimes and includes transnational crimes; these crimes do not create direct criminal responsibility

²⁰ Those cases in which coercion is used to *prevent* someone from entering into a marriage thus fall outside the scope of this book.

²¹ Pursuant to Dutch law, the term ‘forced marriage’ also covers the phenomenon of marital captivity (see *Parliamentary Proceedings (Lower House)* 2012/2013, 11, p. 49).

²² See e.g. Cryer *et al.* 2010, pp. 3–21.

²³ Bassiouni 2008, p. 133. In this regard, see also Cryer 2008, pp. 107–111.

²⁴ N. Boister, ‘*Transnational Criminal Law?*’, *European Journal of International Law* (14) 2003, pp. 953 and 955.

under international law. Instead, states are obliged by treaty to criminalise the offences in their domestic laws.²⁵ The locus of the criminal prohibition of transnational crimes, therefore, is the municipal law of the prosecuting state: the treaty places obligations on states, and not on individuals. In contrast, the locus of the proscription of international crimes *stricto sensu* is the international legal order.²⁶ In this book, the term ‘international criminal law’ is used to refer to this narrower field of international criminal law: the offences that fall within the jurisdiction of the international criminal tribunals and the ICC. These are offences for which international criminal law directly imposes individual criminal liability.²⁷ Consequently, the term ‘international crime’ is used to refer to the crimes of genocide, war crimes, crimes against humanity and aggression – the so-called ‘core crimes’. This subdivision is also known as supranational criminal law.²⁸

The manuscript was concluded in April 2014 and the law in this book is stated as at 1 May 2014.

²⁵ Gaeta 2009, pp. 63–65 and 69–70, draws a clear distinction between international crimes proper (i.e. the core crimes) and treaty-based crimes.

²⁶ Cryer 2008, pp. 108–109.

²⁷ Milanović 2011, p. 28. Some crimes, such as torture and enslavement, can be both core crimes as well as transnational crimes (Cryer 2008, p. 108).

²⁸ See De Brouwer 2005 and R.H. Haveman, O. Kavran & J. Nicholls (eds.), *Supranational criminal law: a system sui generis*, Antwerp: Intersentia 2003.

PART I
FORCE AND MARRIAGE
Description and definition
of forced marriage

CHAPTER 1

CONSENSUS FACIT NUPTIAS

1. INTRODUCTION

Before going into the issue of forced marriages in times of peace and conflict, it is important to first understand what ‘marriage’ and ‘force’ exactly entail. Only after taking careful cognisance of these concepts is it possible to start dissecting the phenomenon of forced marriage. To this end, this chapter provides the book’s conceptual framework. First, the concept of marriage is elucidated and with the help of sociological definitions, a universally applicable definition of marriage is formulated (paragraph 2). In paragraph 3, several universal and regional human rights instruments are analysed. As a direct consequence of the Nazi racial laws prohibiting mixed marriages between certain ethnic groups and the injustices committed under the veil of marriage during the Second World War – such as child marriages and marriage as a cover for slavery – the international community saw fit to formulate marriage as a human right. By including the right to marry in the 1948 Universal Declaration of Human Rights (UDHR), the international community gave expression to the importance of this institution and its central position in society.²⁹ An entire gamut of international human rights treaties now contain provisions on the right to marry and on the equality between men and women during every stage of the marriage. After discussing these instruments, the concepts of coercion and consent are explored. Finally, in paragraph 4, a working definition of forced marriage is presented; if necessary, this working definition will be revised after the description and discussion of the practice of forced marriage as it takes place in times of peace and conflict (Chapters 2 and 3). A separate sub-paragraph is devoted to the practice of arranged marriages. Paragraph 5 contains some concluding remarks.

²⁹ Alkema 1984, p. 145. For the drafting history of the UDHR and the goals of achieving equality between men and women, see UN Economic and Social Council, UN Doc. E/HR/18/Rev.1, 16 May 1946, pp. 2–4 (available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/GL9/902/06/PDF/GL990206.pdf?OpenElement>>, last accessed December 2013).

2. MARRIAGE

2.1. THE SOCIOLOGY OF MARRIAGE

Marriage as a way of organising life and formalising relationships has existed as a social institution in all societies throughout history.³⁰ Throughout recorded history, marriage has been the main vehicle by which (private) property was exchanged and handed down to new generations, and by which sexual relationships and the position of children in society were regulated. At the same time, marriage has also always been one of the most important means of creating alliances, expanding networks, exerting political influence and enhancing social status.³¹

While the institution of marriage may be as old as the hills, the definition of marriage is not written in stone. Marriage, as opposed to, for example, birth – which is a biological event – is a dynamic social construct which is defined in terms of law and custom and may therefore vary considerably from society to society.³² Marriage refers both to the act of marrying, as well as to the continuing condition of the marital status, and, like ownership, it is generally understood as a legal title.³³ Consequently, the way in which marriage is defined in a particular society depends on the national laws governing the civil law marriage contract or the (religious) traditions or customs applicable to the union. But even within one particular society, customs and laws regarding marriage can differ. In Sierra Leone, for example, there are three recognised types of marriage: marriages under Islamic, civil and customary law.³⁴ Customary marriages, in turn, vary among the different ethnic groups.³⁵ The challenge is to adopt a cross-culturally valid definition of marriage. Such a universally applicable definition, if at all possible, will inevitably remain general due to the major differences between societies, both with regard to the formalities of what is considered a ‘wedding’ and to its cultural and social connotations.³⁶ For example, in most societies, marriages are, at least in theory, based on the free and full consent of both parties, but in other societies the consent of the relatives of the spouses may substitute their own consent. In some traditions, a marriage is regarded as a union of two families;

³⁰ According to Coontz 2005, pp. 24 and 32–33, the Na people of China were the only people who did not grant marriage a prominent place in their society.

³¹ Coontz 2005, p. 48. E. Bartels, ‘Gedwongen uithuwelijking: definitie, praktijk en culturele achtergronden’, in: SPIOR, *Hand in hand tegen huwelijksdwang*, SPIOR: Rotterdam 2007, p. 28.

³² UN Demographic Yearbook 2008, p. 9.

³³ J. Allain, ‘The definition of slavery in international law’, *Howard Law Journal* (52) 2008–2009, p. 257; and Rude-Antoine 2005, pp. 13–16.

³⁴ Human Rights Watch 2003a, pp. 15–16; and Scharf 2005, p. 79.

³⁵ See in general AFRC Expert Report Thorsen.

³⁶ With regard to the fact that the cultural and social connotations of marriage differ from one society to another, see ECtHR 24 June 2010, Appl. No. 30141/04 (*Schalk and Kopf v. Austria*), para. 62.

in others, it is seen purely as a union of two individuals.³⁷ Some cultures permit polygamy; others prohibit it.³⁸ Finally, in some societies, marriage requires some sort of formalisation in the form of a contract, registration or ceremony, whereas in other societies, no such formalities are required for a couple to be considered married.³⁹ In addition, the legal and social consequences that are attached to the marital status – such as inheritance, legal paternity and tax-related matters – may vary from one society to another.⁴⁰ Because of all of these differences, criteria such as cohabitation, running a joint household, division of domestic tasks and ritual recognition have each proved to be too limiting to serve as universal characteristics of marriage.⁴¹ And arguably, Western notions of marriage might be too exclusionary: they carry certain Euro-American connotations of love and marriage, namely that love (and passion) is the basis for partnering.⁴² Consequently, sociologists and anthropologists have emphasised the need to re-conceptualise these notions in context, by looking at the meaning of certain concepts within a particular society.⁴³

Anthropologists attempting to avoid using such narrow elements and/or a purely Western concept of marriage have defined marriage in several more abstract ways. Broadly speaking there are two approaches to defining marriage: one focuses on the act that establishes the union and on the other focuses on the consequences that are the result of the act of marriage. Some anthropologists, such as Gough in 1959, define marriage by referring to the legitimacy of the children resulting from this relationship, thereby linking legitimacy to marital status.⁴⁴ However, seeing as many (matrilineal) societies are quite unfamiliar with the concept of illegitimate children and as many countries have by now rejected the traditional legal distinction between legitimate and illegitimate children, this definition of marriage no longer rings true.⁴⁵ Others, such as Leach, argue that a cross-culturally applicable definition of marriage does not exist since there is

³⁷ R.J. Simon & H. Altstein, *Global perspectives on social issues. Marriage and divorce*, New York: Lexington Books 2003, p. 5.

³⁸ For example, polygamy is accepted in some Mormon communities, in a limited number of Islamic states and among certain African peoples, see M. Kottvedgaard Zeitzen, *Polygamy: a cross-cultural analysis*, Oxford: Berg Publishers 2008, esp. pp. 3–4.

³⁹ See e.g. on the so-called ‘common-law marriage’ Krause & Meyer 2007, pp. 54–57.

⁴⁰ In many societies, the marital status also has consequences with regard to criminal liability, expressed in the doctrine of spousal privilege (Scharf 2005, p. 85), see for example Article 217(3) Dutch Code of Criminal Procedure.

⁴¹ Coontz 2005, pp. 26–31.

⁴² This is different in some other cultures: for example, most Cambodians interviewed by LeVine placed values such as loyalty, kindness and harmony over love (LeVine 2010, pp. 27–29). With regard to cultural connotations of ‘marriage’ see also: Del Vecchio 2011.

⁴³ In this regard, compare McKay and Mazurana’s arguments pertaining to the notions of ‘child’ and ‘childhood’ in different societies, McKay & Mazurana 2004, p. 119. When discussing ‘marriage’, it is important to look at the meaning of this institution within the country in question (for an example in Sierra Leone, see Coulter 2009, p. 220).

⁴⁴ E.K. Gough, ‘The Nayars and the definition of marriage’, *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* (89) 1959, p. 23.

⁴⁵ Alkema 1984, p. 162.

such a large variety of (sub)types of marriages. Therefore, he proposed defining all the different institutions of marriage in terms of the allocation of classes of rights that result from a marriage. Leach listed ten examples of such rights, including property rights, legal parenthood and monogamy, stressing that these rights differ across cultures.⁴⁶ According to Leach, marriage is therefore 'a set of legal rules under which such items of property (e.g. goods, titles, and social status;⁴⁷ IH) are handed down from generation to generation'.⁴⁸ Another approach to defining marriage was proffered by Bell. In 1997, Bell defined marriage in terms of a right to sexual access. In his view, marriage is a relationship that provides a husband with a demand-right of sexual access and obliges a wife to yield to this demand.⁴⁹ This definition is problematic in the sense that Bell does not explain what he means by 'demand-right to sexual access', which leaves this term open to the interpretation that a husband has the right to sex on demand.⁵⁰ Whereas this might once have been the case, the criminalisation of marital rape in many jurisdictions (and its condemnation by the UN Declaration on the Elimination of Violence Against Women) most certainly has clarified that – at least in many societies – marriage does not establish a 'right' to sex on demand.⁵¹ Therefore, Bell's definition is not (or at least no longer) universally applicable.

The 2008 UN Demographic Yearbook provides a more neutral definition, defining marriage as 'an act, ceremony or process by which the legal relationship of husband and wife is constituted'. The legality of this relationship 'may be established by civil, religious or other means as recognised by the laws of each country or area'.⁵² Even though this definition is broad, inclusive and non-ethnocentric, it is discriminatory in the sense that it grammatically appears to exclude same-sex marriages. In light of the recent legalisation of same-sex marriages in several countries and in view of the customs in certain cultures that provide for the possibility of women marrying women and men marrying men, a definition that includes such marriages is warranted. The following anthropological definition, which in part takes Leach's rights-based approach, offers a solution. It appears inclusive enough to be cross-culturally valid: it is non-ethnocentric, gender-neutral with respect to marriage partners and it includes the possibility of polyandrous and polygynous marriages. According to this definition, formulated by anthropologists Haviland, Prins, Walrath and

⁴⁶ E.R. Leach, 'Polyandry, Inheritance and the Definition of Marriage', *Man* (55) 1955, p. 183.

⁴⁷ Coontz 2005, p. 28.

⁴⁸ E.R. Leach, 'The Social Anthropology of Marriage and Mating', in: V. Reynolds & J. Kellest (eds.), *Marriage and Mating*, Oxford: Oxford University Press 1991, p. 93.

⁴⁹ D. Bell, 'Defining marriage and legitimacy', *Current Anthropology* (38) 1997, p. 241. In a reply to the comments on his article, Bell explained that this definition is actually a criterion by which marriage may be identified (D. Bell, 'Reply', *Current Anthropology* (38) 1997, p. 250).

⁵⁰ M.L. Burton, 'Comments', *Current Anthropology* (38) 1997, p. 245.

⁵¹ However, in 2006, at least 53 countries still accepted marital status as a valid legal defence in rape cases (The Secretary-General, *In-depth Study on All Forms of Violence Against Women, delivered to the General Assembly*, UN Doc. A/61/122/Add.1, 6 July 2006, p. 89).

⁵² UN Demographic Yearbook 2008, p. 8.

McBride, marriage is ‘a culturally sanctioned union between two or more people that establishes certain rights and obligations between the people, between them and their children, and between them and their in-laws’.⁵³ These rights and obligations may relate to *inter alia* property, sex, child rearing, labour, inheritance and status.⁵⁴ According to Stone, ‘the only generalization one can make about marriage is that everywhere it entails intimate, if not emotionally charged, relationships between spouses, and everywhere it creates in-laws’.⁵⁵ Marriage thus involves a comprehensive union of spouses, a special link to children and norms of permanence and exclusivity.⁵⁶

2.2. DEFINITION OF MARRIAGE

A large range of international, regional and national human rights instruments contain provisions regarding the institution of marriage (see *infra* paragraph 3.1). Several of these instruments are specifically devoted to marriage and include provisions pertaining to the requirement of free and genuine consent, the condemnation of child marriages and the overall equality of men and women during all stages of a marriage. Yet none of these treaties, conventions, declarations or resolutions provide a (legal) definition of marriage. Therefore, recourse needs to be taken to other sources, such as case law and the interpretation of legal documents. As evidenced by the link between the words ‘marry’ and ‘to found a family’ in Article 12 European Convention on Human Rights (ECHR), at the time of the promulgation of the ECHR, marriage was regarded as the bedrock of the family within the European legal order and was therefore primarily aimed at procreation.⁵⁷ It follows from earlier case law of the European Court of Human Rights (ECtHR) that in most European countries, marriage was traditionally seen as a community between a man and a woman, contracted in a formalised procedure and based on permanence.⁵⁸ Due to societal changes as a result of which founding a family is no longer intrinsically linked to marriage, the ECtHR no longer adheres to this strict interpretation of marriage. Marriage, in the context of the ECHR, is now regarded as a legally and socially recognised and formalised form of (long-lasting) cohabitation that is based on exclusivity with regard to sexuality and on the mutuality of material and moral support and

⁵³ Haviland *et al.* 2010, p. 473.

⁵⁴ Haviland *et al.* 2010, p. 473. A more general definition is proffered in a report of Plan UK: ‘marriage is a formalised, binding partnership between consenting adults’ (Plan UK 2011, p. 2).

⁵⁵ Stone 2000, p. 187.

⁵⁶ S. Girgis, R.P. George & R.T. Anderson, ‘What is marriage?’, *Harvard Journal of Law & Public Policy* (34) 2011, p. 252.

⁵⁷ Van Grunderbeeck 2003, p. 198.

⁵⁸ Van Grunderbeeck 2003, p. 199. In almost all societies, marriage is intended to be a long-term (lifelong) commitment (LeVine 2010, p. 58).

affection.⁵⁹ Whereas this characterisation of marriage might be valid for most European and other Western countries, it does not necessarily hold true for other societies. As stated previously, the formal requirements for marriages vary from one country to another, as do the legal and social consequences. Consequently, the legal definition of this institution also varies.⁶⁰

However, when abstracting from the formal (ceremonial) requirements and the specific rights and obligations associated with it, it is possible to arrive at a description of marriage that is universally applicable. A marriage, whether religious or civil, must be seen as a contract between two or more persons⁶¹ and, for the purpose of this research, is defined as:

Any union between two or more people which, in a specific society is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital or marital-like.

This broad and expansive definition allows for many different types of unions to be characterised as marriage.⁶² ‘Marriage’ thus refers to a person’s civil or marital status, which reflects all legally sanctioned forms of partnership within a particular societal context that change the legal status of the parties concerned and that create mutual rights and obligations between the partners. In this way, many different forms of marriage and legally sanctioned marital-like associations, such as registered or civil partnership⁶³ and other unions that are equated with marriage in a particular society, will fall within the ambit of the definition.

⁵⁹ Van Grunderbeeck 2003, p. 238.

⁶⁰ Black’s Law Dictionary, 8th edition, 2004, defines marriage as ‘the legal union of a couple as husband and wife’. The 2006 3rd pocket edition of Black’s Law Dictionary defines marriages as ‘the legal union of a couple as spouses’.

⁶¹ *Sheffield City Council v. E and Another* (2005) Fam 326, para. 141(x). Marriage is regarded as such in Muslim law, as well as in Hindu and Christian laws on marriage (Siddiqi 2005, p. 286).

⁶² Del Vecchio 2011, pp. 17–18 argues for such an inclusive definition.

⁶³ Even though a partnership does not always have the same status and the same benefits as a marriage, it still establishes certain rights and obligations between partners. Moreover, in some countries, partnerships and other legal forms of cohabitation are often equated with marriage (see e.g. Alkema 1984, pp. 153–154). For example, in the Netherlands, the two unions are equal with regard to the legally prescribed conditions for entering the union and the rights and obligations between the partners (Article 80b of Book 1 of the Dutch Civil Code). For differences, see Chapter 7.

3. *CONSENSUS FACIT NUPTIAS: COERCION, CONSENT AND HUMAN RIGHTS*

3.1. HUMAN RIGHTS INSTRUMENTS

3.1.1. *Introduction: the legal effects of human rights instruments*

The legal effects of the human rights instruments listed in the following two sub-paragraphs vary from one instrument to another: some create positive and/or negative obligations for States Parties; others only contain recommendations or guidelines. Covenants, statutes, protocols and conventions, are legally binding for those States that have consented to be bound by them, by ratifying or acceding to them.⁶⁴ These instruments are broadly called treaties: international agreements that are governed by international law and concluded in written form, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation. Agreements can be made between one or more States and one or more international organisations.⁶⁵ Individuals are not party to these human rights treaties: States are. Human rights treaties require States to undertake to respect and ensure human rights. When implementing the duty to respect and ensure human rights, States have a double obligation: they must refrain from violating these rights and at the same time protect civilians from violations committed by other civilians. In this way, the treaties have indirect horizontal effect.⁶⁶ In addition, the preambles of several human rights instruments state that individuals also have a duty to respect human rights. These preambular considerations are not binding. However, common Article 5(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights stipulates that nothing in these covenants:

‘may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.’

This common provision has been interpreted as forbidding the abuse of human rights by non-State actors, including individual citizens.⁶⁷

⁶⁴ See Article 26 of the 1969 Vienna Convention, Article 26 of the 1986 Vienna Convention and <www2.ohchr.org/english/law>.

⁶⁵ See Article 1(a) 1969 Vienna Convention, Article 1(a) 1986 Vienna Convention.

⁶⁶ Saul 2008, pp. 234–235.

⁶⁷ UNCHR, *Terrorism and Human Rights: Preliminary Report by Special Rapporteur K. Koufa*, 7 June 1999, UN Doc. E/CN.4/Sub.2/1999/27, paras. 22–23; and Saul 2008, pp. 235–236.

Principles, recommendations, and resolutions, unlike treaties, are instruments that have no binding legal effect. They do, however, provide guidance to States and often also have a certain moral force.⁶⁸ These non-binding documents are also known as ‘soft law’: they are not law, but are important nonetheless and can exercise influence in the fields of international law and politics.⁶⁹ General recommendations made by the Committee on the Elimination of Discrimination against Women, for example, may be regarded as soft law: the recommendations are not binding, but are important in connection with the Convention on the Elimination of All Forms of Discrimination against Women.⁷⁰

The legal effects of the instruments of the EU are discussed in Article 288 of the Treaty on the Functioning of the European Union. Pursuant to this provision, regulations are binding in their entirety and are directly applicable in all member states of the EU. Directives are also binding, but only as to the result to be achieved and not with regard to the means with which the result is to be achieved. Decisions are also binding in their entirety, whereas recommendations and opinions have no binding force.

3.1.2. *Universal human rights instruments*

The right to marry out of free will is recognised in a plethora of universal human rights documents. Article 16 UDHR recognises the right of men and women of full age to marry and found a family and stipulates that ‘marriage shall be entered into only with the free and full consent of the intending spouses’.⁷¹ This right also incorporates the right not to marry.⁷² Article 10(1) ICESCR stipulates that ‘marriage must be entered into with the free consent of the intending spouses’.⁷³ The ICCPR formulates the principle of consent to marriage negatively: Article 23(3) ICCPR explicitly prescribes that ‘no marriage shall be entered into without the free and full consent of the intending spouses’.⁷⁴ On several occasions, the Human Rights Committee, the body that monitors the implementation of the ICCPR, has spoken out on the equality of rights between men and women in general and with regard to marriage in particular. For example, in General

⁶⁸ Shaw 2008, pp. 115–121.

⁶⁹ Shaw 2008, pp. 117–118.

⁷⁰ Shaw 2008, pp. 323–324.

⁷¹ See also Resolution 843 (IX) of the UN General Assembly on the Status of women in private law: customs, ancient laws and practices affecting the human dignity of women, 17 December 1954. This Resolution urges states to abolish laws and practices that limit women’s complete freedom in the choice of a spouse.

⁷² Gill & Anitha 2011, p. 6; and L. Lindholt & S. Schaumburg-Müller, *Human rights in development. Yearbook 2003*, Leiden: Brill 2005, p. 381.

⁷³ Note that ‘free and full consent’ implies absence of coercion: someone who was *forced* to marry will not have entered into that marriage with free and full consent.

⁷⁴ Bahrain, Israel and Kuwait made reservations with regard to Article 23 ICCPR in those cases in which the provisions of Article 23 conflict with their national (religious) laws, see: <<http://treaties.un.org>>.

Comment No. 28, the Committee enumerated a triad of factors that may prevent women from being able to freely make the decision to marry: the lack of a statutory minimum age for marriage, the practice whereby a (male) guardian consents to the marriage instead of the woman herself, and the practice whereby a rapist may limit or exclude criminal liability by marrying the rape victim, and whereby at the same time, the victim is pressured (by her relatives or the community at large) to accept this marriage. In addition, the Committee refers to restrictions on (re) marriage imposed on women and not on men, and the practice of polygamy, noting that this violates the dignity of women and constitutes discrimination against women.⁷⁵

Another important human rights instrument is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This Convention not only acknowledges the principle that marriage is entered into only with free and full consent, but also guarantees the right of men and women to freely choose a spouse (Article 16(1)b). Several countries made reservations with regard to Article 16. Although no country specifically referred to Article 16(1) (b), twelve states parties made reservations with regard to Article 16 as a whole.⁷⁶ It is therefore assumed that these states do not consider themselves bound by Article 16(1)(b) insofar as this provision is incompatible with their national laws.⁷⁷ The Committee on the Elimination of Discrimination against Women, the UN treaty body that monitors the CEDAW, has made many recommendations on issues affecting women. One of these recommendations, General Recommendation No. 21, pertains to Article 16 CEDAW and equality in marriage and family relations. This Recommendation elaborates on the right to choose a spouse and the ways in which this right is sometimes restricted by certain cultural and religious practices, resulting in forced marriages. The Recommendation concludes that '(s)ubject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom

⁷⁵ UN Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, CCPR/C/21/Rev.1/Add.10, 29 March 2000, paras. 23–24.

⁷⁶ Algeria, Bahrain, Egypt, India, Iraq, Israel, Maldives, Micronesia, Morocco, Singapore, Thailand and the United Arab Emirates (see *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women*, Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, Fourteenth meeting, New York 23 June 2006, UN Doc. CEDAW/SP/2006/2, 10 June 2006).

⁷⁷ These states made reservations to Article 16, insofar as this article is incompatible with their national laws (Algeria, Israel and Thailand), the Islamic Shari'a (Bahrain, Egypt, Iraq, Malaysia, Maldives, Morocco and the United Arab Emirates), or religious or personal laws (Singapore). India declared that it shall abide by and ensure the provisions of Article 16 'in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent'. (See *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women*, Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, Fourteenth meeting, New York 23 June 2006, UN Doc. CEDAW/SP/2006/2, 10 June 2006).

she will marry must be protected and enforced at law'.⁷⁸ The right to free choice of a spouse is likewise enshrined in the UN Declaration on the Elimination of All Forms of Discrimination against Women (Article 6(2)(a)).

Several other human rights instruments condemn the practice of forced marriage. Article 1(1) of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages⁷⁹ expressly stipulates that:

‘No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.’⁸⁰

The 1965 UN Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages reiterates free consent as a *condicio sine qua non* for marriage. The 1985 UN Nairobi Forward-looking Strategies for the Advancement of Women also address the importance of basing a marriage agreement on freedom of choice (paragraph 73). In 1991, the UN General Assembly adopted a Resolution concerning the implementation of the Nairobi Forward-looking Strategies.⁸¹ The importance of free and full consent to marriage, in the light of early marriages, was also stressed in the Beijing Declaration and Platform for Action, which was adopted during the Fourth World Conference on Women in September 1995.⁸² A Resolution concerning actions and initiatives to implement the Beijing Declaration adopted by the UN General Assembly five years later sums up actions to be taken by national governments to eradicate harmful customary or traditional practices, such as early and forced marriage.⁸³

The final instrument that ought to be mentioned is the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Article 1(c) of this convention explicitly classifies several marriage practices as slavery-like, namely any institution or practice whereby:

⁷⁸ CEDAW Committee, General Recommendation No. 21.

⁷⁹ The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages has 55 States Parties (December 2013).

⁸⁰ Bangladesh made a reservation to this provision, reserving the right to apply this provision insofar as it relates to the question of legal validity of child marriage, in accordance with the personal laws of different religious communities of the country (see <<http://treaties.un.org>>). No other state party made reservations relating to the requirement of full and free consent.

⁸¹ UN General Assembly, *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*, UN Doc. A/RES/46/98, 16 December 1991.

⁸² *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 15 September 1995, UN Doc. A/CONF.177/20 (1995), para. 274.

⁸³ UN General Assembly, *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, UN Doc. A/RES/S-23/3, 16 November 2000.

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.⁸⁴

In order to put a stop to these institutions and practices, the Supplementary Convention on the Abolition of Slavery prescribes that its 123⁸⁵ states parties take (legislative) action with regard to the minimum age of marriage, consent to marriage and registration of marriages (Article 2).

3.1.3. *Regional human rights instruments*

Whereas most international legal instruments stipulate the conditions that make a marriage valid and implicitly condemn the practice of forced marriage,⁸⁶ the majority of regional instruments are explicitly directed at the illegality of forced marriages. Article 6 of the Protocol to the African Charter on human and peoples' rights on the rights of women in Africa stipulates that member states enact legislative measures to guarantee that the minimum age of marriage for women is eighteen, that no marriage takes place without the free and full consent of both parties and that monogamy is encouraged as the preferred form of marriage.⁸⁷ Further, Article 19(i) of the 1981 Islamic Declaration of Human Rights stipulates that no person may be married against his or her will. Article 5(a) of the 1990 Cairo Declaration on Human Rights in Islam states that men and women have the right to marry regardless of their race, colour or nationality.⁸⁸ Article 33 of the 2004 Arab Charter on Human Rights⁸⁹ holds that men and women of full age have the right to marry and that no marriage can take place without the full and free consent of both parties. Article 17(3) of the American Convention on Human

⁸⁴ Article 1(c) Supplementary Slavery Convention.

⁸⁵ As of December 2013.

⁸⁶ UN Division for the Advancement of Women, *Forced and early marriage: a focus on central and eastern Europe and former Soviet Union countries with selected laws from other countries. Expert paper prepared by C. Thomas*, UN Doc. EGM/GPLHP/2009/EP.08, 19 June 2009, pp. 5–6; endnote 1.

⁸⁷ Note that the African Charter on human and peoples' rights makes no reference to marriage. The African Union, which adopted the African Charter on human and people's rights and its protocols, has 53 members. The Protocol on the rights of women in Africa was, in December 2013, ratified by 30 members of the African Union (see <www.au.int>).

⁸⁸ Note the absence of religion (and gender). The Cairo Declaration on Human Rights in Islam was adopted by the Organization of Islamic Cooperation which has 57 (December 2013) member states.

⁸⁹ The Arab Charter on Human Rights was adopted by the Council of the League of Arab States. The League has 22 member states. In December 2013, seven member states had ratified the Charter (see < www.lasportal.org >).

Rights also stipulates that no marriage shall be entered into without the free and full consent of the intending spouses.⁹⁰

In contrast to the abovementioned regional human rights instruments, the European Convention on Human Rights⁹¹ is silent on the right to enter into marriage only with free and full consent.⁹² Article 12 ECHR lays down the right of men and women of marriageable age to marry and found a family, in accordance with the national laws governing the exercise of these rights. As is the case in many other human rights documents, the right to marry encapsulated in the ECHR is restricted to the so-called ‘one-off action’ of *entering into* marriage, so the right to form a legal union and obtain a legal status.⁹³ It does not extend to any rights or obligations that are created by this legal status. These rights are protected by other provisions, such as the right to family life (Article 8 ECHR).⁹⁴ The equality of the spouses with regard to rights and responsibilities during all stages of the marriage is laid down in Article 5 of Protocol No. 7 to the ECHR. The second relevant European human rights instrument, the Charter of Fundamental Rights of the European Union (CFREU) does not explicitly require the consent of both parties either, but only specifies, in Article 9, that the right to marry is to be guaranteed in accordance with the national laws governing the exercise of this right. Unlike the ECHR, the CFREU does not refer to the right of men and women to marry, leaving out any reference to gender. Both Article 12 ECHR and Article 9 CFREU include in addition to a positive right to marry, a negative right, i.e. the right not to marry,⁹⁵ although the ECtHR has not yet asserted this.⁹⁶ A right to

⁹⁰ The American Convention on Human Rights was adopted by the Organization of American States. In December 2013, 24 of the 35 Members of the Organization had ratified the convention (see <www.oas.org>). None of the member states made reservations with regard to Article 17.

⁹¹ Signing and ratifying the ECHR is a precondition to becoming a member state of the Council of Europe. The Council of Europe has 47 member states (see <<http://hub.coe.int/>>).

⁹² Nonetheless, Article 12 ECHR does seem to implicitly include the right to marry free from any coercion (Liberty, Liberty’s Briefing: Forced Marriage (Civil Protection) Bill, London January 2007, p. 4; Schmidt & Rijken 2005, p. 14; and Van Grunderbeek 2003, p. 207). Moreover, forcing someone to marry against his or her will may constitute a violation of the underlying principles of personal autonomy and human dignity, and of the right to respect for private and family life, enshrined in Article 8 ECHR (Liberty, Liberty’s Briefing: Forced Marriage (Civil Protection) Bill, London January 2007, p. 4; and Van Grunderbeek 2003, p. 207).

⁹³ D. Gomien, D. Harris & L. Zwaak (eds.), *Law and practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg: Council of Europe Publishing 1996, p. 253.

⁹⁴ Van Grunderbeek 2003, pp. 199–200.

⁹⁵ Van Dijk *et al.* 2006, p. 843. In the same manner, the freedom of religion also includes the right not to have a religion, see ECtHR 18 February 1999, Appl. No. 24645/94, para. 34 (*Buscarini and others v. San Marino*). Article 11, which guarantees the positive right to freedom of association, also confers a negative right not to join an association, see ECtHR 30 June 1993, Appl. No. 16130/90 (*Sigurdur A. Sigurjónsson v. Iceland*), para. 35. See also N. Copeland, ‘Library Briefing: forced marriage in the EU – the legal situation’, Library of the European Parliament, 30 June 2011; Liberty, Liberty’s Briefing: Forced Marriage (Civil Protection) Bill, London January 2007, p. 4.

⁹⁶ Van Grunderbeek 2003, p. 207.

divorce is not guaranteed by Article 12 ECHR, or by Article 5 of Protocol No. 7 to the ECHR.⁹⁷

On the level of the Council of Europe, several resolutions have been passed that concern the issue of forced marriage. Resolution 1468 (2005) of the Council of Europe Parliamentary Assembly on forced marriages and child marriages condemns forced marriage and defines it as the union of two persons to which at least one of whom has not given their full and free consent.⁹⁸ The Parliamentary Assembly urges member states to refrain from recognising forced marriages and child marriages contracted abroad, to facilitate the (automatic) annulment of forced marriages and to regard as rape any coercive sexual intercourse that victims are subjected to within a forced marriage and child marriage. In addition, the Resolution asks member states to consider criminalising forced marriage as an independent criminal offence.⁹⁹ The Recommendation of the Committee of Ministers to member states on the protection of women against violence classifies forced marriage as a harmful traditional practice that may constitute violence against women, and recommends that member states prohibit marriages concluded without the consent of the persons¹⁰⁰ concerned.¹⁰¹

In April 2011, the Council of Europe adopted the Convention on preventing and combating violence against women and domestic violence.¹⁰² This Convention builds on the previously mentioned 2002 Recommendation of the Committee of Ministers on the protection of women against violence and sets legally binding standards with regard to the prevention of violence against women and domestic violence, the protection of the victims and the punishment of the perpetrators. For this purpose, the Convention establishes a number of criminal offences and requires the parties to ensure that several forms of violence against women, including forced marriage, are criminalised (Articles 33–39), but parties are not

⁹⁷ ECtHR 18 December 1986, Appl. No. 9697/82 (*Johnston and others v. Ireland*), para. 54. See also Van Dijk *et al.* 2006, pp. 852 and 987; and Van Grunderbeeck 2003, pp. 261–265.

⁹⁸ Resolution 1468 (2005) of the Council of Europe on forced marriages and child marriages, 5 October 2005, para. 4. See also Recommendation 1723 (2005) of the Parliamentary Assembly on the Resolution on forced marriages and child marriages, 5 October 2005.

⁹⁹ Resolution 1468 (2005) of the Council of Europe on forced marriages and child marriages, 5 October 2005, paras. 14.2–14.4. In 2001, in a recommendation concerning domestic slavery, the Parliamentary Assembly also recommended the Committee of Ministers to ask the governments of member states to ‘make slavery and trafficking in human beings, and also forced marriage, offences in their criminal codes’ (Recommendation 1523 (2001) of the Council of Europe on domestic slavery, 26 June 2001).

¹⁰⁰ It may be presumed that the Committee of Ministers meant ‘forced marriages concluded without the consent of *one or both* of the persons concerned’.

¹⁰¹ Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002.

¹⁰² Convention on preventing and combating violence against women and domestic violence CM(2011)49 of the Committee of Ministers of the Council of Europe (7 April 2011). Pursuant to Article 75, the Convention will enter into force once ten countries, of which at least eight are Council of Europe member states, have ratified it. In December 2013, eight member states had ratified the Convention and another 24 had signed it, including the United Kingdom and the Netherlands.

obliged to introduce *specific* provisions that criminalise this conduct.¹⁰³ Article 37 establishes the offence of forced marriage and requires parties to criminalise the intentional conduct of forcing someone (adult or child) to enter into a marriage. Likewise, parties are to criminalise the intentional conduct of luring an individual abroad with the purpose of forcing this individual to enter into a marriage.

According to the Explanatory Report, the term ‘forcing’ refers to ‘physical and psychological force where coercion or duress is employed’. The offence of forced marriage is completed once a marriage is concluded to which at least one party did not voluntarily consent as a result of the use of force, coercion or duress. In case of intentionally luring a person abroad with the intention of forcing the person to marry against his or her will, the marriage does not have to be concluded for the offence to be completed.¹⁰⁴ In accordance with Article 41, parties are required to establish as an offence any attempts to commit a forced marriage and the aiding or abetting of a forced marriage. Article 44 requires parties to establish jurisdiction over the offences described in the Convention on the basis of the principles of territoriality, and active and passive nationality. In addition, parties should establish jurisdiction over the offences when either the victim or the perpetrator has his or her habitual residence in their country. Further, the Convention eliminates the requirement of dual criminality for the most serious offences enumerated in the Convention, which includes forced marriage. The Convention also stipulates that when these offences are committed by nationals of the party concerned, jurisdiction should not be subordinated to the condition that prosecution can only be initiated when the victim has reported to offence or when the relevant authorities of the state in which the offence was committed filed charges.¹⁰⁵ In addition to criminalising certain conduct, the Convention requires parties to ensure that victims also have access to adequate civil law remedies. A victim of a prospective forced marriage should, for example, be able to turn to a civil law court to acquire a court order or injunction (Article 29).¹⁰⁶ Article 32 specifically deals with the civil consequences of forced marriages and stipulates that parties shall take (legislative) measures to ensure that marriages that were concluded under force ‘may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim’.

¹⁰³ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), paras. 21 and 155.

¹⁰⁴ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), paras. 195–197.

¹⁰⁵ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), para. 228.

¹⁰⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), para. 157.

On the level of the European Union, a Directive of 5 April 2011 concerning human trafficking links this phenomenon to forced marriage.¹⁰⁷ In accordance with this Directive, the concept of human trafficking also covers forced marriages insofar as they fulfil the constitutive elements of trafficking in human beings. The issue of forced marriage is also on the agenda of the EU outside the context of human trafficking. In June 2011, a hearing was organised by the European Foundation for Democracy at the European Parliament. During this hearing, the issue of criminalising forced marriage at EU level was discussed.¹⁰⁸

3.2. COERCION AND FORCE¹⁰⁹

There is no such thing as complete and absolute free will. Coercion is commonplace to human existence and indeed inevitable in human interaction. Different forms of coercion are used in many aspects of daily life: people are pressured into working for a living, minors are forced to attend schools, and the law – which is *enforced* – is used to make people do or refrain from doing certain things. In this sense, coercion must be seen as a valuable social and legal practice. Without it, there would be chaos. Nevertheless, not all forms of coercion are acceptable, nor is coercion desirable in all contexts: forcing someone to sign a contract at gunpoint can hardly be regarded as a practice that is to be encouraged.

The verb ‘coerce’ derives from the Latin *coercere*, which means to confine, to control or to constrain. In very broad terms, coercion may be defined as the act of making someone do, omit or undergo something that this person would not have done otherwise, by attaching to the scenario that the coerced person does not comply certain consequences that are perceived as harmful or negative by the coercee. According to Black’s Law Dictionary, coercion may consist of physical force or threat of physical force. For this purpose, the dictionary distinguishes between actual force, constituting a physical (violent) act on the one hand, and constructive force, which is often intangible and includes threats and intimidations, on the other hand.¹¹⁰ Bayles lists five conditions that apply to coercion: (1) X has the double intention of making Y do A and (2) of further hurting Y if he does not do so. (3) To this end, X threatens harm if Y does not do A. (4) As a result of this threat, Y does A, which, (5) had he not been threatened,

¹⁰⁷ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011, L 101/1).

¹⁰⁸ This hearing has yet to receive a follow-up.

¹⁰⁹ This paragraph and the next discuss the concept of coercion and consent in general, for more information on the meaning of coercion and consent in Dutch and English criminal law specifically, see Chapter 7. This Chapter will also go into the question as to under which circumstances the coercion used to establish a forced marriage may amount to a criminal offence.

¹¹⁰ Black’s Law Dictionary, 3rd pocket edition, 2006.

he would not have done.¹¹¹ In accordance with requirement 2, coercion can be distinguished from persuasion by the coercer's further intention of harm to the coerced if he does not act as the coercer wants.¹¹² This intention is not present in situations of persuasion. Lindenberg states that the concept of (criminal) coercion consists of five different elements: involuntariness, inevitability, the coerced's awareness of the coercion, the coercer's awareness of the coercion and causality. Criminal liability for coercion thus requires that the coerced acted as a result of the coercion exercised by the coercer (causality), that he did not want to act as he did (involuntariness), that he had no other reasonable option but doing what the coercer wanted (inevitability), that the coercer intended to force the coerced to do something (coercer's awareness), and that the coerced experienced the coercer's acts as coercive (coerced's awareness – which is particularly relevant in case of non-physical coercion).¹¹³

There are many different gradations of coercion. Coercion is often difficult to prove and is often expressed verbally so that the manner in which something is said (e.g. intonation, what the perpetrator means, how the victim interprets this), the circumstances in which something is said, who says it, etc., all become relevant aspects.¹¹⁴ The question of whether or not someone was forced, depends on both objective circumstances as well as subjective experiences of the persons involved.¹¹⁵ Some young people might experience any family involvement/interference as a form of pressure or coercion and a limitation of their free partner choice, whereas others value their parents' opinion, take into consideration their wishes and seek their blessing.¹¹⁶

The case law of the different international and internationalised tribunals and the ICC Elements of Crimes offer guidance in determining what force and coercion mean in the context of international criminal law. The first case in which the concepts of force and coercion were addressed under international criminal law was the *Akayesu* case. In this case, the ICTR Trial Chamber had to formulate a definition of the crime of rape. Holding that rape is a physical invasion of a sexual nature, committed on a person under circumstances which are coercive, the Trial Chamber stated that 'coercion' is not restricted to physical force:

¹¹¹ In his paper, Bayles lists 'Y does A' as a separate condition (M.D. Bayles, 'A concept of coercion', in: J.R. Pennock & J.W. Chapman, *Coercion*, New York: Aldine-Atherton Inc 1972, p. 24).

¹¹² M.D. Bayles, 'A concept of coercion', in: J.R. Pennock & J.W. Chapman, *Coercion*, New York: Aldine-Atherton Inc 1972, p. 28.

¹¹³ Lindenberg, pp. 20–35 and 133–175. Coercion is a distinct criminal offence pursuant to Dutch law. In accordance with Article 284 of the Dutch Criminal Code, a person is guilty of criminal coercion when he unlawfully coerces a person to do, not do or tolerate something by an act of force or another hostile act or by threat of force or threat of another hostile act, directed against the victim or a third person. In the Netherlands, the act of forced marriage is subsumed under this particular offence. The particular meaning of coercion in Dutch criminal law and the different elements of Article 284 are discussed in detail in Chapter 7).

¹¹⁴ Schmidt & Rijken 2005, p. 8.

¹¹⁵ Schmidt & Rijken 2005, p. 31. Gill & Anitha 2011, pp. 13, 55 and 91–92.

¹¹⁶ De Koning & Bartels 2005, pp. 45 and 61.

‘threats, intimidation, extortion and other forms of duress which prey on fear or desperation’ may also constitute coercion.¹¹⁷ In addition, the Trial Chamber stressed that coercive conditions may be inherent in certain situations, such as in armed conflicts.¹¹⁸ The ICTY Trial Chambers in the *Čelebići* and *Kvočka et al.* cases endorsed this conclusion.¹¹⁹ The ICTY Appeals Chamber in the *Kunarac et al.* case went a step further by considering that the circumstances prevailing in most cases charged under international criminal law will be almost universally coercive.¹²⁰ The ICTR Trial Chamber in the *Muhimana* case concurred with this opinion.¹²¹ Furthermore, both *ad hoc* tribunals have stated that coercion is also inherent in captivity, in the sense that captivity vitiates consent.¹²²

The *ad hoc* tribunals’ assessment of force and coercion is mirrored in the ICC Elements of Crimes. Pursuant to a footnote clarifying the element ‘forcibly’ – which is included in the definition of the crime of genocide by forcibly transferring children – force is not restricted to physical force, but may include threat of force or coercion.¹²³ The concepts of non-physical (threat of) force and coercion are further elaborated in the definitions of the crimes of rape, enforced prostitution and sexual violence. Taking enforced prostitution as an example, the first element of this crime requires that the perpetrator caused one or more persons to engage in one or more acts of a sexual nature:

‘by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power,^{124; 1H} against such person or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent’.¹²⁵

A footnote explains that natural, induced or age-related incapacity may render a person incapable of giving genuine consent.

3.3. CONSENT

Seeing as marriage and consent are closely interconnected – several international and regional human rights instruments regard the free and genuine consent

¹¹⁷ *Akayesu* Trial Judgement, para. 688.

¹¹⁸ *Akayesu* Trial Judgement, para. 688.

¹¹⁹ *Čelebići* Trial Judgement, para. 495; and *Kvočka et al.* Trial Judgement, para. 178.

¹²⁰ *Kunarac et al.* Appeal Judgement, para. 130.

¹²¹ *Muhimana* Trial Judgement, para. 546. See also De Brouwer 2009, pp. 583–593 and *Gacumbitsi* Appeal Judgement, paras. 147–157.

¹²² *Akayesu* Trial Judgement, para. 688; *Kunarac et al.* Trial Judgement, para. 646; *Furundžija* Trial Judgement, para. 271; *Kvočka et al.* Trial Judgement, para. 178.

¹²³ Article 6(e)-1 ICC EoC.

¹²⁴ The words ‘such as’ indicate that this list is not exclusive (Boon 2001, p. 651).

¹²⁵ ICC EoC Article 7(1)(g)-3.

of both parties as the *condicio sine qua non* for a valid marriage (see *supra* paragraph 3.1) – it is important to also take into consideration the concept of consent. Rude-Antoine states that the ‘consent to marriage depends simultaneously on psychological intent – inner commitment – and on a declaration of intent at the time the marriage is contracted’.¹²⁶ In the case of forced marriages, inner and declared consent will not necessarily be consistent: victims will have been forced to say ‘I do’ during the actual marriage ceremony (declared intent)¹²⁷ against their will (inner intent). Unless someone clearly voices his true inner intent, a person’s inner intent will be difficult to determine, especially in those cases where there is no actual physical evidence that someone was forced to marry.¹²⁸

Pursuant to Dutch and English law, consent cannot be qualified as valid when it was given as a result of coercion. Article 12(c) of the English Matrimonial Causes Act 1973 stipulates that a marriage is voidable on the ground that either party to the marriage did not *validly consent* to it, as a consequence of duress, mistake, unsoundness of mind or otherwise; and pursuant to Article 1:71(1) Dutch Civil Code, a spouse can request the annulment of a marriage if this marriage was contracted under the influence of an unlawful serious threat.¹²⁹

On the international level, the discussions pertaining to coercion and consent mainly take place in light of the definition of rape, but it is possible to put these discussions in a broader context. Consent and coercion constitute two different ways of understanding and conceptualising a criminal act: whereas consent focuses on the will and behaviour of the victim, coercion centres on the conduct of the perpetrator.¹³⁰ In accordance with the spectrum of human rights instruments, a marriage requires the free and full consent of both parties. Consent must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.¹³¹ It cannot be said to be full and genuine when it was formed under coercive circumstances. It has been held that the presence of factors such as coercion, force, or threats of force may evidence the absence of consent, and that coercion in general encompasses most conduct that negates consent.¹³² And seeing as the circumstances in situations where the majority of international crimes are committed are almost universally coercive, which

¹²⁶ Rude-Antoine 2005, p. 40.

¹²⁷ Note that the bush wives in Sierra Leone (see Chapter 3) were not even required to declare intent: they became bush wives to their captors merely by the declarative act of these captors.

¹²⁸ Rude-Antoine 2005, p. 21.

¹²⁹ Note that the Dutch Marital Coercion (civil law) Bill proposes to amend Article 1:71(1) of the Dutch Civil code, deleting ‘unlawful serious threat’ and instead making coercion a ground for interruption (see the legal framework set out in Chapter 7).

¹³⁰ K.A. Koenig, R. Lincoln & L. Groth, *The jurisprudence of sexual violence. Sexual violence & accountability project working paper series*, Human Rights Center University of California, Berkeley May 2011, p. 44.

¹³¹ AFRC Trial Judgement, para. 694. See also *Kunarac et al.* Appeal Judgement, para. 127.

¹³² RUF Trial Judgement, paras. 1470–1471; *Kunarac et al.* Trial Judgement, paras. 458–459 and *Muhimana* Trial Judgement, para. 546.

negates any consent, then true consent of the victim under those circumstances is virtually impossible.¹³³

This is reflected by Rule 70 of the ICC Rules of Procedure and Evidence pertaining to the principles of evidence in case of sexual violence. This Rule states that in case of sexual violence, the ICC shall be guided by and, where appropriate, apply the following principles relating to the issue of consent:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) (...).

As for the elements of rape, enforced prostitution and sexual violence, Rule 70 creates the presumption of non-consent in coercive situations and only allows for the affirmative defence of consent when it cannot be established that the circumstances under which the crime was committed were coercive.¹³⁴ When this is the case, the admissibility of evidence of consent is subsequently discussed and assessed *in camera*.¹³⁵ Forced marriages that take place in times of conflict often occur against the background of coercive circumstances, which means that the issue of consent will not, in principle, have to be examined by a court.¹³⁶

4. A (PRELIMINARY) DEFINITION OF FORCED MARRIAGE

4.1. FORCED MARRIAGE: A (WORKING) DEFINITION

Defining marriage in general, and forced marriage in particular, is difficult. This was recognised in a 2005 study by the Council of Europe on forced marriage in its member states:

¹³³ *Kunarac et al.* Appeals Chamber, para. 130. See also De Brouwer 2009, pp. 583–593.

¹³⁴ Boon 2001, pp. 652–653.

¹³⁵ See Rule 72 of the ICC Rules of Procedure and Evidence.

¹³⁶ Compare the Appeal Judgement in the case against the former leaders of the RUF: 'Having thus found, *inter alia*, that the victims were subject to enslavement, force and coercion, the Trial Chamber did not have to examine the issue of consent, and in particular to have assessed whether every victim did not consent' (RUF Appeal Judgement, para. 740).

‘Selecting a definition is not straightforward, for two reasons: firstly because the social and moral dimensions of marriage are not easily contained within a legal definition, and secondly because of the dual meaning of “marriage”, designating both the immediate act that initiates the state of being married, and the state itself as a continuing condition.’¹³⁷

Forced marriage is often regarded as an umbrella term used to denote a complex variety of acts. Perhaps as a result of the difficulties that surround it, there exist a great many definitions of the phenomenon, stemming from national and international case law, government documents, NGO reports and literature.¹³⁸ This multitude of definitions have two things in common: lack of consent on the side of at least one of the spouses and an emphasis on coercion exercised by another party. In the context of this book, forced marriage is defined as:

a marriage (i.e. a marital or marital-like association), which at least one of the partners entered into against their will as a result of some form of coercion exerted by another party.

The word ‘marriage’ in this definition should be understood in the way it was defined in paragraph 2.2 (*supra*), that is: a union between two or more people which, in a specific society is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital or marital-like. A forced marriage therefore refers to a sanctioned, binding partnership between two (or more) people.¹³⁹ The act of causing a forced marriage refers to forcing someone to enter into such a partnership against that person’s will.

A central element of a forced marriage is the exertion of force. As will be demonstrated in the next chapters, forced marriage can occur through psychological abuse, emotional blackmail, social pressure, physical violence, abduction or a combination of these factors. But when does force or pressure become criminal?¹⁴⁰ Especially on the level of national law, it will be important to distinguish between forced marriages and arranged marriages. By juxtaposing the two practices, the definition of forced marriage will become clearer and better demarcated.

¹³⁷ Rude-Antoine 2005, p. 16.

¹³⁸ For the different definitions of forced marriages in international criminal law, English law and Dutch law, see Chapters 2, 3, 7 and 8.

¹³⁹ Compare in this regard the Sierra Leonean bush marriages (Chapter 3): these associations are not seen as official marriages by the Sierra Leonean communities, but in the bush culture of the civil war, they were regarded as officialised conjugal associations.

¹⁴⁰ The criminality of coercion is further explored in Chapter 7.

4.2. ARRANGED MARRIAGE

Until two centuries ago, parental involvement in spousal selection was the norm rather than the exception in Euro-American society, especially amongst the aristocracy.¹⁴¹ Marrying out of love and free choice are therefore relatively new cultural ideals in Western civilisation. It was not until the end of the eighteenth century, during the Enlightenment, that the idea of love marriages started to become popular. Hitherto – as in most societies worldwide – marriage was regarded as such an important economic and sometimes even political institution that love, a transitory and volatile emotion, was not considered to be the primary reason for a marriage. Marriage was a means of accumulating resources, rising up the social ladder, increasing a family's labour force, forging political alliances or securing succession by providing a family with an heir. Companionship was a secondary goal and love a possible but not a necessary bonus.¹⁴² Because marriage was such an important strategic political and economic weapon, more often than not, parents, kin and others were actively involved in arranging the marriages of their children, choosing potential partners on the basis of their compatibility.¹⁴³ The practice of the arrangement of marriages thus performed an important function in society.¹⁴⁴

Nowadays, in many countries, parents (or other relatives) still take a leading role in arranging the marriages of their children, for many of the same reasons mentioned above. The practice of arranged marriage, which takes place on all continents, but most commonly in India, the Middle East, Japan, China and parts of Africa,¹⁴⁵ gives expression to a communal view of marriage and plays an important role in preserving culture, tradition and the community, symbolising the union of two families instead of just two individuals.¹⁴⁶ As stated by Siddiqi, referring specifically to the importance of marriage in Bangladesh, '(m)arriages can seal or undermine existing social relations of kinship and alliance and often set a public precedent for similar future arrangements'.¹⁴⁷ Seeing as the arranging of marriages is a custom¹⁴⁸ (and not so much part of religious practice¹⁴⁹), the

¹⁴¹ Samad & Eade 2003, p. 43; and A.S. Roy, *Marriage Customs and Ceremonies in World Religions*, Victoria, BC: Trafford Publishing 2005, p. 186.

¹⁴² Coontz 2005, pp. 6 and 19.

¹⁴³ Coontz 2005, pp. 5 and 15; and Samad & Eade 2003, p. 41.

¹⁴⁴ Parrot & Cummings 2008, p. xii.

¹⁴⁵ A.S. Roy, *Marriage Customs and Ceremonies in World Religions*, Victoria, BC: Trafford Publishing 2005, pp. 185–186. Roma communities in Europe are also known for arranging marriages, also between minors; see J. Timmerman, 'When her feet touch the ground: conflict between the Roma familistic custom of arranged juvenile marriage and enforcement of international human rights treaties', *Journal of Transnational Law & Policy* (13) 2004, pp. 475–497.

¹⁴⁶ An-Na'im 2000, p. 3.

¹⁴⁷ Siddiqi 2005, p. 295.

¹⁴⁸ Although arranged marriages are also often economically driven. See Plan UK 2011, p. 8.

¹⁴⁹ Arranged marriages are practiced by people of all major religions. For example, in the United States of America, some Mormon fundamentalist communities are known to arrange

customs pertaining to this tradition vary strongly from one culture to another.¹⁵⁰ In general terms though, it can be said that an arranged marriage is any marriage which parties other than the two spouses actively took part in bringing about, usually by selecting the potential marriage partners and introducing them to each other with the aim of having them enter into marriage.¹⁵¹ It has also been defined as a 'contractual agreement, written or unwritten, between two families, rather than individuals'.¹⁵²

In diaspora communities, arranged marriages are considered to be a way to preserve culture and tradition, affirm ethnic identity,¹⁵³ strengthen family ties, especially with relatives abroad, enhance social networks and status, and affirm group boundaries.¹⁵⁴ Transnational arranged marriages may also arise out of a sense of duty towards relatives in the 'home' country, giving them an opportunity to gain entry to a more economically developed country. Further, the feeling that the marriage pool in the immigration country is limited as a result of which a suitable match must be found abroad can be a reason for transnational arranged marriages.¹⁵⁵

There are many different types of arranged marriages. Qureshi distinguishes three: planned, delegated and joint-venture marriages. In a planned arranged marriage, parents take care of the entire process and select a spouse without consulting their child. A delegated arranged marriage implies that children, especially sons, tell their parents what kind of partner they would like and the parents take these criteria into consideration when selecting a spouse. This type of arranged marriage usually also allows for chaperoned interaction. In the joint-venture arranged marriage, both children and their parents are actively involved in the process of selecting a spouse.¹⁵⁶ It appears that the risk of coercion

marriages between their members (P. McAvoy, 'Should arranged marriages for teenage girls be allowed?' *Theory and Research in Education* (6) 2008, p. 5).

¹⁵⁰ It would not be right to present a monolithic view of all (arranged) marriage practices as the particularities are very diverse amongst different cultures: practices in arranged marriages include the future husband building a house for his future wife (in Cambodia, see Pich-Sal, *Le mariage Cambodgien*, Sihanouk: Université Buddhique Preah, pp. 1–4), the family of the bride giving (the family of) the groom a dowry (India) and the future husband symbolically presenting the bride's family with kola nuts (Sierra Leone, see AFRC Expert Report Bangura). Therefore, this chapter will discuss *general* characteristics of arranged marriages that are similar across many cultures.

¹⁵¹ For example, Scharf 2005, p. 87 defines an arranged marriage as the practice whereby the intending spouses delegate the process of selecting a spouse to members of their family.

¹⁵² A.U. Zaidi & M. Shuraydi, 'Perceptions of arranged marriages by young Pakistani Muslim women living in a Western society', *Journal of Comparative Family Studies* (33) 2002, p. 496.

¹⁵³ Conversation with Senior Policy Advisor of the Crown Prosecution Service (dd. 20 April 2012); An-Na'im 2000, p. 3; and D. Bradley, 'Duress and arranged marriages' *The Modern Law Review* (46) 1983, p. 500.

¹⁵⁴ Siddiqi 2005, p. 294.

¹⁵⁵ Samad & Eade 2003, pp. v and 48–49.

¹⁵⁶ R.B. Qureshi, 'Marriage Strategies among Muslims from South Asia,' in: Y. Haddad en J. Smith (eds.), *Muslim Communities in North America*, Albany: SUNY Press 1991, p. 185, reproduced

is highest in the context of the so-called planned arranged marriages; once coercion is used, this type of arranged marriage will become a forced marriage.

4.3. NOTIONS OF SHAME AND HONOUR

As stated, (many of) the reasons for parental/family involvement in marital affairs mentioned above are similar across cultures and times: there might be financial considerations, motivations related to endogamy, or a marriage between two people may be arranged in order to fulfil a pledge made between the parents years ago, or even in order to repay a debt.¹⁵⁷ A concept that plays a very important role in the practice of arranged marriage specifically in South Indian and Islamic culture, but also in Catholic and Protestant culture, is honour.

All cultures are to a certain extent familiar with the concept of honour defined as virtue, and all cultures value virtuous behaviour, altruism, and moral integrity and character.¹⁵⁸ But certain cultures and societies attach more importance to the notion of honour than others. In these so-called honour cultures, honour manifests itself as a central theme in everyday life, and to a large extent dictates social activity, determining interaction between people, and permeating all social layers.¹⁵⁹ Approximately 80% of the world population lives in an honour culture and derives an important part of their sense of self-esteem from honour.¹⁶⁰ In many of these societies, honour is mainly linked to the reputation of men, which in turn is based on their ability to protect their family and the extent to which others respect them. Female honour, on the other hand, is tied up with the avoidance of shame and upholding the family's reputation, requiring modesty, chastity and obedience.¹⁶¹ In many honour cultures, male honour is linked to female purity and women are seen as the bearers of family honour; their (sexual) behaviour can uphold family honour or bring dishonour and shame.¹⁶² Controlling female sexuality is therefore important in many honour cultures. For example, traditional Latin-American cultures historically required unmarried women to be virgins, wives to be faithful, and widows to be chaste, 'the system

in A.U. Zaidi & M. Shuraydi, 'Perceptions of arranged marriages by young Pakistani Muslim women living in a Western society', *Journal of Comparative Family Studies* (33) 2002, p. 496.

¹⁵⁷ See *inter alia* IKWRO, *Response to the government consultation on forced marriage*, February 2012, p. 7; and Muslim Arbitration Tribunal, *Liberation from forced marriage*, 2008, para. 3.2.

¹⁵⁸ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 12; Vandello & Cohen 2003, pp. 997–998 (see this article specifically with regard to the importance of honour in certain South American societies).

¹⁵⁹ Examples of honour cultures are Middle Eastern, South Asian, Arab and American South Anglo cultures (such as Texas), Mediterranean societies, and Iberian influenced South-American cultures (see Vandello & Cohen 2003, pp. 998 and 1000).

¹⁶⁰ M. Albrecht, 'Huwelijksdwang en eer', in: SPIOR, *Hand in hand tegen huwelijksdwang*, SPIOR: Rotterdam 2007, p. 43.

¹⁶¹ Vandello & Cohen 2003, p. 998.

¹⁶² Meetoo & Mirza 2007, p. 191; and Vandello & Cohen 2003, pp. 998–999.

of family honour thereby sought to prevent and constrain the sexual activity of single daughters and married women'.¹⁶³ Honour being of the utmost importance, parents will often want their (female) children to get married before they become sexually active to prevent any shame being brought upon the family.

Seeing as obedience and refraining from pre- or extramarital sexual relations are fundamental elements of female behaviour for upholding family honour, choosing one's own marriage partner or having a boyfriend is often regarded as dishonourable. In such cases, modifying the woman's behaviour can reclaim honour.¹⁶⁴ It is in this setting that the concept of (family) honour comes to the fore as the main motivator for external involvement in decisions related to marriage. Honour dictates that children marry a spouse who is regarded as appropriate in the eyes of the family and community and as a consequence, the family of the child will take a leading role in selecting this partner from within a limited circle of suitable partners. Suitability generally refers to religion and religiousness, lineage, profession, wealth or means and societal position.¹⁶⁵ Free choice marriages potentially threaten the honour of the family, because they make it more difficult for the parents to exercise control over potential marital alliances and to rein in their children's choice to suitable partners from within an acceptable circle.¹⁶⁶

In a report published by the Muslim Arbitration Tribunal on forced marriage in England, the Tribunal explained the link between marriage and the concepts of honour and pride, explaining that the following types of marriage are especially motivated and affected by honour:

1. Marriages that have been agreed at the birth of the children must be fulfilled irrespective of later circumstances and desires of the parties;
2. Marriages that are dictated by the caste of the families;
3. Marriages that are decided by historical local friendships of members of the family;
4. Marriages that are the product of familial necessity, e.g. the desire to settle a poorer wing of the family;
5. Marriages that are decided by the material aspirations and advancements of the parents;
6. Marriages that are linked to political aspirations of the parents either within the family or the community;

¹⁶³ M. Nazzari, 'An urgent need to conceal', in: L.L. Johnson & S. Lipsett-Rivera (eds.), *The faces of honor: Sex shame, and violence in colonial Latin America*, Albuquerque: University of New Mexico Press 1998, p. 104.

¹⁶⁴ Sen 2005, p. 47. In this way, a (forced) marriage (often with the offender) may also be used to 'restore' honour after rape or sexual abuse/assault (CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 13).

¹⁶⁵ E.Y. Krivenko, *Women, Islam and International Law*, Leiden: Martinus Nijhoff 2009, pp. 60–61.

¹⁶⁶ Siddiqi 2005, p. 294. See also Bakker & Felten 2012, pp. 14–15 and 47–48 for an account of the ways in which children's marriage choices are limited in Dutch orthodox Protestant communities.

7. Marriages that solidify the strength of one parent's side of the family over the other;
8. Marriages that protect the interests of the parents in their ancestral agricultural farmland, by the family of the other spouse;
9. Marriages that are primarily aimed at fulfilling the care/needs of the parents.¹⁶⁷

In these types of marriages, the wishes of the two individuals who are to be married are often subjugated to those of their parents and thus of secondary importance.¹⁶⁸

Although the majority of publications focus on honour and shame in (South) Asian cultures, it should be noted that these concepts are not foreign to Western European culture either.¹⁶⁹

4.4. FORCED ARRANGED MARRIAGES

The reasons why parents may resort to force when their children do not agree to marry according to their wishes are complex and diverse. Key motivations for forced marriages, especially in migrant communities, include building stronger families to strengthen ties and links, and preserving certain cultural and religious traditions and values of the home country, even though these may have changed.¹⁷⁰ A forced marriage may also be a response to pressure either from peer groups or extended family, for example because an agreement was reached about marriage a long time ago, or because family members abroad wish

¹⁶⁷ Muslim Arbitration Tribunal, *Liberation from forced marriage*, 2008, para. 3.2.

¹⁶⁸ Muslim Arbitration Tribunal, *Liberation from forced marriage*, 2008, para. 3.2.

¹⁶⁹ This can be demonstrated by an English forced marriage case from 1986: when a 17-year-old girl refused to marry him, the rejected lover falsely informed the girl's parents that she was pregnant. The girl's father, presumably to prevent the shame of an extramarital pregnancy, threatened to put her in a convent or home unless she agreed to marry the man in question. Subjected to grave fear of virtual incarceration, the girl succumbed to her father's threats and married the man in question. Once married, it became clear that the girl had not been pregnant. Upon a petition of nullity, the judge held that the marriage was void for duress as a result of threats of incarceration uttered by her father (*McLarnon v. McLarnon* (1968) 112 S.J. 419). See also a more recent Irish case, where a woman married the man who got her pregnant out of fear of losing her position in society and her job: her parents had told her to marry him, otherwise she would be shunned, and her employer had made it clear she could not stay on as an unmarried mother (*W. (C.) v. C.* (1989) I.R. 696). See also paragraph 4.5 *infra* on forced marriages in Dutch orthodox Protestant communities.

¹⁷⁰ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 5; and conversation with Senior Policy Advisor CPS (20 April 2012). In this regard it is interesting to note the concept of fossilisation of cultural practices. Often it is the case that especially first generation immigrants hold on to traditions and ideals that were part of their lives at the time they left their birth country in the 1950s/1960s, whereas in that country, these traditions and values have changed in the meantime (A Choice by Right: The Report of the Working Group on Forced Marriage 2000, p. 14).

to obtain foreign citizenship through marriage. In these situations, parents can be pressurised to marry their children off to the extent that they themselves may even be attacked.¹⁷¹ Other reasons for forced marriages are achieving financial gain, fulfilling long-standing family commitments, or simply not accepting a person's wish to remain unmarried.¹⁷² In cases concerning a person with a mental or physical disability, parents may wish to provide their child, or themselves, with a caregiver in the form of a spouse.¹⁷³ These motivations are very similar to the motivations underlying arranged marriages.¹⁷⁴

In a 2007 report, the Special Rapporteur on Trafficking in Persons listed the following types of forced marriages:

‘The different kinds of forced marriage listed include: to settle debt (Afghanistan); to receive dowry payment (Tanzania); to further cultural/economic interests, e.g. forced marriages initiated by landlords or local commanders who overrule girls/women and parents (Afghanistan); to gain control over daughters' lives by sending daughters back to the home country to marry local men (United Kingdom, United States of America, France, Austria and Switzerland); of girls to men from overseas in order for them to obtain residence permits as husbands (United Kingdom, Germany); to display status, e.g. bride wealth (Kenya); as inheritance when a widow is forced to marry a dead husband's brother, or a widower marries a dead wife's younger sister without her consent (Africa); in *trokosi* or *devadasi*, when young girls are forcibly married to a local god, represented by a priest (Ghana and India); after abduction or kidnapping (Afghanistan, Ghana, Serbia among the Roma people); to any willing groom, often men with disability or of lower class, to a girl who is impregnated while living at home by a male relative (Kenya); to “protect” a girl's virginity and counteract promiscuity (Kenya); as compensation when men of one extended family have killed a man of another extended family (Afghanistan); to relieve poverty and for economic gain (Zambia); and to facilitate female genital mutilation (Ethiopia).’¹⁷⁵

The underlying cause for the vast majority of forced marriages in most cultures, however, appears to be linked with protecting or upholding family honour, which includes preventing relationships that are regarded as unsuitable by parents, relatives or community members.¹⁷⁶ This holds for South Asian, North African,

¹⁷¹ Kazimirski *et al.* 2009, p. 16.

¹⁷² Demos 2012, p. 15.

¹⁷³ Kazimirski *et al.* 2009, p. 16. Research has demonstrated that physically and mentally disabled people constitute a significant percentage of the total number of victims of forced marriage (CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 23; and Probert 2008).

¹⁷⁴ Proudman 2011, p. 33.

¹⁷⁵ UN Human Rights Council: Report of the Special Rapporteur on Trafficking in Persons 2007, para. 28.

¹⁷⁶ *The Missing Link: A joined up approach to addressing harmful practices in London*, London: Imkaan 2011, p. 4; Choudhry 2011, p. 70; Conversation with IKWRO Campaigns Officer (14 May 2012). The transcript of the interview is on file with the author; and *Report of the*

Turkish, Surinam-Hindustani as well as orthodox Protestant and very strict Catholic communities. Honour, in turn, can be traced back to patriarchy and the resulting hierarchical power relationships between men and women and between parents and children; it is, as Sen states, based on patriarchal notions of ownership and control of women.¹⁷⁷

Family honour is especially used as a reason to control female behaviour.¹⁷⁸ As explained above, in many (honour) cultures, women are seen as the bearers of family honour. Upholding family honour requires deference, obedience, modesty and chastity. In this context, having a (sexual) relationship may often be regarded as behaviour that causes shame. A forced marriage, therefore, is often triggered when a woman (or man) exercises her right to self-determination either by choosing her own partner,¹⁷⁹ or by rejecting the spouse selected by her family.¹⁸⁰ Refusing to participate in an arranged marriage can be seen as a transgression of the code of honour and this may result in the use of force.¹⁸¹ As An-Na'im puts it: 'the honor of a family is tied primarily to the status of the woman, leaving her much more vulnerable to the persuasion and coercion into a union to which she objects'.¹⁸² In the context of preventing shame and protecting honour, forced marriages can also be used as a means to correct 'unwanted' behaviour, such as alcohol and drug use, criminal activities or sexual orientation.^{183, 184}

4.5. AN EXAMPLE: FORCED MARRIAGES IN DUTCH ORTHODOX PROTESTANT COMMUNITIES

Illustrative in the context of the forced/arranged marriage dichotomy and the concept of honour is a recent study focusing on the prevalence of domestic violence in some orthodox Protestant communities in the region known as the Dutch Bible

Working Group on Contemporary Forms of Slavery on its twenty-eighth session, UN Doc. E/CN.4/Sub.2/2003/31, 27 June 2003, para. 11.

¹⁷⁷ Sen 2005, p. 48.

¹⁷⁸ Heaton, McCallum & Jogi 2009, p. 9; Gangoli, Razak & McCarry 2006, p. 13; and Razack 2004, p. 165.

¹⁷⁹ See e.g. *Hirani v. Hirani* (1984) 4 FLR 232 (CA).

¹⁸⁰ Razack 2004, p. 164.

¹⁸¹ Sen 2005, p. 49.

¹⁸² An-Na'im 2000, p. 4.

¹⁸³ *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 9, para. 36; and *A Choice by Right: The Report of the Working Group on Forced Marriage 2000*, p. 14. LGBT (lesbian, gay, bisexual and transgender) people may be forced into marriage to 'cure' their sexual orientation (CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 12).

¹⁸⁴ Indeed, as a result of deeply ingrained homophobia in conservative communities, lesbian, gay, bisexual and transgender people appear to be at high risk of being forced into a marriage (Demos 2012, p. 15).

belt.¹⁸⁵ This study concludes that in these communities, mechanisms of group pressure and social exclusion comparable to those prevalent in honour cultures are used to keep up appearances – indeed, it could be argued that these strict Protestant communities can be characterised as honour cultures. If community members do not adhere to the (moral) rules of the religious community, they will bring shame and dishonour upon themselves and their relatives, which puts them at risk of banishment.¹⁸⁶ In many communities, a child's partner choice is severely limited by its parents: parents want their child to marry someone who belongs to the same religious community – note that there are countless different denominations and sub groups in Protestantism – and who is strict enough in their religious belief and practice. If the child chooses a partner from a different religious community, some strict parents will do everything in their power either to have the partner in question convert to their particular belief or to prevent the marriage altogether. The respondents in the study report that parents and other family members use both psychological violence, in the form of humiliation, and threats of hell and damnation, exclusion and disownment, as well as physical violence to prevent marriages that are seen as undesirable.¹⁸⁷ In addition to preventing marriages, forced marriages are not uncommon either, especially in cases of extra-marital pregnancy, although it appears that in many circles the taboo is being lifted and replaced by a more open-minded view. The report defines a forced marriage as a marriage that one or both partners entered into involuntarily as a result of coercion or pressure exerted by parents, family members, relatives or community members.¹⁸⁸ Especially in case of homosexuality, some parents might pressurise their child to marry someone belonging to the opposite sex.¹⁸⁹ Force relating to marriage also arises in cases of extra-marital pregnancies. In many orthodox Protestant communities, sex and marriage are inextricably linked to each other: extra-marital sex is seen as a sin which becomes even more problematic when resulting in extramarital pregnancy because the sin then becomes visible for all. In the traditional and very closed Protestant communities in the Dutch Veluwe region, extramarital pregnancy can result in a forced marriage. In these communities, unmarried mothers are completely excluded from religious and social life; they are regarded as bringing disgrace to their families. A couple that has had extramarital sex will be required to publicly confess to their sins. Refusing the marriage that is subsequently 'proposed' by the church and parents can result in banishment.¹⁹⁰

¹⁸⁵ For more details on forced marriage in the Netherlands and in autochthon Dutch communities, see Chapter 2.

¹⁸⁶ Bakker & Felten 2012, pp. 14, 28, 31 and 49. The study does not provide any statistical data on the number of forced marriages taking place in these Protestant communities.

¹⁸⁷ Bakker & Felten 2012, pp. 18–22 and 47–48.

¹⁸⁸ Bakker & Felten 2012, p. 15.

¹⁸⁹ Bakker & Felten 2012, pp. 22 and 48.

¹⁹⁰ Bakker & Felten 2012, pp. 20 and 31.

Therefore, what is stated above with regard to South Asian, Turkish and North African communities is in part also applicable to very conservative religious autochthon communities in the Netherlands. Indeed, it would appear that notions of shame and honour play more important roles in conservative and closed communities in general, which puts members of these communities who wish to make their own choices at a higher risk of practices such as forced marriage.

4.6. DISTINGUISHING ARRANGED MARRIAGES FROM FORCED MARRIAGES

It is often stated that it is possible to draw a sharp line between arranged marriages and forced marriages. The main reasons for making such a clear distinction pertain to the desire to express cultural sensitivity, and not to appear racist or to stigmatise arranged marriage in general.¹⁹¹ To this end, arranged marriages are distinguished from forced marriages on the basis that in an arranged marriage, even though parties other than the spouses took a leading role in choosing the partner, both spouses fully and freely consented to the marriage. A forced marriage, on the other hand, takes place without the free and full consent of one or both of the spouses.¹⁹² In this light, it has been suggested that arranged and forced marriages are best situated along a continuum of consent, alongside the degree of choice offered to spouses in the arrangement of marriages.¹⁹³ On the one end are the arranged marriages in which the final decision to get married lies with the intending spouses; on the other end are the arranged marriages in which force was used to obtain ‘consent’. In between these two extremes lies a grey area and it is this grey area that makes the perspicuous distinction of arranged marriages from forced marriage an arduous task.¹⁹⁴ Due to the many forms of arranged marriages and the degrees of choice offered to spouses in the arrangement of marriages, coupled with the complexity with which (passive) coercion may manifest itself within family relations, unlike what is often stated, such a sharp distinction cannot be made.¹⁹⁵ In addition, it should be noted that

¹⁹¹ Enright 2009, p. 332; and Deveaux 2007, p. 172.

¹⁹² See Foreign and Commonwealth Office 2006, p. 4. The governments of Austria, Canada, Norway and Germany have made this distinction in the same manner, see UN Human Rights Council: Report of the Special Rapporteur on Trafficking in Persons 2007, para. 25.

¹⁹³ Rights of Women, *Forced Marriage: A Wrong Not a Right. Rights of Women Response to the Home Office/Foreign and Commonwealth Office Consultation on Criminalisation*, p. 5.

¹⁹⁴ Sigma Huda, former Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, stresses that the line between an arranged marriage and a forced marriage is in some cases thin (UN Human Rights Council: Report of the Special Rapporteur on Trafficking in Persons 2007, para. 26).

¹⁹⁵ Enright 2009, pp. 339–340; Scharf 2005, pp. 88–89; and Samad & Eade 2003, p. 43. The choice may also be restricted because the spousal selection was limited by the marriage arrangements: which means the man or woman in question can only choose from a limited

the reasons why families practice arranged marriages are very similar to the motives for forced marriages. What complicates matters even more is the fact that in certain cultures, such as South Asian cultures, it is considered shameful for an unmarried woman to express individual desire, and specifically with regard to matters of marriage, women are expected to refrain from voicing their opinions too explicitly.¹⁹⁶ Indeed, when asked whether she consents to a marriage, a woman is not expected to answer directly. Consent may be inferred from body language such as smiling, averting the eyes or covering the face, and is often assumed in the absence of explicit verbal rejection.¹⁹⁷ Therefore, claiming that it is possible to draw a strict line between forced and arranged marriage misjudges the amount of pressure and multifaceted forms of coercion (in the form of social expectations and emotional pressure) men and women may be exposed to in the context of an arranged marriage.¹⁹⁸

Although high value is attached to the consent of both spouses in many cultures in which arranged marriages are customary,¹⁹⁹ it is difficult to establish the degree to which consent to an arranged marriage was actually free and full. Obviously, not every arranged marriage is also a forced marriage, but women and men may be under severe pressure by their relatives and might marry for the good of their family, clan or community. The pressure exerted in most forced marriages often consists in socio-cultural expectations and emotional pressure.²⁰⁰ The reluctant, or forced, consent that is given as a result can hardly be qualified as 'free and full consent' as required by international human rights instruments. There are many shades of coercion ranging from passive and implicit pressure, such as social expectations, to active and explicit force, such as the use of physical violence. And, 'it seems undeniable', as Deveaux stated, that in the custom of arranged marriages 'short of what would constitute forced marriage, less severe forms of pressure on young adults, particularly girls and young women, may also be present'.²⁰¹ Certainly, little pressure may be needed when it is applied by parents or other important and dominant figures in an individual's life: parents may resort to arguments related to duty, honour, personal affection, religion,

number of candidates (Enright 2009, p. 340, footnote 45). This can violate the right to free choice of spouse, as enshrined in Article 16(1)(b) Convention on the Elimination of All Forms of Discrimination against Women.

¹⁹⁶ Siddiqi 2005, pp. 282, 291 and 293.

¹⁹⁷ Lucy Carroll, 'Arranged marriages: law, custom, and the Muslim girl in the U.K.' *Women Living under Muslim Laws*, Dossier 20, July 1998, p. 5.

¹⁹⁸ A. Bredal, 'Tackling forced marriage in the Nordic countries: between women's rights and immigration control', in: S. Hossain & L. Welchman (eds.), *Honour: Crimes, Paradigms and Violence Against Women*, London: Zed Books 2005, p. 167; and Deveaux 2007, p. 148.

¹⁹⁹ For example among several ethnic groups in Sierra Leone (Coulter 2009, pp. 76–84).

²⁰⁰ Gangoli, Razak & McCarry 2006, p. 10; see also Deveaux 2007, p. 167.

²⁰¹ M. Deveaux, 'Personal autonomy and cultural tradition. The arranged marriage debate in Britain', in: Arneil *et al.* (eds.), *Sexual justice/cultural justice. Critical perspectives in political theory and practice*, Oxon: Routledge 2007, p. 149.

and social and family obligations.²⁰² Parents may also trick their children into situations where they feel they can no longer refuse the marriage: A is introduced to or shown a picture of B and agrees to marry B. On the day of the wedding, the groom turns out to be B's much older brother C and A does not want to marry C. However, A finds it impossible to say 'no': all arrangements for the wedding have been made, everything has been prepared, and both C and A's relatives are present.²⁰³ Further, two studies found that both men and women who initially identified their marriages as 'arranged', later acknowledged that some element of coercion (such as emotional blackmail) had been present, but at that time, they did not realise it: even when they did not want the marriage, they listened to their parents because it never occurred to them to be disobedient.²⁰⁴

As stated by Sigma Huda, former Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children: 'marriage imposed on a woman²⁰⁵ not by explicit force, but by subjecting her to relentless pressure and/or manipulation, often by telling her that her refusal of a suitor will harm her family's standing in the community, can also be understood as forced'.²⁰⁶ Indeed, Moschetti defines arranged marriages as:

'a form of social construction that informs the girl from a young age of her expected familial duties and her understanding of what constitutes bringing "shame" upon the family. If a young woman is bodily kidnapped the force is obvious but when a marriage is "arranged" by her relatives' trickery and stealth, she does not realize, often until it is too late, that an arranged and forced marriage amounts to much the same thing.'²⁰⁷

²⁰² Enright 2009, p. 343; and *NS v. MI* (2006) 1 FLR 444, para. 34: 'where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.' (Citations omitted).

²⁰³ This example was given by victims of forced marriage who participated in a focus groups organised by the Iranian Kurdish Women's Rights Organisation in March 2012. Other types of coercion used to force someone to marry that were listed by the participants included: physical violence, imprisonment, heavily controlling a person's behaviour (subjecting them to surveillance by family and (wider) community members), threats of physical violence against them or others, emotional blackmail (e.g. telling someone their mother will get seriously ill if they refuse to go ahead with the marriage), and taking a person abroad where they are isolated, vulnerable, have limited freedom of movement and will have more difficulty to seek help and support (see IKWRO 2012, p. 7).

²⁰⁴ Proudman 2011, pp. 30–31; and Gangoli, Razak & McCarry 2006, pp. 10 and 17.

²⁰⁵ The same can of course also apply to men. The definition should therefore be read as also applying to male victims.

²⁰⁶ UN Human Rights Council: Report of the Special Rapporteur on Trafficking in Persons 2007, para. 26.

²⁰⁷ Carole Olive Moschetti, *Conjugal Wrongs Don't Make Rights: International Feminist Activism, Child Marriage And Sexual Relativism*, Ph.D. Thesis, University of Melbourne, Political Science Dept., Faculty of Arts, 2006, p. 270.

However, also in marriages that are not arranged in the traditional cultural sense, many factors may limit an individual's free choice and possibility to give free and full consent. Factors that come to mind in this regard are social and financial problems that could restrict the marital choice.²⁰⁸ An unplanned pregnancy and the prospect of negative reactions from relatives and community members can also lead to the decision to marry, or even result in a marriage in which the consent of one or both of the parties is procured under duress.²⁰⁹ This latter type of marriage was also known as a 'shotgun marriage', which refers to cases in which a man is forced to marry the woman he allegedly made pregnant.²¹⁰ Brown remarks that marital duress, in any culture, may also result from a strong desire to have children, social conformity, sexual attraction, the wishes of one's family, a sense of obligation (e.g. in case of pregnancy), the desire not to hurt the other party, the fear of loneliness, and dynastic ambitions.²¹¹ In addition, a person's choice of partner may be limited or (subconsciously) influenced by factors such as social class, religion, race and nationality.²¹²

Therefore, instead of regarding arranged marriages and forced marriages on a continuum of consent – as discussed above – forced marriages and *free choice* marriages should be regarded alongside this continuum. Arranged marriages can feature across the entire width of the spectrum, including on both extremes. As was stressed by Justice Singer in his judgement in the case *SK (Proposed Plaintiff)*, regarding the question of whether the High Court of England and Wales has jurisdiction in a suspected forced marriage case involving an adult:

'I emphasise, as needs always to be emphasised, that there is a spectrum of forced marriage from physical force or fear of injury or death in their most literal form, through to the undue imposition of emotional pressure which is at the other end of the forced marriage range, and that a grey area then separates unacceptable forced marriage from marriages arranged traditionally which are in no way to be condemned, but rather supported as a conventional concept in many societies. Social expectations can of themselves impose emotional pressure and the grey area to which I have referred is where one may slip into the other: arranged may become forced but forced is always different from arranged.'²¹³

²⁰⁸ Enright 2009, pp. 341–342 and 348.

²⁰⁹ See e.g. *McLarnon v. McLarnon* (1968) 112 S.J. 419, where a father forced his daughter, whom he falsely believed to be pregnant, to marry the man who claimed to have impregnated her.

²¹⁰ Shotgun marriages were not uncommon in nineteenth and early twentieth century United States (see Brown 1967, pp. 837–860; and Krause & Meyer 2007, p. 52).

²¹¹ Brown 1967, p. 847.

²¹² A.H. Manchester, 'Marriage or Prison: The Case of the Reluctant Bridegroom' (1966) 29 *The Modern Law Review*, p. 624. De Koning & Bartels 2005, p. 61 state that personal, economic, social, political, cultural and demographic factors determine or influence the decision (whom) to marry.

²¹³ Judgement of Justice Singer regarding *SK (Proposed Plaintiff)* (2004) EWHC 3202 (High Court of Justice Family Division), para. 7.

The barrier between arranged marriage and forced marriage is thus a permeable one. What it boils down to is that, in the end, in each individual case, the question of whether or not either or both of the spouses entered into the marriage under duress will have to be evaluated by taking into consideration all circumstances of the specific case.

5. CONCLUDING REMARKS

The institution of marriage is as old as society and (some equivalent of it) exists in all cultures. A marriage can be defined as a union between two or more people which, in a specific society is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital(-like). Traditionally, parental involvement played an important role in spousal selection and other decisions relating to marriage. In a large part of the world, this is still the case. Modern marriage is characterised by the requirement of consent: consent of the spouses, specifically to the marriage. This is confirmed by a large number of binding and non-binding human rights documents. Universal and regional human rights instruments discern the right to marry and the right not to marry without full and free consent. This means that forced marriage, i.e. a marriage celebrated against the will of at least one of the partners as a result of some form of coercion that was exerted, constitute a human rights violation. In many cases, a marriage arranged by parties other than the spouses themselves will be at the basis of a forced marriage. That is to say, an arranged marriage may turn into a forced marriage in those cases where the wishes of the arrangers are not in line with the wishes of the one(s) for whom the arrangements are made, and the former nevertheless force the latter to enter into the marriage. Concepts of shame and honour (protecting family honour) are the underlying cause of the majority of forced (arranged) marriages. Because of the subtle forms of coercion and pressure that can be applied (e.g. in the form of socio-cultural expectations, that, to a certain extent, are internalised) it is not always easy to establish the degree to which consent to an arranged marriage was actually free and full, and thereby distinguish between arranged and forced marriages. This may change if (threats of) physical violence has been used as a means of coercion.

CHAPTER 2

FORCED MARRIAGES IN THE NETHERLANDS AND ENGLAND

1. INTRODUCTION

The practice of forced marriage is not something that is generally associated with Western Europe. Often, it is assumed that this only happens in ‘other’ countries. Yet research shows that forced marriages are a daily reality in Europe. In England, the majority of forced marriages take place in Indian, Pakistani and Bangladeshi communities; in the Netherlands, Moroccan, Turkish and Surinamese Hindustani communities are mostly associated with the practice.²¹⁴ Granted, the bulk of forced marriages are contracted in migrant communities, but as was discussed in Chapter 1 and will be demonstrated below, forced marriages are not foreign to traditional Dutch and English communities either: they also take place in orthodox Protestant and strict Catholic circles.

In order to get a clear picture of the practice of forced marriage, this chapter describes forced marriages as they occur in the Netherlands and England, focusing on prevalence, victims, perpetrators, key motivations and consequences. As was stated in the previous chapter, this research defines ‘forced marriage’ as a marriage at least one of the partners entered into against their will as a result of some form of coercion exerted by another person.²¹⁵

2. FORCED MARRIAGE IN THE NETHERLANDS

2.1. PREVALENCE

Forced marriage is a hidden phenomenon that is difficult to quantify.²¹⁶ Most known and alleged cases of forced marriage take place within the context of the families of the spouses.²¹⁷ Often, they become visible only after the situation

²¹⁴ See below.

²¹⁵ For a comparison between (the legal frameworks concerning) forced marriages in the Netherlands on the one hand and England on the other hand, see Chapter 9.

²¹⁶ ACVZ 2005, p. 20.

²¹⁷ Schmidt & Rijken 2005, pp. 7–8.

has escalated and has resulted in domestic or honour-related violence.²¹⁸ Anthropologists, legal researchers and law enforcement professionals have noted that victims of forced marriage are reluctant to go to the police, as this could compromise their relationship with their family and community.²¹⁹ As a result of these complicating factors, and because neither the police nor the Public Prosecution Service (PPS) specifically registers cases of forced marriage, there are no exact figures on the prevalence of this practice in the Netherlands.²²⁰

Research suggests that this phenomenon takes place predominantly within the three largest migrant groups in the Netherlands (Turkish, Moroccan and Surinamese Hindustani communities) and within Somali, Afghan, Chinese, Sinti and Roma communities.²²¹ It should be noted, however, that the concept of non-voluntary marriage is not foreign to tight-knit (religious) autochthon communities either.²²²

In the early 1960s and early 1970s, two sociological studies were carried out with the aim of mapping the frequency of forced marriage in the Netherlands and finding possible sociological explanations for this phenomenon.²²³ This research covered the four most common philosophies of life in the Netherlands in those periods: Roman Catholic, Calvinistic Protestant, Pietistic Reformed ((Reformed) Presbyterian Church), and liberal/non-ecclesial. Forced marriage was defined as a marriage in which a child was born within seven months after the marriage was entered into.²²⁴ In other words, the researchers classified as ‘forced’ those marriages that were (or appeared to be) the result of pre-marital pregnancy. In the Netherlands of the 1960s and 1970s, it would be likely that many cases of pre-marital pregnancy resulted in marriage, because pre-marital sex was not generally accepted, and pre-marital pregnancy was, in some regions at least, regarded as shameful.

Nevertheless, the definition used by the researchers is questionable, since it arguably also encompassed completely voluntary marriages, e.g. those cases in

²¹⁸ Cornelissens, Kuppens & Ferwerda 2009, p. 34 and ACVZ 2005, p. 72.

²¹⁹ De Koning & Bartels 2005, p. 52.

²²⁰ *Parliamentary Papers II (Lower House)* 2011/12, 32 840, no. 6, p. 7; and Cornelissens, Kuppens & Ferwerda 2009, p. 12. In 2012, the city council of Amsterdam received reports about three instances of forced marriage and/or abandonment; in 2013 that number was thirteen (see ‘Meer meldingen gedwongen huwelijken in Amsterdam’, *Het Parool* 8 December 2013, available at <www.parool.nl/parool/nl/7/MISDAAD/article/detail/3541342/2013/11/08/Meer-meldingen-gedwongen-huwelijken-in-Amsterdam.dhtml> last accessed December 2013).

²²¹ Cornelissens, Kuppens & Ferwerda 2009, p. 31; De Koning & Bartels 2005, p. 23; and ACVZ 2005, pp. 2, 17 and 24. Forced marriages have also been reported in Iranian, Iraqi, Pakistani, Sudanese and Sri Lankan communities (ACB Kenniscentrum 2010, p. 25).

²²² Kool 2012, p. 46, footnote 66: native Dutch forms of forced marriage: the obligation to marry in case of pre-marital pregnancy in certain religious Dutch communities. See also Chapter 1, paragraph 4.5.

²²³ G.A. Kooy & M. Meuls, *Enforced marriage in the Netherlands: a statistical analysis in order to test some sociological hypotheses*, Wageningen: Landbouwhogeschool Wageningen 1967; and Cramwinckel-Weeda 1975.

²²⁴ Cramwinckel-Weeda 1975, p. 4.

which a man and woman had already decided to get married before the woman got pregnant. At the same time, this definition would have excluded non-voluntary marriages where there had been no pregnancy or pre-marital sex. The researchers collected their data through marriage and birth registers and found that between 1969 and 1971, 16.7% of all marriages in the Netherlands could be qualified as forced marriages according to their definition. As a result of changing social mores with regard to pre-marital sexual intercourse, combined with an increase of effective use of trustworthy contraceptives (most notably the introduction of the birth control pill in 1963 followed by the intra-uterine device and the morning after pill in 1970), and a less disapproving attitude towards abortion, the researchers noted that the number of ‘forced’ marriages strongly decreased in the following years.²²⁵

More recent research concerning domestic violence in Dutch orthodox Protestant communities highlights that parental and communal pressure with regard to marriage still take place in autochthon groups in this day and age.²²⁶ Although the researchers do not provide any statistics, it appears that in certain closed and very traditional Dutch circles, parents have a strong hand in the spousal selection process and, although this is increasingly uncommon, pre-marital pregnancy can result in severe pressure to get married.²²⁷

Interestingly, research conducted in the past ten years indicates that the practice of forced marriage within Turkish, Moroccan and Surinamese Hindustani communities in the Netherlands is also waning.²²⁸ Although parents and other relatives still play a part in spousal selection, autonomy and free choice are becoming more and more important. Young people more often take the initiative in finding their own partners, or they are introduced to potential spouses by their friends.²²⁹ At the same time, many parents have stopped using coercion, often because they have had bad experiences with forced marriages in the past: they married off their older sons and daughters and experienced that such forced marriages can quickly lead to problems or divorce.²³⁰

In this context, a study on the prevalence of forced marriages in Germany carried out by order of the German government is worth noting. According to the study, forced marriages cover those situations in which at least one of the spouses was forced to enter into a formal or informal (so including those conjugal associations entered into through a religious or social ceremony) marriage as a result of the exercise of force or threat of appreciable harm, and this spouse either did not dare to resist or refuse the marriage, or found that no consideration was

²²⁵ Cramwinckel-Weeda 1975, pp. 6–8, 17 and 40.

²²⁶ Bakker & Felten 2012.

²²⁷ More on this in Chapter 1 (paragraph 4.5).

²²⁸ De Koning & Bartels 2005, pp. 23 and 27.

²²⁹ De Koning & Bartels 2005, pp. 29, 34 and 37.

²³⁰ De Koning & Bartels 2005, p. 71.

given to his or her refusal.²³¹ The researchers concluded that in 2008, in Germany, almost 3500 cases of (threatened) forced marriage took place, but that the actual number is probably higher, because victims are reluctant to report the practice. Of the 3443 cases, 60% concerned threatened forced marriages and 40% concerned forced marriages that had already taken place. The majority of these reported forced marriages took place in families with a migration background; the highest percentage in families from a Turkish background.²³² The Dutch Minister of Security and Justice pointed out that this research might offer an indication of the extent of the problem of forced marriages in the Netherlands because of the similarities between the German and Dutch migration populations.²³³ There might be certain similarities, but it would not be prudent to extrapolate estimates on the number of forced marriages in the Netherlands from the figures in this study.

2.2. BACKGROUND OF FORCED MARRIAGES IN THE NETHERLANDS

The majority of forced marriages have roots in the practice of arranged marriage. As explained in Chapter 1, there are many different gradations of arranged marriages, ranging from those in which parents or other family members direct the entire process and select a spouse without consulting or interacting with their child, to those in which both parents and children are actively involved in the arranging of the marriage and selection of the spouse. In the Netherlands, the practice of arranged marriages is mostly found in Moroccan, Turkish and Surinamese Hindustani communities. Within these specific cultures, children are generally brought up with values concerning absolute respect for parents and the ideal of marriage. From childhood onwards, girls are told that they will marry and become a mother and as a girl grows older, parents, relatives and community members will make insinuations regarding future marriages.²³⁴ As is the case with most values on which children are brought up, regardless of their cultural or religious background, these ideals are often internalised by the children and thus become difficult to set aside once they have grown into adults.²³⁵ Marriage is often also surrounded by heavy social pressure. In some cultures, this pressure works several ways: parents see it as their duty to make sure their children marry (before a certain age) and therefore feel pressure from their community when they do not

²³¹ Mirbach *et al.* 2011, p. 18.

²³² Mirbach *et al.* 2011, pp. 22, 24 and 28–29.

²³³ *Parliamentary Papers II (Lower House)* 2011/12, 32 840, no. 6, p. 4.

²³⁴ Especially in Surinamese Hindustani culture, marriage is (or at least was) regarded as inevitable and self-evident: only through marriage are men and women able to fully participate in all parts of social life and are they seen as full members of the Surinamese Hindustani community (De Koning & Bartels 2005, pp. 25, 46, 52 and 56).

²³⁵ De Koning & Bartels 2005, p. 59.

succeed in achieving this. At the same time, children experience pressure to get married, both from within their family as well as from the larger community.²³⁶ Pressure to marry is often exerted psychologically and not so much by means of physical violence, although in extreme cases, physical force is also used.²³⁷ Emotional blackmail, social pressure and the concept of family honour may be used to convince someone to marry and can result in severe psychological coercion. Insistent talking and persuasion by different family members are other tactics that are applied.²³⁸

Research suggests that victims are often afraid to reject the partner selected by their parents, so it is possible that no actual or active coercion, force or pressure was exerted, but that a victim was just afraid to speak his or her mind.²³⁹ Internalised ideals of respect, honour and marriage, and social pressure working two ways combined with the fact that often the communication between parents and their children on the subject of sexuality and marriage is not optimal, makes men and women often feel they cannot refuse a marriage candidate selected by their parents.²⁴⁰ In reality, however, they may in fact have the possibility to do so, although in many cases this would be a theoretical option, since exercising agency and autonomy in matters relating to marriage might result in social sanctions with severe consequences such as ostracism.²⁴¹ This implies that the perception of pressure may be shaped by a lack of communication between parents and their children.²⁴² And when marriage parties fail to make their wishes known to their parents (e.g. that they do not want to marry (the selected person)), parents may not realise that their children feel pressurised and experience their (i.e. the parents') actions as coercion. However, it has been remarked and may be assumed that – at least in general – parents will know if their child wants something or not, even if the child has not voiced this.²⁴³

Once an arranged marriage has been publicly announced, rejecting it will become more difficult: those involved fear to disrespect their parents and bring shame on the family. The pressure to marry also increases once individuals have refused several suggested candidates and grow older.²⁴⁴ This indicates that the complexity of the practice of arranged marriages can raise the stakes for parents as well as for their children and can have a negative impact on the ability of prospective spouses to freely and genuinely consent to a marriage.

In practice, it appears to be very difficult to assess whether a marriage is forced or not. Even for friends and family members of the spouses, this is not readily

²³⁶ De Koning & Bartels 2005, p. 49.

²³⁷ Cornelissens, Kuppens & Ferwerda 2009, p. 29; De Koning & Bartels 2005, pp. 38 and 46.

²³⁸ De Koning & Bartels 2005, pp. 51 and 57.

²³⁹ Schmidt & Rijken 2005, p. 44.

²⁴⁰ De Koning & Bartels 2005, p. 61.

²⁴¹ De Koning & Bartels 2005, pp. 28, 30–32 and 58.

²⁴² De Koning & Bartels 2005, p. 70.

²⁴³ Cornelissens, Kuppens & Ferwerda 2009, p. 28.

²⁴⁴ De Koning & Bartels 2005, pp. 46, 48 and 49.

ascertainable, especially since many marriage candidates are afraid to say ‘no’. In those cases in which one of the parties to the marriage clearly shows that he or she does not want to marry, either by explicitly speaking out or by running away from home, or when physical violence is used, may relatives, friends or outsiders be able to recognise an (intended) marriage as forced.²⁴⁵ In other cases, the pressure or force that was at the bedrock of the marriage could remain invisible.

2.3. VICTIMS AND PERPETRATORS

Both men and women may experience pressure or coercion when it comes to making the decision to marry, but in general, it seems that men have more freedom of choice and more options to negotiate partner selection with their parents.²⁴⁶ In the majority of cases, the perpetrators of forced marriages are family members of the victims, most notably the parents, but aunts, uncles, cousins, nieces, nephews, siblings and grandparents may also be involved. As was explained above, the larger community can also be responsible for or contribute to the social pressure that is felt by the victims.²⁴⁷ Furthermore, it is possible that the intended spouse (i.e. the person that the victim is forced to marry) also exerts force.

2.4. CAUSES

Reasons why parents might interfere with their children’s marriage choices relate to their wish to correct or prevent behaviour they regard as ‘unwanted’, e.g. preventing girls from having boyfriends, or boys from becoming criminal. Parents might also meddle in their children’s affairs out of disapproval of the partner chosen by the child itself, or in order to arrange a right of residence for a family member or a friend from the (grand)parents’ country of origin.²⁴⁸ The latter type of marriage will, depending on the circumstances, (also) qualify as a so-called sham marriage, that is a marriage that is entered into not with the intention of fulfilling the marital duties that the law attaches to the marital status, but with the aim of gaining admission to the Netherlands.²⁴⁹ Several other reasons why parents interfere in marital affairs can be distinguished, including economic motives (maintaining or expanding family the fortune), strengthening family

²⁴⁵ Cornelissens, Kuppens & Ferwerda 2009, p. 29; De Koning & Bartels 2005, pp. 50 and 52.

²⁴⁶ De Koning & Bartels 2005, p. 38.

²⁴⁷ See *inter alia* De Koning & Bartels 2005, p. 49.

²⁴⁸ Schmidt & Rijken 2005, pp. 8–9; and De Koning & Bartels 2005, pp. 39–40. Among Surinamese Hindustani there appear to be less migration pressure and fewer ‘kin’ marriages (De Koning & Bartels 2005, p. 49).

²⁴⁹ See also Chapter 7.

ties (usually resulting in a marriage between (second) cousins²⁵⁰) and the wish to preserve and maintain culture, resulting in endogamy.²⁵¹ Other factors that have been listed as explanations for forced marriage relate to the characteristics of patriarchal culture: the importance of virginity, protecting family honour, and obedience to one's father.²⁵²

Often, parents (also) act or believe they act for their children's own benefit: they believe they know what is best for their children.²⁵³ As stated, the majority of forced marriages take place within the context of the family. Outside of the family context, forced marriages usually take place in the course of human trafficking,²⁵⁴ although forced marriages that occur within a family can also amount to human trafficking (see *infra* paragraphs 2.5 and 2.6).

2.5. CONSEQUENCES

The consequences of a forced marriage can be severe and range from resignation to one's fate (limiting an individual's personal development) to being forced to live and start a family with someone against one's will (which has a large impact on the personal privacy of individuals), mental illness, abuse, rape, domestic violence, or suicide.^{255,256} Research indicates that suicide rates and suicidal thoughts and behaviour are most prevalent among girls and young women of Turkish and Hindustani descent.²⁵⁷ Van Bergen concluded that, amongst other factors, 'the extent to which young women are restricted in important life choices plays a crucial role'.²⁵⁸ When and whom to marry is such an important life choice.²⁵⁹ Those who resist a marriage arranged by their families are at risk of becoming socially isolated, being taken from school, being abandoned abroad, and/or losing contact with family members. In extreme cases, refusing a marriage may result in

²⁵⁰ It is estimated that approximately 25% of the Turkish and Moroccan Dutch marry within their (extended) families (*Parliamentary Paper II (Lower House) 2009/2010*, 32 175, no. 1, p. 6, referring to E.J.W.M. Troe, *Ethnic differences in fetal growth, birth weight and infant mortality. The Generation R Study*, Rotterdam: Erasmus University 2008, p. 86).

²⁵¹ ACVZ 2005, p. 23.

²⁵² Rude-Antoine 2005, p. 30.

²⁵³ Schmidt & Rijken 2005, p. 9.

²⁵⁴ See e.g. Guideline of the Public Prosecution Service on human trafficking within the meaning of servitude and labour exploitation (2012R002), 1 May 2012.

²⁵⁵ *Parliamentary Papers II (Lower House) 2011/12*, 32 175, no. 35 (Prevention of Forced Marriages 2012–2014), p. 1.

²⁵⁶ Anticipating what will be argued in the next chapters: acts such as rape and domestic violence taking place within a forced marriage are distinct, independent criminal offences; they are not elements of the offence of forced marriage (see Chapter 10).

²⁵⁷ <www.movisie.nl/smartsite.dws?id=139877> last accessed December 2013.

²⁵⁸ See 'Failure to recognise wishes of young female migrants leads to suicide attempts', 16 June 2009, available at <www.nwo.nl/nwohome.nsf/pages/NWOA_7T3CL8_Eng> last accessed December 2013.

²⁵⁹ See D.D. van Bergen, *Suicidal behavior of young migrant women in the Netherlands: a comparative study of minority and majority women*, Amsterdam: VU 2009.

exclusion from the family or even honour killings.²⁶⁰ There is also research that uncovers a higher suicide rate among Dutch Surinamese men and young Dutch men from Turkish descent, but in this research, this higher prevalence of suicide was not explicitly linked to forced or arranged marriages.²⁶¹

Forced marriages may also result in forms of enslavement; there are many reports of slavery-like exploitation within forced marriages. The Dutch Rapporteur on Human Trafficking has recorded several cases of (predominantly) women who were either forced to marry or who initially entered into the marriage of their own volition, and were subsequently used as slaves.²⁶² The majority of these women came from outside the Netherlands and were brought to the Netherlands for the purpose of the marriage. Dutch courts have also dealt with such cases. One of these cases concerns a young Moroccan woman. When she was fifteen and lived in Morocco, a Moroccan-Dutch man came to her village to ask for her hand. Within a week, the two were married. After eight months, her husband came back to Morocco to bring her to the Netherlands where, as she had been promised, she would start school. Once in the Netherlands, the girl was locked in her mother-in-law's house. Her passport was taken away from her and she was not allowed to learn Dutch. She was beaten and raped by her husband and, over the course of several years, forced to prostitute herself. After the two had divorced, the man married another Moroccan woman, brought her to the Netherlands and also forced her to prostitute herself. The man was convicted of several counts of human trafficking and sentenced to eight years' imprisonment.²⁶³

2.6. TRANSNATIONAL DIMENSIONS

In the Netherlands, the majority of forced marriages take place in immigrant communities, and as a result, forced marriages play a role in the context of marriage migration (see also the example given in the previous paragraph).²⁶⁴

²⁶⁰ De Koning & Bartels 2005, p. 50.

²⁶¹ M.J. Garssen, J. Hoogenboezem & A.J.F.M. Kerkhof, 'Zelfdoding onder migrantengroepen en autochtonen in Nederland', *Nederlands Tijdschrift voor Geneeskunde* (150) 2006, pp. 2143–2149.

²⁶² For an example of a *voluntary* (sham) marriage resulting in sexual exploitation, see Court of Appeal Amsterdam 11 April 2013, ECLI:NL:GHAMS:2013:BZ8541. Human trafficking, Seventh report of the National Rapporteur, The Hague: Bureau NRM October 2009, p. 531.

²⁶³ District Court Utrecht 1 June 2011, ECLI:NL:RBUTR:2011:BQ6884. For more examples and judgements that have not been published, see Human trafficking, Seventh report of the National Rapporteur, The Hague: Bureau NRM October 2009, pp. 531 *ff* and *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 3.

²⁶⁴ It is estimated that at least 20% of the Turkish Dutch and 15% of the Moroccan Dutch marry a partner from their (grand)parents' country of origin (*Parliamentary Paper II (Lower House)* 2009/2010, 32 175, no. 1, p. 4). Bijlage bij *Kamerstukken II* 2009/10, 32 175, no. 9, 'Factsheet huwelijksmigranten: beeldvorming en feiten anno 2009' van E-Quality, p. 10. See also <www.cbs.nl/nl-NL/menu/themas/bevolking/publicaties/artikelen/archief/2011/2011-3512-wm.htm> last accessed December 2013.

Two forms, which can both amount to human trafficking, can be distinguished: it is possible that a foreign spouse is brought to the Netherlands to marry or after having married someone who lives in the Netherlands. In this scenario, it is possible that both spouses were forced to marry, but it is also possible that only one of them was forced. In the case that the foreign spouse is the one who was pressurised into a marriage, and especially if it is a woman, she may find herself in a difficult situation in the Netherlands. There have been reports of men marrying women from abroad, bringing them to the Netherlands and subsequently making them completely dependent on them, for example by not applying on their behalf for a residency permit, as a result of which the woman's stay in the Netherlands becomes illegal.²⁶⁵

A second possibility is that a Dutch citizen is brought overseas, often by deception, to marry there.²⁶⁶ Oftentimes, but not always, this is combined with a form of pre-planned abandonment: parents abandon their daughter or son abroad, often completely against the child's will and without any identification or travel documents.²⁶⁷ There, they will be forced to marry a partner selected by their relatives.²⁶⁸ This practice of abandonment has received quite a lot of attention in the Netherlands over the past few years.²⁶⁹ Abandonment is most prevalent among communities originating from Morocco and Turkey, but there have also been reports of children being abandoned in Egypt, Pakistan, Iran, Somalia and Afghanistan.²⁷⁰ There are no exact figures on how many people are abandoned abroad each year, but in its action plan regarding forced marriage and abandonment, the Dutch Labour Party (PvdA) notes that each year, dozens, possibly hundreds of school-age children do not return to school after the summer holidays.²⁷¹

²⁶⁵ ACB Kenniscentrum 2010, p. 27.

²⁶⁶ ACB Kenniscentrum 2010, p. 27. This might qualify as human trafficking, see also Chapter 7.

²⁶⁷ Not only children, but also adults, particularly women, are abandoned abroad, usually by their (ex) husbands who abandon them in a foreign country in order to get rid of them, ACVZ, *Tegen de wil achtergebleven. Een advies over in herkomstlanden achtergelaten vrouwen en kinderen*, The Hague: ACVZ April 2005, p. 19.

²⁶⁸ See e.g. the story of Sarah, a Dutch girl of Somali descent whose mother took her to Somalia when she was sixteen. In Somalia, she was forced to marry an uncle who subsequently raped and assaulted her. After two years, she managed to return to the Netherlands: J. Groen, 'Ontsnapt aan een "vieze oom" in Mogadishu', *Volkskrant* 25 July 2012, pp. 6–7.

²⁶⁹ See e.g. *Parliamentary Papers II (Lower House)* 2003/04, 29 742, no. 1–27 (Interpellation regarding the abandonment of women and children in Morocco).

²⁷⁰ ACVZ, *Tegen de wil achtergebleven. Een advies over in herkomstlande achtergelaten vrouwen en kinderen*, The Hague: ACVZ April 2005, p. 20.

²⁷¹ Partij van de Arbeid, *Huwelijksdwang en achterlating: PvdA plan van aanpak*, November 2009; see also 'Achterlating gezinsleden in buitenland strafbaar stellen', *Volkskrant* 7 June 2012 (available at <www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3267401/2012/06/07/Achterlating-gezinsleden-in-buitenland-strafbaar-stellen.dhtml> last accessed December 2013); and Movisie, *Factsheet huwelijksdwang: feiten en achtergrondinformatie*, November 2009, p. 4.

3. FORCED MARRIAGES IN ENGLAND

3.1. PREVALENCE

In England and Wales, forced marriage, which is cross-governmentally defined as ‘a marriage conducted without the valid consent of both parties, where duress is a factor’,²⁷² is still very much a hidden problem: like in the Netherlands, it is underreported and difficult to detect.²⁷³ The low visibility of forced marriages due to the fact that they often take place in domestic settings in hard-to-reach, tight-knit communities together with the inconsistent recording of instances of forced marriage across many agencies and organisations, are listed as factors that impede the detection of this practice.²⁷⁴ The attitude of many professionals, including police officers, educators and social services may also have contributed to the relatively low reporting rate of forced marriages: over the past few years, many professionals have indicated that they are (or at least were) unwilling to intervene in possible cases of forced marriage for fear of appearing racist.²⁷⁵ On top of this, there also seems to be a gap in the knowledge about the existing legal framework of forced marriage due to a low level of awareness of the phenomenon of forced marriage and the legal remedies available, especially among professionals.²⁷⁶ Many – though not all – victims of (potential) forced marriages are believed to be reluctant to report their ordeal to the authorities: they may be afraid of the consequences (e.g. they may fear retaliation from relatives or be wary of police involvement), or they may accept the value system of their culture and believe they have caused or would cause their family dishonour by reporting a forced marriage. Others might not speak English and/or might not know where to go. Further, those with an insecure immigration status may fear deportation – a threat that is also used by perpetrators to keep victims in the marriage.²⁷⁷ Back home, they may face further violence/harassment, because of the shame of

²⁷² Choice by Right 2000, p. 6; CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 6.

²⁷³ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 3. In 2008, the Muslim Arbitration Tribunal 2008, para. 3.3 wrote that the cases reported to the authorities are only the tip of the iceberg.

²⁷⁴ Kazimirski 2009, pp. 37–39. See also N. Khanum, *Forced marriage, family cohesion and community engagement: national learning through a case study of Luton*, Luton: Equality in Diversity March 2008, p. i.

²⁷⁵ Demos 2012, p. 14; and Home Affairs Committee, *Forced Marriage* (HC 2010–12, 880), Oral Evidence Ms J. Sanghera, pp. Ev 8 and 9.

²⁷⁶ During a 2010 meeting held by Karma Nirvana, an NGO based in Leeds dedicated to helping victims of forced marriage, 76% of the front line services and professionals who might encounter instances of forced marriage (including educators and social workers) were not aware of the legal status of forced marriage or the existence of forced marriage protection orders (Demos 2012, p. 13). In general, there is very little awareness of the Forced Marriage (Civil Protection) Act (Demos 2012, p. 40).

²⁷⁷ CPS Legal Guidance Honour-Based Violence and Forced Marriage, pp. 24–25.

their failed marriage.²⁷⁸ A reason why immigrant women in particular might not report a (threatened) forced marriage, or indeed other forms of violence, is that they grew up in countries where women in general do not go to the police with these problems.²⁷⁹

As a result of the hidden nature of forced marriage, there is a lack of reliable data on the prevalence of the phenomenon.²⁸⁰ There are, however, some reports containing estimates. A report published in 2009, basing its estimates on the number of forced marriage cases encountered by national and local organisations, estimated that the number of *reported* forced marriages (involving either actual forced marriage or threats of forced marriage) in England in 2008 lay between 5,000 and 8,000.²⁸¹ Several organisations believe that these figures, which are quoted in the Home Office consultation document, are exaggerated and that the total number of forced marriages is considerably lower and more in line with the number of cases reported to the so-called Forced Marriage Unit (FMU).²⁸² In 2011, the Home Office reported that, since its creation, the number of cases reported to the FMU has risen every year. The FMU, which is a joint venture between the Foreign and Commonwealth Office and the Home Office, was created to provide advice and support to (potential) victims of forced marriage and give information to professionals dealing with these cases.²⁸³ In 2008, the FMU dealt with 1618 cases, in 2009 that number was 1682 and in 2010 the total number of cases in which the FMU provided advice or support peaked at 1735.²⁸⁴ In 2011, the number dropped to 1468; in 2012, this was 1485, in 2013, it was 1302.²⁸⁵ The growing number of NGOs that offer advice and support to (potential) victims of forced marriage, for example by means of a helpline, might explain the drop in the number of cases reported to the FMU in 2011. For many victims, NGOs might

²⁷⁸ However, if immigrants can demonstrate that they have experienced domestic violence in a relationship with a British or settled partner, they may be allowed to remain in the UK. This also applies when a person can demonstrate that they fear gender-related prosecution in their country of origin (CPS Legal Guidance Honour-Based Violence and Forced Marriage, pp. 25 and 42–43).

²⁷⁹ IKWRO 2012, p. 5.

²⁸⁰ Choice by Right 2000, p. 11.

²⁸¹ Kazimirski *et al.* 2009, pp. 24 and 28. It is not clear from this report whether the estimate of 5,000–8,000 also includes forced marriages that were reported in 2008, but that had taken place before 2008. In 2000, the estimated number of forced marriages taking place annually in the UK was set considerably lower, at around 1,000 (An-Na'im 2000).

²⁸² Southall Black Sisters 2012, para. 21; Ashiana Network 2012, p. 2; and Diversity Subcommission of the Family Justice Council 2012, para. 10.

²⁸³ In 2000, the Foreign and Commonwealth Office (FCO) created the Community Liaison Unit to provide advice and support to (potential) victims of forced marriage. In 2005, this unit transformed into a joint venture with the Home Office becoming known as the Forced Marriage Unit (*The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 4).

²⁸⁴ Home Office, *Forced Marriage Consultation*, December 2011, p. 5.

²⁸⁵ FMU, *Statistics on Forced Marriage between January and December 2012*; available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/141823/Stats_2012.pdf> last accessed December 2013.

be easier to approach as these organisations often have people present from the same ethnic background and/or who speak the same language.²⁸⁶

Forced marriage appears to be on the increase in England, but it is not possible to say this with certainty; it is also possible that the increase in the number of reported cases is due to the spotlight that was aimed at forced marriages by the awareness raising campaigns of the past few years. There are three noticeable trends. First, forced marriages take place more often in a broader range of communities, including those that were originally not associated with the practice (including Irish Traveller and Eastern European communities). Secondly, a higher percentage of men step forward as victims of forced marriages and thirdly, it has become clear that not only first and second, but also third and fourth generation English citizens are faced with forced marriages.²⁸⁷

Like honour-based violence,²⁸⁸ the Crown Prosecution Service (CPS) regards 'forced marriage' as an umbrella term covering a multitude of criminal offences.²⁸⁹ In April 2010, the CPS first started flagging cases of forced marriage with the aim of recording any criminal offence of threatening behaviour, violence or psychological, physical, sexual, financial or emotional abuse that was carried out in the context of a forced marriage, i.e. crimes committed in order to coerce someone to enter into a marriage, or crimes committed after a forced marriage has taken place. These offences are then flagged both as forced marriage and as the specific offence (e.g. rape or kidnap) on the CPS Case Management System.²⁹⁰ Harassment taking place in the course of forcing someone to marry will therefore be flagged as harassment and as forced marriage. Between November 2012 and July, 41 defendants were prosecuted for offences flagged as forced marriage – defined by the CPS as 'a marriage conducted without the valid consent of one or both parties where duress is a factor'²⁹¹ – with 70.7% resulting in a conviction.²⁹²

²⁸⁶ Conversation with a member of the Forced Marriage Unit (dd. 20 March 2012). The transcript of the interview is on file with the author.

²⁸⁷ Demos 2012, pp. 14–15. See also the concept of fossilisation of cultural practices, explained in Chapter 1, paragraph 4.4, footnote 170.

²⁸⁸ The government and CPS define honour-based violence as 'a crime or incident, which has or may have been committed to protect or defend the honour of the family and/or community', see CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 4. On the dubious term "'honour"-based violence', see CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 4; and Welchman & Hossain 2005, pp. 6–8.

²⁸⁹ CPS Legal Guidance Honour-Based Violence and Forced Marriage, pp. 4 and 16.

²⁹⁰ CPS Legal Guidance Honour-Based Violence and Forced Marriage: Guidance on Identifying and Flagging cases, paras. 4–5 and 8.

²⁹¹ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 6.

²⁹² CPS Violence against Women and Girls Crime Report 2012–2013, July 2013, p. 45. In 2010–2011, 41 defendants were prosecuted for offences flagged as forced marriage, with just under 50% resulting in a conviction (CPS Violence against Women and Girls Crime Report 2010–2011, November 2011, p. 34).

3.2. VICTIMS AND PERPETRATORS

Most cases of forced marriage in England and Wales concern young women in their (early) teens²⁹³ and early twenties.²⁹⁴ Although women constitute the largest proportion of victims of forced marriage, men also fall victim to this practice.²⁹⁵ Initial figures displayed a large difference between the ratio of male and female victims, with approximately 85% of the victims being female and 15% male. More recent estimates point towards an increase in male victims – perhaps due to awareness raising campaigns – 70% female to 30% male.²⁹⁶ Research has shown that physically and mentally disabled people are also at risk of being forced into a marriage by their relatives and constitute a significant percentage of the total number of victims of forced marriage.²⁹⁷ The majority of cases arise from communities with a cultural background in the Indian subcontinent, i.e. Pakistan, India and Bangladesh,²⁹⁸ but the FMU also deals with cases involving families from the Middle East, the Horn of Africa, North Africa and Eastern Europe.²⁹⁹ In addition, there have been forced marriages involving families who originate from the UK and Ireland, such as members of Irish traveller communities.³⁰⁰ In all of these communities, lesbian, gay, bisexual and transsexual (LGBT) people

²⁹³ In 2008, 41% of forced marriage cases reported to the ten local authorities interviewed by Kazimirski *et al.* involved minors (Kazimirski *et al.* 2009, p. 23).

²⁹⁴ There have also been several instances of considerably younger and older victims. In 2012, one of the cases the FMU dealt with concerned a two-year-old girl; the oldest victim assisted by the FMU in that year was 71 (FMU, *Statistics on Forced Marriage for 2012*; available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/141823/Stats_2012.pdf> last accessed December 2013).

²⁹⁵ For a recent example of a male victim of forced marriage, see the case of a British boy who was sent to Nigeria by his mother in an attempt to force him into a marriage ('First person jailed for breaking forced marriage laws', *Solicitor First*, 15 February 2011). For other examples see *Buckland v. Buckland* (1967) 2 W.L.R. 1506; and Heaton, McCallum & Jogi 2009, p. 19.

²⁹⁶ Home Affairs Committee, *Forced Marriage* (HC 2010–12, 880), p. 4; and Choice by Right 2000, p. 19. The 30:70 ratio is based on the cases reported to Karma Nirvana. According to the information on the website of the FMU, of the 1468 possible instances of forced marriage it dealt with in 2011, 78% concerned female victims and 22% male victims (see <www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage/> last accessed December 2013).

²⁹⁷ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 23; see also Probert 2008, pp. 395 *et seqq.* Specifically: *Forced Marriage and Learning Disabilities: Multi-Agency Practice Guidelines*, London: FMU, December 2010.

²⁹⁸ In 2008, 97% of those seeking assistance with regard to forced marriage from the ten local authorities interviewed by Kazimirski *et al.* were identified as Asian, of which 72% were from Pakistani families (Kazimirski *et al.* 2009, p. 22). See also Choice by Right 2000, p. 11. In 2008, 64% of cases that came to the attention of the FMU related to Pakistani victims, 15% related to Bangladeshi victims, and 8% related to Indian victims (Kazimirski *et al.* 2009, p. 22).

²⁹⁹ Home Affairs Committee, *Forced Marriage* (HC 2010–12, 880), p. 4; and Heaton, McCallum & Jogi 2009, p. 6.

³⁰⁰ Heaton, McCallum & Jogi 2009, p. 6; and The Women's Health Council, *Translating Pain into Action A Study of Gender-based Violence and Minority Ethnic Women in Ireland*, February 2009, pp. 155–157.

have been identified as a potentially vulnerable group at risk of being forced into a marriage.³⁰¹

A wide selection of people can become involved in forcing someone to marry. Victims are generally forced to marry by their parents and close relatives, but extended family members and even community members or the future spouse may also be involved.³⁰² A broad range of perpetrator age has been identified in research: victims may be pressurised by much younger siblings and great-grandparents alike.³⁰³ In general – and especially in South Asian contexts – the main perpetrator is the father of the victim (often aided by the mother), who is regarded as the head of the family: he decides when and whom his children will marry, although he, in turn, may be pressured by his relatives or community members.³⁰⁴

3.3. CAUSES

The reasons why parents resort to force when their children do not agree to marry according to their wishes are complex and diverse. Key motivations that have been identified for forced marriages in South Asian communities include: responding to pressure either from peer groups or extended family; building stronger families, strengthening ties and links; preserving certain cultural and religious traditions and values; achieving financial gain; preventing relationships that are regarded as unsuitable by parents, relatives or community members; protecting family honour (*izzat*) and preventing shame (*sharam*); fulfilling long-standing family commitments; assisting claims for UK citizenship; and correcting unwanted behaviour, such as alcohol and drug use or criminal activities.³⁰⁵

As stated, the underlying reason for the majority of forced marriages appears to be upholding family honour by controlling (female) behaviour.³⁰⁶ In South Asian traditions, women are seen as the bearers of family honour; their (sexual) behaviour can uphold family honour or bring dishonour.³⁰⁷ Modest sexual behaviour, refraining from pre- or extramarital sexual relations and obeying parents' wishes are key elements to female behaviour that upholds family honour. Choosing one's own marriage partner or having a boyfriend are therefore

³⁰¹ Demos 2012, p. 15; CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 12.

³⁰² There can be as many as fifteen people involved, see Home Affairs Committee, *Forced Marriage* (HC 2010–12, 880), Oral Evidence Ms J. Sanghera, p. Ev 9; and Heaton, McCallum & Jogi 2009, p. 3.

³⁰³ Kazimirski *et al.* 2009, p. 18.

³⁰⁴ Conversation with Senior Policy Advisor at the CPS (20 April 2012); conversation with IKWRO Campaigns Officer (14 May 2012). The transcripts of the interviews are on file with the author.

³⁰⁵ *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 9, para. 36; and Choice by Right 2000, p. 14.

³⁰⁶ Proudman 2011, p. 13; and Razack 2004, p. 165.

³⁰⁷ Meettoo & Mirza 2007, p. 191.

often regarded as actions that bring dishonour. In those cases, modifying the transgressor's behaviour – for example by a (forced) marriage – can reclaim honour.³⁰⁸

3.4. CONSEQUENCES

The consequences of forced marriage are diverse. Victims may suffer from isolation, feelings of guilt, shame, betrayal and fear.³⁰⁹ Because the majority of victims are forced to marry by their relatives, these non-consensual marriages often also negatively impact family relations.³¹⁰ Other possible results of a forced marriage are rape, physical and psychological violence, forced pregnancy, forced child bearing, and domestic servitude.³¹¹ Men and women who run away from home to escape (the threat of) a forced marriage may find themselves hiding in fear of their own relatives, facing harassment and/or social ostracism. In order to restore family honour, some families may take recourse to extreme measures to bring runaways back home and a rejected or failed (forced) marriage may even result in murder.³¹²

In addition, forced marriage involving children or young adults generally has a negative impact on health, personal development, education and economic status.³¹³ Further, research has shown that rates of (attempted) suicide are considerably higher among South Asian women living in Britain than among other groups in the United Kingdom.³¹⁴ Notably, family disputes over marriage and arranged marriages are cited as significant contributory sociocultural factors to the instances of (attempted) suicide by South Asian women.³¹⁵ This highlights the psychological impact that forced marriage can have on women, even when individual incidents of pressure or violence may appear relatively minor when seen in isolation.³¹⁶

³⁰⁸ Sen 2005, p. 47.

³⁰⁹ Heaton, McCallum & Jogi 2009, p. 7.

³¹⁰ The feeling of betrayal may be so strong that even in those cases in which the victim established a loving relationship with the person he/she was forced to marry, the relationship between the victim and those family members who forced him/her to enter into the marriage are permanently disrupted (Gangoli, Razak & McCarry 2006, p. 11).

³¹¹ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 33.

³¹² *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 12; and Choice by Right 2000, p. 15.

³¹³ Demos 2012, pp. 12 and 17–23.

³¹⁴ In the United Kingdom, the suicide rate among South Asian women is almost twice that of white women (M.H. Hicks & D. Bhugra, 'Perceived causes of suicide attempts by U.K. South Asian women', *American Journal of Orthopsychiatry* (73) 2003, p. 455).

³¹⁵ See e.g. N. Thompson & D. Bhugra, 'Rates of deliberate self-harm in Asian: Findings and models', *International Review of Psychiatry* (12) 2000, pp. 39 and 41.

³¹⁶ Choudhry 2011, p. 74.

3.5. TRANSNATIONAL DIMENSIONS

Many forced marriages that occur in England very clearly also have international dimensions. There are cases in which British nationals from South Asian communities are forced into a marriage with a foreign national and are either taken overseas – through deception or force – to marry and live with their spouse or are required to act as a sponsor for their spouse's immigration.³¹⁷ It is estimated that each year, hundreds of 14-, 15- and 16-year-old girls and boys disappear from schools and suffer this fate.³¹⁸ There have also been cases in which parents initially did not have the intention to marry their children off, but who, once abroad, were pressurised by family or community members into doing so.³¹⁹ Victims report having their passports taken away and in some cases reported having been drugged before being transported abroad.³²⁰ There have been reports of women who were kept abroad until they became pregnant, making it more difficult for them to exit the marriage.³²¹ There are also cases in which a foreign national is brought to England for the purpose of a forced marriage.³²² According to a report issued by the Muslim Arbitration Tribunal, in over 70% of all marriages between an English citizen and a foreign national from the Asian subcontinent, an element of force or coercion is present before the marriage takes place.³²³

4. CONCLUDING REMARKS

This chapter has demonstrated that forced marriages mainly take place in traditional and closed communities that attach great value to family honour and keeping up appearances. In the context of Dutch and English society, forced marriages are especially prevalent among communities with origins in India, Bangladesh, Pakistan, Morocco, Turkey and Surinam, but also in orthodox Protestant circles and (Roman Catholic) Irish traveller communities.

Forced marriage is a hidden practice that often takes places within the privacy of the family. It is mainly used as a means to control (female) children and uphold traditional values, both with the aim of protecting family honour. It is possible that only the future spouse exerts pressure on the victim, but in most cases,

³¹⁷ Choice by Right 2000, p. 12; and *NS v. MI* (2006) 1 FLR 444.

³¹⁸ Conversation with a member from the Forced Marriage Unit (interview dd. 20 March 2012); L. Tickle, 'Forced marriage: the pupils who vanish in the holidays', *The Guardian* 9 April 2012; and *Multi-agency practice guidelines: Handling cases of Forced Marriage*, London: FMU, June 2009, p. 54.

³¹⁹ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 12.

³²⁰ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 36; and Choice by Right 2000, p. 12.

³²¹ Choice by Right 2000, p. 15.

³²² Choice by Right 2000, p. 12.

³²³ Muslim Arbitration Tribunal 2008, para. 3.3(e). It is not clear how the Muslim Arbitration Tribunal calculated this percentage.

parents and relatives are the ones forcing the victim(s) to enter into a marriage. The force used is very diverse and ranges from (threats of) physical violence to psychological pressure (such as emotional blackmail) exerted by a large variety of people over a long period of time. Threats of disownment and social exclusion/ostracism are especially effective in closed and traditional communities because these mechanisms (i.e. disownment and exclusion) are used to display public disapproval if a community member transgresses what is deemed to be acceptable (see also Chapter 1 on the differences between arranged and forced marriages).

These types of forced marriages ought to be distinguished from the forced marriages that occur outside the context of the family. The latter type of forced marriage are often linked with human trafficking, generally involve more physical violence and are often (also) brought about by others than the victim's relatives – although forced marriage taking place within family circles may also amount to trafficking.

CHAPTER 3

FORCED MARRIAGES IN CONFLICT SITUATIONS

1. INTRODUCTION

All is fair in love and war. This statement still seems to be true today. In conflict situations, the taking of brides by the victor is a common occurrence. Through the years, many conflicts around the world have been marked by the abduction of women and girls who were forced into what is generally referred to as ‘marriages’ with their captors.³²⁴ There are reports of forced marriages taking place during the conflicts in *inter alia* Afghanistan, Angola, Cambodia, the Democratic Republic of Congo, East Timor, Guatemala, Kashmir, Liberia, Mozambique, Myanmar, Peru, Rwanda, Sierra Leone, Somalia, Sudan (Darfur), and Uganda.³²⁵ This chapter focuses on the phenomenon of forced marriages in the situations that have been or are being tried before the ICTY, ICTR, ICC, SCSL and ECCC with an emphasis on the forced marriages that took place during the civil war in Sierra Leone and under the Khmer Rouge in Cambodia. As was stated in the General Introduction, this book focuses on these two situations because of the high prevalence of forced marriage during the two conflicts. In addition, the conflict of Sierra Leone was chosen because it resulted in the first case law concerning the act of forced marriage under international criminal law.

In this chapter, first, acts of forced marriage during the Rwandan genocide and the conflicts in the former Yugoslavia are discussed. The third paragraph focuses on situations currently before the ICC. The practice of forced marriage was (or is) prevalent to some extent in all situations, but in some more than in others. The conflict in Uganda is especially infamous for the high number of child abductions coupled with forced marriages and this particular topic has

³²⁴ However, see Chapter 10, where it is argued that in many cases, ‘marriage’ is the wrong label to describe conduct that in fact amounts to (sexual) enslavement. For the sake of readability, however, this chapter will consistently use the word ‘marriage’, sometimes in combination with the prefix ‘bush’.

³²⁵ For a global overview, see M. Bastick, K. Grimm & R. Kunz, *Sexual Violence in Armed Conflict. Global Overview and Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces 2007.

been well-documented. Therefore, paragraph 3 will mainly focus on Uganda. The situations in other countries under investigation by the ICC are briefly discussed, mainly for the practical reason that there is little information on (the prevalence of) forced marriages taking place in those situations. Next, the practice of forced marriage as it took place during the conflicts in Sierra Leone (paragraph 4) and Cambodia (paragraph 5) will be discussed, forming the main focal point of this chapter.³²⁶ This descriptive part is followed by two comparative paragraphs. In paragraph 6, the Sierra Leonean ‘bush marriages’ and the Cambodian Khmer Rouge marriages are compared and differences and similarities are highlighted. Where applicable, reference will be made to the forced marriages that took place during other conflicts discussed in this chapter. In paragraph 7, the types of forced marriages as described in this and the previous chapter are compared with each other: what are the differences and similarities between forced marriages that take place during conflict situations and those that occur in times of peace? Paragraph 8 contains some concluding remarks.

The main aim of this chapter is cataloguing empirical data regarding forced marriages. The analysis of the legal aspects related to the practice of forced marriage takes place in Part III of this book.

2. FORCED MARRIAGES DURING THE CONFLICTS IN RWANDA AND THE FORMER YUGOSLAVIA

2.1. RWANDA

6 April 1994 marked the start of the genocide in Rwanda. In one hundred days, Hutu extremists killed almost one million Tutsis and moderate Hutus. It is estimated that during this time frame of a little over three months, between 250,000 and 500,000 women and girls were raped.³²⁷ In addition to (gang) rape, Tutsis and moderate Hutus were subjected to forced incest, sexual mutilation and forced nudity.³²⁸ What is less commonly known is that some women were singled out and forced into marital-like relations with individual Hutu militia.³²⁹ At checkpoints, roadblocks or other places where people were being attacked, members of the *Interahamwe* – a paramilitary Hutu organisation – would select women and girls and take them as their wives, sometimes through bizarre wedding ceremonies, but in general, simply by declaring a woman to be their

³²⁶ The case law of the SCSL and ECCC pertaining to the practice of forced marriage is discussed in the legal framework (Chapter 8).

³²⁷ Human Rights Watch 1996, p. 24 and UN Commission on Human Rights: Report on the situation of human rights in Rwanda 1996, para. 16. For a selection of testimonies of rape victims, see De Brouwer & Ka Hon Chu 2009.

³²⁸ UN Commission on Human Rights: Report on the situation of human rights in Rwanda, para. 18.

³²⁹ Kalra aptly calls this practice ‘Rwanda’s secret’, see Kalra 2001.

‘wife’.³³⁰ Militia leaders would sometimes hand out women as rewards to men who had killed many Tutsis, and Hutu rebels occasionally sold the women and girls they captured to other Hutus, who would then turn them into their ‘wives’.³³¹ These forced marriages, which lasted anywhere between a few days to several months, in some cases even continuing after the genocide had ended, resulted in prolonged physical and psychological suffering.³³² The victims often served as second or third wives to Hutu men and many were repeatedly raped, beaten, threatened with death, forced to perform domestic duties and in addition had to maintain an intimate relationship with their tormentors.³³³ A lot of survivors who were forced into a marriage in a twisted way owe their lives to their captors, a fact which is accompanied by feelings of both shame and guilt, seeing as most of the victims’ relatives did not survive and in some cases, were even killed by the very men they had to call ‘husband’.³³⁴ Moreover, upon their return to their communities, the women, like other victims of sexual violence, faced stigmatisation and condemnation because survivors accused them of collaborating with Hutu extremists.³³⁵ Having nowhere to go or because they had not been able to escape – there are reports of Hutus taking their ‘wives’ with them when they fled Rwanda – some women remained with their captors for unknown periods after the genocide.³³⁶ For example, Hyacintha Nirere – one of the women who survived the genocide and whose testimony was recorded in the book *The Men Who Killed Me* – was forced to stay in a marriage with a member of the *Interahamwe* for two years. When this man fled to the Democratic Republic of Congo, he left Hyacintha, who was six months pregnant, behind.³³⁷

Forced marriage has not been charged before the ICTR. It was, however, obliquely mentioned in several judgements.³³⁸ For example, the Trial Chamber has found that Callixte Kalimanzira, Minister of the Interior of the interim government of Rwanda during the genocide, had ordered the killing of young Tutsi girls who had been forced into marriages with Hutu men because they could cause problems.³³⁹

³³⁰ Human Rights Watch 1996, p. 58 and Kalra 2001, p. 201.

³³¹ African Rights 1995, p. 780, Human Rights Watch 1996, pp. 58–59 and Kalra 2001, p. 209.

³³² Kalra 2001, p. 205; Human Rights Watch 1996, p. 1; and African Rights 1995, p. 781.

³³³ Kalra 2001, pp. 201 and 205; and African Rights 1995, pp. 778–779.

³³⁴ Human Rights Watch 1996, p. 74. African Rights 1995, p. 783, recorded the testimony of a young Tutsi woman who was given as a ‘wife’ to a member of the *Interahamwe*, who got her a Hutu ID card so he could ‘keep’ her.

³³⁵ Human Rights Watch 1996, pp. 56 and 74; and Kalra 2001, pp. 202–203.

³³⁶ Kalra 2001, p. 202; Human Rights Watch 1996, p. 62; and African Rights 1995, p. 748.

³³⁷ De Brouwer & Ka Hon Chu 2009, pp. 121–122.

³³⁸ See also *Muhimana* Trial Judgement, paras. 310–315 and 322: ‘In light of the coercive circumstances (...) the Chamber is not persuaded by the testimonies of Defence Witnesses DAB and DAC that Witness BG consented to “marry”, or cohabit with Mugonero, an *Interahamwe*, who had participated in killing other refugees who had been in hiding with the witness.’ See also *Akayesu* Trial Judgement, paras. 435–436.

³³⁹ *Kalimanzira* Trial Judgement, paras. 717, 721 and 728–729.

2.2. THE FORMER YUGOSLAVIA

During the wars that raged on the territory of the former Yugoslavia in the 1990s, sexual violence was committed on a large scale against women, children and men. Although atrocities were perpetrated by and against all sides, the majority of the sexual assaults were committed by Serbs against Muslim and Catholic Croat women.³⁴⁰ Rapes were committed in the houses of the victims, in the streets, in the woods and in detention centres. In some of these detention centres, also known as rape camps, women and girls were held for the purpose of rape.³⁴¹ Some soldiers, usually commanders or other high ranking soldiers, would select women and girls from these detention facilities and take them to a house or apartment. Locked in these houses for varying periods of time, ranging from several hours to several months, the girls were (gang)raped by their captors and forced to perform domestic chores. It has been said that the conditions these girls and women were kept in are similar to what the former bush wives in Sierra Leone endured during their captivity (see *infra* paragraph 4).³⁴² A good example of this type of sexual enslavement is provided by the ICTY case against Kunarac, Kovač and Vuković, three former (sub-)commanders of the military police of the Bosnian Serb Army. Dragoljub Kunarac was found guilty of having kept two girls in an abandoned house for approximately six months and was convicted of rape and enslavement.³⁴³ During at least two of these months, he continuously raped one of the girls whom he had reserved exclusively for himself, forbidding other soldiers to rape her. The other girl was raped for a period of six months by another commander, referred to in the Trial Judgement as DP6. Whilst in captivity, the girls were beaten, threatened, kept in constant fear and forced to perform domestic tasks and obey all demands made by Kunarac and DP6. Even though at some point, the girls were given keys to the house, the Trial Chamber held that they were not free to go where they wanted seeing as they had nowhere to go and had no place to hide from their captors. The second accused, Radomir Kovač, was found guilty of detaining four girls in his apartment for several months and treating them as his property and was convicted of rape, enslavement and outrages upon personal dignity. The girls were beaten and threatened and were repeatedly raped by Kovač (who had reserved one of the girls exclusively for himself) and other occupants of and visitors to the apartment. Whilst in captivity, the girls were also forced to perform domestic duties such as laundering, cooking and cleaning.³⁴⁴

Several other cases that were on trial before the ICTY dealt with similar issues, although no mention was made of any forced (domestic) labour carried

³⁴⁰ Serbs married to Muslims were also targeted (*Krajišnik* Trial Judgement, paras. 445 and 567).

³⁴¹ De Brouwer 2005, p. 9; and Salzman 1998, pp. 349 and 359.

³⁴² Kalra 2001 p. 215.

³⁴³ *Kunarac et al.* Trial Judgement, para. 745. Note that the ICTY Statute does not list the crime of sexual slavery.

³⁴⁴ *Kunarac et al.* Trial Judgement, paras. 728, 739–741, 747–752, 761 and 775.

out by the victims. Miroslav Bralo was found guilty of unlawfully confining a Bosnian Muslim woman in a house for a period of two months. During her captivity, she was repeatedly raped.³⁴⁵ Bralo was convicted of *inter alia* rape and unlawful confinement. Dragan Zelenović was convicted of rape for keeping four women in a house for several months, during which time he and others raped the women.³⁴⁶

Although none of the ICTY judgements explicitly deal with instances of forced marriage, the Trial Chamber in the *Kvočka et al.* Trial Judgement did list forced marriage, alongside sexual mutilation and forced abortion, as an example of a crime that falls within the ambit of sexual violence.³⁴⁷

3. FORCED MARRIAGES AND THE SITUATIONS BEFORE THE ICC

As of January 2014, eight situations have been brought before the ICC: the Central African Republic, Kenya, Darfur (Sudan), the Democratic Republic of Congo, Uganda, the Republic of Côte d'Ivoire, Libya and Mali. Several reports indicate that forced marriages – to a greater or lesser extent – took (or still take) place in at least seven of the eight situations. Libya, at this stage, appears to be the exception.³⁴⁸ In this paragraph, the forced marriages as they took place during the different conflicts will be briefly described, as will the legal steps that have been taken by the Prosecutor and the ICC.

3.1. CÔTE D'IVOIRE

In 2002, civil war broke out in Côte d'Ivoire. Several factions fought each other, aided by mixed groups of mercenaries from Libya and Sierra Leone. After a peace agreement was signed in 2007, the 2010 presidential elections resulted in a second civil war when two candidates, Alassane Ouattara and Laurent Gbagbo, both claimed victory and took up office.³⁴⁹ Initially, the ICC investigation focused on

³⁴⁵ *Bralo* Sentencing Judgement, paras. 15–16 and 33.

³⁴⁶ *Zelenović* Sentencing Judgement, para. 27.

³⁴⁷ *Kvočka et al.* Trial Judgement, para. 180, footnote 343.

³⁴⁸ The author found no (official) reports of cases of forced marriages taking place during the Arab Spring in Libya that started early 2011. There have, however, been reports of cases concerning Libyan men forcing Syrian refugee women and girls into marriage (see *inter alia* BBC news, *Libyans 'exploiting Syrian women' with marriage offers*, 20 September 2012 (available at <www.bbc.co.uk/news/world-middle-east-19660293> last accessed December 2013).

³⁴⁹ According to the ICC Prosecutor there are reasonable grounds to believe that pro-Gbagbo forces committed crimes against humanity, and that it is likely that similar crimes were committed by pro-Ouattara forces (see Pre-Trial Chamber III, Decision on the Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010, No. ICC-02/11 22 February 2012).

the violence during this second Ivorian war, but in 2012, Pre-Trial Chamber III expanded its authorisation for the investigation in Côte d'Ivoire to include crimes that were allegedly committed during the first civil war.³⁵⁰ NGO reports are rife with accounts relating to rape and sexual slavery. Many women were abducted by fighters and forced to marry them. These forced marriages bear many similarities with the forced marriages that took place during other African conflicts, such as the civil war in Sierra Leone (see *infra* paragraph 4) and the Rwandan genocide: women were forced to live with their captors for periods ranging from several weeks to over a year. Some were forced to take an active part in the fighting. Many had to wash, cook and clean and were regarded as the 'property' of individual fighters, which ensured some modicum of protection from crimes such as gang rape by other rebels.³⁵¹ Laurent Gbagbo and his wife Simone Gbagbo have both been charged with four counts of crimes against humanity: murder, rape and other forms of sexual violence, other inhumane acts, and persecution.

3.2. KENYA

Another country that has seen a surge of post-election violence is Kenya; murder, rape, acts of persecution and forcible transfer were committed in the run-up to and in the wake of the 2007 elections. There are many reports on the wave of sexual violence – especially in the form of rape – that washed over the country, but accounts of sexual slavery or forced marriages are relatively limited. In its first publication on the post-election violence, the Kenya National Commission on Human Rights did state that there were reported cases of men taking advantage of vulnerable women and girls by forcing them into marriages.³⁵² It appears that in Kenya, forced marriages were not as endemic as in other (African) conflicts under investigation before the ICC.

3.3. THE CENTRAL AFRICAN REPUBLIC

The Central African Republic has been torn by violent conflict on and off ever since decolonisation in 1960. During a recent armed conflict between government and rebel forces, many civilians were killed and raped, with violence reaching its peak

³⁵⁰ Pre-Trial Chamber III, Decision on the Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010, No. ICC-02/11 22 February 2012.

³⁵¹ Human Rights Watch, 'My Heart Is Cut'. *Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire*, August 2007, pp. 41–46; and Amnesty International, *Briefing to the Committee on the Elimination of Discrimination against Women. Cote d'Ivoire*, London: Amnesty International 2011, p. 6.

³⁵² Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, August 2008 (Preliminary Edition), para. 405.

in 2002 and 2003. In addition to acts of murder and rape, several cases concerning forced marriages have been reported.³⁵³ It appears that the majority of these forced marriages took (and take) place in the context of child soldiering.³⁵⁴ Members or rebel groups abduct girls and force them into marriages. A 2013 report of the Secretary-General of the UN on sexual violence in conflicts mentions several cases of girls being forced into marriages with members of the armed *Convention des patriotes pour la justice et la paix en Centrafrique*.³⁵⁵ The investigations of the ICC focus on one accused, Jean-Pierre Bemba Gombo, who is charged with the war crime of pillaging, and with rape and murder as crimes against humanity and war crimes.³⁵⁶

3.4. REPUBLIC OF MALI

In January 2012, civil war broke out in the Republic of Mali in which several Islamic and nationalist rebel groups started fighting the government. In July 2012, the government of Mali referred the situation to the ICC.^{357, 358} It appears that many rebel groups abduct women and girls and force them into marriages. There are reports that some Islamist rebel groups threaten parents in the regions they control into handing over their daughters for marriage.³⁵⁹ It has been suggested that fighters force women and girls into religious marriages as a means to legitimise their (sexual) enslavement.³⁶⁰

3.5. DEMOCRATIC REPUBLIC OF CONGO

The conflict in the DRC started in the 1990s and involved a number of different rebel groups and fighting forces, such as the *Force de résistance patriotique en Ituri* (FRPI), the *Front des nationalistes et intégrationnistes* (FNI), the *Forces patriotiques pour la libération du Congo* (FPLC) and the *Union des Patriotes Congolais* (UPC).³⁶¹ The ICC Prosecutor has charged five former leaders of

³⁵³ Women's Initiative for Gender Justice, *In Pursuit of Peace*, April 2010, p. 32.

³⁵⁴ UNICEF, *Central African Republic Situation Report*, 13 June 2013.

³⁵⁵ UN GA/SC, *Report of the Secretary-General on sexual violence in conflict*, UN Doc. A/67/792-S/2013/149, 14 March 2013, para. 21.

³⁵⁶ See *Bemba Gombo* Decision on the Confirmation of the charges, 15 June 2009.

³⁵⁷ See Office of the Prosecutor, *Situation in Mali Article 53(1) Report*, 16 January 2013.

³⁵⁸ At the time of writing (December 2013), no one had yet been charged.

³⁵⁹ UN GA/SC, *Report of the Secretary-General on sexual violence in conflict*, UN Doc. A/67/792-S/2013/149, 14 March 2013, para. 54.

³⁶⁰ See UNSC 6948th meeting, 17 April 2013, UN Doc. S/PV.6948, pp. 7–8 (statement by Saran Keita Diakité); and <www.unwomen.org/en/news/stories/2013/5/girls-receive-a-visit-from-a-different-man-every-night-a-new-husband/> (last accessed December 2013).

³⁶¹ Another rebel group that has been active in the conflict in the DRC is the Democratic Forces for the Liberation of Rwanda, founded by Rwandan *génocidaires* who fled to the DRC after the

several such groups; the cases against two of them are relevant to this study. In his submission of the public version of the document containing the charges against Katanga,^{362, 363} the Prosecutor alleged that there is evidence that during an attack on a village called Bogoro, women were raped and then taken to military camps, where some of them were given as ‘wives’ to their captors.³⁶⁴ During the confirmation of the charges hearing, the Prosecution reiterated that forcibly marrying abducted women to their rapists was common practice within the FRPI and the FNI.³⁶⁵ In the decision on the confirmation of the charges in the case against Katanga, the ICC Pre-Trial Chamber briefly expressed itself on forced marriages when it stated that:

‘In the view of the Chamber, sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be “practices such as the detention of women in ‘rape camps’ or ‘comfort stations’, forced temporary ‘marriages’ to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the preemptory norm prohibiting slavery.”³⁶⁶

It would seem that the ICC Pre-Trial Chamber thus concurs with the AFRC and Charles Taylor Trial Judgements (see Chapter 8) in holding that forced marriage is not a distinct crime (in the form of an ‘other inhumane act’) but a form of sexual slavery that is completely subsumed under this offence.

1994 genocide. According to Ertürk, the Special Rapporteur on violence against women, its causes and consequences, ‘the sexual atrocities committed in South Kivu are (...) reminiscent of those perpetrated by Interahamwe militia during the Rwandan genocide. The atrocities are structured around rape, sexual slavery and forced marriage’ (UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Yakin Ertürk, *Addendum Mission to the Democratic Republic of the Congo*, UN Doc. A/HRC/7/6/Add.4, 28 February 2008, para. 21). See also UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, paras. 722 and 6068.

³⁶² Mathieu Ngudjolo Chui was also charged in this case, but in December 2012 he was acquitted of all charges and released (*The Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04–02/12, Judgement pursuant to article 74 of the Statute, 18 December 2012).

³⁶³ Note that on 7 March 2014, the ICC Trial Chamber acquitted Katanga of the charges relating to rape and sexual slavery. Katanga was found guilty of *inter alia* willful killing as a war crime and murder as a crime against humanity (see *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04–01/07, Trial Judgement, 7 March 2014).

³⁶⁴ *Katanga and Ngudjolo Chui* Prosecution’s submission of public version of document containing the charges, para. 89.

³⁶⁵ *Katanga and Ngudjolo Chui* Confirmation of Charges Hearing, p. 64, lines 9–11. See also pp. 19, 22, 23 and 25–27.

³⁶⁶ *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 431. The Pre-Trial Chamber cites from the report of the former Special Rapporteur on the issue of systematic rape, sexual slavery, and slavery-like practices in armed conflict, McDougall (UN Commission on Human Rights: Contemporary forms of slavery 1998, para. 8).

In March 2012, Thomas Lubanga Dyilo, alleged founder of the UPC and FPLC, was convicted of enlisting and conscripting children under the age of 15 years into the FPLC and using them to actively participate in hostilities in the context of an international and non-international armed conflict.³⁶⁷ In his opening statement in the case against Lubanga, the Prosecutor also referred to forced marriages and described how commanders sent (child) soldiers to look for girls and to bring them to the camp. The Prosecutor stated that as soon as the girl's breasts started to grow, Lubanga's commanders could select them as their forced wives, adding that 'wife' is the wrong word, as the girls were transformed into sexual slaves.³⁶⁸ In the Prosecution's Closing Brief, dated 1 June 2011, the Prosecutor recognised that the term 'child soldiers' is not restricted to children who actively fight, but also includes 'children whose roles are essential to the functioning of the armed group, such as those working as cooks, porters, messengers, as well as girls recruited for sexual purposes and forced marriage'.³⁶⁹ The Trial Chamber considered this broad definition of child soldiering, but did not reach a conclusion on whether acts of sexual violence and forced marriage are properly included within the scope of 'using (children under the age of 15) to participate actively in hostilities'. The Decision on the Confirmation of Charges contained no facts relating to sexual violence and basing a decision on evidence introduced during the trial would be impermissible, seeing as the Rome Statute prescribes that Trial Chamber's Decision shall not exceed the facts and circumstances described in the charges and any amendments to them.³⁷⁰

3.6. SUDAN

The conflict in the Sudanese region of Darfur started in 2003. There are several reports on the prevalence of sexual slavery and forced marriage taking place in Sudan.³⁷¹ According to these reports, the *Janjaweed*, a government-backed armed militia group, abduct women and children from villages, confine them for protracted periods of time, ranging from days to years, and subject them to (gang) rapes and force them to perform all sorts of labour.³⁷² Many of the women and girls are forced into marriage with their captors or their captors' relatives, or are

³⁶⁷ *Lubanga Trial Judgement*.

³⁶⁸ *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-T-107-ENG, Opening Statement, p. 12 lines 7–10.

³⁶⁹ *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Prosecution's Closing Brief, 1 June 2011, para. 139. See also paragraph 6.3.1 *infra*.

³⁷⁰ *Lubanga Trial Judgement*, para. 630.

³⁷¹ See e.g. Darfur Consortium 2009, Doctors Without Borders, *The Crushing Burden of Rape: Sexual Violence in Darfur*, 8 March 2005 and The UN International Commission of Inquiry, October 2004, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, pp. 89 *et seq.* and Report of the International Eminent Persons Group, *Slavery, Abduction and Forced Servitude in Sudan*, 22 May 2002.

³⁷² Darfur Consortium 2009, pp. 8–9.

transported from Darfur to the capital, Khartoum, or other parts of Sudan, where they are made into wives of government soldiers.³⁷³ As regards the involvement of government soldiers, several sources state that the Sudanese army is also actively involved in systematically kidnapping girls for the purpose of forced marriage. Witness testimonies in NGO reports provide evidence that soldiers receive money in exchange for abducted women and girls.³⁷⁴ The investigation into the situation in Darfur focuses on six individuals who allegedly bear the greatest responsibility for crimes committed in this Sudanese region. Of the six men, four are accused of sexual violence crimes: Ahmad Harun and Ali Kushayb are accused of the war crime of outrages upon personal dignity and rape as a war crime and crime against humanity. President Al Bashir is accused of rape as a crime against humanity and Abdel Raheem Hussein is charged with rape as a crime against humanity and war crime.³⁷⁵

3.7. UGANDA

The conflict in Uganda started when the National Resistance Army of President Yoweri Museveni came into power in 1986. Supporters of the previous government fled to the north of Uganda and the south of Sudan where they united in opposition groups, which fought the government. In the second half of the 1980s, several splinter groups came into being, one of them a religious and military group which later became known as the Lord's Resistance Army (LRA). The LRA, led by Joseph Kony, ostensibly aimed to overthrow the Ugandan government and in pursuit of this goal, killed, mutilated and raped countless civilians.³⁷⁶

Extensive research has been done into the practice of forced marriages within the LRA.³⁷⁷ The LRA is most notorious for the abduction of children, who are then used as child combatants, slaves or 'wives'.³⁷⁸ Abductees served multiple roles within this rebel group. A 2004 population study of former female LRA captives reveals that 51% of the abducted girls at one point served as a wife to a

³⁷³ Darfur Consortium 2009, p. 10.

³⁷⁴ Darfur Consortium 2009, p. 10.

³⁷⁵ See e.g. *The Prosecutor v. Omar Hassan Ahmed Al Bashir*, Case No. ICC-02/05-01/09, Second warrant of arrest, 12 July 2010.

³⁷⁶ Human Rights Watch 2003b, p. 4. The LRA is not the only group in Uganda that commits violations of humanitarian and human rights law: there are reports that the government forces, the Uganda Peoples' Defence Forces, have also committed unlawful killings, rapes and beatings (Amnesty International 2008, p. 5).

³⁷⁷ See *inter alia* Annan *et al.* 2011, Annan *et al.* 2009, Carlson & Mazurana 2008, Sway 2008, and McKay & Mazurana 2004.

³⁷⁸ It is estimated that at least 66,000 children have been abducted by the LRA since 1986 (Sway 2008, p. 44). More recent reports estimate that between 60,000 and 80,000 youths were abducted by the LRA for at least a day: approximately 26% of the population of female youth and 47% of male youth (Annan *et al.* 2011, p. 883).

fighter, in addition to being a porter, food producer, and fighter herself.³⁷⁹ There is evidence that these forced marriages were perpetrated in a widespread and systematic manner in northern Uganda with abductions of girls being carried out for the very purpose of forcibly marrying them to LRA fighters.³⁸⁰ The LRA leaders decided how many girls should be abducted; the commanders' demand for 'wives' determined in part the number of female abductions.³⁸¹ Records – detailing the number of (new) abductees, escapees and deceased – were kept on female abductees so that the top leaders would know exactly how many girls there were in a camp at any given time and how many were available for distribution. If the commanders were of the opinion that there were not enough marriageable women, they would instruct units to abduct specified numbers of girls.³⁸² The commanders reportedly favoured educated girls as they were able to assist the fighters with medical care, planning, record-keeping, logistical support and radio communication. This confirms that women and girls had a specific and strategic role within the LRA: according to the former intelligence officer to Kony's alleged right-hand man Vincent Otti, Otti refused to trade women for weapons or medicine with Arab Sudanese fighters, because he said the girls were needed in the LRA camps.³⁸³

The LRA imposed a puritanical code of conduct on its members that governed fighting, eating, praying, washing and sexuality. There were strict rules concerning sex and civilian rape and the use of sexual violence was highly controlled by strong norms and sanctions.³⁸⁴ Control over sexuality was exercised through a rigid hierarchical structure and by means of violence and intimidation.³⁸⁵ Intercourse was permitted only within sanctioned LRA wedlock. Sexual contact outside of these 'marriages' was strictly forbidden and punishable by death. This provides evidence for the thesis that forced marriages were part of the LRA's military strategy and the social order created by the commanders.³⁸⁶ Forced marriages were used to enhance control over the fighters, maintain strict discipline, govern relations within the group, create social cohesion and contain the spread of HIV and other STDs. Forced marriages, combined with the prohibition of sex (and rape) outside of these marriages thus had a strategic

³⁷⁹ McKay & Mazurana 2004, pp. 73 and 135–136.

³⁸⁰ SWAY 2008, p. 39; Carlson & Mazurana 2008, pp. 8 and 14; and Human Rights Watch 1997, p. 107.

³⁸¹ Annan *et al.* 2011, p. 885.

³⁸² Carlson & Mazurana 2008, p. 18.

³⁸³ Annan *et al.* 2011, p. 886 and Carlson & Mazurana 2008, pp. 20 and 22.

³⁸⁴ See also Annan *et al.* 2011, p. 883.

³⁸⁵ Carlson & Mazurana 2008, p. 17.

³⁸⁶ Amnesty International 1997, p. 19. Annan *et al.* 2009, p. 25 compare the LRA with disciplined, ideological groups such as the Sri Lankan Tamil Tigers who used abduction, forced marriage and the prohibition of sex (and rape) outside of these marriages as a strategic way to create social cohesion and to maintain control over a group of fighters.

instrumental purpose.³⁸⁷ There is also evidence that the forced marriages served ideological goals, namely to populate a new Acholi nation in northern Uganda and to produce future fighters, mothers and workers for the LRA. Either way, it has been suggested that the control of sexual violence and the instrumental use of forced marriages have contributed to the effectiveness and longevity of the LRA.³⁸⁸ Within the context of the forced marriages, pregnancy was broadly promoted, and it even seems that (forcibly) impregnating forced wives was policy within the LRA. Girls who did not conceive were given medication; girls who attempted to prevent or abort pregnancies were put to death. There are even reports from former LRA fighters who state that their sex lives with their wives were monitored and there are testimonies from women who claimed that some men did not want to have sex with their wives, but were ordered to do so by commanders with the aim of conceiving children.³⁸⁹

The LRA seems to have had a policy of not raping prepubescent girls for two reasons. First, because they were regarded as unfit for sexual activity as they could not conceive yet and secondly, because they needed to remain free from STDs to ensure they were 'clean' when they were given to commanders as wives.³⁹⁰ Once the girls were deemed sexually mature, around the age of twelve, they were made wives of individual LRA fighters, who usually had several wives, the total number depending on their rank.³⁹¹ Women who refused to go with the men they were given to could be punished by rape, torture or even death.³⁹² Conflicting reports have been given as regards the question of whether or not men were at liberty to refuse a 'wife': some researchers report that men could not disobey the order given by a commander to take a wife,³⁹³ others were informed by former LRA members that boys and men could both request and refuse wives.³⁹⁴

³⁸⁷ Annan *et al.* 2009, pp. 1 and 10–12. This contrasts sharply with the practices of the AFRC and RUF in Sierra Leone (see *infra*), who did not use *prohibition* of civilian rape, but rather used the *commission* of gang rape of civilians as a means to bind rebels to the group (Annan *et al.* 2009, p. 12 and D.K. Cohen, 'The role of female combatants in armed groups: women and wartime rape in Sierra Leone (1991–2002)', in: *Annual Convention of the International Studies Association*, New York, 2009). The LRA on the other hand, used non-sexual physical violence to sever ties between the captive and her or his relatives and community and at the same time to bind abductees to the group, forcing them to beat, mutilate or murder other abductees, civilians and family members (Annan *et al.* 2011, p. 884 and McKay & Mazurana 2004, p. 28).
³⁸⁸ Annan *et al.* 2009, p. 12.

³⁸⁹ Carlson & Mazurana 2008, pp. 23–24; and Allen 2005, p. 28.

³⁹⁰ SWAY 2008, p. 41 and Carlson & Mazurana 2008, p. 22, Human Rights Watch 2003c, p. 28. This also explains the LRA's preference for young girls: when abducted before reaching puberty, the chances of the girls carrying any STD is relatively small (Human Rights Watch 2003c, p. 19). Otti allegedly had girls checked for physical and sexual illnesses at a local hospital before he took them as his wives (Carlson & Mazurana 2008, p. 20).

³⁹¹ Human Rights Watch 1997, pp. 3 and 30–31. Human Rights Watch 2003b, p. 14. SWAY 2008, p. 42.

³⁹² Carlson & Mazurana 2008, p. 19.

³⁹³ Allen 2005, p. 28. Therefore, it cannot be ruled out that some men were also victims of the forced marriages.

³⁹⁴ Carlson & Mazurana 2008, p. 18.

Once in an LRA marriage, the women were at the complete mercy of their husbands, who had absolute power over them and who could discipline and even kill them.³⁹⁵ Some former LRA wives reported that they had been treated very badly; others stated that they had been treated relatively well. One woman explained that she and the man she was forced to marry, who had also been abducted, got along well.³⁹⁶ For some girls, being given to a commander meant that they had more privileges than they had had as a common servant: they were no longer required to perform hard labour, they received more food and sometimes shared in the looted goods. But in their new role as ‘wife’, they could now be subjected to repeated rape by their husband, in many cases resulting in STDs and pregnancies.³⁹⁷

The duration of the LRA marriages exceeds the duration of the average forced marriage in other African conflict situations: there are reports of girls who were married for as long as five, nine or even ten years, although others were married for shorter periods of time.³⁹⁸ It is estimated that the average LRA marriage lasted somewhere between three and four years.³⁹⁹ The average duration of abduction is assessed at 11.4 months for females and 9.1 months for males.⁴⁰⁰ Research conducted by SWAY (Survey of War-Affected Youth), a research programme in northern Uganda, reveals that about one quarter of abducted girls were given as wives to LRA fighters and commanders.⁴⁰¹ Half of the women who were forced to assume the role of wife gave birth to children of those marriages.

In general, these former LRA wives reported having suffered significantly more overall violent events (an average of thirteen forms of violence as opposed to an average of eight forms of violence reported by other female (long-term) abductees) and stayed longer in captivity.⁴⁰² Moreover, the victims of forced marriages and their children were less likely to be released by the LRA (and the LRA did frequently release or leave behind children) because they were regarded as the property of LRA fighters and therefore most had to organise their own escape. Victims also reported that their captor husbands threatened them with death: should they try to escape, they would be killed and should they manage to escape, their children and relatives would be murdered.⁴⁰³ It is not clear how many women still remain in captivity today, but those who managed to escape were sometimes hounded by their LRA husbands.⁴⁰⁴ Agnes, a woman who stated she

³⁹⁵ Carlson & Mazurana 2008, p. 21.

³⁹⁶ Annan *et al.* 2011, p. 884.

³⁹⁷ Human Rights Watch 2003b, pp. 13–14. SWAY 2008, p. 41.

³⁹⁸ Amnesty International 2008, p. 11; Human Rights Watch 2005, p. 58; Human Rights Watch 2003b, p. 14.

³⁹⁹ SWAY 2008, p. 54.

⁴⁰⁰ Annan *et al.* 2011, p. 883.

⁴⁰¹ SWAY 2008, p. 40: approximately 10% of all 619 female interviewees – abducted and not abducted – were forced wives.

⁴⁰² SWAY 2008, pp. vii, 26 and 54.

⁴⁰³ SWAY 2008, pp. 36 and 41–44; Human Rights Watch 2003b, p. 15.

⁴⁰⁴ Carlson & Mazurana 2008, pp. 27–28.

became the second wife of Otti in 1995, escaped after nine years. After her escape, Otti is said to have written a letter, threatening to kill everyone in her parish, unless she was returned to him. According to a relative of this woman, the LRA went to Agnes' village and beat her mother to death.⁴⁰⁵ This example illustrates that even after their escape, some women are still in the grip of their tormentors.

Although girls and boys alike suffered the most horrifying ordeals, Human Rights Watch emphasises the uniqueness of the girls' plight due to the additional abuses they suffered in the form of sexual violence.⁴⁰⁶ The LRA marriages have left a lurid legacy: more than 50% of the victims of forced marriages who returned from captivity have one or more children from their LRA husbands and these single child-mothers are often (initially) left to their own devices.⁴⁰⁷ Like most victims of sexual and gender-based violence, women and girls who were subjected to forced marriages face widespread stigma, to such an extent that, upon return from captivity, even the children born out of these forced marriages may be discriminated against.⁴⁰⁸ In the patriarchal society of the Acholi people, who live in northern Uganda, a child belongs to its father and his family, but children born out of recognised wedlock belong to the mother and her clan.⁴⁰⁹ Seeing as neither Ugandan statutory law,⁴¹⁰ nor Ugandan customary law or practice⁴¹¹ recognise the forced marriages that were contracted by the LRA, the children born out of these unions belong to the mother.⁴¹² In the long-run, most mothers reported that they and their children were accepted by their communities and families although there are also reports of children being rejected.⁴¹³ In general, though, girl mothers did face higher levels of rejection and stigma.⁴¹⁴

As well as the problems they face as a result of the enforced pregnancies, these girls, upon return to their community, also have difficulties adjusting to the traditional role of women in Ugandan society: they are expected to conform to stereotypical female behaviour after having become used to fighting, harsh

⁴⁰⁵ Human Rights Watch 2005, p. 58.

⁴⁰⁶ Human Rights Watch 2003c, p. 30.

⁴⁰⁷ Amnesty International 2008, pp. 11–12. Of the 619 girls and women interviewed by SWAY, 35.9% of the women who had been forcibly married had one child by her captor, 12% had two children and 3.7% had three children (SWAY 2008, p. 43).

⁴⁰⁸ Amnesty International 2008, p. 12.

⁴⁰⁹ Carlson & Mazurana 2008, pp. 29 and 53.

⁴¹⁰ The freedom to marry by consent is enshrined in Article 31(3) of the Constitution of Uganda, which stipulates that 'marriage shall be entered into with the free consent of the man and woman intending to marry'.

⁴¹¹ According to customary law of the Acholi and Langi people, two ethnic groups who live in the northern parts of Uganda, bride and groom, as well as their respective parents, are required to consent to the marriage. The husband-to-be is subsequently required to provide a dowry to the bride's father. Without this dowry, the marriage is invalid (Carlson & Mazurana 2008, pp. 51–52).

⁴¹² SWAY 2008, p. 44 and Carlson & Mazurana 2008, pp. 8 and 31. In the eyes of the LRA, however, the children belonged to them.

⁴¹³ Annan *et al.* 2011, pp. 892–897. See also SWAY 2008, p. 80.

⁴¹⁴ McKay & Mazurana 2004, p. 87.

conditions and living with other fighters during their captivity with the LRA.⁴¹⁵ A long time after escaping captivity, they are still traumatised, both physically and psychologically.⁴¹⁶

Recent reports show a more positive picture of victims of forced marriage in the long run and suggest that women who were forced into marriage run a much lower risk of being rejected by family and community than is popularly believed.⁴¹⁷ The conclusion of these reports is that upon their return from captivity, the majority of victims of forced marriages experience problems with reintegration,⁴¹⁸ but many of these difficulties, as well as psychological problems, decrease over time. According to SWAY, '(r)esilience and acceptance rather than rejection or trauma is the norm'.⁴¹⁹ Due to a lack of qualitative and quantitative data from other African countries, it is difficult to say whether the results from Uganda are relevant to (the aftermath of) other conflicts, but Annan *et al.* note that there are an increasing number of qualitative studies that show a similar more positive reintegration image of former abductees.⁴²⁰

In 2003, the Ugandan government referred the situation concerning the LRA to the Prosecutor of the ICC. Arrest warrants have been issued for Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, who are all still at large. The arrests warrants for Kony and Otti contain allegations of rape and sexual slavery. As regards the internal organisation of the LRA, former ICC Chief Prosecutor Luis Moreno-Ocampo, in his Statement on the Uganda arrest warrants, referred to the abduction, distribution and use of girls as wives, stating that the LRA corrupted language to cover their criminal acts by using the word 'wife', whereas these girls were, in the view of the Prosecution, used as (sex) slaves.^{421, 422}

⁴¹⁵ Human Rights Watch 2003c, p. 30.

⁴¹⁶ Amnesty International 2008, p. 10.

⁴¹⁷ Such as Carlson & Mazurana 2008; and SWAY 2008.

⁴¹⁸ The majority of women who were forced to marry LRA combatants experienced problems with their relatives and communities in the first weeks after their return, but these problems decreased over time. Out of 42 girls sampled by Mazurana & Carlson, 64% stated they initially felt stigma, 41% reported being physically threatened and 10% reported being physically attacked (McKay & Mazurana 2004, p. 84).

⁴¹⁹ SWAY 2008, p. viii.

⁴²⁰ Annan *et al.* 2011, p. 881. See *inter alia* Williamson 2006, pp. 185–205.

⁴²¹ Statement by the Chief Prosecutor on the Uganda Arrest Warrants, 14 October 2005, p. 5.

⁴²² In 2008, a special division of the High Court of Uganda (the International Crimes Division) was established to deal with crimes committed during the conflict in Uganda. It is possible that, at some stage, this Court will also address the practice of forced marriages within the LRA.

4. FORCED MARRIAGES DURING THE CIVIL WAR IN SIERRA LEONE

4.1. CONTEXTUALISATION: THE CONFLICT IN SIERRA LEONE

In March 1991, civil war broke out in Sierra Leone. During this conflict, which lasted over a decade, several rebel groups fought government troops with the aim of taking over control of the country. The two most important rebel groups were the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC). The inability of the Sierra Leone Army to repel the rebels triggered the emergence of civilian-led paramilitary groups. These groups eventually became collectively known as the Civil Defence Forces (CDF) and fought in support of the Sierra Leonean government.⁴²³

The Sierra Leone conflict was characterised by exceptionally brutal attacks on civilians, as the AFRC/RUF systematically rampaged through towns and villages.⁴²⁴ Sexual violence was endemic and was committed by all parties. Although women and men⁴²⁵ of all ages were subjected to atrocities, the majority of the victims of sexual violence were pre-pubescent girls and young adolescents, as the rebels favoured virgins.⁴²⁶

4.2. FORCED MARRIAGES DURING THE CIVIL WAR: 'YU NA MI WEF'⁴²⁷

4.2.1. 'Bush wives'

In an atmosphere of extreme violence, thousands of women and girls were abducted by rebels and forced to become their wives.⁴²⁸ The rebels used these abductions and subsequent marriages as a means to instil fear in the civilian population, break social bonds and destroy the traditional family nucleus.⁴²⁹ Sierra Leoneans use the expression 'bush wives' to refer to women who were (forcibly)

⁴²³ Carlson & Mazurana 2004, p. 11 and RUF Trial Judgement, para. 16.

⁴²⁴ RUF Sentencing Judgement, para. 120.

⁴²⁵ Men and boys also suffered from sexual violence. For example, there are reports of abducted girls abusing abducted boys in rebel camps (McKay & Mazurana 2004, p. 58).

⁴²⁶ RUF Trial Judgement, para. 1409; TRC Report 2004–3B, p. 161 ('Testimony to the Commission has revealed that all of the armed groups, particularly the RUF and the AFRC, perpetrated a deliberate policy of abducting pre-pubescent young girls and raping them, breaking all cultural taboos'); and Human Rights Watch 2003a, p. 28.

⁴²⁷ Krio for 'you are now my wife', the phrase rebels used to turn women and girls into their wives (see K. Sanin, Trial Chamber II – AFRC Trial 5 October 2005, U.C. Berkeley, War Crimes Studies Center, Weekly report, Update #57, p. 5).

⁴²⁸ Carlson & Mazurana 2004, p. 12; and Physicians for Human Rights 2002, pp. 2 and 4.

⁴²⁹ Oosterveld 2011, p. 52; and RUF Trial Judgement, paras. 1349 and 1351.

married to rebels during the civil war. ‘Bush’ became the dominant metaphor for rebel, because rebels lived in the bush and mostly moved along the bush path. The term ‘bush wife’ is therefore synonym for rebel wife. The prefix ‘bush’ also emphasises that the marriages that took place in the bush were invalid and not socially sanctioned, meaning that they had no legal or cultural value outside of the bush.⁴³⁰ Life in these rebel camps would usually mimic the social composition of a village and the structure of a family, much as was the case in Uganda (see *supra*). The group in a camp was divided into several smaller groups comprising household units. A rebel commander, who could have up to six wives, commonly ranging in age from 9 to 19,⁴³¹ would act as the *pater familias* of the unit. His pseudo family consisted of his captives and recruits. As women could also rise to the level of commander, it was also possible that female fighters, even young girls, served as heads of these ‘families’.⁴³²

Women and girls were usually abducted during attacks on towns and villages, and taken to the rebels’ camps. There, the rebels distributed the abductees among themselves as their new wives, often after first (gang) raping the women.⁴³³ In some camps, this ‘distribution process’ was even regulated and registered: in at least one camp, the soldiers had to sign before a woman could be given to them as a bush wife. Santigie Borbor Kanu, one of the accused and convicted in the AFRC case which was tried before the SCSL, monitored this process and was the one who made rebels sign for women.⁴³⁴ In most cases, a man would simply declare the woman to be his wife (‘*yu na mi wef*’) and this would make the bush marriage a fact. Sometimes married to the very men they had witnessed brutalising their relatives, the women were often subjected to continued and inescapable rape.⁴³⁵ As a result of these rapes, many women became pregnant and were forced to give birth, often without assistance of a midwife or access to proper medical health care.⁴³⁶ If the father did not want the child, for example because he believed it would slow down the group, or if the woman was already pregnant when she was abducted, the woman could be forced to undergo an abortion.⁴³⁷ As bush wives, some women were compelled to perform domestic labour and to give their husbands ‘love and affection’.⁴³⁸ In addition to this, some women were subjected

⁴³⁰ Coulter 2009, pp. 100–101 and Coulter 2008, pp. 55–56, footnote 2.

⁴³¹ RUF Trial Judgement, para. 1411 and McKay & Mazurana 2004, p. 93.

⁴³² Coulter 2009, pp. 102–103; and Carlson & Mazurana 2004, pp. 13–14.

⁴³³ Coulter 2009, pp. 127–128 found a certain pattern and strategy in the organised manner in which most bush marriages followed multiple rapes: abducted women would first be raped by several men. Then, at some point, a rebel, usually of higher rank, would intervene and claim the women as his ‘wife’, thus rescuing her from further gang rapes. This made many women feel loyal to her ‘saviour’.

⁴³⁴ AFRC Trial Judgement, para. 1138; and AFRC Transcript 23 May 2005, pp. 76–77.

⁴³⁵ AFRC Trial Judgement, para. 1138; and RUF Trial Judgement, paras. 1213, 1413 and 1467.

⁴³⁶ McKay & Mazurana 2004, p. 70; and Human Rights Watch 2003a, p. 40.

⁴³⁷ McKay & Mazurana 2004, p. 69.

⁴³⁸ AFRC Appeal Judgement, paras. 190 and 192. Coulter 2009, pp. 113 and 130, found that several of her informants, who were wives of rebel commanders, were not forced to do any domestic

to drug abuse and mutilations.⁴³⁹ Many also contracted STDs as a consequence of the frequent sexual abuse in the bush.⁴⁴⁰

In order to survive in the hostile and uncertain environment in the rebel camps, women were required to make themselves useful to their bush husbands:⁴⁴¹ women who were rejected by their husbands were often sent to the front lines or had to take part in particularly dangerous missions.⁴⁴² The way the victims were treated depended a lot on their husbands and some women reported they were treated relatively well. Others experienced only cruelty at the hands of their rebel husbands.⁴⁴³

In addition to being completely at their husbands' mercy and forced to pander to their every wish, in many camps, the women were also subjected to disciplinary regulations.⁴⁴⁴ In the Koinadugu and Bombali districts, for example, one of the rebels in charge issued disciplinary orders that regulated the conduct of the women: a woman who was unfaithful to her husband could be punished with up to 200 lashes.⁴⁴⁵ At the same time, a rebel was expected to provide for his wife and children during their captivity under penalty of imprisonment or beatings,⁴⁴⁶ and a rebel who raped another rebel's wife could be put to death.⁴⁴⁷ In some camps, women could report maltreatment they suffered at the hands of their husbands to the wives of the camp leaders, who were called 'mamy queen' or 'de mamy'. These mamy queens would then investigate the situation.⁴⁴⁸ However, Coulter found that mamy queens could do little to protect women from their own bush husbands.⁴⁴⁹

4.2.2. *Women's complex roles within rebel groups*

What is generally not highlighted in NGO reports is that many women who were forced to become wives of rebels also served as fighters, spies, looters and even

labour. On the contrary, their husbands would not allow them to do so: their only 'duty' was to have sex with their husbands. They were, however, encouraged to become fighters (see also the testimony of a former wife of a colonel who did not have to do any household chores, AFRC Transcript 9 March 2005, pp. 57–58; see also paragraph 3.2.2 *infra*).

⁴³⁹ Human Rights Watch 2003a, p. 44; AFRC Trial Judgement, para. 1095; and TRC Report 2004–3A, p. 479

⁴⁴⁰ McKay & Mazurana 2004, p. 62.

⁴⁴¹ Denov 2007, p. 8; and TRC Report 2004–3B, p. 173.

⁴⁴² Coulter 2009, p. 136.

⁴⁴³ See e.g. Human Rights Watch 2003a, p. 34.

⁴⁴⁴ Coulter 2009, p. 107 found that her respondents described life in the rebel camps as marked by strict rules and regulations.

⁴⁴⁵ AFRC Trial Judgement, paras. 1122, 1123 and 1138.

⁴⁴⁶ Human Rights Watch 2003a, p. 45.

⁴⁴⁷ AFRC Trial Judgement, para. 1139.

⁴⁴⁸ AFRC Trial Judgement, para. 1123; and AFRC Transcript 7 July 2005, pp. 102–106.

⁴⁴⁹ Coulter 2009, p. 106.

commanders within the rebels forces.⁴⁵⁰ Research conducted by Coulter, and Carlson and Mazurana, which focuses on the totality of experiences and aspects of women's lives in the bush, reveals that women played important military roles in both the CDF and in the rebel movements. The figures are eloquent: according to estimates, between 10% and 30% of force members of the RUF and AFRC were women.⁴⁵¹ The majority of these women had entered the forces through abduction and would never have 'joined' the groups otherwise. However, it is not unlikely that a small number of girls and women made the (circumscribed) decision to join the rebel groups themselves, for example to acquire prestige and resources or to escape poverty or domestic violence.⁴⁵²

It is difficult to distinguish between women and girls who were primarily fighters and those who were primarily wives as the one role did not exclude the other. On the contrary, all women surveyed by Carlson and Mazurana who reported that they were fighters within the rebel movement also indicated that they were forced to become rebel wives.⁴⁵³ One third of the women surveyed stated they had fighting experience, nearly half had received weapons training and more than half indicated that they had been forced to become wives of commanders. Carlson and Mazurana found that the formerly abducted women in their study had several additional roles alongside being a fighter: they served as cooks (72%), porters (68%), assistants for the sick and wounded (62%), bush wives (60%; only 8% reported that serving as a bush wife was their primary role), food producers (44%), messengers between rebel camps (40%), spies (22%), communications technicians (18%) and workers in diamond mines for their captor husbands or commanders (14%).⁴⁵⁴ This shows that women's and girls' experiences in rebel camps were as complex as they were diverse: they could be abductees, victims of rape, forced wives and forced mothers. Yet at the same time, they might also be fighters, murderers, spies and looters, providing support to the rebels, whether they wanted and intended to or not.

Although most abducted women were forced to become fighters and 'wives', some took matters into their own hands and became, once they had been abducted, active within a rebel group.⁴⁵⁵ This proves that many women were not victims without agency.⁴⁵⁶ It is important to emphasise, however, that the situation most abducted women were in constitutes a good example of what Aretxaga calls 'choiceless decision': the choice between continuous (gang) rape and death on the one hand and becoming a fighter, bush wife or spy on the other hand cannot

⁴⁵⁰ Although most RUF commanders were male, there is evidence that some were female (Denov & Maclure 2006, p. 78; and Carlson & Mazurana 2004, p. 13).

⁴⁵¹ Carlson & Mazurana 2004, p. 6. On female fighters and more specifically the transition from rape victim to combatant, see Coulter 2009, pp. 135–153.

⁴⁵² McKay & Mazurana 2004, pp. 14, 23; and Coulter 2009, pp. 142 and 151.

⁴⁵³ By contrast, not all bush wives were also fighters.

⁴⁵⁴ Carlson & Mazurana 2004, pp. 2 and 12.

⁴⁵⁵ Coulter 2008, p. 58.

⁴⁵⁶ Carlson & Mazurana 2004, p. 14 and Coulter 2008, pp. 66–69.

be regarded as an actual choice.⁴⁵⁷ Faced with the very realistic possibility of death, many women ‘decided’ to take up weapons themselves: when they became fighters, they had better access to food and they would have a gun to protect themselves with, which created a sense of empowerment.⁴⁵⁸ Becoming a fighter, just like becoming a wife, was therefore often a strategic move, motivated by fear and linked to survival, in the sense that becoming a fighter could improve life in the bush.⁴⁵⁹ Nevertheless, these women would still be subjected to rape and other forms of violence. They would thus be victims and at the same time perpetrators of atrocities.

The research of Coulter and (especially) Carlson and Mazurana also throws more light on the position of bush wives within the rebel camps. Those who were married to rebels of higher rank were elevated in their overall status and generally enjoyed a certain degree of protection from the other rebels and sometimes benefited from the looted items.⁴⁶⁰ Also, Coulter found that bush wives often had several girls or young women working for them, doing the cooking, laundering, cleaning and other domestic work.⁴⁶¹ It was not uncommon, therefore, for girls to try to attach themselves to rebels in order to secure access to food, rise in the rebel hierarchy, and avoid gang rapes.⁴⁶² However, although some commanders had as many as nine bodyguards accompany their wives to both prevent escape and provide protection, survivor testimonies demonstrate that being the wife of a commander was no hard guarantee against rape by other rebels.⁴⁶³ Still, as the bush wife of a commander, some women could exert substantial power within the rebel compound. When the commander was out, his wife would often act in his absence. Looted food and goods were brought to the commander’s house, and the wife (or wives) would then distribute the food among those living in the compound.⁴⁶⁴ There are several accounts of women who used their powers to prevent sexual abuse of younger girls. They would, for example, use food to bribe or reward younger fighters for not harassing girls. Some commander’s wives also had a strategic military role: they would give orders, send out spies and supervise looting and killing expeditions. These women were at times also in charge of

⁴⁵⁷ B. Aretxaga, *Shattering silence: women, nationalism and political subjectivity in Northern Ireland*, Princeton, NJ: Princeton University Press 1997, p. 61. See Coulter 2008, p. 68 on this concept in relation to the position of abducted women and girls in Sierra Leone.

⁴⁵⁸ Coulter 2008, p. 60; Denov & Maclure 2006, p. 78; and Carlson & Mazurana 2004, p. 12.

⁴⁵⁹ Coulter 2008, p. 60.

⁴⁶⁰ Coulter 2009, p. 112 and Human Rights Watch 2003a, p. 43.

⁴⁶¹ Coulter 2009, p. 112. In the AFRC case, for example, witness TF1–023, who, against her will, was given to a Colonel as his ‘wife’, testified that she was raped and detained by the Colonel, but that she was not forced to do any work. Instead, she had several girls working for her. She also stated that other people in the rebel camps respected her, because of her status as a commander’s wife (AFRC Transcripts 9 March 2005, pp. 45 and 57–58).

⁴⁶² Carlson & Mazurana 2004, p. 14.

⁴⁶³ Carlson & Mazurana 2004, p. 14; and TRC Report 2004–3B, p. 173; and Women’s Commission for Refugee Women and Children, *Precious resources: adolescents in the reconstruction of Sierra Leone*, New York: Women’s Commission 2002, p. 61.

⁴⁶⁴ Coulter 2009, p. 103.

the small boys unit and small girls unit; units made up of boys and girls aged between 6 and 15 who were used for food raids, scouting activities in preparation of attacks, and killing expeditions.⁴⁶⁵ In the absence of their husband, some of these wives, who were often still minors, were in charge of entire compounds:

‘They kept in communication with the commander and would select and send troops, spies, and support when needed. These girls and young women decided on a daily basis who in the compound would fight, provide reconnaissance, and raid villages for food and loot. Some counseled their captor husbands on war strategies, troop movement, and upcoming attacks.’⁴⁶⁶

In all these capacities, the women and girls were of vital importance to the rebel organisations. As fighters, wives, cooks, nurses, workers, food producers, spies and looters, they were a source of military, strategic and logistical support and formed the backbone of the rebel forces.⁴⁶⁷ The SCSL acknowledged the importance of forced marriages for the rebels ‘as both a tactic of war and means of obtaining unpaid logistical support for troops’.⁴⁶⁸

4.2.3. *Reintegration and stigmatisation*

After the war, many women were released or left behind by the rebels who had abducted them. Others managed to escape. Some were able to return to what was left of their pre-war communities and had few (temporary) problems with reintegration.⁴⁶⁹ Others, however, faced more difficulties and were victimised for a second time when they experienced that reintegration into their society was difficult. Although the majority of former bush wives were accepted back by their parents and/or immediate family members, they were – like other abductees – at the same time stigmatised by their communities, because of their affiliation with the rebels.⁴⁷⁰ Some were also rejected by their families. In order to survive, these women often became prostitutes.⁴⁷¹

Many former abductees, including bush wives, were not considered to be innocent victims; people believed they were dangerous and had acquired ‘bush-like’ behaviour. Even though the majority of women had been abducted and raped, for their families, this did not explain why they had stayed with the rebels and even fought with them. It was believed that they could have escaped

⁴⁶⁵ Carlson & Mazurana 2004, p. 14. According to witness testimonies, some women also sexually abused the girls and boys in these units (Denov & Maclure 2006, p. 77).

⁴⁶⁶ Carlson & Mazurana 2004, p. 14.

⁴⁶⁷ Coulter 2009, pp. 123 and 157–158.

⁴⁶⁸ RUF Trial Judgement, para. 2107.

⁴⁶⁹ Coulter 2009, pp. 131 and 193.

⁴⁷⁰ Williamson 2006, p. 192; and TRC Report 2004–2, p. 16.

⁴⁷¹ Coulter 2009, pp. 203–205.

if they had wanted to.⁴⁷² Some women who were married before the civil war broke out were rejected by their original husbands and some girls who were no longer virgins were deemed unmarriageable and therefore of little worth to their families.⁴⁷³ On top of this, many men were afraid of women who had lived in the bush – whether or not as a bush wife – and did not want to marry them for that reason.⁴⁷⁴ The belief that women who had spent time in the bush with rebels had acquired rebel behaviour and could therefore not be trusted was affirmed due to the inability of many girls to assume the ethics of the traditional Sierra Leonean woman. After spending a prolonged period of time in an extremely violent environment and often having taken on an aggressive attitude to be able to survive in this setting, many women had difficulties adjusting to the subservient and deferential straitjacket that, especially in rural areas, is the norm for traditional Sierra Leonean women. Those women who were able to act in a socially acceptable manner, which essentially meant picking up their pre-war lives as if nothing had ever happened and assuming the ethics of the traditional Sierra Leonean woman: subservience, acquiescence, deference and diligence, experienced less difficulties with reintegration.⁴⁷⁵

As in Uganda,⁴⁷⁶ women who had most difficulties with reintegration were those who gave birth to children fathered by rebels.⁴⁷⁷ Apart from possible problems with attachment that these mothers have themselves, their families and communities were unfavourably disposed towards their children who are seen as rebels.⁴⁷⁸ The extent of acceptance of the children is linked to several variables, such as the identity of the father (when his identity is unknown, the stigma is greater) and the issue of matrilineal versus patrilineal society, although this may vary from region to region and tribe to tribe.⁴⁷⁹

Coulter found a correlation between material wealth and the quality of social relations in the sense that the extent to which ex-combatants and former bush wives were accepted back by their families was dependent on the degree to which they could contribute to the household. Contributing to the family's welfare could have positive effects on the reintegration of former bush wives and ameliorate the acceptance process, whereas women who returned to their families empty handed and unable to generate income were more often stigmatised and marginalised.⁴⁸⁰

⁴⁷² Coulter 2009, pp. 121, 134 and 152; and Coulter 2008, p. 67.

⁴⁷³ Physicians for Human Rights 2002, pp. 65 and 67.

⁴⁷⁴ Coulter 2009, p. 197.

⁴⁷⁵ Coulter 2009, pp. 176–180, 190–193 and 212.

⁴⁷⁶ Women who had become mothers during their time with the LRA experienced the highest level of rejection and stigmatisation (Annan *et al.* 2009, p. 18; see also SWAY 2008, p. 80).

⁴⁷⁷ It deserves mentioning that many women also gave birth to children fathered by soldiers associated with the Economic Community of West African States Monitoring Group and the UN mission in Sierra Leone (UNAMSIL) soldiers. These women and their children were also stigmatised (Coulter 2009, p. 232).

⁴⁷⁸ Save the Children 2007, p. 43.

⁴⁷⁹ McKay & Mazurana 2004, p. 54.

⁴⁸⁰ Coulter 2009, pp. 180, 188 and 194.

Another aspect that could either ameliorate or deteriorate the reintegration of former bush wives was their post-war behaviour. Those women who acted in a socially acceptable manner after their return from the bush were more easily accepted back by their families and communities. Post-war behaviour could also mitigate the effects of loss of virginity. Coulter therefore found that it was not so much the loss of virginity that made girls unmarriageable in the eyes of society, but how they behaved (e.g. behaving aggressively or using abusive language). Loss of virginity could be forgotten provided that women behaved in a culturally acceptable manner.⁴⁸¹

There were also those who stayed with their bush husbands, for example because they had nowhere else to go, because they feared no man would ever marry them, because their bush husband refused to let them go and kept them in captivity for sexual and domestic purposes, or because they had children with their husbands.⁴⁸² Habituation was another reason for staying in the bush marriage; after spending years in the bush, from an early age onwards, many women did not know any better, they had grown accustomed to their lives in the bush, and to their lives with their rebel husbands.⁴⁸³ And in some cases, women might have chosen to stay with their bush husbands, because the latter had treated them correctly during the war, or because they had developed some form of emotional attachment to or affection for their husbands.⁴⁸⁴ What adds to the decision to stay with the bush husband is that when the latter is willing to have the bush marriage legitimised, girls and their children have better chances of reintegration.⁴⁸⁵ However, many girls found that their parents refused to accept their bush husbands⁴⁸⁶ and could therefore not formalise their marriage. It is important to reiterate that, even though some girls saw their captors as their husbands – although the majority had not come to accept their forced bush marriage and left their rebels husbands when they had a chance⁴⁸⁷ – in the eyes of the community, bush marriages are unlawful since none of the proper marriage traditions had been followed, for example, the man had not asked the woman's

⁴⁸¹ Coulter 2009, pp. 216 and 244. See also Save the Children 2007, p. 44.

⁴⁸² Save the Children 2007, p. 44.

⁴⁸³ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 45.

⁴⁸⁴ Human Rights Watch 2003a, p. 44. In some cases, women might have formed an attachment to their bush husband as a result of the Stockholm syndrome, but no research has been done on this matter. The Stockholm syndrome is a term used in psychology to describe the phenomenon wherein the hostage identifies and empathises with the hostage-taker (TRC Report 2004–3B, p. 173). In other cases, women felt a sense of loyalty towards their husbands for saving their lives (Coulter 2009, p. 208).

⁴⁸⁵ McKay & Mazurana 2004, p. 56.

⁴⁸⁶ This was probably (also) due to the 'don't ask, don't tell' atmosphere: accepting the rebel husband would be (publicly) confirming a girl's past as bush wife. For an example of parents who were persuaded by their daughter to give a former rebel permission to officially marry her, see Van Gog 2008, p. 104.

⁴⁸⁷ Williamson 2006, p. 191.

parents for permission to marry her and no bride wealth had been paid.⁴⁸⁸ This does not change the fact that the situations that the women were trapped in, in the bush, can be referred to as marital-like.

5. FORCED MARRIAGES IN CAMBODIA UNDER THE KHMER ROUGE

5.1. CONTEXTUALISATION: THE KHMER ROUGE

On 17 April 1975, the Kampuchea People's National Liberation Armed Forces and the army of the Communist Party of Kampuchea (CPK, better known as Khmer Rouge) marched into the capital of Cambodia, overthrowing President Lon Nol and rechristening Cambodia 'Democratic Kampuchea'. The fall of Phnom Penh brought an end to the civil war that had started in 1970 and it marked the beginning of the Khmer Rouge's reign of terror which was to last until 7 January 1979.⁴⁸⁹ It is estimated that between 20% and 30% of the total Cambodian population lost their lives during this period.⁴⁹⁰ When the Khmer Rouge were overthrown on 7 January 1979, almost four years after taking over the rule of Cambodia, approximately 1.5 million Cambodians had died from starvation, overwork and misdiagnosed and wrongly treated illness. At least another estimated 200,000 people had been executed.⁴⁹¹

Under the command of dictator Pol Pot, the CPK aspired to transform Cambodia into an autarchic agricultural communist state and a rural-based society, abolishing religion, education, currency and private property, closing down hospitals and libraries, severing family ties and destroying legal and judicial structures.⁴⁹² The Khmer Rouge divided the population into two categories: on the one hand the ethnic Khmer peasants ('base people') and on the other hand all other citizens of Cambodia, including the urban population and educated individuals ('new people'), who were seen as counterrevolutionary.⁴⁹³ The Khmer

⁴⁸⁸ McKay & Mazurana 2004, p. 56. In Sierra Leone, marriage is not so much a single event as it is a long process that traditionally could start with the engagement of a girl at birth. The entire process of engagement and ultimately marriage is very ritualistic and is marked by close involvement of the families of both intended spouses. Other important features of this process are bride wealth and the exchange of labour between the two families (Coulter 2009, p. 76).

⁴⁸⁹ *Duch* Trial Judgement, paras. 59–62. On 7 January 1979, after a Vietnamese military offensive which had started a month earlier and which had led to the fall of Phnom Penh, many Khmer Rouge officials, including 'Brother Number One' Pol Pot, fled into the jungle and lived there until the end of the 1990s. In 1997 Pol Pot was arrested. He was about to face trial when he died in 1998 (B. Kiernan, *The Pol Pot Regime. Race, power and genocide in Cambodia under the Khmer Rouge, 1975–1979*, New Haven: Yale University Press 2008, preface, p. xix).

⁴⁹⁰ Chandler 1999, p. vii and Heuveline & Poch 2006, p. 102.

⁴⁹¹ Chandler 1999, p. vii.

⁴⁹² Chandler 1999, p. vii and *Duch* Trial Judgement, para. 82.

⁴⁹³ Kasumi 2008, p. 15.

Rouge aimed to transform the latter group into peasants and for this purpose, emptied towns and cities and sent all inhabitants to agricultural production cooperatives where people were forced to work under extreme conditions.⁴⁹⁴ Many rural families were similarly forced to abandon their homes and were relocated in cooperatives throughout the country.⁴⁹⁵

The supreme executive authority of Cambodia became known under the name *Angkar* (the ‘Organisation’) and was responsible for drafting and implementing the CPK policy. Eliminating or ‘smashing’ enemies of the CPK was arguably the most critical aspect of this policy.⁴⁹⁶ Persons who were deemed ‘enemies’ of *Angkar*, were detained, tortured, made to confess to counterrevolutionary crimes and subsequently executed in re-education, interrogation and security centres, such as the infamous S-21 prison in Phnom Penh, where more than 12,000 people were detained and ultimately killed.⁴⁹⁷ Supporters, officials and sympathisers of the former government, people who had enjoyed some form of education (especially teachers and students) and capitalists were almost automatically classified as ‘enemies’.⁴⁹⁸

When the Khmer Rouge seized power in 1975, the family, as the centre of cultural and economic life, formed the very foundation of Cambodian society.⁴⁹⁹ The CPK ideology included a radical transformation and collective re-organisation of social structures, which resulted in the destruction of traditional family life. In order to achieve this goal, the Khmer Rouge worked along established lines: after evacuation from cities, towns and villages, family members and relatives were separated from each other and divided into six different categories according to age and sex: boys and girls younger than 14 formed two groups, men and women aged between 14 and 50 were two groups, and men and women older than 50 constituted the other separate two groups.⁵⁰⁰ People had to work, live and eat with their new labour teams and were only occasionally allowed to see their family members.⁵⁰¹ Collective labour, collective dining and even collective motherhood⁵⁰² were used to demonstrate that the work team had replaced the family as the basic social unit with *Angkar* as everybody’s parents and Pol Pot as the eldest brother (‘Brother Number One’).⁵⁰³ In the cooperatives, people were indoctrinated with revolutionary ideology. They were made to spy on others and

⁴⁹⁴ *Duch Trial Judgement*, para. 82 and Chandler 1999, p. vii.

⁴⁹⁵ Mam 2006, p. 119.

⁴⁹⁶ *Duch Trial Judgement*, paras. 85 and 99.

⁴⁹⁷ *Duch Trial Judgement*, paras. 23, 141–143 and 208.

⁴⁹⁸ Mam 2006, p. 155 and E. Becker, *When the war was over. Cambodia and the Khmer Rouge revolution*, New York: PublicAffairs 1998, p. 162.

⁴⁹⁹ Mam 2006, pp. 120–121.

⁵⁰⁰ Mam 2006, pp. 125–126.

⁵⁰¹ Mam 2006, pp. 127–130.

⁵⁰² In some of these communes, mothers had to leave their babies in special compounds when going off to work. In these compounds, children were looked after by wet nurses and women who were too old to work (see Mam 2000, pp. 10–24).

⁵⁰³ Mam 2006, pp. 133 and 142 and Chandler 1999, p. 28.

inform *Angkar* about possible crimes or missteps. Children were taught to see their own parents as enemies.⁵⁰⁴

Another strategy that was used to undermine the traditional family was the attack on cultural and religious institutions. In Cambodia, the metaphysical or spirit realm plays a very important role in people's lives. The belief that ancestral spirits and other entities roam the world permeates all layers of existence and all facets and stages of life.⁵⁰⁵ Rituals are needed to appease evil or lost spirits and honour and remember ancestors who protect individuals from bad karma,⁵⁰⁶ which is seen a great source of anxiety. Therefore, in Cambodia, there are (or at least were) rituals relating to every possible aspect of life: courtship, marriage, pregnancy, birth, illness and death, but there are also rituals related to sowing and harvesting.⁵⁰⁷ Under the Khmer Rouge, every single one of these rituals was abolished, leaving people scared, anxious and lost.⁵⁰⁸

Part of the CPK policy pertaining to the transformation and collective reorganisation of social structures was the systematic compulsory arrangement of marriages with the aim of controlling sexuality and reproduction and facilitating population growth.⁵⁰⁹ At the same time, arranged marriages were strategically used to deliberately undermine the traditional family and break apart its structure and replace the traditional family and kinship bonds with loyalty to *Angkar*.⁵¹⁰ Estimates of how many men and women were married during this period vary from tens of thousands to almost half a million.⁵¹¹

Closely linked with the marriage policy of the Khmer Rouge was the introduction of a category of so-called 'crimes against morality', which was composed of all acts that were not in accordance with the revolution.⁵¹² Extramarital sex (which was regarded as a subversive act that distracted people's

⁵⁰⁴ Mam 2006, pp. 142–144.

⁵⁰⁵ LeVine 2010, p. 29.

⁵⁰⁶ In its broadest sense, 'the term karma denotes a system of beliefs that see the physical, social, and moral condition of an individual as the result of actions performed by that individual in the past, especially but not exclusively in a more or less chronologically distant past life. This process is (...) continuous so that it is generally projected into the indefinite future.' (R.P. Goldman, 'Karma, Guilt, and Buried Memories: Public Fantasy and Private Reality in Traditional India', *Journal of the American Oriental Society* (105) 1985, p. 414).

⁵⁰⁷ LeVine 2010, p. 2.

⁵⁰⁸ LeVine 2010, p. 33, found that this so-called 'spirit-based anxiety' resembles the anxiety that is evoked by stalking, and calls the Khmer Rouge's abolishment of rituals 'ritualcide' (LeVine 2010, p. 14).

⁵⁰⁹ Studzinsky 2011, p. 6; Jain 2008, p. 1025; and Mam 2006, p. 138. ECCC Case 002 Closing Order, paras. 216–220.

⁵¹⁰ Mam 2006, pp. 119–120.

⁵¹¹ Fitzpatrick 2011 (tens of thousands of people), Kimseng 2010 (200,000 people); Immigration and Refugee Board of Canada, *Cambodia: Forced marriages; whether forced marriage is currently practised; protection available from the government; consequences for a woman who refuses a forced marriage*, 9 December 2003, KHM42219.FE (250,000 women), and Case 002 Civil Parties' Co-Lawyers' Second Investigative Request concerning forced marriages and forced sexual relations, paras. 9 and 13 (400,000 people).

⁵¹² Mam 2000, p. 34.

attention from the revolution and was prohibited in order to maintain social order and control) and all forms of non-functional communication with the opposite sex (such as non-work related conversations) are examples of these moral offences and were punishable by imprisonment, forced labour or death.⁵¹³ Rape (outside of marriage⁵¹⁴) was also seen as an offence against morality and both perpetrator and victim were at risk of being punished.

5.2. KHMER ROUGE MARRIAGES IN THE CONTEXT OF THE CONFLICT

5.2.1. *Khmer Rouge marriage policy*

Marriage, which was a very important and highly esteemed institution before the Khmer Rouge era and which was seen not merely as a union between two people, but as a union between two families, was transformed by *Angkar* into an impersonal public affair without any sentiment. Before the CPK took over, most marriages were arranged by the parents of the spouses and involved many religious and cultural ceremonies and festivities spread over several days. In contrast, during the Khmer Rouge regime, especially after 1976, marriages were often devoid of family involvement and were conducted *en masse*, usually without the attendance of the parents or other family members of the spouses.⁵¹⁵ The Khmer Rouge did away with all rituals surrounding marriage: important traditions such as consulting fortune-tellers with regard to the compatibility of the spouses and honouring the ancestors after the wedding ceremony by means of offering food were strictly forbidden.⁵¹⁶ In most cases, individuals were not allowed to choose their partner. Instead, *Angkar* chose for them.

Refusal could be met with severe punishment, such as imprisonment, torture, rape or death, depending on the status of the individual (base person or new person, soldier or civilian) and on how strict the local CPK was.⁵¹⁷ Accounts of people who did not suffer any consequences for refusing a marriage also exist, but are relatively rare.⁵¹⁸ In general though, it seems that the Khmer Rouge was more lenient towards base people, who were considered pure revolutionaries. Some of them therefore occasionally had a certain amount of credit and margin

⁵¹³ Kasumi 2008, pp. 16 and 36; K. Anderson, 'Tang Kim's dilemma: responding to sexual violence under the Khmer Rouge', *Searching for the Truth* 2005–1, p. 30.

⁵¹⁴ Marital rape was not a crime in Cambodia in 1975. It was first criminalised in 2005, see UN Committee Against Torture, *Concluding observations of the Committee against Torture: Cambodia*, 20 January 2011, UN Doc. CAT/C/KHM/CO/2, p. 2.

⁵¹⁵ Ngor 1989, p. 292.

⁵¹⁶ LeVine 2010, pp. 54 and 175.

⁵¹⁷ LeVine 2010, p. 122; Kasumi 2008, pp. 18–19 and 44; and Mam 2006, p. 139.

⁵¹⁸ See LeVine 2010, pp. 20, 28, 59, 102 and 108.

for negotiation when it came to the selection of a spouse.⁵¹⁹ Soldiers generally were also granted more liberties when it came to marriage. There is also evidence that marriage was used as a reward and compensation system for soldiers: those who had contributed to the revolution were given the opportunity to choose a husband or wife, as were soldiers who had become handicapped in the line of duty.⁵²⁰

The forced marriages in Democratic Kampuchea were a form of social engineering: through the marriages, the Khmer Rouge gained control over people's sexuality and reproductive functions and asserted their loyalty, as they had to pledge allegiance to *Angkar* during the wedding ceremony.⁵²¹ In this sense, the marriages were also a test: complying with the order to marry was a confirmation of loyalty; resisting the order was an indication that someone might be a 'bad element'.⁵²² The Khmer Rouge weddings were depicted as a duty with the goal of reproduction: children were needed as new workers for the revolution (see *infra*).⁵²³

The marriage policy was disseminated by *Angkar* through telegrams and CPK publications, such as the CPK Magazine entitled 'The Revolutionary Flag'. These documents emphasised the voluntariness of the marriages. However, several CPK officials (even those who believed people freely agreed to marriage) noted that, in practice, individuals rarely refused an arranged marriage for fear of punishment or even death, even though not every refusal was met with violent repercussions.⁵²⁴ The marriage policy was implemented throughout Democratic Kampuchea in a similar manner, although differences did exist between districts and communes. The chiefs of the communes would usually act as matchmakers and decide who would marry whom.⁵²⁵ In the early years of the Khmer Rouge, spouses were selected on the basis of their standing: base people were married to base people, new people to new people.⁵²⁶ During the later years however, people's geographical background became a more common ground for pairing.⁵²⁷

⁵¹⁹ R.C. Huy, 'Khmer Rouge wedding', *Searching for the Truth* (25) January 2002, p. 27.

⁵²⁰ LeVine 2010, p. 97; and Kasumi 2008, p. 19.

⁵²¹ Anderson 2010, p. 29.

⁵²² Mam 2000, p. 63. Mam argues that the marriages were also a means to optimise labour: she states that people were often forced to marry only after their abilities to work had been exhausted. As a consequence, according to Mam, people were not allowed to marry young, unlike the custom in the pre-Khmer Rouge period. Instead, people were ordered to marry when they were in their late twenties (Mam 2000, p. 54 *et seq*). This particular conclusion is not confirmed by other research and does not follow from statistical data: LeVine found that most people she interviewed were between the ages of 18 and 24 when they got married (LeVine 2010, p. 20), an average age span that is corroborated by other research (Heuveline & Poch 2006, p. 108).

⁵²³ Kasumi 2008, p. 17; Jain 2008, p. 1025 and Mam 2006, p. 138.

⁵²⁴ Case 002 Closing Order, paras. 216–220.

⁵²⁵ LeVine 2010, p. 147.

⁵²⁶ Case 002 Closing Order, para. 847.

⁵²⁷ LeVine 2010, p. 84.

The Khmer Rouge weddings were impersonal affairs that were performed in groups, with the number of couples varying anywhere from 5 to 500.⁵²⁸ The sombre ceremonies were solemnised by government officials and were used to disseminate CPK propaganda. After listening to speeches from Khmer Rouge leaders, the names of the men and women were called out, upon which the spouses had to stand next to each other, pledge their allegiance to *Angkar* and promise to stay together forever.⁵²⁹ Spouses were not, however, expected to build an emotional bond with each other or establish an actual relationship, because such a bond could compete with their absolute loyalty to *Angkar*.⁵³⁰ In some communal villages, married men and women were allowed to live together, which meant that couples were only separated during day time when they went to different work sites.⁵³¹ Others, on the other hand, were re-located to different work camps a couple of days after their wedding and were only allowed to see each other once in a while.⁵³²

5.2.2. *Marriage and the prescription of sexual intercourse*

After being married, most couples had to go straight back to work, only to come back again late in the evening to spend a few nights together in special huts.⁵³³ Studies show that some couples were told to consummate their marriage on their wedding night and that they were spied upon during the nights to make sure they did what they were told to do and did not discuss any counterrevolutionary ideas with each other.⁵³⁴ Research conducted by LeVine demonstrates that whether or not couples were ordered to have sexual intercourse strongly depended on the community they lived in, as not all commune chiefs prescribed sex. About 40% of the 192 people interviewed by LeVine were told to consummate their marriage on the wedding night and 30% reported that they were watched by spies during the night.⁵³⁵ Others were not directly ordered to have sex, but believed *Angkar* expected them to consummate their marriage and would know if they refrained from having intercourse.⁵³⁶

⁵²⁸ LeVine 2010, pp. 1 and 20.

⁵²⁹ LeVine 2010, p. 154 and Studzinsky 2011, p. 6.

⁵³⁰ Mam 2000, p. 71.

⁵³¹ LeVine 2010 pp. 89, 108 and 114.

⁵³² LeVine 2010, p. 82. LeVine 2010, p. 62 found that couples were given between one and three days off from work after their wedding. See also Mam 2006, p. 138. And as already has been stated, in many work camps, men and women lived, worked, ate and slept separately (Case 002 Closing Order, para. 359).

⁵³³ LeVine 2010, p. 90.

⁵³⁴ LeVine 2010, p. 88 and Mam 2000, p. 70. LeVine 2010, p. 88 found that, at least with respect to the people she interviewed, the order to have sex was often given to the husband alone and not (also) to the wife (see also Studzinsky 2011, p. 6).

⁵³⁵ LeVine 2010, p. 88.

⁵³⁶ *Duch* Civil Parties' Co-Lawyers' Request for supplementary preliminary investigations, para. 20. *Angkar* was deemed amorphous, omnipotent and omnipresent and was so powerful

Kasumi found evidence that some men forced their wives to have sex with them, without being ordered to do so by the Khmer Rouge.⁵³⁷ In most cases however, both spouses were forced to have sex and often either did so or pretended to do so because they were threatened with death if they refused. Not consummating the marriage was seen as disobeying *Angkar's* order and some couples were forced to have sex at gunpoint.⁵³⁸ Whereas Kasumi found that some women were treated cruelly by their husbands, LeVine found that the opposite could also be true. One of her male respondents fell victim to a violent wife who tried to poison and drown him on numerous occasions.⁵³⁹

The Khmer Rouge prescribed intercourse within marriage with a view to increase childbirth, as this would result in more workers for the revolution.⁵⁴⁰ This was articulated by Pol Pot in a speech he gave in September 1977 and was affirmed by him on several other occasions. Pol Pot stated that increasing Cambodia's population to 20 million within 10 to 15 years was one of the objectives of the CPK.⁵⁴¹ In this address, Pol Pot also announced that marriages were to be performed in groups of several couples at the same time.⁵⁴² It appears that this speech and the public declaration of the objective of population growth had an effect on the post-marriage protocol: LeVine found that prescriptive sex became more common during and after 1978.⁵⁴³ However, despite *Angkar's* efforts, relatively few children were born during the regime.⁵⁴⁴ Survivors explain that they were often too exhausted, weak and worried to engage in sexual activity. Therefore, they merely pretended to have sexual intercourse with their spouses.⁵⁴⁵ In addition, women often became less fertile or completely infertile due to malnutrition and maltreatment.⁵⁴⁶ Of those women who did become

that people actually believed it could read their minds (LeVine 2010, pp. 13, 35, 115 and esp. 138–162).

⁵³⁷ Kasumi 2008, pp. 20–22. None of the couples interviewed by LeVine spoke of rape: neither those who had been told to consummate their marriage, nor those who had not been told to do so (LeVine 2010, p. 89). This might be linked to the fact that the concept of marital rape is still relatively new in Cambodia: it was first criminalised in 2005 (UN Committee Against Torture, *Concluding observations of the Committee against Torture: Cambodia*, 20 January 2011, UN Doc. CAT/C/KHM/CO/2, p. 2). It might also be because people still do not want to talk about it.

⁵³⁸ Kasumi 2008, pp. 20–22 and 45 and LeVine 2010, pp. 88–89.

⁵³⁹ After this woman's father died, she apologised to her husband and he decided to stay with her out of pity. They remained married until the woman became violent again and he finally left her in 2004 (LeVine 2010, pp. 113–114).

⁵⁴⁰ Some couples even had to promise during their wedding ceremony that they would have a child within a year (Dy 2007, p. 34).

⁵⁴¹ It is estimated that 7.3 million people lived in Cambodia in 1975 when the Khmer Rouge took over (see <countrystudies.us/cambodia/40.htm> last accessed December 2013).

⁵⁴² Case 002 Closing Order, para. 218.

⁵⁴³ Of the respondents married before 1977, 29% were told to have sex, as opposed to 60% of the respondents wedded during or after 1978 (LeVine 2010, p. 89).

⁵⁴⁴ De Walque 2006, pp. 224–225; and Ngor 1989, p. 293.

⁵⁴⁵ LeVine 2010, pp. 30 and 88.

⁵⁴⁶ In some cases, famished newlywed women were given bigger rations of protein-rich food, so that they might become able to conceive again. Anderson 2010, p. 3; J.S. Bashi, 'Starvation

pregnant, relatively few carried their child to term as a consequence of starvation, exhaustion and illness.⁵⁴⁷

5.2.3. *Khmer Rouge marriages: forced or not?*⁵⁴⁸

As stated, the majority of marriages that took place under the Khmer Rouge were arranged by the CPK. In general, people had no say in the selection of their spouse. Individuals were literally called out and given the order to marry: they were conscripted into marriage as it were.⁵⁴⁹ Not all people who married during the Khmer Rouge regime, however, married against their will. There are reports of Cambodians (mostly soldiers, both male and female) making a formal request to *Angkar* to marry a specific person, such as their fiancé(e)s, and who were given permission to wed.⁵⁵⁰ Family members could also ask the chiefs of the communes whether their son or daughter could marry a particular person, and if the chief believed it was a good match, he or she would grant permission. Especially during the earlier years of the Khmer Rouge, the CPK appeared to have been more lenient with regard to the arrangement of marriages. LeVine found that in the period before 1977, people were allowed to arrange their own marriages and could easily obtain permission from the commune leader. After 1977, this changed. In September 1977, the existence of the CPK was officially announced, after having already been in power for more than two years.⁵⁵¹ As a result, all Khmer Rouge policies, including the marriage policy, were more strictly enforced.

Pol Pot's speeches regarding population growth were a second catalyst for the stricter enforcement of the marriage policy and post-marriage protocols.⁵⁵² Consequently, after 1977, people had less room for negotiation when it came to marriages. From then on, the majority of marriages were arranged by *Angkar* and involvement of future spouses or their relatives became less common. Commune leaders would arrange marriages between people who sometimes had no or little prior acquaintance.⁵⁵³ As a result, many people met their partner for the first time on the day of the marriage,⁵⁵⁴ which may be seen as an indication of the coerced nature of the weddings. It should be mentioned, however, that in Cambodia, both prior to and after the Khmer Rouge period, it was not uncommon for people to marry someone they had never met until the wedding day. Heuveline and Poch

under the Democratic Kampuchea regime', *Searching for the Truth* 2008–2, p. 53; De Walque 2006, p. 223; Ngor 1989, p. 293.

⁵⁴⁷ Anderson 2010, p. 3. See also De Walque 2006, pp. 224–225.

⁵⁴⁸ LeVine 2010, p. 31–35, Chapter 1: the Khmer Rouge weddings: forced or not?

⁵⁴⁹ LeVine 2010, p. 175 and Kasumi 2008, pp. 18–19 and 44.

⁵⁵⁰ Heuveline & Poch 2006, p. 110 found that 16% of the women who married during the Khmer Rouge regime stated that they themselves had chosen their partner.

⁵⁵¹ Case 002 Closing Order, para. 18.

⁵⁵² According to Heuveline & Poch 2006, p. 102, towards the end of their reign, the Khmer Rouge wanted to counter depopulation by enforcing marriages and pregnancies.

⁵⁵³ LeVine 2010, pp. 23, 25, 75, 83 and 154 and Jain 2008, p. 1024.

⁵⁵⁴ Mam 2006, pp. 136–138.

found that, on average, 42% of women who married before (pre-1975) and after (between 1979 and 1999) the Khmer Rouge years also reported having met their husband for the first time on the wedding day, as opposed to 59.7% of the women who married during the Khmer Rouge era.⁵⁵⁵

Nevertheless, there is a distinct difference. In the period before and after the Khmer Rouge, people would never marry a complete stranger: their parents had approved of their future spouse, knew who he or she was and had had close dealings with the future in-laws. The negotiation period in the build-up to the actual wedding was lengthy, fortune tellers had been consulted and in many cases, the husband had laboured for the bride's parents.⁵⁵⁶ In the Khmer Rouge era, however, people would be married off to a total stranger. In the atmosphere of betrayal and distrust that marked the years 1975–1979, it was difficult for some to determine whether or not they could trust this stranger who was now their spouse.

Cambodia has a long tradition of arranged marriages in which the consent of the future spouses is subordinate to that of their parents.⁵⁵⁷ And as stated, it is, or at least did not use to be, uncommon for bride and groom to meet for the first time on the wedding day. Therefore, especially against this background of arranged marriages, it would be an over-simplification to claim – as is often done in literature – that all marriages arranged by the Khmer Rouge were uniformly forced. There are many examples of couples that wanted to marry and were happy with their marriage.⁵⁵⁸ The concept of force and the way in which this is interpreted by Cambodians married during the reign of the CPK was analysed by LeVine. The results were quite different from the standard assumptions made in studies on Khmer Rouge marriages. LeVine found that while people used the word 'forced' to describe the labour the Khmer Rouge required them to carry out, none of her 192 respondents, whether they had stayed together or not, used this term to refer to their marriages.⁵⁵⁹ An explanation might be found in the fact that marriages arranged by parties other than the spouses themselves are customary in Cambodia.⁵⁶⁰ In addition, irrespective of all hardships and anxiety, marriage seems to have brought a sense of purpose and belonging to many people's lives, affording couples a small amount of order in the chaos that was the Democratic Kampuchea and sometimes even resulting in some more food, rest and comfort.⁵⁶¹

⁵⁵⁵ Heuveline & Poch 2006, p. 110.

⁵⁵⁶ LeVine 2010, pp. 61–62; and Pich-Sal, *Le mariage Cambodgien*, Sihanouk: Université Buddhique Preah, pp. 1–4.

⁵⁵⁷ LeVine 2010, p. 36. Although parents are discouraged from marrying their daughter against her will (Heuveline & Poch 2006, p. 101).

⁵⁵⁸ See e.g. LeVine 2010, pp. 59 and 75–76.

⁵⁵⁹ LeVine 2010, p. 175.

⁵⁶⁰ Parents often call on matchmakers to find a suitable spouse for their child (Heuveline & Poch 2006, p. 101).

⁵⁶¹ LeVine 2010, pp. 15–16, 114 and 126. Married persons were considered to be more senior and therefore they were generally allowed a little more food and rest, although this depended on

As LeVine puts it, ‘people were given a touchstone to vitality in DK (Democratic Kampuchea; IH) via the wedding and birth experiences’.⁵⁶² People again became able to imagine a future.⁵⁶³ This was not true for all couples though: some did not trust each other in the climate of betrayal that prevailed or fought each other over food, and there are accounts of wives reporting their husbands to Khmer Rouge soldiers.⁵⁶⁴

Quantitative research with a larger sample size than LeVine’s did indicate a certain degree of force with regard to the Khmer Rouge marriages. Heuveline and Poch found that a little over 67% of the 837 women who married during the Khmer Rouge regime stated that they had consented to the marriage. The other 32% reported that they had not consented to the marriage and had been forced to marry by either non-relatives or relatives.⁵⁶⁵ In view of the tradition of arranged marriage in Cambodia, it is interesting to compare these figures to other years. According to Heuveline and Poch’s data, of those women who married pre-1975 and between 1979 and 1999, on average almost 7% reported that they had not consented to their marriage.⁵⁶⁶

So despite the fact that marriages to which one of the spouses has not consented are not an unfamiliar phenomenon in Cambodia, this was more common under the Khmer Rouge: of the marriages contracted during the Khmer Rouge period, a larger percentage can be qualified as ‘forced’ as opposed to marriages contracted in Cambodia in other periods.

In summary, it is not correct to say that all marriages arranged by the Khmer Rouge were forced marriages. They varied from elective to imposed with distinct regional differences.⁵⁶⁷ In some regions and communes people were almost literally forced to marry at gunpoint, in other regions and communes, people were awarded some discretion as regards the choice to marry and were allowed to choose a spouse or refuse the appointed spouse.⁵⁶⁸ This depended both on the local CPK, as well as on the status of the individual: often, soldiers had more options to request or refuse a marriage. Also, it is possible that after 1977, more marriages were forced: people had less room for negotiation as a consequence of the Khmer Rouge’s attempt to solidify marriages and the post-marriage protocol, with the aim of achieving the CPK objective pertaining to population growth.⁵⁶⁹

the commune chief. Single people, on the other hand, were considered to be the ‘force number one’ when it came to working (LeVine 2010, p. 99).

⁵⁶² LeVine 2010, p. 167.

⁵⁶³ LeVine 2010, p. 127.

⁵⁶⁴ Ngor 1989, p. 293.

⁵⁶⁵ Heuveline & Poch 2006, p. 110. The total sample consisted of 8,911 women who married only once. Of these women, 9.39% married between 1975 and 1978.

⁵⁶⁶ Heuveline and Poch calculated that on average, of *all* women in their sample (a total of 8,911 women who married before 1999) almost 10% reported that they had not consented to the marriage (Heuveline & Poch 2006, p. 110).

⁵⁶⁷ LeVine 2010, p. 28.

⁵⁶⁸ LeVine 2010, p. 28.

⁵⁶⁹ See also ECCC Case 002 Closing Order, paras. 216–220.

Nevertheless, the Khmer Rouge marriages – whether they were voluntary or forced, whether they provided any comfort or caused more anxiety – had a lasting impact on people’s lives and had consequences that stretched far beyond the three-year reign of *Angkar*. Some people were not allowed to marry their beloved but had to marry a stranger; others who fell in love with someone other than their spouse after the fall of the Khmer Rouge regime could not be together because they were already married. The fact that the majority of couples stayed together (see *infra* paragraph 5.2.4) illustrates the impact the marriages had on people’s lives. Some report that they are happy and (have learned to) love each other; others state they are miserable but remain together out of a sense of loyalty towards a deceased family member whom they can no longer ask for permission to separate, or because they feel they are obliged to stay married.⁵⁷⁰ It is therefore justified to say that the Khmer Rouge’s experiment of social engineering, of arranging and in many cases forcing marriages between people on a massive scale has radically and permanently altered the course of people’s lives.⁵⁷¹

5.2.4. *The marriages in post-conflict Cambodia*

Although it is not clear exactly how many couples stayed together after the collapse of the Pol Pot regime, recently conducted research gives reason to believe that the clear majority of spouses remained married to each other after the Vietnamese army ousted the Khmer Rouge in 1979. LeVine found that over 80% of the 192 people she interviewed had stayed with their partner. Most couples (almost 75%) testified that they stayed together because they had experienced each other’s kindness during the most difficult years of their lives. They had, for example, shared food when starving, comforted each other and together, formed a front against *Angkar*. Other reasons for staying together were children, financial considerations, feelings of pity for the partner, or a sense of loyalty and duty either to a deceased family member or to the spouse.⁵⁷² As an additional reason for remaining together, 54% of LeVine’s respondents mentioned the fact that their extended family had played a role in arranging the marriage.⁵⁷³ Jain found that another compelling reason for couples to stay together was the fact that they had made a formal commitment to each other to stay together and that their communities considered them to be married.⁵⁷⁴ The marriages had been performed by government officials and up to this day, Cambodians see them

⁵⁷⁰ LeVine 2010, p. 96. One woman interviewed by LeVine stated ‘I don’t want to change the Khmer way so we stay together’ (LeVine 2010, p. 123).

⁵⁷¹ LeVine 2010, p. 17.

⁵⁷² LeVine 2010, p. 19. For a complete overview of reasons the interviewees gave for staying together, see LeVine 2010, p. 94.

⁵⁷³ LeVine 2010, p. 95.

⁵⁷⁴ Jain 2008, p. 1026.

as legitimate and authentic.⁵⁷⁵ In addition, divorce⁵⁷⁶ was (and still is) socially unacceptable and for these reasons, many marriages endure.⁵⁷⁷ Another reason why so many people decided to remain married is that these individuals shared hardships with their spouses; an experience which Heuveline and Poch believe might enhance their commitment to the marriage.⁵⁷⁸ Finally, the fact that so many people stayed together might also be explained by the fact that Cambodians, at least the older generation, believe that marriages are predestined by Buddha (*kou prenh*: Khmer for ‘destined mate’). So regardless of the conditions under which they wed, some believe that Buddha determined their marriage even before they were born.⁵⁷⁹

6. COMPARISON: THE BUSH MARRIAGES AND THE KHMER ROUGE MARRIAGES

6.1. INTRODUCTION

The conflicts in both Cambodia and Sierra Leone were marked by forced marriages that took place on a large scale. On the surface, it seems the Khmer Rouge marriages were quite different from the bush marriages. Does closer inspection reveal any similarities between these two types of forced marriages? This paragraph juxtaposes the bodies of facts of the marriages described above and first lines up the most evident differences between the two. Subsequently, the cases are analysed for the purpose of finding similarities. The differences and similarities described below are generalised for convenience of comparison. For example, in *most* cases, both men and women were victims of forced marriages in Cambodia, although sometimes one was the victim and the other the perpetrator.⁵⁸⁰ Conversely, in *most* cases in Sierra Leone, the husband was the

⁵⁷⁵ LeVine 2010, pp. 26 and 85.

⁵⁷⁶ LeVine 2010, p. 82, notes that spouses often ask a parent or village elder for permission to separate instead of filing for legal divorce.

⁵⁷⁷ Jain 2008, p. 1026. Nevertheless, in traditional marriages, the road to divorce was relatively easier for women than for men: men could only divorce on grounds of infidelity on the wife’s part; women could seek a legal divorce unilaterally on a variety of grounds (Heuveline & Poch 2006, p. 101).

⁵⁷⁸ Heuveline & Poch 2006, p. 118. Interestingly, research shows that Khmer Rouge marriages are almost as stable as pre-Khmer Rouge marriages and more stable than the marriages that were performed in the period following the collapse of Pol Pot’s regime (Heuveline & Poch 2006, p. 117).

⁵⁷⁹ LeVine 2010, pp. 26, 44 and 98: a quarter of all couples interviewed by LeVine, regardless of whether they had stayed together, believed that Buddha had arranged their marriage before they were born. See also Sok-Kheang 2007, p. 1.

⁵⁸⁰ Kasumi 2008, p. 19, recorded the testimony of a former CPK soldier who stated that soldiers could ask *Angkar*’s permission to marry a specific person. If *Angkar* had granted permission but this particular person did not want to marry, he or she would be forced to marry. This was especially the case when handicapped soldiers were given the privilege of choosing a spouse:

perpetrator, although in some instances men were forced by their commanders to take women as their wives.

It is reiterated that one of the goals of this research is to assess if, and if so, how the practice of forced marriage should be criminalised in the context of the ICC, i.e. within the framework of the Rome Statute. Yet it seems that the bush marriages that took place during the civil war in Sierra Leone are, to a large extent, comparable to the forced marriages that took (and take) place during seven of the situations under investigation before the ICC: Côte d'Ivoire, CAR, Mali, DRC, Darfur, Uganda and Kenya (described above in paragraph 3). In all those situations, men (often 'rebels') abduct women and girls and force them into marriage, which often results in a situation of abuse and enslavement.⁵⁸¹ More research will need to be done into these cases: currently, there are only a few reports that focus on this practice. The forced marriages orchestrated by the LRA, however, have been extensively documented and where applicable, they will be referred to below.

6.2. THE DIFFERENCES

6.2.1. *Policy as a similarity in disguise: state policy versus rebel policy*

One of the most striking characteristics of the forced marriages that took place during the conflicts in Sierra Leone and Cambodia is that in both countries, these acts were committed as part of a policy. Yet, because this similarity was the cause of many differences (discussed below), it is discussed in this paragraph rather than in the paragraph that deals with the similarities.

First, a short foray into the concept of policy is necessary. On the international level, there is some discussion with regard to the question of whether the element 'attack' (directed against a civilian population), which is part of the chapeau of crimes against humanity, requires the existence of a state or organisational policy.⁵⁸² On the one hand, the *ad hoc* Tribunals, the SCSL and the ECCC have rejected a policy element as a separate requirement of crimes against humanity in their case law,⁵⁸³ which is consistent with the absence of such an element in the

often the chosen spouse did not want to marry the disabled cadre, but he or she would then be forced to marry (e.g. Kasumi 2008, p. 19).

⁵⁸¹ The same goes for forced marriages that took place during the Rwandan genocide.

⁵⁸² Cryer *et al.* 2010, pp. 237–238. Note that a policy element is also (often) inherent in war crimes and genocide, see W.A. Schabas, 'State Policy as an Element of International Crimes', *Journal of Law and Criminology* (98) 2008, pp. 953–982.

⁵⁸³ However, in its earlier case law, both the ICTY (*Tadić* Trial Judgement, para. 644, discussing policy in the context of the element 'population') as well as the ICTR (*Akayesu* Trial Judgement, para. 580, linking policy to the element 'systematic') did require the presence of a preconceived plan or policy for conduct to be classified as a crime against humanity, see Robinson 1999, p. 49. See also RUF Trial Judgement, para. 79; and *Duch* Trial Judgement, para. 301.

statutes of these four courts. The Rome Statute, on the other hand, does require an element of state or organisational policy in order for conduct to be classified as an attack directed against a civilian population and thus a crime against humanity. According to Article 7(2)(a) Rome Statute, the acts enumerated in Article 7(1) must have been committed pursuant to or in furtherance of a policy to commit an attack against a civilian population. The ICC EoC explain that the policy to commit such an attack ‘requires that the State or organization actively promote or encourage such an attack’.⁵⁸⁴ In exceptional circumstances, the deliberate failure of a state or organisation to take action against such an attack may also be seen as an encouragement of the attack and thus as an implementation of the policy.⁵⁸⁵ This policy element has a low evidentiary threshold and the existence of a plan or policy can be inferred from the manner in which acts were committed.⁵⁸⁶

The forced marriages under the Khmer Rouge were part of official state policy pertaining to the regulation of marriages. Senior leaders of the CPK wanted a greater labour force for the benefit of the revolution and therefore they required an increase in birth rates.⁵⁸⁷ As part of a strategy to obtain complete control over the Cambodians and to manage their sexuality and reproductive function, the leaders of the CPK devised a policy of arranging the marriages of the majority of single adults in their twenties and thirties.⁵⁸⁸ The existence of this policy, which was disseminated through propaganda tools such as the magazine ‘Revolutionary Flag’ and by telegrams sent to senior CPK leaders stationed throughout Cambodia, is evidenced *inter alia* by the fact that the CPK marriages took place all over the country with a similar *modus operandi*.⁵⁸⁹

In Sierra Leone, there was no official government policy pertaining to the abduction and forced marriage of young girls. Rather, the bush marriages were part of the RUF/AFRC common purpose to gain and exercise political control over the territory of Sierra Leone.⁵⁹⁰ The bush marriages were perpetrated by the rebels on a massive, widespread scale throughout the territory of Sierra Leone as part of a *de facto* rebel policy. As is evidenced by the judgements of the SCSL, the bush marriages were organised and in some cases regulated by high-ranking

⁵⁸⁴ Article 7 Introduction sub 3 ICC EoC.

⁵⁸⁵ Article 7 Introduction sub 3, footnote 6 ICC EoC.

⁵⁸⁶ Cryer *et al.* 2010, p. 238; and Robinson 1999, p. 51.

⁵⁸⁷ This is redolent of the alleged (forcible) impregnation policy within the LRA: testimonies of former LRA fighters indicate that pregnancy was promoted within the forced marriage and that abortion was punishable by death. In some cases, commanders allegedly ordered individual rebels to have sex with their wives and even had the sex lives of their fighters monitored (Carlson & Mazurana 2008, pp. 23–24; and Allen 2005, p. 28).

⁵⁸⁸ Although in some cases the spouses were younger or older (Case 002 Closing Order, para. 842).

⁵⁸⁹ Case 002 Closing Order, para. 1446.

⁵⁹⁰ The SCSL held that the common purpose of the joint criminal enterprises formed by the accused in the AFRC and RUF cases was ‘to take any action to gain and exercise political control over the territory of Sierra Leone by conduct constituting crimes within the Statute’ (AFRC Appeal Judgement, para. 16; RUF Trial Judgement, para. 376). Note that forced marriages were allegedly also committed by the pro-government CDF.

commanders in the rebel compounds. For example, the Trial Chamber found that managing the system of slavery within the AFRC faction was one of the tasks allotted to Santigie Borbor Kanu, who was Chief of Staff of the AFRC. He was held individually responsible for planning, organising and implementing the commission of sexual slavery.⁵⁹¹

‘In Bombali District the Accused Kanu designed and implemented a system to control abducted girls and women. All abducted women and girls were placed in the custody of the Accused. Any soldier who wanted an abducted girl or woman to be his “wife” had to “sign for her”. The Accused informed his fighters that any problems with the women were to be immediately reported back to him, and that he would then monitor the situation. The Accused issued a disciplinary instruction ordering that any woman caught with another woman’s husband should be beaten and locked in a box.’⁵⁹²

The systematisation of the bush marriages brings to mind the abduction and marriage policy of the LRA. The LRA is infamous for their abduction of young children who are then indoctrinated with LRA ideology and forced to become fighters, cooks, porters or spies. Within the rebel compounds, the children live in communities that are an imitation of traditional ‘families’, headed by a commander and consisting of several other young children, fighters and ‘wives’. Girls who have reached puberty are distributed as wives among the fighters – a process which in some camps is ordered and monitored by high-ranking officers.⁵⁹³ Sexual intercourse, which is strictly controlled, is only allowed within these marriages. In this way, the marriages have assisted in maintaining discipline, enhancing the control over the fighters, creating social cohesion, containing the spread of HIV and other STDs, and facilitating childbirth.⁵⁹⁴ Several authors have argued that a clear pattern of command responsibility could be detected with regard to the abductions and forced marriages.⁵⁹⁵ According to these authors, detailed records were kept on the age and number of abducted girls. The LRA commanders decided how many girls should be abducted and would, if at a given time they believed there were not enough marriageable girls available, instruct units to abduct specified numbers of girls.⁵⁹⁶

A consequence of the difference between state policy and rebel policy was that in Sierra Leone, girls and women were more randomly forced into marriages: ‘only’ those who had been abducted were at risk of becoming a bush wife. In Cambodia, on the other hand, the entire part of the population of Cambodia that

⁵⁹¹ AFRC Appeal Judgement, paras. 289–299 and 302.

⁵⁹² AFRC Trial Judgement, para. 766.

⁵⁹³ Carlson & Mazurana 2008, p. 19.

⁵⁹⁴ Annan *et al.* 2009, pp. 1 and 10–12; and Amnesty International 1997, p. 19.

⁵⁹⁵ Carlson & Mazurana 2008, pp. 8 and 17–18. See also Amnesty International 1997, p. 20.

⁵⁹⁶ Annan *et al.* 2011, p. 885; and Carlson & Mazurana 2008, p. 18.

consisted of singles roughly between the ages of 18 and 40 were at risk of being forced to enter into marriage.

The difference in the type of policy is also reflected in the act that was necessary to realise the marriage: in Cambodia, the marriages were concluded by a third party, usually a government official, during a special ceremony that was also conducted by this official. In Sierra Leone, it was usually the bush husband who ‘established’ the bush marriage, usually by (publicly) claiming the woman as his wife (‘*yu na mi wef*’). In some camps, men were required to sign for the women who had been allocated to them.⁵⁹⁷ In a few cases, there would be an informal ceremony, during which a commander or camp leader would unite rebel and abductee in (bush) marriage.

6.2.2. *Victim-victim versus perpetrator-victim*

A major difference between the marriages that took place in Sierra Leone and Cambodia is the relationship between husband and wife. In Sierra Leone, this relationship was generally one of perpetrator-victim: the perpetrator was often the intended husband himself, save for the few exceptions in which a commander forced both parties to marry. Therefore, the victims were usually the wives and the perpetrators were usually the husbands. These husbands were the ones who committed attacks on the civilian population; they had plundered the women’s villages and sometimes killed their relatives. So the women were forced to enter into bush marriages with the ‘enemy’. In Cambodia, on the other hand, the relation between husband and wife was one of victim-victim: often neither party had any say in the decision to marry or in the choice of spouse. The perpetrator of the forced marriages (and the enemy) was often a third party: the government embodied by *Angkar*. Consequently, in Cambodia in most instances both men and women were victims of the forced marriage.

This perpetrator-victim/victim-victim dichotomy also had its effect on crimes that were committed within the marriage. In a forced marriage during the civil war in Sierra Leone, rape, sexual violence, (sexual) slavery and physical abuse constituted a large part of the victim’s ordeal. Within a forced marriage, these crimes were often committed by the victim’s bush husband. In Cambodia, however, this was not so much the case: and it seems that in the Khmer Rouge marriages, it was the forced conjugal association *in itself* that caused much of the victims’ (psychological) suffering.⁵⁹⁸ Although in several instances sexual intercourse was prescribed, generally *both* spouses were forced to have sex with each other and many only pretended to do so. In those cases in which the sexual intercourse constituted rape, the men (husbands) were mostly innocent agents,

⁵⁹⁷ See also T. Doherty, ‘Jurisprudential developments relating to sexual violence: the legacy of the Special Court for Sierra Leone,’ in: A. de Brouwer *et al.* (eds.), *Sexual violence as an international crime: interdisciplinary approaches*, Antwerp: Intersentia 2013, p. 167.

⁵⁹⁸ Anderson 2010, p. 39.

acting out the orders they had been given by camp leaders who had prescribed sexual intercourse and monitored them.⁵⁹⁹ It appears, therefore, that (forced) sexual intercourse is more often imposed by a third party in those cases where forced marriages are (partly) aimed at procreation. This tallies with accounts of some former LRA fighters who stated that they had not wanted to take a wife, but were told to do so and were also ordered to have sexual intercourse with these women – often for the purpose of procreation. Some even state that their sex life was monitored.⁶⁰⁰

6.2.3. *Official versus unofficial*

Another difference between the Khmer Rouge weddings and bush marriages is the status of the unions. In Cambodia, the marriages were official and state-sanctioned and therefore *de iure* associations. However, during the Khmer Rouge rule, many marriages could hardly be qualified as *de facto* marriages,⁶⁰¹ in the sense that there often was no actual marital life to speak of. Spouses were not encouraged to have a marital relationship, hardly saw each other and in many cases did not cohabit.⁶⁰² After the fall of the Khmer Rouge regime, however, the marriages of the spouses who remained together did become *de facto* marriages. The bush marriages in Sierra Leone, by contrast, were only *de facto* marriages and not *de iure*, as argued by several authors.⁶⁰³ The victims were forced to cohabit with their bush husbands, have sexual relations with them and do household tasks. Within the bush, the marriages were seen as legitimate, but the non-rebel community (the civilian population) did not regard the bush marriages as legitimate unions. Bush marriages were seen as illegitimate, uncivilised, and not socially sanctioned because none of the proper marriage traditions had been adhered to.^{604, 605}

A corollary to the difference between official versus unofficial marriages concerns the annulment of the marriages. It seems that because the bush marriages were illegitimate, in Sierra Leone men could easily abandon their wives without taking any (legal) action; and after the civil war, those women who had escaped their bush husbands were no longer bound to them by the bush marriage. In Cambodia, this was different: a formal divorce, usually coupled with permission

⁵⁹⁹ Although there are also examples of men who took advantage of the situation and treated their wives badly (see e.g. Kasumi 2008, pp. 17 and 21).

⁶⁰⁰ Carlson & Mazurana 2008, pp. 23–24; and Allen 2005, p. 28.

⁶⁰¹ See also Jain 2008, p. 1026.

⁶⁰² Although, as already explained, in some villages, couples were allowed to cohabit.

⁶⁰³ Anderson 2010, pp. 39–40; and Jain 2008, p. 1026.

⁶⁰⁴ Coulter 2009, pp. 100–101 and 220; and Coulter 2008, pp. 55–56, footnote 2. Compare in this sense the LRA marriages, which are not recognised as formal marriages or seen as binding by any legal standard in Uganda or within northern Ugandan customary law (SWAY 2008, p. 44; and Carlson & Mazurana 2008, p. 8).

⁶⁰⁵ Note that the Khmer Rouge marriages were not conducted in conformity with the traditional marriage customs either (e.g. parental permission and offerings made to appease spirits of ancestors), yet the marriages are still seen as official, valid associations.

to separate by a parent or village elder, was necessary to dissolve the marriage.⁶⁰⁶ Couples were considered to be officially married in the eyes of the community and in addition, divorce was frowned upon. This, along with other reasons, compelled many Cambodians to stay together after the fall of the Khmer Rouge regime. In Sierra Leone, many bush marriages ended along with the civil war. Those couples who did remain together, for whatever reason, found themselves in a changed position: the community did not recognise their association as it had not been negotiated or sanctioned by the family or the community and because no bride wealth had been paid to the girl's family.⁶⁰⁷ Therefore, the bush marriages had to be formalised. Occasionally, this happened, but there are also accounts of women who wanted to stay with their bush husbands, but whose wish to have their marriage solemnised was thwarted by relatives or the community, who refused formalisation because they did not approve of the relationship.⁶⁰⁸

6.2.4. *Eradicated versus exacerbated gender roles*

Another difference that should be noted concerns the so-called conjugal duties resulting from the forced marriages. Rebels in Sierra Leone forced their wives to do (household) chores,⁶⁰⁹ but in Cambodia, the only 'conjugal duty' the spouses had was procreation. Apart from that, they were, like non-married people, forced to work for *Angkar*. Neither women nor men were assigned household tasks as a result of their status as either husband or wife: there were no more households in the traditional sense of the word; there was only the collective, and people were randomly selected to work in the kitchens and cook for the entire collective.⁶¹⁰ Moreover, the Khmer Rouge had eliminated many traditional gender roles and communalised women's roles as caretakers.⁶¹¹ In Sierra Leone, on the other hand, traditional gender roles perpetuated in the bush and were even exacerbated, whereas at the same time, bush wives also transgressed traditional notions of femininity when they became fighters. Girls appear to have been abducted in Sierra Leone (and for example also in Uganda) exactly for their productive labour.⁶¹² In the camps, girls and women were made to carry out traditional gender roles, such as cooking, cleaning and rearing children. In their multifaceted roles as wives, girls and women were used to support the fighting forces and thus became indispensable to the economy of war, forming the foundations upon

⁶⁰⁶ LeVine 2010, p. 82 notes that legal divorce or separation was not established in Cambodia. However, see the Cambodia Law of the Marriage and Family 1989, Article 38 *ff*.

⁶⁰⁷ Coulter 2009, p. 220; and Scharf 2005, p. 81.

⁶⁰⁸ See the testimonies of Aminata and Finda, recorded by Coulter 2009, pp. 209 and 219–220.

⁶⁰⁹ Compare also the forced marriages that took place during the Rwandan genocide.

⁶¹⁰ In some collectives, people were not required to eat in communal dining halls, but were allowed to prepare their own food and eat it with their spouse (LeVine 2010, p. 30; Ngor 1989, p. 296).

⁶¹¹ Mam 2000, p. 10 *et seq.*, and Anderson 2010, p. 41.

⁶¹² Coulter 2009, pp. 67 and 116–117.

which the fighting forces relied. Bush marriages, therefore, were accompanied by a new set of duties for most women. For some, it worked the other way around: bush marriages resulted in a decrease in the amount of their duties as they rose in the hierarchy and had slaves working for them.⁶¹³ *Angkar*, on the other hand, used the entire Cambodian population, women and men alike, for their gender-neutral productive labour in order to further the revolution. The Khmer Rouge aimed at eradicating gender roles,⁶¹⁴ and indeed, it seems that the Khmer Rouge valued people not on the basis of their gender, but on the basis of their sex: men and women were reduced to their biological differences as they were ‘used’ for their reproductive functions. Marriages were arranged for the benefit and purpose of the revolution: marriages would lead to childbirth which would facilitate population growth which, in the long run, would result in more workers for *Angkar*, securing the future of Democratic Kampuchea.

6.3. SIMILARITIES

6.3.1. *Forced union of two people*

The most obvious similarity between the Khmer Rouge marriages and the Sierra Leonean bush marriages is that in both situations, the conduct involved the union of two people in a conjugal(-like) association. Of these two people, at least one was forced to enter into this relationship. The marriages took place in coercive circumstances, which ruled out the possibility of genuine consent.⁶¹⁵

LeVine aptly calls the Khmer Rouge marriages ‘conscripted marriages’.⁶¹⁶ The same terminology was used by the Co-Lawyers for the Civil Parties in the ECCC case against Kaing Guek Eav, the former director of the S-21 prison camp, who spoke of the forced marriages in terms of ‘the conscription into conjugal relationships’.⁶¹⁷ The qualification ‘conscription’, which refers to the compulsory enlistment or enrolment into a national service, usually an army, is also an appropriate term for the bush marriages that took place during the civil war in Sierra Leone – and several other recent conflicts on the African continent, such as in Uganda. In Cambodia, men and women were given the order to marry for the

⁶¹³ Compare in this regard the LRA: often young abductees (referred to as *ting ting*) were responsible for farming, finding water, carrying heavy loads, cooking and cleaning and waiting on their commanders and their ‘wives’. Once a girl *ting ting* reached puberty and became wife to an individual fighter, she would rise in hierarchy and stand above these young slaves (Human Rights Watch 2003b, pp. 13–14; SWAY 2008, p. 42).

⁶¹⁴ Mam 2000, pp. 8–9 *et seq.*

⁶¹⁵ It is reiterated that not all marriages that took place under the Khmer Rouge regime can be considered to have been forced.

⁶¹⁶ LeVine 2010, p. 29.

⁶¹⁷ *Duch* Civil Parties’ Co-Lawyers’ Request for supplementary preliminary investigations, para. 34.

good of the revolution (i.e. to contribute to its achievement) and were told to report themselves at a given place on a given time and date to enter into this prescribed marriage.⁶¹⁸ In Sierra Leone, abducted women and girls were given to rebel fighters as wives. In this capacity, many were not only forced to be subject to the sexual wishes of their bush husbands and cook and clean for them, but they also provided auxiliary services to the rebel forces: monitoring the food distribution process in the camps and the radio communication between the troops, giving orders, sending out spies, and leading looting and killing expeditions. In the absence of her bush husband, the first wife of a commander could even be in charge of the entire rebel compound. Seen in this light, both the Khmer Rouge unions as well as the Sierra Leonean bush marriages can be regarded as forms of conscription.

6.3.2. *Compelled to remain in the union (conjugal association) for a certain period*

Both in Sierra Leone and in Cambodia, the perpetrators (the bush husbands and members of *Angkar* respectively) caused the victims to remain in the conjugal associations for a certain period of time, varying from several weeks to several years. During this period, the victims were made to go through life as husband and wife. So the result of these forced conjugal associations was a general status of husband or wife and a prolonged association. The victims were not able to dissolve the marriage, and were consequently bound *by* the marriage *in* the marriage.⁶¹⁹ In Sierra Leone, a woman could not leave her bush husband, whereas a man could easily end the bush marriage by abandoning his wife, for example by leaving her behind or sending her to the front line. In some cases, the end of the civil war did not bring any change in the women's possibility to leave the bush marriage: some men forced their wives to stay with them; other women had no other option than to stay with their bush husbands because they were rejected by their relatives and had nowhere to go. In the latter cases, the women could, in theory, leave their bush husbands because they were no longer confined to the bush. In practice, however, some were still bound to their husbands: no longer directly by the ties of the bush marriage, but as a consequence of the adverse effect that this association had on their reintegration.

The state-sanctioned Khmer Rouge weddings excluded the possibility of separation and remarrying for *both* parties.⁶²⁰ It is not clear whether divorce was at all possible between 1975–1979, but a former sector secretary, whose testimony

⁶¹⁸ See also K. Dy, *A history of Democratic Kampuchea (1975–1979)*, Phnom Penh: Documentation Center of Cambodia 2007, p. 35: 'The main purpose of weddings, for the Khmer Rouge, was not to form family units, but to produce children who could serve the revolution.'

⁶¹⁹ Mattler 2004, p. 28; and Scharf 2005, p. 96.

⁶²⁰ *Duch* Civil Parties' Co-Lawyers' Request for supplementary preliminary investigations, para. 34; and Jain 2008, p. 1026.

was included in the Closing Order of ECCC Case 002 (see Chapter 8), stated that, even though it was announced that couples were free to divorce, in reality anyone who split up a marriage would be in trouble and would be sent away to worksites for hard labour.⁶²¹ The difficulty of separation even extended to the period after the fall of the Khmer Rouge regime: many couples did not consider themselves able to separate and marry someone else because they had sworn to stay together, were officially married in the eyes of the community and divorce was not approved of socially.

6.3.3. *Union created certain obligations and/or rights between spouses*

As a result of the forced marital union, certain obligations and/or rights were created between the spouses; obligations and/or rights that they did not share with others.⁶²² The most obvious consequence of the conjugal association was a sanctioned exclusivity between spouses. This exclusivity was reciprocal in Cambodia: extra-marital sexual intercourse was prohibited on pain of punishment. In Sierra Leone, the bush marriages were also based on exclusivity, but this exclusivity was unilateral: the woman was the exclusive sexual property of her bush husband; she could not have more than one husband and was not allowed to have sexual intercourse with other men. The bush husband, on the other hand, was allowed to have more than one wife and could also have extra-marital sex with other women, as long as they were not associated with another rebel.

In addition to exclusivity, the marriages had other consequences that can be classified as obligations. In Sierra Leone, the woman had to perform duties that are traditionally associated with marriage in this country: many bush wives had to perform household tasks, such as washing, cooking and cleaning, they had to have sexual intercourse with their husbands and bear and rear children.⁶²³ The husband, in turn, provided a modicum of protection against the other rebels and gave his wife accommodation and food, sometimes allowing her to share in his loot. Providing for food and shelter is considered to be a duty of the husband in Sierra Leonean marriages.⁶²⁴ So by forcing a girl to become his bush wife, a rebel also indicated that he was willing to take on certain responsibilities and obligations generally ascribed to husbands.⁶²⁵ In some instances, bush marriages would improve the lives of the abductees in more ways than just protection:

⁶²¹ Case 002 Closing Order, para. 845. LeVine 2010, p. 83 found one case of divorce: a man and woman married under *Angkar* both asked *Angkar* permission to separate, one month after their wedding, so that the woman could take care of her sick parents. Permission was granted and the man, who was a soldier, was sent to a different region, while the woman was allowed to stay in her village to look after her parents. It is not clear whether these two people were actually divorced, or just physically separated.

⁶²² Mattler 2004, p. 13; Scharf 2005, p. 85.

⁶²³ This is similar to the forced marriages that took place during the Rwandan genocide.

⁶²⁴ Coulter 2009, p. 79.

⁶²⁵ AFRC Expert Report Thorsen, p. 16; and Coulter 2009, p. 79.

women could gain more power and esteem and some could delegate household tasks to younger slaves.⁶²⁶ In Cambodia, marriage could be coupled with forced procreation. There are several accounts of couples who shared food with each other,⁶²⁷ but seeing as men and women (including spouses) generally did not live together, there existed few other rights and/or obligations between spouses apart from staying together (as they had pledged to *Angkar* on the wedding day) and having children.

6.3.4. *The forced marriages served specific (but different) purposes*

The aims with which the Khmer Rouge contracted forced marriages were quite similar to the objectives of the Sierra Leonean rebels, with a few differences. The purpose of the CPK policy that regulated the marriages in Cambodia was fourfold: marriages were arranged by the CPK to obtain absolute control over the interaction between individuals and their sexuality,⁶²⁸ in particular to increase population growth, to destroy the traditional family and to reaffirm loyalty to *Angkar* (which had replaced the roles of parents) by making spouses swear fidelity not only to each other, but also to *Angkar*. Marriage was also used as a reward for those who had already proved their loyalty to *Angkar*, i.e. soldiers who had fought bravely or CPK cadre who had become handicapped in the line of duty. The primary goals, however, were obtaining absolute control over people's lives (by taking over the traditional roles over parents in arranging marriages) and facilitating population growth by means of enforced procreation within marriages.⁶²⁹ Extra-marital sex was a crime against morality, so marriage was a prerequisite for procreation.⁶³⁰

The primary goal of the bush marriages in Sierra Leone seems to have been establishing a system of individual slavery, whereby commanders and fighters with a higher rank had personal slaves in the form of bush wives. In this way, the forced marriages were also a means of obtaining unpaid logistical support for rebel troops,⁶³¹ and a method of organising life in the bush. Moreover,

⁶²⁶ Compare in this regard also the LRA marriages, which often also allowed women to rise up the hierarchical ladder within the rebel camps.

⁶²⁷ See e.g. LeVine 2010, p. 30.

⁶²⁸ Compare the LRA's puritanical code of conduct with regard to sexuality: strict norms surrounding sexuality were used to maintain discipline, obtain control over the fighters, and to restrict the transmission of STDs (Annan *et al.* 2009, p. 12). Further, procreation was also a specific goal of the LRA marriages (Carlson & Mazurana 2008, p. 23–24; and Allen 2005, p. 28).

⁶²⁹ Again, compare the alleged LRA policy of impregnating forced wives.

⁶³⁰ M. Vickery, *Cambodia 1975–1982*, Chiang Mai: Silkworm Books 1999, p. 186: 'One of the DK (Democratic Kampuchea; IH) goals, even if only for chauvinistic reasons, was an increase in population (...) since sexual relations outside marriage were prohibited by one of the strictest regulations of all (...) marriages were used to facilitate childbirth.' Within many LRA camps, extra-marital sex was also forbidden. Intercourse was permitted only within sanctioned, LRA wedlock (Amnesty International 1997, p. 19; and Annan *et al.* 2009, p. 25).

⁶³¹ RUF Trial Judgement, para. 2107.

forced marriages helped keep rebel fighters and commanders committed to the movement, because the bush wives satisfied their sexual and emotional needs and took care of everyday chores.⁶³² At the same time, the bush marriages in Sierra Leone were used as a reward system for rebels and a way to control the sexuality of the abducted women and girls.⁶³³ A supplementary goal of the bush marriages consisted in destroying family and social bonds⁶³⁴ and spreading terror and thereby increasing the rebels' exercise of power and control over the population.⁶³⁵ The rebels' bush marriage policy served no ideological purpose, unlike the Khmer Rouge's policy.

6.3.5. *Elements of control and ownership*⁶³⁶

A final similarity between the forced marriages that took place in Cambodia in the second half of the 1970s and those that took place in Sierra Leone in the 1990s is that both types have characteristics that are redolent of enslavement. Rebels treated their bush wives as their personal property in Sierra Leone, and the Khmer Rouge exercised powers attaching to the right of ownership over Cambodians, in effect enslaving an entire population.⁶³⁷

Pursuant to Article 7(2)(c) Rome Statute in conjunction with Article 1(1) of the 1926 Slavery Convention, the crime of enslavement requires that the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons. The ICC EoC stipulate that this includes 'purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'.⁶³⁸ A footnote elucidates the term 'deprivation of liberty', holding that this may include trafficking in persons and, in some circumstances, reducing a person to a servile status such as by extracting labour or in the manners defined in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. In this regard, this 1956 Convention refers to practices of debt bondage, serfdom, certain instances of forced marriage (including widow inheritance), and the exploitation of children.

In the *Kunarac et al.* case, the ICTY Trial Chamber listed a number of factors that are to be taken into consideration in determining whether enslavement was committed in a particular case. The factors include:

⁶³² As stated by the Prosecutor in RUF Prosecution Final Trial Brief, para. 290.

⁶³³ Jain 2008, p. 1026.

⁶³⁴ RUF Trial Judgement, para. 1349.

⁶³⁵ RUF Trial Judgement, paras. 1351–1352 and 2070; and Oosterveld 2011, pp. 69–70.

⁶³⁶ Note that in this paragraph, the entire factual complex surrounding forced marriages is assessed; the question of whether the forceful conferral of marital status *sec* could qualify as slavery, is addressed in Chapter 10.

⁶³⁷ Ngor 1989, p. 289 uses the term 'war slaves'.

⁶³⁸ Article 7(1)(c)-1 ICC EoC.

‘the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.’⁶³⁹

The bush marriages most strongly resemble enslavement: abducted women and girls were given to rebels as wives without the possibility to refuse. In the case of most bush marriages, all the above-mentioned factors quoted from the *Kunarac et al.* case were present to a certain extent. The movements of the bush wives were closely monitored: most were guarded by a number of bodyguards, both to protect them from attacks from other rebels and to prevent them from escaping. Many were confined to the rebel compound or their husband’s house and could only leave the premises after they had obtained permission. The husbands not only controlled their wives’ movements, they also controlled their sexuality: a bush wife was not allowed to have sexual intercourse with anyone but her husband on pain of severe punishment. In addition, the wives were forced to work for their husbands: labour which included portering, cooking, cleaning and laundering. The bush wives had to obey their husbands’ demands and were often subjected to abuse and cruel treatment. The men treated their wives as their personal property,⁶⁴⁰ and could dispose of them as they saw fit. Bangura, the expert witness for the Prosecution in the AFRC trial, even argued that the rebels used the terms ‘marriage’ and ‘wife’ as a means to express their control over the women. The deliberate and strategic use of this terminology worked two ways: on the one hand it was a way to openly stake a claim, to express to other rebels that a particular woman belonged to a particular man and to demonstrate the permanence of the association. On the other hand, the use of the word ‘wife’ served to psychologically manipulate the abducted women.⁶⁴¹ In the words of the RUF Trial Chamber: ‘the use of the term “wife” by the rebels was deliberate and strategic, with the aim of *enslaving* and psychologically manipulating the women and with the purpose of treating them like *possessions*’.⁶⁴²

In Cambodia, it was not individuals, but the government that enslaved people. The CPK evacuated cities and villages and relocated civilians in communities where they were forced to work, cultivating the land and constructing irrigation projects. If they refused to work or did not work hard enough, they were at risk of being sent for ‘re-education’, a euphemism for being sent to interrogation and security centres.⁶⁴³ In many communities, the living conditions were appalling and

⁶³⁹ *Kunarac et al.* Trial Judgement, para. 543 (footnotes omitted).

⁶⁴⁰ Compare *Kunarac et al.* Trial Judgement, para. 728 (and 738): ‘the girls were treated as personal property of the accused Kunarac and DP 6, they had to do household chores and they had to obey all demands.’

⁶⁴¹ AFRC Expert report Bangura, pp. 15–16.

⁶⁴² RUF Trial Judgement, para. 1466 (emphasis added).

⁶⁴³ Case 002 Closing Order, para. 145.

hundreds of thousands of Cambodians died as a result of starvation, exhaustion and maltreated illness. Not only people's movements, but also their interaction and communication with others and even their thoughts were controlled, as many believed *Angkar* was omnipresent and able to read minds. The complete control the CPK had over the Cambodians is evidenced by the fact that it was able to regulate the marriages that took place from at least 1977 up to 1979 and coerce people into conjugal relations and subsequently force them to procreate. By prohibiting extra-marital sexual relations and forcing men and women into marriages, often allowing them no say in the selection of a spouse, men and women could not have sex with anyone but their spouse and were prevented from marrying anyone else.⁶⁴⁴

When the perpetrator, in addition to exercising powers attached to the right of ownership, also causes the enslaved person to engage in one or more acts of a sexual nature, the legal requirements of the crime of sexual slavery are satisfied.⁶⁴⁵ In many cases, sexual abuse constituted a large part of the victims' ordeal within the bush marriages. Therefore, the bush marriages also resulted in sexual slavery.⁶⁴⁶ The same may be said for some of the Khmer Rouge marriages: in those cases in which the Khmer Rouge ordered married couples to have sexual intercourse with each other, the elements of sexual slavery might be satisfied.⁶⁴⁷

7. COMPARISON: FORCED MARRIAGES IN CONFLICT SITUATIONS AND FORCED MARRIAGES IN THE NETHERLANDS AND ENGLAND

Forced marriages happen on a daily basis, in times of conflict, as well as in times of peace. Looking at the forced marriages that were described in this chapter and the previous one, it immediately becomes clear that there is a difference between the perpetrators of these marriages: i.e. the people who force others to enter into conjugal associations. In England and the Netherlands, forced marriages are often the result of people close to the victim, usually parents and direct kin, interfering in the victim's life. Parents use pressure to force their children to enter into a marriage to protect family honour, to fulfil a promise made to the

⁶⁴⁴ See also ECCC Case 002 Civil Parties' Co-Lawyers' Second Investigative Request concerning forced marriages and forced sexual relations, para. 27: 'couples were convened, married, and then assigned to spend night(s) together and to have conjugal visits later on. People were controlled and ordered how, where, and when, to conduct their conjugal life as a wedded couple with their new partners. This practice should be considered as enslavement as a crime against humanity.'

⁶⁴⁵ Article 7(1)(g)-2 ICC EoC.

⁶⁴⁶ See AFRC, RUF and Taylor Judgements.

⁶⁴⁷ This is further examined in Chapter 10.

parents of the other spouse, to facilitate entrance to a country, and/or because they believe they act in their child's best interests. There are also examples where forced marriages take place in a different context, such as in the course of human trafficking.⁶⁴⁸ Dutch courts have dealt with several such cases⁶⁴⁹ and the Dutch Human Trafficking Rapporteur reported on several occasions that the police are increasingly often confronted with female prostitutes who are victims of human trafficking and whose stay in the Netherlands is dependent on a marriage. The Rapporteur does not deal with the issue of the extent to which these marriages are forced, but it would appear justified, considering the circumstances these women are in, to assume that at least some of these marriages are forced.⁶⁵⁰ Other examples of forced marriages that usually, but not necessarily exclusively, take place outside the family context are cases of bride kidnapping.⁶⁵¹ Apart from these exceptions, the majority of forced marriages in the Netherlands and England take place in the context of the family and are usually coupled with psychological or more subtle forms of coercion. The period over which the coercion is exercised is in most cases protracted: this may be illustrated by a Scottish case concerning a man of Pakistani origin who had been under pressure from his parents and other family members for twelve years to enter into a marriage with his cousin. He was told that refusal would bring shame and degradation to his family and he was blamed for the death of his father, who had died of a stroke and whose last wish had been that his son would agree to the marriage. When his mother's health began declining and his family told him he would need a wife who would take care of his mother, he eventually relented and married his cousin. At the time of this marriage, he was living with his girlfriend whom he intended to marry and with whom he had a child.⁶⁵²

This differs from conflict situations. As demonstrated *inter alia* by the conflicts in Sierra Leone, Uganda, Cambodia and the DRC, in times of conflict, family members often have no involvement whatsoever in the forced conjugal associations that take place and (family) honour is generally not an issue in forced marriages. In Cambodia, the Khmer Rouge took over parents' traditional role in arranging the marriage of their children; in several conflicts in African countries, rebel groups abducted women and girls and divided them amongst themselves as wives. The run-up to these marriage is considerably shorter and the means of coercion more aggressive and violent; the marriages are usually brought about with (threats of) physical violence. In addition, it appears that, in times of

⁶⁴⁸ See e.g. Guideline of the Public Prosecution Service on human trafficking within the meaning of servitude and labour exploitation (2012R002), 1 May 2012.

⁶⁴⁹ See *inter alia* District Court Utrecht 1 June 2011, ECLI:NL:RBUTR:2011:BQ6884. See also Chapter 2.

⁶⁵⁰ Human trafficking, Third report of the National Rapporteur, The Hague: Bureau NRM July 2004, pp. 83–84.

⁶⁵¹ Dutch Supreme Court 27 February 1990, *NJ* 1991, 109; Dutch Supreme Court 2 July 1990, *NJ* 1991, 110; and Smid & Rijken 2005, pp. 9–10. See also Chapter 7 (legal framework).

⁶⁵² *Mahmud v. Mahmud* (1994) SLT 599, p. 599.

peace (that is to say at least in the Netherlands and England), relatively more men become victims of forced marriages than in times of conflict (with the exception of Cambodia). In the latter situations, the vast majority of victims are women.

8. CONCLUDING REMARKS

As this chapter demonstrates, a complex body of material facts, commonly denoted by the umbrella term ‘forced marriage’, occurs in conflicts all over the world. It appears that forced marriages are especially prevalent in African conflicts: there are reports of forced marriages taking place during the conflicts in *inter alia* Angola, the Democratic Republic of Congo, Liberia, the Central African Republic, Mozambique, Rwanda, Somalia, Sudan and Uganda. In the previous paragraphs, the forced marriages that took place during two conflicts in particular were highlighted: the bush marriages that took place during the civil war in Sierra Leone (‘rebel marriages’) and the forced arranged marriages that were contracted by order of the Khmer Rouge government (‘government-planned marriages’).

In Sierra Leone, rebels abducted thousands of women and girls and forced them into associations that are known as bush marriages: situations of individual slavery that were referred to as marriage in the bush, but that were not recognised as legitimate marriages by the Sierra Leonean community. In these bush marriages, many girls were raped, abused and used as slaves. And although many former bush wives were (eventually) welcomed back by their family, they nevertheless suffered from secondary victimisation through stigmatisation, discrimination and socio-economic marginalisation, just like the majority of rape victims and child soldiers. Stigma, therefore, is not synonymous with rejection or ostracism (by family or community) and ought not to be conflated with it.

The practice of forced marriage was also dominant in the 1970s under the rule of Pol Pot. During the Khmer Rouge regime, the Cambodian government arranged marriages between civilians as part of policies aimed at population growth and breaking all family ties to facilitate complete loyalty to *Angkar*. The systematic arrangement of marriages demonstrated that the Khmer Rouge had taken over the traditional role of parents of all Cambodians. Most people had little or no say in this matter: they were informed by Khmer Rouge officials that it had been decided that they would marry a certain person on a settled date and time. From interviews with survivors of the Khmer Rouge era, it follows that in some collectives, married couples were ordered to have sex with each other whereas in other collectives, sexual intercourse was not prescribed. As evidenced by the same survivor narratives, couples were not expected to build an emotional bond: many couples were separated a few days after their wedding and those who were not separated hardly saw each other since they worked long days in the labour groups

which were classified on the basis of sex and age. Many couples remained married after the fall of the Khmer Rouge.

It appears that forced marriage can be seen as a policy-based crime: in conflict situations, forced marriages are often used for particular reasons. The main goal pertains to dominion: gaining control over people and regulating their sexual conduct. In Cambodia and within the LRA, life was governed by a puritanical code and sex was only allowed within sanctioned wedlock. Seen from this perspective, the marriages were also used as a way to legitimise sex. As a consequence, adultery was prohibited: unilateral if not bilateral. In Cambodia and Uganda, married couples were not allowed to have sex with others; in Sierra Leone, a bush wife was forbidden to have sexual relations with someone other than her captor husband. In Cambodia and Uganda, moreover, procreation seems to have been an additional goal of the forced associations, whereas the Sierra Leonean rebels mainly used bush marriages as a means to establish a system of individual slavery.

In all cases described above, a union between two (or more) people was established against the will of at least one of the individuals involved. The union was established by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.⁶⁵³ This union resulted in a (prolonged) association that was, within the particular context in which it took place, regarded as conjugal or conjugal-like, and it created certain (unilateral or bilateral) rights and/or obligations between the parties or between the parties and a third party.

⁶⁵³ Wording based on element two of the definition of rape in the ICC EoC.

PART II

A TALE OF TWO THEORIES

**Criminalisation on the level of
national law and international law**

CHAPTER 4

NATIONAL CRIMINALISATION

1. INTRODUCTION

The central question of this research revolves around criminalisation of forced marriage: should this practice be criminalised, and, if so, how? Should it be prohibited as a distinct, separate offence, or under the heading of (generic) existing crimes? Decisions regarding criminalisation are, for a large part, based on policy choices and political considerations, and are therefore dependent on the political hue of the incumbent government. For example, in the Netherlands, (criminal) law was traditionally used more or less exclusively as an instrument of ‘codification’, that is to say as a means to record existing moral views. However, as a result of the development of Dutch society from a welfare state into a security state, coupled with the growing influence of populism, (criminal) law is increasingly used as an instrument of ‘modification’, i.e. as a means to change views and behaviour in society. This has led to a trend of increased willingness to penalise and thus to a proliferation of criminal offences.⁶⁵⁴ The same can be said for England, indeed, it has been stated that Anglo-American jurisdictions in general create offences in a casual and routine manner.⁶⁵⁵

Yet irrespective of the highly political nature of criminalisation, certain guidelines can be distilled from legal doctrine. The issue of criminalisation has exercised and still exercises many minds and the question of what justifies criminal prohibition has inspired lawyers and philosophers to fill reams upon reams of paper, exploring the conditions that must be satisfied before the state may

⁶⁵⁴ De Hullu 2012, pp. 10–11; Groenhuijsen 1987, pp. 11–12; and T. Koopmans, ‘De rol van de wetgever’, in: *Honderd jaar rechtsleven. De Nederlandse Juristen-Vereeniging, 1870–1970*, Zwolle: W.E.J. Tjeenk Willink 1970, p. 4. See also Cleiren 2012, p. 23.

⁶⁵⁵ D. Husak, ‘The Criminal Law as Last Resort’, (24) 2004 *Oxford Journal of Legal Studies*, p. 208. See also Ashworth & Horder 2013, pp. 5–6. It was estimated that between May 1997 and August 2006, the Blair government created 3,023 criminal offences: 1,169 introduced by primary legislation – which is debated in Parliament – and 1,854 by secondary legislation such as statutory instruments (N. Morris, ‘Blair’s “frenzied law making”: a new offence for every day spent in office’, *The Independent* 16 August 2006, available at <www.independent.co.uk/news/uk/politics/blairs-frenzied-law-making--a-new-offence-for-every-day-spent-in-office-412072.html>). Chalmers & Leverick 2013, p. 551 counted the number of offences created in 1997–1998 and reached a total of 1,235 offences that are applicable to England. On the basis of this exercise, they estimate that the number of offences created between 1997 and 2006 is considerably higher than 3,023.

proscribe certain behaviour, thereby subjecting the culpable offender to criminal liability and (subsequently) punishment. Throughout the years, different theories of criminalisation have been articulated. There are clear similarities between these theories, which, for a large part, build on each other. As De Hullu – one of the leading Dutch criminal law scholars – noted, what most theories have in common is that they require that the necessity and added value of criminalisation must be demonstrated, either from a practical or from an ideological or legal theoretical point of view.⁶⁵⁶ These theories have all been summarised, discussed and criticised in many writings.⁶⁵⁷ Therefore, instead of offering yet another summarising overview of all different criminalisation theories, this chapter aims to provide a brief synthesis of the most important (contemporary) English and Dutch penalisation theories by presenting a set of principles that are common to the majority of theories.⁶⁵⁸ The result is a frame of reference containing a non-exhaustive set of criteria that can be used when answering the question of whether the criminal law should be used to regulate certain conduct. The

⁶⁵⁶ De Hullu 2012, pp. 15 and 17.

⁶⁵⁷ For an overview of Dutch theories, see e.g. Cleiren 2012, pp. 10–12; De Hullu 2012, pp. 13–24; Haveman 1998, pp. 11–41; and Rummelink 1996, pp. 26–43.

⁶⁵⁸ Many different (sub) criteria for criminalisation have been formulated in literature. In this chapter, only six are discussed (harm, wrong, proportionality, subsidiarity, effectiveness and legality). Other criteria include the ‘absolute negative criteria’ formulated by Hulsman: criminalisation should not take place 1. when the primary goal is to change moral views concerning certain behaviour; 2. when the primary goal is to create possibilities to help (potential) convicted persons; 3. when this would cause problems for the capacity of the law enforcement apparatus; 4. when criminalisation is a spurious solution to the problem, i.e. when it does not reasonably contribute to solving the problem (Hulsman 1972, pp. 90–91). The ‘relative criteria’ for criminalisation formulated by Hulsman: criminalisation ought to be questioned when the particular act concerns conduct that 1. chiefly occurs in socially weak groups or groups that are subject to discrimination; 2. is generally not reported to the police; 3. has a very high prevalence; 4. is displayed by a very large number of people; 5. generally only happens in emergency situations; 6. is not easily defined accurately; 7. usually takes place in the privacy of an individual’s house; or 8. is regarded as permissible by a significant part of the population (Hulsman 1972, pp. 91–92). Haveman created a framework for criminalisation debates which focuses on four questions: 1. is there a problematic situation that requires a response? 2. do the authorities have a role to play in this? 3. are there adequate non-criminal responses? 4. is the criminal law an adequate response? (4a. it is possible to isolate certain behaviour from the problematic situation; 4b. this behaviour is illegal and blameworthy; 4c. this behaviour can be legally defined; 4d. criminalisation is proportional; 4e. criminalisation helps achieve one of the aims of criminal law; 4f. criminalisation is necessary in view of legal protection, see Haveman 1998, pp. 43, 73–81 and 416–417). Principles of criminalisation listed by Ashworth & Horder include individual autonomy, welfare, harm, public wrongs, and the minimalist approach encompassing respect for human rights, the right not to be punished, last resort, and not criminalising where this would be counterproductive (Ashworth & Horder 2013, pp. 22–43). Husak’s criteria of harm, wrongfulness, desert, the state’s burden of proof to justify a penal offence, substantial state interest, direct advancement of the government’s purpose, and prevention of over-inclusiveness) on criminalisation (Husak 2008, pp. 55 and 120–122). Finally, the principles of criminalisation listed by Simester and Von Hirsch, *inter alia* harm, wrong, and mediating considerations concerning privacy, regulatory alternatives, fair warning, fair labelling, and practical constraints (Simester & Von Hirsch 2011, pp. 3–88 and 189–211). This list is not exhaustive; there are more criteria. For a literature overview, see the previous footnote.

principles discussed in this chapter are based on the ‘traditional moral criminal law’, on the so-called core criminal offences, and not on purely regulatory or strict liability offences. Traditionally, criminal law dealt only with the most morally reprehensible of crimes, so-called *mala in se* crimes such as murder, rape and theft. During the past few decades, however, the criminal law is being used increasingly often as a form of governance: a means to regulate activities. Minor ‘offences’ are brought within the ambit of criminal law; acts that cannot, in the traditional meaning of the word, be said to cause severe harm or to constitute a public wrong. This is especially the case in England, which, unlike the Netherlands, does not have a non-criminal (e.g. administrative) system of sanctioning.^{659, 660}

The principles discussed below were distilled from the writings of *inter alia* Mill, Feinberg, Simester, Von Hirsch, Husak, Ashworth, Horder, Duff, Hulsman, Van Bemmelen, De Roos,⁶⁶¹ Corstens, Haveman and De Hullu.

Broadly speaking, the criteria can be divided into three categories. First, a duo of prerequisites for criminalisation, referred to as primary criteria: harm and wrong are indispensable requirements for legitimate criminalisation; they offer an in-principle justification for penalisation.⁶⁶² Secondly, there are criteria that militate against criminalisation, so called limiting or moderating principles: proportionality, subsidiarity (external as well as internal) and a set of practical constraints, such as issues relating to enforceability, i.e. efficiency, efficacy, policing and evidentiary matters. The third part of this chapter deals with legality (in the meaning of *lex certa* or maximum certainty). This principle forms part of some Dutch theories of criminalisation, but it is not used as such in this book. Instead, it is argued in paragraph 4 that this tertiary criterion comes into play *after* the criminalisation decision has been made.

Before discussing the criminalisation criteria, two remarks must be made. First, it should be noted that theories on criminalisation generally depart from the presumption that there is no criminal legislation that deals with the conduct in question. Yet in many cases, such conduct will already be (partly) subsumed under existing (broad) offences. The theories are therefore not in line with the legal reality: they are based on a legal fiction. This means that the theories and

⁶⁵⁹ See also Ashworth & Horder 2013, pp. 2–4; and Simester & Von Hirsch 2011, pp. 212–232.

⁶⁶⁰ This is not to say that there have been no proposals to criminalise minor harms in the Netherlands, see for example a proposal launched by several politicians to criminalise ‘hissing’ at women in the streets as a form of sexual intimidation: P. van den Dool, ‘Na PvdA wil nu ook VVD boete voor sissen naar vrouwen’, *NRC* 10 August 2012, available at <www.nrc.nl/nieuws/2012/08/10/na-pvda-wil-nu-ook-vvd-boete-voor-sissen-naar-vrouwen/>, last accessed December 2013.

⁶⁶¹ The criteria for criminalisation formulated by De Roos were taken as the starting point for this chapter. According to De Roos, the legislator is authorised to criminalise behaviour if this behaviour is (1) harmful and (2) cannot be tolerated in the context of individual freedom. Whether the legislator should use this competence is determined by the principles of (3) subsidiarity, (4) proportionality, (5) legality and (6) practical applicability and effectiveness (De Roos 1987, pp. 53–78).

⁶⁶² Simester & Von Hirsch 2011, p. 32.

their distinct criteria cannot necessarily be used as a perfect template in all criminalisation debates, as will be demonstrated in Chapter 10 with a view to the criminalisation of forced marriage. Secondly, the criteria for criminalisation discussed in this chapter were derived from criminalisation theories that were developed in the context of national legal systems. The question of whether (and to which extent) these criteria also apply to criminalisation on the level of international criminal law will be addressed in Chapter 6.

2. PRIMARY CRITERIA: THRESHOLD PRINCIPLES

2.1. A DUAL-ELEMENT THRESHOLD

Considerations regarding a) harmfulness and b) wrongfulness feature, with varying emphasis, in all contemporary theories of criminalisation.⁶⁶³ Duff and Moore, for example, ground their penalisation doctrines principally on the concept of wrongfulness (a school of thought referred to as legal moralism), whereas *inter alia* Feinberg and De Roos underline the importance of harmfulness.⁶⁶⁴ Others, such as Simester, Von Hirsch, Husak, Van Bemmelen and Ashworth and Horder argue in favour of a two-element approach and state that justified criminalisation requires that conduct not only be harmful, but that it is also wrongful.⁶⁶⁵

As a justification for criminalisation, harm and wrong are in fact two sides of the same coin, which will be demonstrated below. Conduct can be harmful without being wrongful (e.g. causing a person considerable emotional distress for example by ending a relationship; and some forms of honest competition such as drastically lowering the prices of merchandise as a result of which other entrepreneurs go out of business) and wrongful without being harmful (e.g. offending someone behind their back is wrongful but not necessarily harmful to that person, provided the offensive conduct does not amount to defamation or racism).⁶⁶⁶ Yet justified criminalisation requires conduct to be harmful as well as wrongful: the harm principle forms a rational test in the debate on the limits of the criminal law, functioning as a gate keeper that forms a buffer against absolute moralism. The wrongfulness requirement forms a barrier against criminalisation of conduct that only causes remote harm.⁶⁶⁷ Harm and wrong can therefore be considered to be the threshold criteria for criminalisation.

⁶⁶³ Von Hirsch 2014, pp. 246–247.

⁶⁶⁴ See Duff 2014, pp. 217–235; M.S. Moore, *Placing Blame: A General Theory of the Criminal Law*, Oxford: OUP 2010, pp. 33–35; Feinberg 1984, pp. 34–36; and De Roos 1987, pp. 53–78 (Mill also emphasises the importance of harmfulness, see Simester & Von Hirsch 2011, p. 21).

⁶⁶⁵ Von Hirsch 2014, pp. 248–251; and Simester & Von Hirsch 2011, p. 21; Husak 2008, pp. 55; 65–67; Van Bemmelen 1973, p. 10; and Ashworth & Horder 2013, pp. 28–30.

⁶⁶⁶ Ashworth & Horder 2013, p. 29; and Simester & Von Hirsch 2011, pp. 22–30.

⁶⁶⁷ Von Hirsch 2014, pp. 250–251; Herring 2009, p. 11; and De Roos 1987, p. 53.

2.2. HARM

Mill is said to be the *auctor intellectualis* of the harm principle. In his 1859 publication *On Liberty*, he presents harm as a negative⁶⁶⁸ constraint: ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’⁶⁶⁹ Feinberg, on the other hand, presents harm as a positive ground for penalisation, stating that preventing harm to persons is always a good reason in support of criminalisation provided that there is no equally effective alternative to penal legislation.⁶⁷⁰ Feinberg defines harm as a setback of interests: when an interest – that is a ‘thing in which one has a stake,’⁶⁷¹ so a claim or an entitlement – is left in a worse state than it was in beforehand. Harm therefore causes a negative effect upon a person’s well-being by an impairment of some resource, either personal (physical), proprietary or otherwise.⁶⁷² Simester and Von Hirsch define ‘resource’ as ‘an asset or capability of the person that subsists over a longer term; is independent of consciousness (i.e. not purely a subjective state); and is capable of contributing to the quality of the person’s existence.’⁶⁷³

Harm causes a change, ‘an adverse effect, upon something substantial’.⁶⁷⁴ To paraphrase Ten Voorde, this unlawful change was caused by someone (the perpetrator) who had a certain degree of control over the ways in which and the extent to which this change was brought about.⁶⁷⁵ The kinds of harm that generally fall within the ambit of the criminal law are harms to an individual’s ‘personal or physical sources’, i.e. physical and mental harm and harm to personal property: kicking someone in the head, threatening someone with death, and setting fire to someone’s car are all acts that cause types of harms which would justify criminalisation. But the concept of change implies that harm in the context of criminal law is broader than harm to a person’s life, body or property.⁶⁷⁶ Harm without an obvious victim can also amount to a criminal harm. Good examples are evading taxes and polluting the environment, two acts which cause harm to

⁶⁶⁸ Meaning that in the absence of harm, the state is not authorised to intervene by prohibiting conduct.

⁶⁶⁹ J.S. Mill, *On Liberty*, London: J.W. Parker and Son 1859, p. 22.

⁶⁷⁰ Feinberg thus seems to include the subsidiarity principle (see *infra* paragraph 3.2) within the harm principle: ‘It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and *there is no other means that is equally effective at no greater cost to other values*’ (Feinberg 1984, p. 26; emphasis added). See also Simester & Von Hirsch 2011, p. 35.

⁶⁷¹ Feinberg 1984, p. 34.

⁶⁷² Feinberg 1984, pp. 33–34; and Simester & Von Hirsch 2011, pp. 35–37.

⁶⁷³ Von Hirsch 2014, p. 249; and Simester & Von Hirsch 2011, p. 37.

⁶⁷⁴ Simester & Von Hirsch 2011, p. 36.

⁶⁷⁵ Ten Voorde 2012, p. 68.

⁶⁷⁶ Ten Voorde 2012, p. 68.

society. Then there is an entire category of behaviour that has been criminalised because it causes risk of harm, such as gun possession and driving while under the influence.⁶⁷⁷

The notion of using criminal law solely to prevent harm to others encompasses the tolerance principle. This principle, which emphasises individual freedom, holds that only those types of harmful behaviour that cannot be tolerated from the perspective of individual freedom ought to be criminalised. In De Roos' view, the state derives its authority to punish from the harm and tolerance principles: only when conduct causes harm that cannot be tolerated would the state be authorised to criminalise this conduct. This limiting principle also incorporates the idea of anti-paternalism: after all, paternalism, by its very nature, is intolerant.⁶⁷⁸ Liberal theory and the principle of individual autonomy require that the state grants individuals the freedom to make their own decisions, and that it refrains from taking decisions (e.g. to criminalise certain conduct) in their best interest.⁶⁷⁹

The harm principle⁶⁸⁰ requires the extent, gravity and likelihood of the harm involved in the conduct to be weighed against the implications of the enforcement of criminal law, such as loss of liberty and violations of other fundamental rights. The balancing quality of the harm principle is reflected in what is referred to as the standard harms analysis; a test that is used to determine whether certain harmful behaviour should be criminalised.⁶⁸¹ Feinberg lists the following rules of thumb:

- a. the greater the *gravity* of a possible harm, the less probable its occurrence need be to justify prohibition of the conduct that threatens to produce it;
- b. the greater the *probability* of harm, the less grave the harm need be to justify coercion;
- c. the greater the *magnitude of the risk* of harm, itself compounded out of gravity and probability, the less reasonable it is to accept the risk;
- d. the more *valuable* (useful) the dangerous conduct, both to the actor and to others, the more reasonable it is to take the risk of harmful consequences, and for extremely valuable conduct it is reasonable to run risks up to the point of clear and present danger;
- e. the more *reasonable* the risk of harm (the danger), the weaker is the case for prohibiting the conduct that creates it.⁶⁸²

⁶⁷⁷ Simester & Von Hirsch distinguish three types of harms: direct, primary harms; remote, primary harms; and secondary, reactive harms (Simester & Von Hirsch 2011, p. 44). This research deals with the first category: direct harms.

⁶⁷⁸ De Roos 1987, pp. 58–59.

⁶⁷⁹ Ashworth & Horder 2013, p. 25.

⁶⁸⁰ In addition to the harm principle, the so-called offence principle refers to conduct that is not necessarily harmful, but that causes affront (such as insults and exhibitionism). The offence principle is not discussed in this book, because it is not relevant in the context of the criminalisation of forced marriage. For a detailed discussion of the offence principle, see J. Feinberg, *Offense to Others*, Oxford: OUP 1985.

⁶⁸¹ Simester & Von Hirsch 2011, pp. 45 and 55; and Feinberg 1984, p. 216.

⁶⁸² Feinberg 1984, p. 216.

From these rules of thumb, Simester and Von Hirsch distil the following steps:

- Step 1:* Consider the gravity of the eventual harm, and its likelihood. The greater the gravity and likelihood, the stronger the case for criminalisation.
- Step 2:* Weigh against the foregoing, the social value of the conduct, and the degree of intrusion upon actors' choices that criminalisation would involve. The more valuable the conduct is, or the more prohibition would limit liberty, the stronger the countervailing case would be.
- Step 3:* Observe certain side-constraints that would preclude criminalisation. The prohibition should not, for example, infringe rights of privacy or free expression.⁶⁸³

When these criteria are met, a strong, though not a conclusive, case for criminalisation can be made. Conduct that is harmful *can* be criminalised, but the harm principle does not imply that such conduct *must* be criminalised: justified criminalisation requires that prohibited conduct is also wrongful.⁶⁸⁴

2.3. WRONG

The mere fact that conduct causes harm does not necessarily mean that it ought to be criminalised. Criminal law prohibits behaviour that is deemed (morally) wrong, reprehensible, and this requires the person who culpably perpetrates it to be punished and censured. A form of wrongdoing or wrongfulness is therefore a starting condition, an indispensable requirement for criminalisation: only conduct that is wrong for some reason ought to be criminalised.⁶⁸⁵ Conduct that involves culpably harming another person (battery) can be regarded as wrong, as can creating unwarranted risks of injury (driving under the influence) and breaking important communal obligations (tax evasion).⁶⁸⁶ Wrongness is a complex principle: there are no fixed criteria for determining whether an act is wrong. Indeed in many instances this is mainly based on intuitive considerations, but in general, it can be said that violating a person's interests, causing immediate harm to a person's resources, counts as a wrong. The wrong arises out of the harm that was done.⁶⁸⁷⁺⁶⁸⁸ Or, as stated by Seher: 'a wrong is the deliberate, reckless or

⁶⁸³ Simester & Von Hirsch 2011, p. 55. Other side-constraints are discussed below in paragraph 3.3.

⁶⁸⁴ Herring states that the harm principle is best used as a test to determine what conduct should *not* be criminalised (Herring 2009, p. 11).

⁶⁸⁵ Simester & Von Hirsch 2011, pp. 20–21 and 23: 'Establishing that an action is wrong (...) is indispensable to justifying its prohibition.' Haveman 1998, pp. 74–75: wrongfulness and culpability are conditions for criminality. And Husak 2008, pp. 93–94.

⁶⁸⁶ Some acts, such as murder, therefore, are wrong because of the harm they cause. Other acts, such as blackmail and racism, are considered wrong independent of the harm they cause (Simester & Von Hirsch 2011, pp. 20–21).

⁶⁸⁷ Von Hirsch 2014, p. 252; Seher 2014, pp. 260–262; and Simester & Von Hirsch 2011, pp. 44–46.

⁶⁸⁸ It is more difficult to determine the wrongfulness of conduct that causes remote harm or offence. This falls outside the scope of this research. For a detailed account, see Simester & Von

negligent violation of the interests of other persons (or the state).⁶⁸⁹ The word 'violation' implies that the act was carried out without (the required) permission of the person whose rights/interests were harmed.

A further specification of the wrongfulness requirement is found in what is referred to as the public element. As stated, criminal law conveys public censure; conviction for a criminal offence can be seen as a reaction of society as a whole to certain conduct that is deemed wrongful. This implies that the criminal law should only be invoked to respond to wrongs that are of concern to the community as a whole.⁶⁹⁰ As Duff states: 'A public wrong is thus a wrong against the polity as a whole, not just against the individual victim: given our identification with the victim as a fellow citizen, and our shared commitment to the values that the rapist violates, we must see the victim's wrong as also being our wrong.'⁶⁹¹ As a consequence, the community is responsible for punishing these types of wrongs.

The divide between public and private wrongs brings to the fore the principle of privacy. In general, it can be said that people's private spheres of life deserve to be protected from state intervention, unless the behaviour in question would constitute a serious wrong. For example, what two (or more) consenting adults, whether they be of the opposite or the same sex, do in the privacy of their bedroom, is none of the state's business.⁶⁹² This might change if the lovers take their amorous activities elsewhere – say a shopping mall or a train station. Once the behaviour enters the public sphere, it might turn into a public wrong. An example of an act that is wrong independent of the place where it is committed is domestic violence.⁶⁹³

An element of wrong (in the sense of wrongdoing) is thus a necessary requirement for criminalisation. Yet it is not a sufficiently limiting condition, many acts that amount to torts, for example, qualify as 'wrong', but this does not mean they should be criminalised. Criminalisation is justified when an instance of wrongdoing 'directly or indirectly affects people's lives, such that its regulation would tend to prevent *harms*'.⁶⁹⁴ But, paraphrasing Feinberg, harm and wrong are two *good* reasons in favour of criminalisation; they are not *decisive* factors. How

Hirsch 2011, pp. 46–56 and 91–100.

⁶⁸⁹ Seher 2014, p. 260. A wrong, therefore, is a *culpable* violation of another's interests.

⁶⁹⁰ Ashworth & Horder 2013, p. 30.

⁶⁹¹ R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Oxford: Hart Publishing 2007, p. 142.

⁶⁹² Only in very extreme cases of (sexual) sadism would state intervention by means of criminal law stand to reason. See for example the case of the so-called cannibal of Rotenburg, Armin Meiwes, who videotaped the killing of his victim, who had volunteered to be killed and eaten by Meiwes (*Bundesgerichtshof* 22 April 2005, 2 StR 310/04). See also the case of former Belgium judge Arousseau who was found guilty of assault on his wife, who had given him full permission to puncture her breasts with needles, brand her and stitch up her vagina (Antwerp Court of Appeal 30 September 1997, *Rechtskundig weekblad* 1997–98, pp. 749–750; Belgium Court of Cassation 6 January 1998, *Bulletin des arrêts de la Cour de cassation* 1998, 11; and ECtHR 17 February 2005, Appl. No. 42758/98 (*K.A. and A.D. v. Belgium*)).

⁶⁹³ Herring 2009, pp. 19 and 22. See also Simester & Von Hirsch 2011, pp. 190–192.

⁶⁹⁴ Simester & Von Hirsch 2011, p. 29 (emphasis added).

to determine whether or not to criminalise wrongful harming? This is discussed in the following paragraph.

3. SECONDARY CRITERIA: MODERATING PRINCIPLES

De Hullu stresses the dynamic character of substantive criminal law⁶⁹⁵ and does not choose a set of clearly defined criteria that can be applied to criminalisation matters. He emphasises that the interpretation of such criteria is dependent on particular circumstances and prevailing views during a certain period of time. De Hullu therefore proposes a more pragmatic, casuistic approach, which comes down to balancing the arguments in favour of and against criminalisation in each case.⁶⁹⁶ The framework presented in this chapter will follow this approach. Harm and wrong, as described above, are the threshold criteria for criminalisation. When the conclusion is that certain wrongful conduct causes harm, this in itself is a *prima facie* reason for criminalisation. But this is not a conclusive outcome. In practice, criminalisation decisions are based on lists of pro and contra arguments. The principles sketched below can be used to uncover these arguments and they can offer some guidance and structure in weighing the different interests. The criteria discussed in this paragraph stem from a minimalist approach to the use of criminal law; that is to say the idea that the criminal law should not be used lightly, and that the legislator should adhere to the maxim *in dubio pro libertate* as opposed to *in dubio pro lege*.⁶⁹⁷

3.1. PROPORTIONALITY

The principles of proportionality and subsidiarity are used in several criminal law doctrines to assess the necessity of conduct. For example, defences of justification demand that the requirements of subsidiarity and proportionality are fulfilled: self-defence is justified if violence was used to repel an imminent and unlawful attack, provided that there was no other mode of escape (subsidiarity) and the amount of force that was used was reasonable (proportionality).

Proportionality implies that a reaction to an act should not be more severe than is necessary in relation to that act: it should be proportional.

⁶⁹⁵ The ECtHR also stresses this, see *inter alia* the classic judgement ECtHR 22 November 1995, Appl. No. 20166/92 (*S.W. v. The United Kingdom*), paras. 36 and 43 on the evolution of the criminal law with regard to the criminality of marital rape. See also ECtHR 17 September 2009, Appl. No. 10249/03 (*Scoppola v. Italy, no. 2*), paras. 99–109.

⁶⁹⁶ De Hullu 2012, pp. 5 and 19. See also Cleiren 2012, p. 9.

⁶⁹⁷ For a detailed explanation of the minimalist approach, see Ashworth & Horder 2013, pp. 22–35 and 52. See also Jareborg 2005, p. 531.

Jareborg distinguishes between prospective proportionality and retrospective proportionality.⁶⁹⁸ Retrospective proportionality concerns the relation between the severity of the crime and the severity of the penalty, which means that the punishment of a certain crime should be in proportion to the severity of the crime itself; the punishment should fit the crime.⁶⁹⁹ Prospective proportionality concerns the relation between the severity of the crime and the severity of the reaction of the state in response to it: does the incident warrant use of the most coercive state instrument, i.e. criminal law? Are the harm and wrong severe enough to warrant criminalisation? This question, which requires a balancing of the benefits of criminalisation (*inter alia* norm confirmation, censure and protection of victims) and the burdens and costs it incurs (such as the infringement of the human rights of the offender, but also material costs for the criminal justice system), ought to play a key role in criminalisation debates.⁷⁰⁰ In the context of criminalisation, therefore, the focus is on the prospective proportionality principle.

The role of the proportionality principle is not limited to the stage during which the criminalisation decision is made. Once this decision has been made, the proportionality principle will assist the legislator in deciding and justifying how to classify an act within the system of criminal law – that is whether it is classified as an offence or a misdemeanour.⁷⁰¹ In addition, the proportionality principle arises when determining the (maximum) legal penalty for a crime, in the sense that the sanction that is attached to the offence is in proportion to the severity of the crime.⁷⁰²

3.2. SUBSIDIARITY

3.2.1. *External subsidiarity*

Criminal law can have an enormous impact on the lives of individuals and can ultimately result in depriving an offender of his liberty. Therefore, it is generally acknowledged that criminal law should not be used lightly: when other, less intrusive forms of intervention, such as administrative or civil (tort) law,⁷⁰³ can be

⁶⁹⁸ Jareborg 2005, p. 532.

⁶⁹⁹ De Roos 1987, pp. 70–71.

⁷⁰⁰ Simester & Von Hirsch 2011, p. 22; Haveman 1998, pp. 50 and 81; and Hulsman 1972, p. 89. See also the remarks of then Minister of Justice Modderman during the 1886 Parliamentary discussions regarding the Dutch Criminal Code, who stated that the criminal law must only be invoked when it is proportional (H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht deel I*, Haarlem 1891, p. 16).

⁷⁰¹ Ashworth & Horder 2013, p. 20: '(p)roportionality should have a central role (...) at the legislative stage of grading offences in the criminal law.' See also De Roos 1987, p. 72.

⁷⁰² See with regard to the proportionality of mandatory minimum penalties Groenhuijsen & Kooijmans 2013, pp. 33–36 and 46–47.

⁷⁰³ Civil law, for example, has the advantage that it does not result in a criminal record, public censure, or imprisonment. It lacks the condemnatory character that criminal law possesses;

used as an effective way to prevent harm, they must be applied instead of criminal sanctions. Criminalisation should only be resorted to when it is an appropriate and effective method that is preferable to other (non-)legal mechanisms. This so-called subsidiarity criterion is one of the leading arguments for or against criminalisation. It demands an exploration of the alternatives to criminal law: are there effective alternative means of controlling the unwanted conduct that are less intrusive, less stigmatising than criminal law?⁷⁰⁴ This exercise requires that the (dis)advantages of using criminal law are balanced against the (dis)advantages of other means of (state) intervention.⁷⁰⁵

Alongside its many drawbacks, criminal law also has certain specific advantages, mainly from the perspective of the victim and the society: the state bears the costs for the criminal justice system⁷⁰⁶ – i.e. the enforcement, investigation, prosecution and punishment – and coordinates it, meaning that the victim is generally not the party that is required to start proceedings.⁷⁰⁷ Therefore, state intervention (for example through use of the criminal law) may be required if the identity of the perpetrator is unknown, or the victim does not have enough evidence to prove the perpetrator's guilt, or the victim does not have the financial funds to start (civil/administrative) proceedings against the perpetrator. State intervention would also be appropriate in those cases in which the harm that was done is difficult to determine and/or is not suitable for compensation (e.g. because it comprises a severe violation of personal autonomy and/or causes public feelings of insecurity), or when there is no victim, for example because the conduct merely caused a risk of substantial harm.⁷⁰⁸

see *infra* (Simester & Von Hirsch 2011, p. 193). In addition, the execution of civil judgements can prove to be difficult. This is different in the context of criminal law, where the Public Prosecution Service is responsible for the execution of criminal judgements (Article 553 Dutch Code of Criminal Procedure. See also S. Meijer, *Openbaar ministerie en tenuitvoerlegging*, Nijmegen: Wolf Legal Publishers 2012).

⁷⁰⁴ Ashworth & Horder 2013, pp. 33–34.

⁷⁰⁵ Simester & Von Hirsch 2011, pp. 22 and 42.

⁷⁰⁶ Although in some countries, such as in Germany and in England (see *inter alia* the *Costs in Criminal Cases (General) (Amendment) Regulations* 2012), convicted defendants can be ordered to bear part of the costs of the criminal proceedings that were initiated against them (see P.J.P. Tak, *Kostenveroordeling in strafzaken*, Nijmegen, July 2012). In January 2014, the Dutch Minister of Security and Justice drafted a first concept of a bill that makes it possible for judges to order a defendant to pay (part of) the costs of the criminal trial (see <www.rijksoverheid.nl/nieuws/2014/01/13/opstelten-en-teeven-dader-betaalt-eigen-bijdrage.html>, last accessed February 2014).

⁷⁰⁷ Simester & Von Hirsch 2011, pp. 197–198; and G.J.M. Corstens, *Civielrechtelijke, administratiefrechtelijke of strafrechtelijke rechtshandhaving*, (Handelingen Nederlandse Juristenvereniging 1984-I), Zwolle: Tjeenk Willink 1984, pp. 51–53.

⁷⁰⁸ B.C.J. van Velthoven, 'Een onmogelijke opgave: Criteria voor strafbaarstelling vanuit economisch perspectief', in: C.P.M. Cleiren *et al.* (eds.), *Criteria voor strafbaarstelling in een nieuwe dynamiek. Symbolische legitimiteit versus maatschappelijke en sociaalwetenschappelijke realiteit*, The Hague: Boom Lemma 2012, p. 59; and Simester & Von Hirsch 2011, p. 17, footnote 35 and p. 198.

Because a criminal law response can result in a serious infringement of fundamental human rights and is generally accompanied by stigmatising effects, many authors (mainly from a civil law background⁷⁰⁹) have argued that criminal law must remain the last resort, the *ultimum remedium* or *ultima ratio*.⁷¹⁰ Yet there are cases in which criminal law is preferable to other forms of state intervention. The criminal law systematically condemns certain acts and persons who culpably perpetrate those acts. By doing so, it communicates to the public that certain acts are reprehensible. Other fields of law generally lack this condemnatory, censuring quality.⁷¹¹ In this sense, the harm principle can function as a positive reason to criminalise: certain acts, such as murder, rape and theft, require the condemnatory response of criminal law, even if these acts could also be regulated by tort or tax law.⁷¹² Criminal law officially acknowledges wrongdoing, denounces it, reinforces the violated norm and offers more protection against it than, for example, civil law. Criminal law has a strong symbolic and expressive value, which can be a reason for criminalisation, although criminal legislation that is not enforced but merely exists for its symbolic value is best avoided.⁷¹³ Criminal law, therefore, is not per definition an instrument of last resort. Simester and Von Hirsch explicitly reject the idea that criminal law should always be used as a last resort. In their view, all acts that are *mala in se* – acts that are pre-legally wrong, such as murder and rape – should be prohibited by use of the criminal law, because civil law or tax law, whatever their deterrent effect, do not establish, emphasise and communicate the normative status of crimes such as murder. This means, in other words, that some acts require criminalisation, irrespective of the suitability/availability of alternative mechanisms.⁷¹⁴ Haveman and De Hullu have also held that, in certain cases, the symbolic and expressive effect of criminalisation as well as legal protection of and legal certainty for the norm violator – two aspects that

⁷⁰⁹ The *ultimum remedium*, or *ultima ratio* notion is not widely endorsed in the Anglo-American world, see Simester & Von Hirsch 2011, pp. 197–198; D. Husak, ‘Applying *Ultima Ratio*: A Skeptical Analysis’, (2) 2005 *Ohio State Journal of Criminal Law*, pp. 535–546, at p. 535; and D. Husak, ‘The Criminal Law as Last Resort’, (24) 2004 *Oxford Journal of Legal Studies*, pp. 207–235, at. 208.

⁷¹⁰ E.g. Haveman 1998, pp. 46–49; De Roos 1987, p. 60; Hulsman 1972, pp. 90–91; and H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht deel I*, Haarlem 1891, p. 16.

⁷¹¹ Simester & Von Hirsch 2011, pp. 11–12 and 197–198. The Dutch Competitive Trading Act (administrative law) authorises the Authority for Consumers and Markets to fine companies tens of millions of euros (see Article 57(1) Competitive Trading Act). Still, this is arguably less condemnatory in nature than a fine imposed by a criminal court.

⁷¹² Simester & Von Hirsch 2011, p. 197.

⁷¹³ Haveman 1998, pp. 48 and 81; and De Roos 1987, p. 79.

⁷¹⁴ Simester & Von Hirsch 2011, pp. 18, footnote 36 and 197–198. However, there are academics who plead in favour of restorative justice as an alternative (or supplement) to criminal law, see e.g. K. Daly, ‘Sexual Assault and Restorative Justice’, in H. Strang and J. Braithwaite (eds.), *Restorative justice and family violence*, Cambridge: CUP 2002, pp. 62–88.

are inherent in criminal law as opposed to other fields of law – can plead in favour of invoking the criminal law as a remedy.⁷¹⁵

3.2.2. *Internal subsidiarity*

The type of subsidiarity discussed above could be termed ‘external subsidiarity’: it focuses on alternatives outside the field of the criminal law. Yet it may be argued that subsidiarity also has an internal component that comprises an assessment of alternatives *within* the criminal law. Once it has been determined that there are no suitable (less intrusive) alternatives to the criminal law and that criminalisation would be justified (i.e. proportional and necessary), it is important to look at the existing body of criminal law. Does the criminal law itself contain any options for criminalisation? That is to say, before creating specific criminal legislation, the government should verify whether or not this particular behaviour is already covered by existing criminal offences. If the behaviour is already covered, then the ‘internal subsidiarity principle’ provides a (strong) case against separate criminalisation. This side of subsidiarity therefore comes to the fore after the criminalisation decision has been made and mainly deals with the question of *how* particular conduct should be criminalised. In this sense, it can be seen as a tertiary criterion, like legality.

3.3. EFFECTIVENESS

A fifth criterion that is helpful in deciding whether or not an act should be criminalised is the principle of effectiveness, as put forth by *inter alia* Simester and Von Hirsch, De Roos, and in part by Hulsman. This criterion covers a plethora of utilitarian arguments.

First of all, when considering the option of drafting a new provision for a distinct crime, the legislator must keep in mind that the definition of the crime should be sufficiently clear. The requirement of clarity is dealt with in paragraph 4 as part of the principle of legality and discussed from the perspective of the citizen. However, not only citizens, but also the authorities benefit from comprehensible provisions. After all, the authorities have to apply the provisions and the elements of a crime should not lead to insurmountable difficulties during the investigation, prosecution and trial stages. This is a different form of clarity to *lex certa* (see *infra*); it implies that the definition of an offence should be applicable in practice and should not result in evidentiary problems with regard to the different elements of the crime.⁷¹⁶

⁷¹⁵ Haveman 1998, p. 48; and J. de Hullu, ‘Boekbesprekingen’ (review of the book *Strafbaarstelling van economische delicten: een crimineel-politieke studie* by Th. A. de Roos), *Recht en kritiek* (14) 1988, p. 93).

⁷¹⁶ De Roos 1987, pp. 76–77.

Closely related to the issue of prosecutability is the second variable that concerns the effectiveness of a provision: the chance of detection of the crime. Is there a large or a small risk of detection?⁷¹⁷ And, linked to this question: does the criminal justice system have the capacity to actually enforce the criminal prohibition?⁷¹⁸

Thirdly, the general preventive effect that emanates from a criminal provision plays a role in deciding whether behaviour should be criminalised.⁷¹⁹ In general, it is assumed that every criminal provision possesses a deterrent effect and in that way contributes to the norm-forming function of criminal law. Norm-forming means that by punishing a violation of a norm, the legislator confirms the existence of this norm and points out to civilians the importance of complying with this norm.⁷²⁰ And the mere fact of including certain conduct in the criminal code is said to discourage people – at least to a certain extent – from committing those acts.⁷²¹ Therefore, it should be considered whether criminalisation would contribute to general prevention of the conduct in question. However, as Ashworth and Horder state: ‘it cannot be assumed that creating a new crime or increasing the maximum punishment will lead – in a kind of hydraulic relationship – to a reduction in the incidence of that conduct’.⁷²²

4. LEGALITY: *LEX CERTA* (MAXIMUM CERTAINTY)

The legality principle, which in England is also referred to as ‘rule of law’,⁷²³ prescribes that no one may be held liable and punished for violating a criminal law that did not exist at the time it was violated. In the civil law tradition, the legality principle is generally said to comprise four norms: *nullum crimen sine lege scripta, praevia, certa* and *stricta*: a person can only be held liable for an act that was codified as a criminal offence (*lex scripta*) and that had entered into force at the time it was committed (*lex praevia* also known as the prohibition of creating *ex post facto* laws and the derivative rule of non-retroactivity of criminal law).⁷²⁴ This act must be defined with sufficient clarity (*lex certa*, or the

⁷¹⁷ Jareborg 2005, p. 529.

⁷¹⁸ De Roos 1987, pp. 77–78. See also Hulsman 1972, pp. 90–91. According to Hulsman, criminalisation should not take place when it would exceed the capacity of the criminal justice system.

⁷¹⁹ De Roos 1987, p. 78.

⁷²⁰ Bosker 1997, p. 34.

⁷²¹ De Roos 1987, p. 78.

⁷²² Ashworth & Horder 2013, p. 16.

⁷²³ Ashworth & Horder 2013, p. 56.

⁷²⁴ According to the ECtHR, Article 7(1) ECHR guarantees ‘not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law.’ See ECtHR 17 September 2009, Appl. No. 10249/03, para. 109 (*Scoppola v. Italy* (No. 2)). So if the law relevant to the offence of the

requirement of specificity) and the definition of the criminal offence must not be interpreted too extensively, for example by analogy (*lex stricta*).⁷²⁵ It is regarded as axiomatic that the definition of any (new) criminal offence should be in line with the requirements posed by the principle of legality.⁷²⁶ In this regard, the *lex certa* principle is especially relevant.

The *lex certa* principle, traditionally associated with the civil law tradition but growing increasingly important in common law countries, stipulates that in criminal law, the definitions of crimes must be described as clearly and precisely as possible because citizens must be able to understand what kind of behaviour will lead to criminal liability.⁷²⁷ This ban on vagueness is also known as the principle of specificity, the criterion of maximum certainty (in England) and the criterion of fair warning (in the US).⁷²⁸ Inevitably, however, the law will have certain lacunae: not all forms of criminal behaviour can be exhaustively codified, since the result of such an endeavour would be a vast criminal code containing an impenetrable morass of articles. And that would surely not contribute to the clarity of the law. On the contrary, an excessive increase in legislation, a phenomenon that Groenhuijsen calls the hypertrophy of laws, would obfuscate the intelligibility of the law and would consequently strike at the very roots of the legality principle.⁷²⁹

This exposes a hardy and paradoxical perennial: on the one hand the legality principle demands accurate definitions of crimes and consequently a certain degree of specificity; on the other hand it requires that definitions are not too highly specified, because over-specified laws would be detrimental to the clarity of the law and lead to uncertainty. This implies that the use of some vague terms is inevitable.⁷³⁰ The golden mean is provided by the European Court of Human Rights (ECtHR). In accordance with the case law of the Strasbourg Court, legal certainty, and thereby the *lex certa* principle, is guaranteed if a provision is accessible and foreseeable. The most important factor that contributes to the foreseeability of a legal rule is the availability of accessible case law in which a (vague) element of the definition of a crime is applied and explained.⁷³¹ In other

accused has been amended, the accused should benefit from the less severe law (*lex mitior*), see also *The Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 1(d).

⁷²⁵ The ECtHR has stated that ‘criminal law must not be extensively construed to the detriment of an accused, for instance by analogy’ e.g. ECtHR 12 July 2007, Appl. No. 74613/01, para. 100 (*Jorgic v. Germany*).

⁷²⁶ See also Article 1 Dutch Criminal Code and Article 16 Dutch Constitution.

⁷²⁷ In addition to this principled legal protection side, the *lex certa* principle also has a more practical law enforcement component, see paragraph 3.3. On *lex certa* in general, see J.S. Nan, *Het lex certa-beginsel*, The Hague: Sdu Uitgevers 2011.

⁷²⁸ Jescheck 2004, p. 41; and Simester & Von Hirsch 2011, pp. 198–199 respectively.

⁷²⁹ Groenhuijsen 1987, p. 15. See also Ashworth & Horder 2013, p. 65.

⁷³⁰ According to the ECtHR: ‘many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice’, ECtHR 26 April 1979, Appl. No. 6538/74 (*The Sunday Times v. Great Britain*), para. 49.

⁷³¹ ECtHR 17 September 2009, Appl. No. 10249/03 (*Scoppola v. Italy*, no. 2), paras. 99–109; ECtHR 12 February 2008, Appl. No. 21906/04 (*Kafkaris v. Cyprus*), paras. 40–42; ECtHR 26 April

words, a certain degree of generality/vagueness is compensated for by a further specification of the element(s) of a crime in case law. Furthermore, the ECtHR has held that laws may still satisfy the foreseeability requirement if an individual has to take appropriate legal advice to be able to understand the law in question.⁷³²

The *lex certa* principle should be taken into consideration after the legislator has decided to criminalise certain conduct, in the sense that it should be possible to define this new crime in accurate, clear terms.⁷³³ If this is not the case, the question should be asked whether it would be possible for judges to explain the elements of the definition in case law, thereby mitigating the vagueness, or whether legal advice could offer clarity.⁷³⁴ If the answer to these questions is also negative, then it may be concluded that criminalisation would be detrimental to the legality principle and might therefore not be opportune. This last option, however, is mainly theoretical: in the vast majority of cases it will be possible to define a crime without crossing the boundaries of permissible vagueness.

5. CONCLUDING REMARKS

The criteria discussed in this chapter are compatible with a minimalist approach to criminalisation and were derived from a plethora of different theories stemming from Dutch as well as English legal doctrine. Overall, the theories have many similarities, especially with regard to the requirement that only harmful wrongs ought to be criminalised and that, in general, criminal law should be used only if there are no equally effective non-criminal alternatives. The majority of theories affirm the presumption against penalisation: because of the severity of criminal law and the vast implications it can have for an individual's life, the legislator ought to be reticent when it comes to criminalisation, the maxim he ought to adhere to is *in dubio pro libertate* as opposed to *in dubio pro lege*.

A total of six general criteria were distilled from the best-established and most reputed Dutch and English criminalisation theories. First, two threshold criteria must be fulfilled: criminal law is reserved for *wrongful* conduct that causes some (risk of) *harm*. The harm principle, which provides for a balancing of interests, facilitates informed decision making regarding the harmfulness and criminality of conduct. Reaching an informed decision necessitates a clear understanding of why certain behaviour takes place (etiology) and this requires mapping the background of the behaviour. The conduct, its prevalence and its consequences

1979, Appl. No. 6538/74 (*The Sunday Times v. Great Britain*); and Groenhuijsen & Kristen 2001, pp. 338–339.

⁷³² ECtHR 17 September 2009, Appl. No. 10249/03 (*Scoppola v. Italy*, no. 2), para. 102.

⁷³³ Haveman 1998, p. 73; De Roos 1987, pp. 73–74; and Hulsman 1972, p. 92 (when it is difficult to accurately define particular conduct, this forms a contra-indication against criminalisation in Hulsman's view).

⁷³⁴ De Roos 1987, pp. 73–74.

must be identified and defined, and any available (extra) legal remedies must be critically assessed.⁷³⁵ If at all possible, the harmfulness should be demonstrated by empirical evidence.⁷³⁶ Along with its harmfulness, the wrongfulness of conduct ought to be determined. Wrongfulness is a concept with strong moral connotations and is associated with a high level of intuitivism.⁷³⁷ Acts can be wrong because of the harm they cause (such as assault), or independent of the harm they cause (such as racism).

Once the dual test of harm and wrongfulness has been satisfied, a set of three secondary criteria should be taken into consideration. First, the principle of proportionality can be used to assess the severity of the harm and wrong, and balance this against the benefits and disadvantages of the criminal law. Are the harm and wrong so severe that they warrant the use of the criminal law? Secondly, the legislator should examine the necessity of penalisation by applying the principle of subsidiarity. He should verify whether there are alternatives to criminalisation (external subsidiarity), and, if this is not the case, whether the criminal law already contains offences that address the conduct (internal subsidiarity). Thirdly, the legislator should include the more practical principles of effectiveness and efficiency in his deliberation. A new provision that separately criminalises specific behaviour should not result in investigative or prosecutorial problems. When contemplating the criminalisation of conduct, a legislator should take into consideration De Roos' argument that a criminal provision must offer a sufficient foundation for professionals involved in the investigation, prosecution and trial stages, and must not cause insurmountable evidentiary problems.⁷³⁸ If the crime turns out to be unprosecutable, this would be injurious to the deterrent effect of the offence. These pragmatic considerations, however, are only supplementary arguments, that is to say the other, principled criteria (such as subsidiarity) carry more weight. This means that the pragmatic arguments should not be decisive, they should not tip the scales, but they should be included in the decision-making process nonetheless. Proportionality, subsidiarity and effectiveness function as mediating considerations: they may provide reasons not to criminalise, even when the threshold criteria of harm and wrongfulness are satisfied. Finally, once the legislator has decided to criminalise conduct, it goes

⁷³⁵ Cleiren 2012, p. 17; Simester & Von Hirsch, p. 36; De Roos 1987, p. 56; and Haveman 1998, p. 52.

⁷³⁶ J.P. van der Leun, 'Strafbaarstelling en *evidence* vanuit criminologisch perspectief', in: C.P.M. Cleiren *et al.* (eds.), *Criteria voor strafbaarstelling in een nieuwe dynamiek. Symbolische legitimiteit versus maatschappelijke en sociaalwetenschappelijke realiteit*, The Hague: Boom Lemma 2012, pp. 25–37, who points out the difficulties inherent in using empirical research to shoulder criteria for criminalisation, *inter alia* because research results are often used on a very selective basis.

⁷³⁷ This is especially so for traditional core crimes such murder, rape and theft, but is less the case for regulatory criminal law.

⁷³⁸ De Roos 1987, p. 76

without saying that the (definition of the) new offence must be in line with the legality principle.

These six criteria form a theory of criminalisation that can assist the legislator in making a decision with regard to criminalisation. As stated, the principles discussed in this chapter offer no panacea, but they do facilitate a (partly) principled framework in which a balanced and informed decision regarding criminalisation can be made.⁷³⁹ In this sense, as benchmarks, they offer protection from criminalisation being used as an arbitrary tool or a procrustean solution. More specifically for the Netherlands, criteria for criminalisation can also be used to safeguard the consistency in the taxonomy and systematic scheme of criminal legislation.⁷⁴⁰ In the end, however, criminalisation decisions are based on lists of pro and contra arguments. Therefore, as De Hullu states, the best approach to criminalisation is a more pragmatic, casuistic approach, which comes down to balancing the arguments in favour of and against criminalisation in each case.⁷⁴¹ The principles described above can be used to uncover and systemise these arguments.

Constructing this framework for criminalisation was necessary in order to answer the main question of this research. This framework will be applied to the practice of forced marriage in Chapter 10. First, the criminalisation framework for the level of international criminal law will be constructed in the next chapter.

⁷³⁹ Cleiren 2012, p. 12.

⁷⁴⁰ Cleiren 2012, p. 15.

⁷⁴¹ De Hullu 2012, p. 19.

CHAPTER 5

INTERNATIONAL CRIMINALISATION

1. INTRODUCTION

In this chapter, a framework is constructed that will assist in answering the central research question: should forced marriage be criminalised under international criminal law, more specifically under the Rome Statute and, if so, how?⁷⁴² The structure of the chapter resembles a funnel: starting with international criminal law in the broadest sense, the focus is narrowed down to the core international crimes (i.e. crimes against humanity, war crimes and genocide) and then further specified to particular acts listed in the provisions of the core crimes. The first part of this chapter focuses on the doctrinal foundations of international criminalisation: what circumstances raise conduct to the level of an international crime in the first place? As a relatively new field of law, international criminal law does not have the same number of crystallised theories regarding the criminalisation process that domestic legal systems have and over the years, conduct was mostly criminalised on a spasmodic *ad hoc* basis.⁷⁴³ It has even been argued that there is – or at least *was* – no common doctrinal foundation that constitutes the legal basis for international criminalisation.⁷⁴⁴ Nonetheless, several authors have made an effort to formulate such a doctrinal basis and these theories will be studied and form the point of departure for the evaluative framework. Next, the taxonomy of international criminalisation and the structure of the core crimes will be highlighted in order to demonstrate the differences between the core crimes.

After the required knowledge about international criminalisation has been acquired, a road map pertaining to the question of how criminal conduct ought to be criminalised is constructed. This framework focuses on the possibilities of criminalising conduct as a crime against humanity, a war crime and an act of genocide.⁷⁴⁵ Because of the focus on three different core crimes, the framework presented in this chapter consists of three parts. Each crime has its own checklist of criteria that must be fulfilled in order for conduct to be criminalised as such a crime, yet some overlap between the criteria does exist. In order to find criteria for

⁷⁴² Part of this chapter was published in 2013, see Haenen 2013(I), pp. 796–822.

⁷⁴³ Saul 2008, p. 210.

⁷⁴⁴ Bassiouni 1983, p. 28.

⁷⁴⁵ The crime of aggression falls outside the scope of this book (see the General Introduction).

criminalisation, for each of the three core crimes, two steps are taken. First, the drafting history of the Rome Statute is studied and subsequently, the taxonomy of the core crimes is analysed with the aim of assessing under which conditions a particular act could fit within the systematic structure of these crimes.⁷⁴⁶

For the purpose of determining which requirements have to be satisfied in order for conduct to be criminalised as a crime against humanity and war crime, the example of sexual slavery will be used. Sexual slavery has a long history, both in conflict situations and in times of peace, and occurs on a massive scale and in a myriad of countries. Nonetheless, it was not recognised as an international crime until 1998, when, after much negotiation,⁷⁴⁷ it was included in the Rome Statute as a crime against humanity⁷⁴⁸ and a war crime⁷⁴⁹ and subsequently defined for the first time in the ICC's Elements of Crimes.⁷⁵⁰ These negotiations offer a wealth of information: the core issue of the debates was the question of whether sexual slavery merited distinct recognition in light of the existing crime of enslavement. The arguments, both pro and contra, can assist in constructing a road map for criminalisation. For this purpose, the summary records of the 42 plenary meetings held during the 1998 Rome Conference on the establishment of an international criminal court will be studied. Another important source is formed by articles and books written by delegation members to the Rome Conference. These authors are able to give a firsthand account on what was said not only during the meetings, but also in the corridors. This inside information is important, as many formal as well as informal working groups and negotiating bodies convened during the Rome Conference, discussing different issues, and not all meetings were officially recorded.⁷⁵¹ In the case study of sexual slavery, reference will also be made to other crimes, such as enforced disappearance of persons,⁷⁵² which were not included in previous major instruments pertaining to international criminal law, such as the Statutes of the ICTY and ICTR. Special regard will be given to the reasons that underlay the inclusion of these offences in the Rome Statute.

The chapter concludes with a paragraph in which the criteria constituting the different road maps for criminalisation are presented.

⁷⁴⁶ See also Article 31 of the Vienna Convention on the Law of Treaties, which stipulates that treaties ought to be interpreted using the grammatical, systematic and teleological methods.

⁷⁴⁷ Several NGOs (especially the Women's Caucus for Gender Justice in the International Criminal Court) were responsible for lobbying prior to and during the sessions of the Preparatory Committee (1996–1998), see Women's Caucus Recommendations 1997 and Oosterveld 2004, pp. 613–614, esp. footnote 32.

⁷⁴⁸ Article 7(1)(g) Rome Statute.

⁷⁴⁹ Article 8(2)(b)xxii and 8(2)(e)vi Rome Statute.

⁷⁵⁰ Oosterveld 2004, pp. 606–607.

⁷⁵¹ Lee 1999, p. 22.

⁷⁵² Enforced disappearance of persons was included as a crime against humanity (Article 7(1)(i) Rome Statute).

2. DOCTRINAL FOUNDATIONS OF INTERNATIONAL (AND SUPRANATIONAL) CRIMINALISATION

2.1. THE ADVANCEMENT OF THE CORE CRIMES: A SHORT OVERVIEW

International criminalisation of individual conduct is a recent phenomenon that only really started evolving from the 1990s onwards.⁷⁵³ Before the establishment of the ICTY and ICTR, international law had a mainly repressive function in criminal matters: criminal aspects of international law aimed at allowing states to better regulate the joint repression of certain (mainly transnational) offences, such as human trafficking and counterfeiting.⁷⁵⁴ The first real developments with regard to international criminal law in the strict sense – that is the substantive law concerning the crimes for which international law imposes direct individual criminal liability, also known as ‘core crimes’⁷⁵⁵ – took place after the Second World War, with the Nazi atrocities that were committed during this conflict acting as the catalyst for the crystallisation of these crimes.⁷⁵⁶ The end of the war resulted in the drafting of three important legal instruments: the London Charter which established the Nuremberg International Military Tribunal (IMT), the Tokyo Charter creating the International Military Tribunal for the Far East (IMTFE), and Control Council Law No. 10, which provided the legal basis for the war crime trials in the occupied zones. Both the London Charter as well as the Tokyo Charter contained provisions criminalising war crimes, crimes against humanity and aggression (referred to as ‘crimes against peace’). This list of international crimes also features in Control Council Law No. 10.⁷⁵⁷ In 1947, the UN General Assembly established and authorised the International Law Commission (ILC) to prepare a draft code of offences against the peace and security of mankind.⁷⁵⁸ The trauma of the Second World War also set the stage for further developments on the international level and resulted in the promulgation of a set of pivotal conventions: the 1948 Genocide Convention and the Four Geneva Conventions of 1949.⁷⁵⁹ This state of flux was temporarily hampered by the outbreak of the Cold War, but after the end of this conflict, the core crimes developed considerable

⁷⁵³ See Cryer 2005, pp. 9–72.

⁷⁵⁴ This is international law *largo sensu*, see the General Introduction for the distinction between international criminal law *largo sensu* and *stricto sensu*.

⁷⁵⁵ Milanović 2011, p. 28.

⁷⁵⁶ Bassiouni 1999, p. 253 and Cryer 2008, pp. 119–120. The first initiatives regarding criminalisation of core international crimes date back to the 1919 report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties and to the 1919 Treaty of Versailles after the First World War (see Cryer 2005, pp. 32–35).

⁷⁵⁷ Werle 2009, p. 15.

⁷⁵⁸ The ILC was established on 21 November 1947, by UNGA Res. 174(I).

⁷⁵⁹ Supplemented by the 1977 Additional Protocols I and II. In 2005, a third additional protocol was adopted.

momentum in the 1990s with the creation of the ICTY and ICTR.⁷⁶⁰ Both *ad hoc* tribunals were given jurisdiction over crimes against humanity, war crimes and genocide. In 1998, almost a century (if not centuries) after the idea of a permanent international criminal court first caught hold, the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court was held in Rome. The Rome Statute, which was negotiated during this Conference, gives the ICC jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.⁷⁶¹

Overall, the evolutionary process of international criminalisation lacks any form of systematisation or method and is best characterised as a series of *ad hoc* responses to specific events.⁷⁶² As stated, the Genocide Convention – and even the term ‘genocide’ – was a direct result of the atrocities committed during the Second World War, which also influenced the content of the 1949 Geneva Conventions. The Vietnam War, in turn, influenced additional Protocol I.⁷⁶³ Consequently, there exists no coherent, generally agreed-upon set of principles that may be used to justify criminalisation: international crimes are in part based on ‘intuitive-moralistic’ and legal-political considerations.⁷⁶⁴

As international criminal law is a developing field of law and since it is not inconceivable that in the future more offences will be brought within the jurisdiction of the ICC,⁷⁶⁵ the added value of uncovering the doctrinal foundations of this process is self-evident.⁷⁶⁶ Several authors have made an effort to reveal such a doctrinal basis. Three of these theories are discussed in the following paragraph.⁷⁶⁷ The scholars referred to below focus on international criminal law in the broad sense (i.e. not just the core crimes, but also transnational and treaty crimes for which international law does not impose individual criminal liability), with the exception of May, who discusses the criminalisation of crimes against humanity in particular.⁷⁶⁸

⁷⁶⁰ Bassiouni 2008, p. 131.

⁷⁶¹ The ICC will have jurisdiction over the crime of aggression once the states parties have activated the jurisdiction, which will take place after 1 January 2017 (see Resolution 6 of the Review Conference, 13th plenary meeting, 11 June 2010).

⁷⁶² Cryer 2008, pp. 119–120; and Bassiouni 1999, p. 253. For an account of the inconsistencies in international criminal law, see Ratner 1998, pp. 237–256.

⁷⁶³ Cryer 2008, p. 120.

⁷⁶⁴ Saul 2008, pp. 210 and 216, and I. Tallgren, ‘The sensibility and sense of international criminal law’, *European Journal of International Law* (13) 2002, p. 564.

⁷⁶⁵ See Resolution E attached to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (17 July 1998, UN Doc. A/CONF.183/10), which provided for the possibility of including crimes of terrorism and drug crimes in the Rome Statute.

⁷⁶⁶ May 2005, pp. 21 and 64–68, also acknowledges – indeed stresses – the importance of uncovering the theoretical foundations of international criminalisation (see *infra* paragraph 2.2).

⁷⁶⁷ For a fourth theory on international criminalisation, see W. Lee, ‘International crimes and universal jurisdiction’, in: L. May & Z. Hoskins (eds.), *International criminal law and philosophy*, Cambridge: CUP 2010, pp. 15–38.

⁷⁶⁸ These theories concern the international criminalisation of crimes *sui generis* (such as slavery and piracy) or categories of crimes (such as crimes against humanity and war crimes). The

2.2. AN INDUCTIVE, A DESCRIPTIVE AND A NORMATIVE APPROACH: BASSIOUNI, CASSESE AND MAY

In 1983, Bassiouni was one of the first scholars who set forth a doctrinal basis for the international criminalisation policy, using an empirical approach. For this purpose, he studied all relevant sources of international law, identified 20 international crimes⁷⁶⁹ and derived from these offences two alternative common elements. He concluded that in order for conduct to be classified as an international crime, it must have either an international or a transnational element.⁷⁷⁰ The former concerns conduct that constitutes an offence against the world community (*delicto ius gentium*), the latter element relates to conduct that affects the interests of more than one state.⁷⁷¹ He subsequently argued that the fundamental nature of international crimes is that ‘they affect the interests of the world community as a whole because they threaten the peace and security of mankind and because they shock the conscience of mankind’.⁷⁷² Thirty years later, Bassiouni repeated this exercise and identified a total number of 27 international crimes.^{773, 774} From these offences he derived common features that he translated into five criteria that in his opinion are applicable to the policy of international criminalisation. Bassiouni concluded that each of the 27 crimes had been internationally criminalised because the conduct either:

theories therefore do *not* concern the labelling of specific acts (such as murder or rape) as crimes against humanity (with the exception of May’s normative theory).

⁷⁶⁹ These 20 crimes are international crimes in the broad sense: aggression, war crimes, unlawful use of weapons, crimes against humanity, genocide, *apartheid*, slavery and slave-related practices, torture, unlawful medical experimentation, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of the mail, drug offences, falsification and counterfeiting, theft of archaeological and national treasures, bribery of public officials, interference with submarine cables, and international traffic in obscene publications (Bassiouni 1983, p. 28).

⁷⁷⁰ Yarnold distinguishes a third element that may raise certain conduct to the level of an international crime: international necessity, i.e. conduct that is criminalised by the international community for the primary purpose of effective control. As examples, she lists the international crimes of hijacking, unlawful use of mails, drug offences, falsification and counterfeiting and interference with submarine cables (B.M. Yarnold, ‘Doctrinal basis for the international criminalization process’, *Temple International & Comparative Law Journal* (8) 1994, pp. 99–100, 102–104, 106 and 115).

⁷⁷¹ Bassiouni 1983, pp. 27–29.

⁷⁷² M.C. Bassiouni (Ed.), *International Criminal Law. Volume 1: Crimes*, Ardsley, NY: Transnational Publishers 1999, p. 42.

⁷⁷³ See Bassiouni 2013, pp. 144–146. For this purpose, Bassiouni first identified all conventions that in one way or another penalise (or oblige states to penalise) certain behaviour. From these 281 conventions, he distilled 27 international crimes (Bassiouni 2013, pp. 144–145). The seven ‘new’ international crimes Bassiouni identified were: mercanism, nuclear terrorism, organised crime, use of explosives, financing of terrorism, unlawful acts against certain internationally protected elements of the environment, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas.

⁷⁷⁴ In 1999, Bassiouni identified a total of 25 international crimes (Bassiouni 1999, p. 253).

1. (...) affects a significant international interest, in particular, if it constitutes a threat to international peace and security;
2. (...) constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscience of humanity;
3. (...) has transnational implications in that it involves or affects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
4. (...) is harmful to an internationally protected person or interest; or
5. (...) violates an internationally protected interest but it does not rise to the level required by (1) or (2), however, because of its nature, it can best be prevented and suppressed by international criminalisation.⁷⁷⁵

A second scholar who studied the international criminalisation process was Cassese. Instead of departing from the distinct classes of international or transnational crimes, Cassese adopted a more descriptive approach and formulated a comparable, albeit narrower definition of international criminalisation.⁷⁷⁶ He stated that an international crime results from the cumulative presence of the following elements: (1) an international crime violates international customary rules, either unwritten or codified in treaties; (2) these rules protect values that are considered important by the whole international community, they are binding and enshrined in a gamut of international instruments; (3) there exists a universal interest in repressing these crimes, which, in principle, results in universal jurisdiction;⁷⁷⁷ and finally (4) the perpetrators of international crimes do not enjoy functional immunity, which means that *de facto* or *de iure* state officials can be held accountable for committing international crimes.⁷⁷⁸

Yet another different approach to the international criminalisation process is taken by May. Whereas Cassese and Bassiouni give a more descriptive answer to the question ‘what are international crimes?’, summing up the criteria that are used in the process of identifying these crimes, May approaches international criminalisation and especially the legitimacy of international prosecutions

⁷⁷⁵ Bassiouni 2008, p. 133.

⁷⁷⁶ Pursuant to Cassese’s narrower definition, piracy, trafficking in drugs, arms and humans, money laundering, slave trade and *apartheid* are not international crimes (Cassese 2008, pp. 12–13). These offences do amount to international crimes under Bassiouni’s alternative criteria.

⁷⁷⁷ Cassese 2008, p. 11.

⁷⁷⁸ Cassese points out that some senior state officials may nevertheless enjoy personal immunity (Cassese 2008, p. 12). However, in a recent decision of ICC Pre-Trial Chamber I in the case against the President of Sudan, Omar Al Bashir, the Pre-Trial Chamber ruled that personal immunity of former or sitting heads of state cannot be invoked to oppose a prosecution by an international court (see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05–01/09, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, para. 36).

for crimes against humanity from a normative point of view. May stresses the importance of uncovering the theoretical foundations of international criminalisation, so that a clear basis for identifying international crimes can be developed.⁷⁷⁹ He contends that three basic moral principles legitimise criminalisation in general – that is on both the national as well as the international level: the principles of legality, harm⁷⁸⁰ and proportionality.⁷⁸¹ If a criminal rule does not adhere to these three basic notions, it is not morally legitimate and its enforcement cannot be justified.⁷⁸²

However, May argues that international criminalisation and prosecutions require further moral justifications. In his view, these justifications are provided by two additional normative principles of international criminal law: the security principle and the international harm principle. The security principle makes prosecution before international criminal courts and tribunals possible: when a state deprives its own citizens of physical security or subsistence, or when it fails to protect its citizens from violations of physical security or subsistence, a state loses its claim to sovereignty and the international community can intervene in the state's internal affairs.⁷⁸³ This intervention can take the form of prosecution of that state's subjects before international criminal bodies: by harming or not protecting its people from harm, a state also loses its right to exclusive adjudication.⁷⁸⁴

The security principle alone is not enough to justify international criminalisation and prosecution.⁷⁸⁵ The required additional justification is found in what May calls the international harm principle. To put it briefly, this principle implies that crimes which are group-based – because they are either perpetrated by a group (which, often, includes state involvement) or victimise a group – violate a strong interest of the international community and in some cases even humanity as a whole. And because this group-based harm damages humanity, the conduct is raised to the status of an international crime.⁷⁸⁶ The group-based nature of the victim – that is when crimes harm a large group of victims – makes a crime widespread. The group-based nature of the perpetrator, on the other hand, makes a crime systematic.⁷⁸⁷ In this way, the international harm principle recognises that international crimes (and crimes against humanity in particular) are those crimes that are either widespread or systematic and so egregious that they

⁷⁷⁹ May 2005, pp. 21 and 64–68.

⁷⁸⁰ According to May 2005, p. 66, it is legitimate to criminalise an act when it causes (at least a certain amount of) harm – defined as a 'setback of interests' – and when criminalisation is aimed at the prevention of this harm (see also Chapter 4 paragraph 2).

⁷⁸¹ The principle of proportionality requires that the punishment fits the crime (May 2005, p. 67). See also Chapter 4 paragraph 3.1.

⁷⁸² May 2005, pp. 65–67.

⁷⁸³ May 2005, pp. 68–69.

⁷⁸⁴ May 2005, pp. 72, 75 and 80.

⁷⁸⁵ May 2005, p. 70.

⁷⁸⁶ May 2005, pp. 80–95.

⁷⁸⁷ May 2005, pp. 81–82 and 84–90.

harm humanity.⁷⁸⁸ Summarising May's argument: international criminalisation and prosecution are legitimate when the conduct in question violates a security interest of the victim and somehow harms an interest of the world community.⁷⁸⁹

The three theories described above form a doctrinal basis for the international criminalisation process. They advance criteria that may be used to justify the creation of crimes under international (criminal) law. Although the approaches taken by the authors differ, the outcomes of their studies are similar: there are certain universal values that the international community holds in such high regard that violations of these values warrant international criminalisation. Crimes against humanity, for example, were criminalised because they constitute a threat to international peace and security and because they shock the conscience of mankind – they therefore rise to the level required by Bassiouni's first and second criteria applicable to the policy of international criminalisation.⁷⁹⁰ Crimes against humanity shock the conscience of mankind because they are contrary to universal norms. The notion of 'shocking the conscience of mankind', therefore, is linked to the universality of certain values.⁷⁹¹ May's normative approach also clearly reflects this value-based justification for international criminalisation: when an act violates a strong interest of the international community or humanity as a whole and thereby harms humanity, the conduct is raised to the status of an international crime.⁷⁹² Cassese includes in his characterisation of international crimes violations of international customary rules that protect values that are considered binding and important by the whole international community.⁷⁹³ All three theories thus put emphasis on the violation of universal values.

The concept of universal values has had to endure a fair amount of opposition. Some have argued, for example, that international criminal law is a Western edifice that is imposed on other societies.⁷⁹⁴ The fact, however, that every state in the world has ratified the Geneva Conventions⁷⁹⁵ provides evidence to the

⁷⁸⁸ May 2005, pp. 80 and 82.

⁷⁸⁹ May 2005, p. 107.

⁷⁹⁰ As do the other three core crimes, see Rome Statute, Preamble (2) and (3): 'Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' and 'Recognising that such grave crimes threaten the peace, security and well-being of the world.'

⁷⁹¹ Cryer *et al.* 2010, p. 71, Gaeta 2009, p. 66 and Bassiouni 2008, p. 133.

⁷⁹² May 2005, pp. 80–95.

⁷⁹³ Cassese 2008, p. 11.

⁷⁹⁴ See Cryer *et al.* 2010, p. 38. See also remarks made by the Libyan delegation during the 6th plenary meeting held during the Rome Conference: 'Western values and legal systems should not be the only source of international instruments. Other systems were followed by a large proportion of the world's population', Summary record of the 6th plenary meeting held during the Rome Conference (17 June 1998), UN Doc. A/CONF.183/SR.6, 20 November 1998, para. 83.

⁷⁹⁵ The same cannot be said with regard to Protocol I additional to the Geneva Conventions which concerns the protection of victims of international armed conflicts: this Protocol is less broadly ratified (see Cryer *et al.* 2010, p. 53). Note, however, that the US have ratified the Geneva Conventions, but are not party to the Rome Statute.

contrary and so does the repeated and unanimous condemnation of genocide, war crimes, aggression and crimes against humanity by the UN General Assembly.⁷⁹⁶ As was pointed out by Sadat, Chinese, Islamic as well as Hindu traditions ‘underscore the universal values enshrined in the prohibition of (...) crimes that shock the conscience of mankind’.⁷⁹⁷ And it is, in the words of Gaeta, ‘on account of the values they protect that these crimes (i.e. the core crimes; IH) are truly international; it is because of the importance of these values that the international community directly criminalizes them’.⁷⁹⁸

3. TAXONOMY OF INTERNATIONAL CRIMINALISATION: THE CORE CRIMES OF THE ROME STATUTE

3.1. LEGISLATIVE HISTORY OF THE ICC IN A NUTSHELL: THE ABSENCE OF A LEGAL METHOD

Before going into the criminalisation process of the core crimes, it is important to first give a short overview of the legislative history of the ICC. As stated, in 1947, the UN General Assembly created the ILC and authorised it to prepare a draft code of offences against the peace and security of mankind. During the next 45 years, the ILC, stymied by the Cold War, submitted several draft statutes. The final version was presented to the General Assembly in 1994. The General Assembly then established and charged an Ad Hoc Committee, which met twice in 1995, to review the work done by the ILC. One year later, the General Assembly established a Preparatory Committee and charged it with drafting a statute for a planned conference of states on the establishment of an international criminal court.⁷⁹⁹ The Preparatory Committee submitted the final version of its text in 1996. The text of this statute, referred to as the Draft ICC Statute, was revised several times during the following two years and eventually formed the basis for the negotiations during the Rome Conference. On 17 July 1998, after several weeks of negotiations, the final version of the Rome Statute was adopted and a Preparatory Commission was appointed and authorised to prepare draft texts for *inter alia* the ICC’s Elements of Crimes and Rules of Procedure and Evidence. The final recommendations made by the Preparatory Commission were approved by the Assembly of States Parties in September 2002.⁸⁰⁰

⁷⁹⁶ Cryer *et al.* 2010, p. 38.

⁷⁹⁷ Sadat 2007, p. 229. Saul 2008, p. 211 also opines that consensus has emerged on core international crimes, irrespective of cultural differences between states.

⁷⁹⁸ Gaeta 2009, p. 66.

⁷⁹⁹ Bassiouni 2005(I), p. 36.

⁸⁰⁰ Werle 2009, pp. 19–23. See Assembly of States Parties, *Elements of Crimes*, adopted by the Assembly of States Parties, First session, New York, 3–10 September 2002, Official Records 9 September 2002, ICC-ASP/1/3.

As stated, the criminalisation process of the core crimes is characterised by a lack of systematisation and a legal method. This is not very surprising, as the legislative process on the international level differs from that on the national level. The adoption of domestic legislation by a state is usually preceded by a lengthy procedure of preparatory work by legislative experts, input from Bar Associations, professional groups and non-legal consultants, debates in the Upper and Lower Houses of Parliament, resulting in revisions which are then followed by more debates.

In contrast, generally only few experts are involved in the process of drawing up a treaty, the participation of lawyers in drafting international legislation being the exception rather than the rule. On the international level, diplomats are the ones who conduct treaty negotiations and these diplomats are not necessarily experts in the subject at hand.⁸⁰¹ However, during the 1998 Rome Conference, there was a relatively large amount of (indirect) input from (international) criminal law experts: the delegates, most of whom were not experts in (international) criminal law, were able to draw upon the preparatory work done by committees such as the ILC, the 1995 Ad Hoc Committee and the 1996 Preparatory Committee.⁸⁰² Moreover, the experienced former members of these committees coordinated most of the working groups during the negotiations in Rome. Nevertheless, the delegates often had to opt for consensus – presumably at the cost of a consistent legal method – which, in view of the difficulties of reconciling different legal systems, seems to have been the only option for the creation of a widely accepted statute.⁸⁰³

3.2. CODIFYING ‘NEW’ CRIMES DURING THE ROME CONFERENCE: THE IMPORTANCE OF MATERIAL DISTINCTIVENESS

Acts that had already been recognised as crimes against humanity in the statutes of other international criminal courts and tribunals, such as the IMT, ICTY and ICTR, were included in the Rome Statute because these particular offences were considered to reflect customary international law. When it came to including ‘new’ acts as crimes against humanity, i.e. acts which were not included in previous major instruments pertaining to international criminal law, such as the enforced disappearance of persons, the drafters of the Rome Statute considered it important to avoid as much overlap as possible between different inhumane acts,

⁸⁰¹ Bassiouni 2005(I), p. 91.

⁸⁰² Bassiouni 2005(I), pp. 66–67 and 72.

⁸⁰³ Bassiouni 2005(I), p. 92.

so as to maintain clarity and prevent superfluous crimes.^{804, 805} This is evidenced, *inter alia*, by the negotiations on the inclusion of sexual slavery, both as a war crime and as a crime against humanity. With the horror of the sexual atrocities committed during the conflicts in Rwanda and the former Yugoslavia still fresh in mind, the 1997 Preparatory Committee decided to include in the Draft Statute a separate category of gender crimes in the provisions of crimes against humanity and war crimes.⁸⁰⁶ Sexual offences were, at least in part, already covered by existing offences such as the war crimes of torture and inhuman treatment and the crimes against humanity of torture and enslavement, but the Preparatory Committee considered it important to give explicit recognition to sexual crimes. This decision was inspired by developments taking place on the international level with regard to women and human rights⁸⁰⁷ and influenced by the case law of the ICTR and ICTY which, due to the lack of an extensive catalogue of separate sexual crimes, had to deal with instances of sexual violence by classifying them as other crimes such as torture and enslavement. Therefore, the Preparatory Committee included a selection of sexual crimes in the definitions of war crimes and crimes against humanity.⁸⁰⁸ One of these sexual crimes was sexual slavery. Initially, this particular offence was only included in the war crimes provision⁸⁰⁹ and not also as a crime against humanity.⁸¹⁰ During the Rome Conference, however, it was agreed that this crime also warranted recognition as a crime against humanity.

From the outset, the codification of sexual slavery in the Rome Statute enjoyed much support among delegates, mainly due to the fact that a number of important documents and reports listed sexual slavery as a crime that is frequently committed in conflict situations.⁸¹¹ This argument was also used to advocate the inclusion of the crimes of apartheid and enforced disappearance of persons in the provision of crimes against humanity.⁸¹² Although, like sexual slavery, these crimes did not appear in the Charter of the IMT, the Charter of the IMTFE, Control Council Law No. 10, or in the Statutes of the ICTY and ICTR, it was agreed that codifying these crimes in the Rome Statute was justified

⁸⁰⁴ It should be noted that some overlap already existed between crimes recognised under customary international law, such as between the crimes against humanity of murder and extermination. See Oosterveld 2004, p. 623.

⁸⁰⁵ Overlap between crimes was considered to be less of an issue in the context of war crimes (see also paragraph 4.2 *infra* and footnote 874 in particular).

⁸⁰⁶ Robinson 2001, pp. 185–186.

⁸⁰⁷ Such as the 1995 Fourth World Conference on Women, resulting in the Beijing Declaration and Platform for Action (15 September 1995, UN Doc. A/CONF.177/20).

⁸⁰⁸ Von Hebel & Robinson 1999, p. 117.

⁸⁰⁹ Bassiouni 2005(II), pp. 44–55.

⁸¹⁰ In the category of sexual crimes, the 1998 draft statute listed ‘rape or other sexual abuse (of comparable gravity), or enforced prostitution’ as crimes against humanity, Bassiouni 2005(II), p. 45.

⁸¹¹ *Inter alia* UN Commission on Human Rights: Contemporary forms of slavery 1998; and Oosterveld 2004, pp. 608 and 614–615.

⁸¹² See for example Summary record of the 3rd plenary meeting held during the Rome Conference (16 June 1998), UN Doc. A/CONF.183/SR.3, 20 November 1998, para. 74.

seeing as both offences had already previously been explicitly identified as crimes against humanity in international instruments⁸¹³ and it was recognised that they are undoubtedly inhumane acts that resemble other crimes against humanity in character and gravity.⁸¹⁴

Irrespective of the high level of support in favour of the codification of sexual slavery, two important issues arose during the negotiations concerning this crime: the questions regarding the differences between sexual slavery and the broader crime of enslavement on the one hand,⁸¹⁵ and the differences between sexual slavery and enforced prostitution on the other hand. Some delegates were concerned that sexual slavery, being a form of enslavement, was completely subsumed under this latter crime and would therefore become superfluous, especially as the sexual elements of sexual slavery could be addressed by charging rape cumulatively with enslavement. After all, sexual slavery *is* slavery, and if the former is a form of the latter, then deleting sexual slavery would reduce overlap of crimes in the Statute and many delegates aimed at avoiding repetition or overlap.⁸¹⁶ Other delegates countered this by stating that overlap already existed between crimes recognised under customary international law and brought up the crimes against humanity of murder and extermination. They argued that it was necessary to include ‘an accurate and specific listing of the kinds of serious crimes that occur in today’s world’,⁸¹⁷ sexual slavery being an example of these types of offences. In the context of this debate, the Women’s Caucus for Gender Justice in the International Criminal Court explicitly referred to forced marriages that took place in Rwanda, stating that this practice can have both sexual and non-sexual aspects that require the charging of both enslavement and sexual slavery.⁸¹⁸ In the end, delegates agreed that the two crimes that were traditionally used to prosecute instances of sexual slavery (i.e. rape and enslavement) did not cover the spectrum

⁸¹³ Cryer *et al.* 2010, pp. 262–264; Witschel & Rückert 2001, pp. 99 and 104; and Robinson 1999, p. 55; and Von Hebel & Robinson 1999, p. 102.

⁸¹⁴ For example, the ICTY held that enforced disappearance could constitute an other inhumane act, so long as it is ‘carried out in a systematic manner and on a large scale’ (*Kupreškić et al.* Trial Judgement, para. 566).

⁸¹⁵ The issue regarding the extent of the overlap between enslavement and sexual slavery arose from a proposal of the Holy See submitted to the 1997 Preparatory Committee to delete from the war crimes provision the crimes of sexual slavery, enforced prostitution and forced pregnancy and replace them by a general subsection on enslavement (see *Proposal submitted by the Holy See*, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1997/WG. 1/DP. 12, 9 December 1997; and Oosterveld 2004, p. 615). This proposal was mainly aimed at the deletion of the crime of forced pregnancy, because the Vatican (along with a few Catholic and Arab countries) was concerned that this crime might oblige national systems to allow women who were forcibly impregnated to abort the fetus, and would in that way in fact create a right to abortion (see Von Hebel & Robinson 1999, p. 100; and Steains 1999, pp. 366–367).

⁸¹⁶ Oosterveld 2004, pp. 622–623.

⁸¹⁷ Oosterveld 2004, p. 623.

⁸¹⁸ Women’s Caucus Recommendations 1997, para. WC.5.6–7 and Oosterveld 2004, p. 624.

of harms caused by sexual slavery.⁸¹⁹ Rape, it was recognised, does not properly describe the loss of liberty, whereas enslavement does not properly describe the sexual nature of the crime,⁸²⁰ and it was decided to list both enslavement and sexual slavery as distinct crimes against humanity.⁸²¹

The second controversial issue revolved around the overlap between sexual slavery and enforced prostitution. The leading question during the debates on this issue was whether sexual slavery should replace the crime of enforced prostitution. Supporters of this proposal argued that enforced prostitution is an outdated term which suggests a certain level of voluntarism on the side of the victim, or which carries the assumption of (monetary) compensation. In addition, it was put forward that labelling certain conduct ‘enforced prostitution’ is stigmatising and discriminatory for the victim, and reflects the male (in most cases the perpetrator’s) view, instead of focusing on the victim’s perspective.⁸²² The supporters concluded that sexual slavery encompasses enforced prostitution and better reflects the reality of the crime. Opponents, i.e. those who opined that both crimes deserved to be included in the Rome Statute, argued that enforced prostitution has its own unique elements, especially when committed in peacetime, which make it distinct from sexual slavery.⁸²³ The Special Rapporteur on systematic rape, sexual slavery and slavery-like practices held that, even though sexual slavery encompasses enforced prostitution in most, if not in all, cases, the latter still remains a valid alternative tool for prosecution.⁸²⁴ Eventually, opinion on this matter remained (and arguably still is) divided and because it was not clear whether scenarios were possible in which an act of enforced prostitution would not also constitute sexual slavery, it was decided to include both crimes in the corpus of positive international criminal law.⁸²⁵

The importance of the distinctiveness of crimes was not only discussed with regard to sexual slavery. As a result of the guiding principle that overlap should be avoided, a proposal to include a crime of mass starvation in the list of crimes against humanity did not receive sufficient support because delegates opined

⁸¹⁹ See e.g. *Kunarac et al.* Trial and Appeal Judgement. In this precedent-setting case, the ICTY considered the crime of enslavement for sexual purposes (nota that enslavement was included in the ICTY Statute; sexual slavery was not).

⁸²⁰ Scharf 2005, p. 93.

⁸²¹ The separate listing of sexual slavery and enslavement was (and is) also supported by many academics. Askin, for example, argues that the term ‘sexual slavery’ more accurately describes the nature of the crime (see K.D. Askin, ‘Women and International Humanitarian Law’, in: K.D. Askin & D.M. Koenig (eds.), *Women and international human rights law. Part I*, Ardsley, NY: Transnational Publishers 1999, p. 83). For a different view, see P. Viseur Sellers, ‘Wartime female slavery: enslavement?’, *Cornell International Law Journal* (44) 2011, pp. 115–144.

⁸²² Oosterveld 2004, pp. 618–619.

⁸²³ Oosterveld 2004, pp. 620–621.

⁸²⁴ The crime of enforced prostitution ‘remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations’ (UN Commission on Human Rights: Contemporary forms of slavery 1998, paras. 33 and 32, respectively).

⁸²⁵ Oosterveld 2004, p. 622 and Jain 2008, p. 1029.

that this conduct would most likely fall under the existing crimes of murder and extermination.⁸²⁶

3.3. CODIFYING ‘NEW’ CRIMES AFTER THE ROME CONFERENCE: AMENDING THE ROME STATUTE

3.3.1. *Article 121 Rome Statute: amendments*

The Rome Statute is not carved in stone: Article 121 provides for the possibility of amendment. This is important, seeing as the ICC only has jurisdiction over crimes listed in the Rome Statute.⁸²⁷ The ICC’s jurisdiction over a particular offence, therefore, can only be activated by including that offence in the Statute through amendment. In accordance with Article 121 Rome Statute, a state party can propose an amendment to the Statute; the Assembly of states parties then deals with this proposal.⁸²⁸ In case consensus cannot be reached, a two-thirds majority is required in order for the amendment to be accepted. Amendments to the core crimes provisions (i.e. Articles 5, 6, 7 and 8 Rome Statute) only become applicable to states parties that have accepted them. This means the Court is not able to exercise its jurisdiction regarding a crime covered by the amendment when it was committed on the territory of or by a national of a state which did not accept the amendment.⁸²⁹ Pursuant to Article 121(5) Rome Statute, ‘amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.’ Adding new crimes to the Rome Statute is not something that happens on a daily basis, but neither is it unheard of. The 2010 Review Conference in Kampala, for example, resulted in three war crimes being added to Article 8(2)(e) of the Rome Statute.⁸³⁰ It is vital, therefore,

⁸²⁶ In addition, it was argued that a crime of mass starvation did not have the special recognition in international instruments that other crimes such as *apartheid* and enforced disappearance did have. For *apartheid*, see e.g. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, Nov. 30, 1973, A/RES/3068(XXVIII); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3. With regard to enforced disappearance, see The Inter-American Convention on Forced Disappearance of Persons, Mar. 28, 1996, O.A.S.T.S. 68, 33 ILM 1429. See Von Hebel & Robinson 1999, p. 103.

⁸²⁷ Article 22(1) Rome Statute.

⁸²⁸ The Assembly can deal with the proposed amendment directly or convene a Review Conference (Article 123(2) Rome Statute).

⁸²⁹ R. Clark, ‘Article 121 Amendments’, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Munich: C.H. Beck 2008, margin no. 5. This is in conformity with Article 40(4) Vienna Convention on the Law of Treaties.

⁸³⁰ The war crimes of 1) employing poison or poisoned weapons; 2) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and 3) employing

whilst reading the rest of this chapter to keep in mind that the Rome Statute is a treaty; a contract between states that can be amended at their behest.

It is self-evident that any new crimes must conform to the legality principle, as discussed below.⁸³¹

3.3.2. Principle of legality

One of the most important, if not the most important, principles of criminal law is the principle of legality or *nullum crimen sine lege* (no crime without law). This axiom, which prescribes that no one may be held liable and punished for violating a criminal law that did not exist at the time it was committed, is part of customary international law and is laid down in *inter alia* the UDHR, the ICCPR, the ECHR, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the Rome Statute.⁸³²

During the past decades, a noteworthy shift has taken place in international criminal law from the doctrine of substantive justice to the doctrine of strict legality, mainly due to the anchoring of the *nullum crimen* principle in important human rights instruments. The concept of substantive justice entails that the need to protect society requires that any conduct that is harmful to or dangerous for society is punished, irrespective of whether or not this act has already been legally criminalised at the moment it was committed. This type of justification of the application of *ex post facto* law was used at the Nuremberg IMT.⁸³³ The current prevailing notion, however, leans more and more towards strict legality, a doctrine entailing that the need to protect individuals' human rights implies that no one may be held criminally liable for acts that were not criminalised when they were committed.⁸³⁴

bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions (see Resolution 5 of the Review Conference, 12th plenary meeting, 10 June 2010).

⁸³¹ See also Chapters 4 and 6.

⁸³² Article 11(2) UDHR, Article 15 ICCPR, Article 7 ECHR, Article 7(2) African Charter on Human and Peoples' Rights, Article 9 American Convention on Human Rights, and Articles 22–24 Rome Statute.

⁸³³ See Cassese *et al.* 2013, p. 25.

⁸³⁴ Cassese *et al.* 2013, pp. 25–27. In human rights instruments exceptions to the strict *nullum crimen* principle were included as a result of the criticism on the legality of the Nuremberg and Tokyo trials. These exceptions were meant to emphasise the legality of these tribunals (Boot 2002, p. 613). See Article 7(2) ECHR: 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.' See also Article 15(2) ICCPR.

The four norms of the legality principle (*lex scripta, praevia, certa* and *stricta*) which guided the drafters of the Rome Statute,⁸³⁵ are expressly⁸³⁶ reflected by the Rome Statute in Articles 22 and 24.⁸³⁷ The former article stipulates that:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

The phrase ‘a crime within the jurisdiction of the Court’ refers to the core crimes enumerated in Article 5, which are defined in Articles 6 through 8, and encompasses the *lex scripta* principle.⁸³⁸ In other words, no one can be criminally responsible under the Rome Statute for crimes that are not listed in Article 5(1).⁸³⁹ The third paragraph makes clear that the effects of the legality principles are limited to the Statute, which is also emphasised by the words ‘under this Statute’ in paragraph one.⁸⁴⁰ The requirement of a written criminal provision is peculiar to international criminal law, as traditionally, this field of law was to a large extent based on unwritten norms of custom.⁸⁴¹ However, Article 22(1) Rome Statute clearly prevents the ICC from exercising jurisdiction over crimes that are not codified in the Statute. The *lex scripta* demand therefore does apply to the Rome Statute. Article 22(2) Rome Statute requires that the ICC strictly interprets the definitions of crimes as stipulated in the Statute and forbids extensions by

⁸³⁵ Members of the 1996 Preparatory Committee agreed that ‘that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine lege)’, *Report of the Preparatory Committee on the Establishment of an International Criminal Court (Volume I)*, UN GAOR, 51st Session, Session Supplement No. 22A (A/51/22), 1996, para. 52.

⁸³⁶ It should be noted that the principle of legality is interpreted in a more tolerant and broad sense under general international law and indeed by the ICTY and ICTR. In the context of the Rome Statute, on the other hand, the principle of legality is applied in a stricter sense (Broomhall 2008, margin no. 15; and C. Kress, ‘Nulla poena nullum crimen sine lege’, in *Max Planck Encyclopedia of Public International Law*, margin no. 17). See also Chapter 6.

⁸³⁷ Article 23 stipulates the *nulla poena sine lege* principle: ‘(a) person convicted by the Court may be punished only in accordance with this Statute.’

⁸³⁸ Boot 2002, p. 375; and K. Ambos, ‘General principles of criminal law in the Rome Statute’, *Criminal Law Forum* (10) 1999, p. 4.

⁸³⁹ Werle 2009, p. 38.

⁸⁴⁰ Lamb 2002, p. 753.

⁸⁴¹ See *supra* on the Nuremberg trials and the concept of substantive justice.

analogy.⁸⁴² As noted by Boot, these two corollaries of the principle of legality restrict the ICC to acting as *la bouche de la loi*.⁸⁴³ In the words of Haveman:

‘However heinous the judiciary may consider the behaviour in question to be, as long as the assembly of state parties have not brought this behaviour under the jurisdiction of the court, the court shall have to refrain from punishing individuals for having committed such behaviour.’⁸⁴⁴

Article 24 Rome Statute embodies the rule of non-retroactivity *ratione personae*:

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

In the Rome Statute, the principle of legality is linked to the subject matter jurisdiction of the Court and consequently to the consent of the states parties: the Court has jurisdiction only over the crimes that are delineated in the Rome Statute, i.e. the crimes the states parties agreed upon.⁸⁴⁵ This is not surprising, considering that, in general, states would rather not give up sovereignty by ceding jurisdiction to another country, or in this case, an international court.⁸⁴⁶ Consequently, it is likewise not surprising that during the negotiations in Rome, the prevailing arguments with regard to legality pertained to the consent of states – seeking to protect their sovereignty – to the Court’s exercise of jurisdiction over a particular crime, and that human rights concerns, i.e. the protection of individuals against arbitrary punishment, were more or less subordinate to the states’ demands of legal certainty regarding the Court’s jurisdiction.⁸⁴⁷

The four norms comprising the legality principle have been affirmed by the ICC Pre-Trial Chamber in the Decision on the confirmation of the charges in the case against the Congolese Thomas Lubanga Dyilo. In response to the Defence’s argument that Lubanga could not foresee that the use of child soldiers was

⁸⁴² The *lex stricta* principle applies only to the definitions of crimes as set out in Articles 6–8 Rome Statute; it does not apply to the EoC (Broomhall 2008, margin no. 39). However, the EoC must be interpreted consistently with the Rome Statute; interpreting them extensively would not be consistent with the Rome Statute (see Article 9(3) Rome Statute and General Introduction EoC).

⁸⁴³ Boot 2002, pp. 395 and 613. Cassese 2008, p. 17: ‘A court or tribunal may not apply a customary rule criminalising conduct that does not fall within one of the categories of crimes over which it has jurisdiction under its Statute.’

⁸⁴⁴ Haveman 2003, p. 61.

⁸⁴⁵ Boot 2002, pp. 616–617.

⁸⁴⁶ Boot 2002, p. 617.

⁸⁴⁷ Cryer *et al.* 2010, p. 20; and Boot 2002, pp. 362 and 617–618.

criminal in nature, the ICC's Pre-Trial Chamber I, rejecting this argument, held that,

'there is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy *in malam partem* (*lex stricta*).'⁸⁴⁸

The *lex certa* principle plays an important role during the process of defining crimes, as is evidenced by the legislative history of the ICC EoC. The requirement of specificity was discussed during the meetings of the Preparatory Commission, established after the Rome Conference to draft the ICC's Elements of Crimes and Rules of Procedure and Evidence. During the debates on the elements of the crimes of enslavement and sexual slavery, for example, several delegates expressed concerns regarding the clarity of the definition of sexual slavery. The United States was concerned that merely reproducing the definition of enslavement as encompassed in the Rome Statute in Article 7(2)(c)⁸⁴⁹ would be too imprecise to satisfy the legality principle and therefore suggested the element be accompanied by a non-exhaustive, illustrative list of examples of how the right of ownership can be exercised. As a result, the definition of enslavement (which was copied verbatim from the Rome Statute) was expanded by a number of indicia of ownership: 'such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'.⁸⁵⁰

The importance of the legality principle to criminal law in general makes it relevant to criminalisation and consequently to the question of how certain conduct should be criminalised. The ICC's jurisdiction is limited to the crimes enumerated in the Rome Statute and the Court, therefore, cannot take recourse to customary international law to fill any gaps in the Statute.⁸⁵¹ When certain conduct falls outside the scope of the Rome Statute, it will have to be incorporated (by means of amendment) into this document for the ICC to exercise jurisdiction over it. Each new criminal provision in the Rome Statute will have to be in

⁸⁴⁸ *Lubanga* Decision on the confirmation of the charges, para. 303.

⁸⁴⁹ "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.'

⁸⁵⁰ Article 7(1)(g)-2 ICC EoC.

⁸⁵¹ However, Article 21(1)(b) Rome Statute lists 'the principles and rules of international law' as one of the sources of law the Court can apply. The Court can therefore use customary international law, but only to interpret or clarify existing crimes and not to create new offences (*Lamb* 2002, p. 750).

accordance with the principle of legality and consequently live up to the demands of specificity and non-retroactivity.⁸⁵²

3.4. THE STRUCTURE OF THE CORE CRIMES

In 1997, the Preparatory Committee had agreed that the prospective international criminal court ought to deal only with crimes that are of the most serious concern to the international community as a whole, and it was decided that the crimes which were to be included in the Rome Statute should be crimes already established under customary international law.^{853, 854} As remarked by a European delegate, the ICC was not created ‘as a panacea for all ills’.⁸⁵⁵ This notion of subsidiarity is reflected by the preamble of the Rome Statute, and more specifically with regard to crimes against humanity by the ICC EoC in the introductory provision to this core crime:

‘Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.’

Consequently, in order for conduct to fall within the jurisdiction of the ICC, it will have to constitute one (or more) of the core crimes.⁸⁵⁶ Only conduct that can be classified as a crime against humanity, war crime, genocide or aggression can give rise to individual criminal responsibility under international criminal law.

⁸⁵² It should be noted that the majority of crimes are not defined in the Rome Statute: they are defined in the non-binding Elements of Crimes document.

⁸⁵³ Although in the end crimes which were not (yet) part of customary international law were also included in the Statute (see Cryer 2008, p. 118; Oosterveld 2004, p. 615; Von Hebel 2001, p. 5). Certain listed crimes expand customary international law, in the sense that they are (or at least *were* at the time of codification in the Statute) broader than customary international law, examples are sexual slavery, forced pregnancy and apartheid, see Cassese 2002, p. 376 and Cassese *et al.* 2013, p. 107. Some delegates also explicitly stated that they believed the Rome Statute could advance international law (Oosterveld 2004, pp. 623 and 625). In other words: there was no consensus among delegates with regard to the customary nature of crimes to be included in the Statute (see also Milanović 2011, p. 32, footnote 25).

⁸⁵⁴ Note that not all crimes under customary international law are included in the Rome Statute, see Cassese *et al.* 2013, p. 29 and Article 10 Rome Statute.

⁸⁵⁵ Robinson 2001, p. 70. See also Oosterveld 2004, pp. 622–623.

⁸⁵⁶ See Article 22(1) Rome Statute and paragraph 4.1 *infra*.

In order to create a framework that governs the criminalisation of offences under international criminal law, it is important to examine what the rationale was behind criminalising the core crimes in the first place.

The desire to ensure that in conflict situations at least some elementary principles and values are respected gave rise to the criminalisation of the category of offences with the longest history of the four core crimes: war crimes.⁸⁵⁷ Closely linked with the proscription of war crimes is the criminalisation of aggression, a crime which is characterised by the UN General Assembly as ‘the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences.’⁸⁵⁸ The rationale behind international criminalisation of genocide and crimes against humanity stems from the notion that states do not own the lives of their citizens and that they should respect their citizens’ fundamental rights. This recognition was a large step forward in the protection of fundamental rights, as a state’s treatment of its citizens used to be considered a matter of internal affairs in which no interference of other states was allowed.⁸⁵⁹

Pursuant to Article 5 Rome Statute, the ICC has jurisdiction over four crimes. The layout of the core crimes is quite similar: each of these crimes contains sub-paragraphs enumerating a broad range of in total more than 70 prohibited acts (‘any of the following acts’⁸⁶⁰), which constitute an international crime if they are committed with the required intent and the so-called chapeau elements. The first paragraph of the crimes against humanity provision may be used to illustrate the structure of the core crimes: it contains a list of inhumane acts and a chapeau which sets out the conditions under which the commission of these acts amounts to a crime against humanity:

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;

⁸⁵⁷ Gaeta 2009, p. 66.

⁸⁵⁸ UNGA Res. 3314 (1975) GAOR 29th Session Supp 31, 142. Aggression was internationally criminalised because it constitutes a crime against international peace and by criminalising this conduct, the international community expressed its solemn renunciation of unauthorised war-making (B.B. Ferencz, ‘Enabling the International Criminal Court to Punish Aggression’, *Washington University Global Studies Law Review* (6) 2007, p. 566). Aggression was first tried before the Nuremberg International Military Tribunal under the name of ‘crimes against peace’ and in the view of this Tribunal ‘(t)o initiate a war of aggression (...) is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’ See Nuremberg International Military Tribunal Judgement and Sentences, reprinted in the *American Journal of International Law* (41) 1947, p. 186.

⁸⁵⁹ Gaeta 2009, pp. 66–68.

⁸⁶⁰ Articles 6, 7(1), 8(2)(b) and (c) and 8bis(2) Rome Statute. See Werle 2009, p. 25.

- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The chapeau or threshold requirements describe the circumstances under which specific conduct amounts to an international crime. The category of crimes against humanity entails a contextual threshold: it is required that the listed prohibited acts (such as murder or rape) are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The crime of genocide requires a specific mental state: Article 6 Rome Statute requires that the individual prohibited acts are committed with a specific intent (*dolus specialis*), namely with the specific intent of destroying, in whole or in part, a national, ethnical, racial or religious group, as such. For war crimes the most essential common element is a nexus with an armed conflict, either national or international.

4. CRIMINALISATION AND CRIMES AGAINST HUMANITY

4.1. INTRODUCTION: OPTIONS FOR CRIMINALISATION

The theories on international criminalisation advanced by Bassiouni, Cassese and May demonstrate that only the most serious crimes warrant international criminalisation. This coincides with the intent of the drafters of the Rome Statute and is also affirmed by the text of this Statute and its EoC. More specifically, it is reflected by the definition of crimes against humanity: crimes against humanity are among the most serious crimes of concern to the international community as a whole. In the words of Cassese, the common features of crimes against humanity are as follows:

‘(i) these crimes are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings; (ii) they are not isolated or sporadic events, but are part either of a governmental policy (although the perpetrators need not identify themselves with this policy) or of a widespread practice of atrocities tolerated or condoned by a Government or a de facto authority.’⁸⁶¹

Pursuant to Article 7 of the Rome Statute the *condicio sine qua non* for penalising conduct as a crime against humanity is that the conduct amounts to an inhumane act.⁸⁶² If an act cannot be qualified as ‘inhumane’ it will not amount to a crime against humanity, meaning the conduct cannot be criminalised as such. There are two ways in which certain conduct can constitute a crime against humanity.

First, it is possible that the conduct in question is in fact already penalised as a crime against humanity, because it is subsumed under the inhumane acts enumerated in Article 7 Rome Statute. This was the case, according to the ICC Pre-Trial Chamber, for the forced marriages that took place in the Democratic Republic of Congo. In the decision on the confirmation of the charges in the case against Katanga, the ICC Pre-Trial Chamber stated that forced marriage is a form of sexual slavery that is completely subsumed under the latter offence and can therefore not be qualified as a distinct crime under the heading ‘other inhumane acts’.⁸⁶³ The same goes for the forced marriages that took place during the civil war in Sierra Leone: in the *Taylor* judgement, the SCSL Trial Chamber considered that forced marriage is not a new crime, not a distinct inhumane act, but that it is in fact subsumed under the crime of sexual slavery.⁸⁶⁴ Another example of an act that is considered to be subsumed under a listed inhumane act is the crime of mass starvation: as was mentioned above, during the negotiations in Rome on the Statute of the ICC, delegates considered that this conduct would most likely be covered by the crimes of murder and extermination.⁸⁶⁵

Secondly, it is possible that particular conduct is not covered by already listed inhumane acts, but nevertheless amounts to an inhumane act and is therefore criminalised through the catch-all clause ‘other inhumane acts’, which is part of the definition of crimes against humanity. This was the case, for example, with forced nudity: the ICTR Trial Chamber in the *Akayesu* judgement found that forced nudity, which is not listed as an inhumane act in the ICTR Statute as such,

⁸⁶¹ Cassese, Gaeta & Jones 2002, p. 360.

⁸⁶² This was also recognised during the negotiations on the inclusion in the Rome Statute of *inter alia* sexual slavery, enforced disappearance of persons and apartheid. See Robinson 1999, p. 55; Von Hebel & Robinson, 1999, p. 102. See also Cryer *et al.* 2010, p. 230.

⁸⁶³ *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 431. See also Chapter 8.

⁸⁶⁴ *Taylor* Trial Judgement, paras. 422–430. For a discussion of this judgement, see Chapter 8.

⁸⁶⁵ See Von Hebel & Robinson 1999, p. 103.

can amount to an ‘other inhumane act’.⁸⁶⁶ And contrary to what was stated above with regard to the Taylor trial judgement, in its earlier case law, the SCSL has held that the forced marriages which took place during the civil war in Sierra Leone ought to be qualified as ‘other inhumane acts’, because they are distinct from listed acts such as sexual slavery.⁸⁶⁷ Therefore, when the conduct in question contains at least one distinct element which is not included in the definition of existing inhumane acts, those acts will not adequately cover the distinguishing characteristics of this conduct and consequently will not completely subsume that act.⁸⁶⁸ If this is the case, then the question should be asked as to whether or not the particular conduct could be qualified as an ‘other inhumane act’. Several acts which initially were not listed as specific inhumane acts were qualified as ‘other inhumane acts’ in the case law of the international criminal courts and tribunals and were later codified as specific inhumane acts, for instance in the Rome Statute and the SCSL Statute. Examples include sexual violence, forcible transfer of population, enforced prostitution, and the enforced disappearance of persons.⁸⁶⁹ This implies that acts that are currently not codified as crimes against humanity in the Rome Statute, but *are* qualified as ‘other inhumane acts’ by the ICC, could, theoretically, in the future be included in the list of inhumane acts under Article 7 Rome Statute. Especially if this particular crime with unique characteristics has certain prevalence in conflict situations and is likely to reoccur, it stands to reason to consider including it in the crimes against humanity provision.

If a particular act does not amount to an ‘other inhumane act’, either because it cannot be classified as ‘inhumane’ or because it did not cause serious suffering or injury,⁸⁷⁰ it will fall outside the ambit of crimes against humanity and can therefore not be criminalised as such. This paragraph analyses each of these possibilities of criminalising conduct as a crime against humanity.

⁸⁶⁶ *Akayesu* Trial Judgement, paras. 598, 688. The ICTY and ICTR also qualified sexual violence, forced disappearance and forced prostitution as ‘other inhumane acts’. These crimes were not included as distinct crimes against humanity in the statutes of the ICTR and ICTY, but have now been included in the Rome Statute as such. See Cryer *et al.* 2010, p. 265.

⁸⁶⁷ AFRC Appeal Judgement, paras. 197–202. This conclusion was followed by the Co-Investigating Judges at the ECCC, who have indicted the accused in one of the cases on charges of ‘the other inhumane act of forced marriage’. See Case 002 Closing Order, paras. 1442–1447. See Chapter 8.

⁸⁶⁸ This is also in line with the more strict interpretation of the legality principle.

⁸⁶⁹ AFRC Prosecution Appeal Brief, para. 606. These acts are now listed as crimes against humanity in the Rome Statute. See Article 7(1)(d) – 7(1)(g), 7(1)(i) Rome Statute. These crimes, with the exception of enforced disappearance of persons, are also included in the SCSL Statute.

⁸⁷⁰ As required by the first element of the crime of ‘other inhumane acts’ (see Article 7(1)(k) Elements of Crimes). The ILC, commenting on its 1991 Draft Code, also held that an inhumane act ‘must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity’, as quoted in the *Kayishema* Trial Judgement, para. 150.

4.2. MATERIAL DISTINCTIVENESS: THE CONDUCT IS SUBSUMED UNDER SPECIFIC INHUMANE ACTS LISTED IN ARTICLE 7(1) ROME STATUTE

From a practical point of view, the most logical step is to first verify whether the conduct in question is perhaps already subsumed under existing inhumane acts (internal subsidiarity). If perpetrators of particular conduct can be adequately prosecuted using existing law, creating a new crime would arguably be redundant.⁸⁷¹ The negotiations on the inclusion of certain acts, such as sexual slavery and enforced disappearance of persons, as distinct crimes against humanity in the Rome Statute clearly demonstrate that while overlap between crimes is allowed, a ‘new’ crime against humanity should (ideally) be materially distinct, in the sense that it has at least one element that is not included in already listed crimes.⁸⁷² In other words, the act should require proof of a fact that is not required by other crimes.^{873, 874}

The requirement that a new crime contains at least one unique element that is not encompassed in existing crimes is also mentioned in literature with regard to international criminal law in the broad sense. Saul argues, for example, that the fact that existing international or transnational crimes already prohibit the same conduct under a different nomenclature constitutes a pragmatic, but compelling objection to separately criminalising that conduct.⁸⁷⁵ When, on the other hand, the conduct in question has unique and distinguishing characteristics which are

⁸⁷¹ See also Mattler 2004, p. 23. Obviously, there might be good arguments to create a new prohibition irrespective of overlap, see Chapter 6.

⁸⁷² Oosterveld 2004, p. 638, footnote 149. The argument that a crime must have a unique element was also raised by the Holy See in relation to the crime of enforced pregnancy. The Holy See argued, together with several Catholic and Arab countries, that the elements of this crime were already covered in the Draft Rome Statute by the offences of rape and unlawful detention, which made inclusion of a specific crime of enforced pregnancy unnecessary in their view. See Steains 1999, p. 367. Delegates from Bosnia and Herzegovina, however, argued that a specific criminalisation of this offence was needed because it has a different criminal purpose (i.e. making and keeping a woman pregnant, for example to change the ethnic composition of a population) than other forms of sexual assaults. See *Discussion Paper: Delegation of Bosnia and Herzegovina (crime of enforced pregnancy)*, Rome Conference Preparatory Works, 15 April 1998 (see Von Hebel & Robinson 1999, p. 100; and Steains 1999, pp. 366–367).

⁸⁷³ *Čelebići* Appeal Judgement, para. 412.

⁸⁷⁴ Note that considerations of uniqueness and overlap played a less important role with regard to war crimes. Even when there was overlap between crimes, they were included nevertheless, because drafters wanted to include in the Rome Statute as many rules of customary international law pertaining to armed conflict as possible and in this process, relied on many sources. Therefore, there is considerable duplication (Cryer *et al.* 2010, p. 289). For example, the war crime of intentionally directing attacks against UN personnel is superfluous because existing war crimes already protect UN personnel. However, delegates decided to include this specific war crime, because the crime has great symbolic value: it demonstrates that the world community attaches great value to the work done by UN personnel and that attacks on these people are seen as serious crimes (Von Hebel & Robinson 1999, p. 110). See also paragraph 5 *infra*.

⁸⁷⁵ Saul 2008, p. 245.

not adequately reflected in existing criminal prohibitions, this constitutes an indication that it may be warranted to separately criminalise this conduct.⁸⁷⁶ More generally, restricting the proliferation of superfluous or duplicate international criminal offences will contribute to the overall systematic integrity and coherence of international criminal law.⁸⁷⁷

A similar type of reasoning is reflected by the umbrella category of ‘other inhumane acts’ (discussed in detail below). This catch-all clause was included in the provision of crimes against humanity (for the first time in the London Charter of the IMT) to prevent inhumane acts that are not explicitly enumerated as crimes against humanity from falling outside the scope of international criminal law.⁸⁷⁸ This means that in order to qualify as an ‘other inhumane act’, the conduct must not already be covered by one of the acts specified as crimes against humanity in a particular statute.⁸⁷⁹ This conclusion is confirmed by the case law of the ICTY and ICTR and also follows from logical grammatical interpretation: the clause deals with *other* inhumane acts.⁸⁸⁰ In the words of ICC Pre-Trial Chamber II:

‘The Chamber understands that other inhumane acts is a residual category within the system of article 7(1) of the Statute. Therefore, if a conduct could be charged as another specific crime under this provision, its charging as other inhumane acts is impermissible.’⁸⁸¹

As was stated above, for behaviour to be classified as a crime against humanity, it must amount to an inhumane act. Several of these inhumane acts are already specifically listed in Article 7 Rome Statute. The drafters of the Rome Statute, as well as legal doctrine and criminal procedure, greatly value the substantive distinctiveness of a crime. When certain conduct is not materially distinct from a listed inhumane act, this forms a compelling pragmatic argument not to reshape this particular conduct into a new crime, under a new label. Therefore, when evaluating whether certain conduct could be criminalised as a crime against humanity, the first question that must be addressed is whether the act has at

⁸⁷⁶ Saul 2008, p. 247.

⁸⁷⁷ Saul 2008, p. 210.

⁸⁷⁸ The ICTY Trial Chamber declared that the charge of ‘other inhumane acts’ is generic and encompasses a series of criminal activities that are not explicitly listed (see *Blaškić* Trial Judgement, para. 237).

⁸⁷⁹ See e.g. the preliminary observations of the Prosecution in the *Stakić* case with regard to the classification of forcible transfer as an inhumane act. The prosecutor submitted that forcible transfer is an inhumane act which ‘is not a lesser offence included in the crime of deportation.’ The Trial Chamber disagreed and held that forcible transfer was in fact included in the crime of deportation (*Stakić* Trial Judgement, paras. 716 and 722). The Appeals Chamber reversed this judgement and held that forcible transfer as an ‘other inhumane act’ and deportation are in fact conceptually different (*Stakić* Appeal Judgement, para. 321).

⁸⁸⁰ Jain 2008, p. 1028, referring to *Kayishema* Trial Judgement, para. 150. See also *Vasiljević* Trial Judgement, para. 234.

⁸⁸¹ *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, para. 269.

least one materially distinct element not included in existing crimes. This can be done by verifying whether the conduct is already subsumed under existing inhumane acts. When evaluating whether certain conduct falls within the ambit of the crimes listed in Article 7 Rome Statute, it is important to give heed to the *lex stricta* norm enshrined in Article 22 Rome Statute that stipulates that provisions must be strictly construed.⁸⁸² If the conclusion is that the conduct has distinguishing characteristics that are not adequately reflected in the existing legal criminal instruments, the next step is answering the question of whether that particular conduct can nevertheless be classified as ‘inhumane’. This question can be answered by assessing whether this conduct can be qualified as an ‘other inhumane act’.

4.3. THE CONDUCT CONSTITUTES AN ‘OTHER INHUMANE ACT’

The requirements an act must satisfy in order to be qualified as ‘inhumane’ follow from the umbrella clause ‘other inhumane acts’. As stated, this particular provision was included in the provision of crimes against humanity to prevent inhumane acts that are not explicitly enumerated as crimes against humanity from falling outside the scope of international criminal law. In this sense, the clause allows courts flexibility in determining the cases before them, which prevents the crimes against humanity provision from becoming too rigid.⁸⁸³ This particular provision, which is part of customary international law,⁸⁸⁴ is included in the provisions of crimes against humanity of the IMT Charter, the IMTFE Charter, and in the Statutes of the ICTY, ICTR, SCSL and ECCC.⁸⁸⁵ In none of these documents, however, was the clause defined, rendering it imprecise and unspecified. The Rome Statute and its concomitant EoC brought change to this indefiniteness.⁸⁸⁶ Drawing from the case law of the *ad hoc* Tribunals, and the ILC’s 1996 Draft Code of Crimes against the Peace and Security of Mankind, the EoC offer clarifications on the scope of the category of inhumane acts by means of a set of specified requirements which must be fulfilled for an act to fall within the category of ‘other inhumane acts’:

⁸⁸² This is also emphasised by the ICC’s Elements of Crime introductory paragraph to crimes against humanity.

⁸⁸³ *Kupreškić et al.* Trial Judgement, para. 623.

⁸⁸⁴ *Perišić* Trial Judgement, para. 110; *Stakić* Appeal Judgement, para. 315; and Case 002 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, para. 157.

⁸⁸⁵ As was noted by the ICTY Appeals Chamber, several human rights treaties, such as the ICCPR (Article 7), the ECHR (Article 3), the Inter-American Convention on Human Rights (Article 5) and the African Charter on Human and People’s Rights (Article 5), also prohibit inhuman and degrading treatment: *Stakić* Appeal Judgement, footnote 649, referred to in *Perišić* Trial Judgement, footnote 220.

⁸⁸⁶ Article 7(1)(k) Rome Statute refers to ‘(o)ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁸⁸⁷

A footnote clarifies that the term ‘character’ in the second element refers to the nature and gravity of the act. This element also incorporates a standard of *eiusdem generis*, which is a mode of interpretation that is very similar to, if not a form of, analogy.⁸⁸⁸ By constructing a provision with the use of *eiusdem generis*, which is Latin for ‘of the same kind’, a crime is defined with reference to a specified (list of other) crime(s). Thus, in the case of ‘other inhumane acts’, reference is made to actions of the same kind – nature and gravity – as those specifically listed as inhumane acts in Article 7(1) Rome Statute.⁸⁸⁹ This *eiusdem generis* principle can also be found in the Rome Statute provision pertaining to sexual violence (‘any other form of sexual violence of comparable gravity’).⁸⁹⁰

The elements of the crime of ‘other inhumane acts’ – i.e. the requirements that an inhumane act of a character similar to any of the listed acts in the crimes against humanity provision caused great suffering, or serious injury to body or to mental or physical health on the part of the victim – are tightly interwoven. They are discussed below with a specific focus on the requirement that an act is inhumane.

4.3.1. *Great suffering, or serious injury to body or to mental or physical health*

The definition of ‘other inhumane acts’ requires that an act caused a certain amount of suffering on the part of the victim, more specifically, it requires ‘great suffering, or serious injury to body or to mental or physical health’.⁸⁹¹ It is complicated to set a specific baseline for determining the level of suffering or pain that must have been caused, but the suffering element of ‘other inhumane acts’ can be informed by the interpretation of the war crime of willfully causing

⁸⁸⁷ Article 7(1)(k) ICC EoC.

⁸⁸⁸ Cassese 2008, p. 49.

⁸⁸⁹ The *eiusdem generis* standard is an accepted rule of interpretation in international criminal law and is not regarded as a violation of the ban on analogy (Case 002 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, para. 161). See also Cassese 2008, p. 49.

⁸⁹⁰ See Article 7(1)(g) Rome Statute.

⁸⁹¹ Article 7(1)(k) Rome Statute.

great suffering or serious injury to body or health under Article 8(2)(a)(iii) of the Rome Statute, which arises from the grave breach provisions of the Geneva Conventions.⁸⁹² This offence has been defined in the case law of the ICTY as an act that causes serious mental or physical suffering or injury.⁸⁹³ In line with the case law of the ICTR, the ICTY has held that ‘serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’⁸⁹⁴

In the end, the assessment of the gravity of greatness or seriousness of the suffering implies a value judgement.⁸⁹⁵ In making this relative appraisal, the court must take into consideration all the factual circumstances of the case, such as the context in which the act was committed, the nature of the act, the duration and/or any repetition of the act, the physical, mental and moral effects the act had on the victim, and the individual circumstances of the victim, including age, health and sex.⁸⁹⁶

4.3.2. *Determining the scope of ‘inhumane’ acts*

Before the promulgation of the Rome Statute and the EoC, the *ad hoc* Tribunals also dealt with ‘other inhumane acts’ by means of an *eiusdem generis* standard, requiring, for example, that conduct be ‘of seriousness comparable to other acts enumerated (as crimes against humanity)’.⁸⁹⁷ This requirement was also recognised by the ILC established to create a draft Code of Offences against the Peace and Security of Mankind. In its commentary to the 1996 Draft Code, the ILC noted that the category other inhumane acts ‘is intended to include only additional acts that are similar in gravity to those listed in the preceding sub-paragraphs.’⁸⁹⁸ When determining the seriousness of the conduct, the *ad hoc* Tribunals take into consideration all the factual circumstances, such as the context in which the act was committed, the nature of the act, the individual circumstances of the victim and the effects the act had on the victim.⁸⁹⁹

⁸⁹² Cryer *et al.* 2010, p. 291.

⁸⁹³ *Čelebići* Trial Judgement, para. 511.

⁸⁹⁴ *Krstić* Trial Judgement, para. 513.

⁸⁹⁵ See also the General Introduction (para. 4) to the Elements of Crimes.

⁸⁹⁶ *Dorđević* Trial Judgement, para. 1611. K. Dörmann, ‘Article 8(2): meaning of “war crimes”’, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Munich: C.H. Beck 2008, margin no. 22. See also *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 449.

⁸⁹⁷ *Niyitegeka* Trial Judgement, para. 465. In accordance with the case law of the ICTY, the act or omission must be ‘of similar seriousness to the other crimes enumerated under Article 5 (the article which in which crimes against humanity are defined; IH)’, see *inter alia* *Dorđević* Trial Judgement, para. 1610, and *Krajišnik* Appeal Judgement, para. 331.

⁸⁹⁸ Quoted in *Tadić* Trial Judgement, para. 729.

⁸⁹⁹ *Dorđević* Trial Judgement, para. 1611.

As stated, the *eiusdem generis* canon of statutory construction makes the category of other inhumane acts dependent on other acts already specified as ‘inhumane’.⁹⁰⁰ Although the elements of ‘other inhumane acts’ as set forth in the ICC EoC provide some guidance by prescribing the *eiusdem generis* rule of interpretation, they do not provide an indication of the legal standards which the Court should use to identify the prohibited other inhumane acts.⁹⁰¹ In other words, the definition still leaves open the question of whether parameters exist which a court could use when defining the actual conduct constituting an ‘other inhumane act’. It is here that the case law of the ICTY provides guidance. In its case law, the ICTY has recognised that the Rome Statute offers a clearer definition of ‘other inhumane acts’ and a more specific threshold than does any other Statute, and has on several occasions referred to the Rome Statute and EoC.⁹⁰² However, the ICTY has also recognised that the *eiusdem generis* rule of interpretation is not much help in interpreting the expression ‘inhumane acts’: it refers to actions similar to those specifically provided for, but it offers no guidelines or yardstick which help in identifying possible inhumane acts.⁹⁰³

In the eyes of the ICTY Trial Chamber, applying the *eiusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act is the second step of a two-pronged test: first, the legal parameters for determining the content of the category of ‘inhumane acts’ must be identified.⁹⁰⁴ The ICTY Trial Chambers have on several occasions set out to find such a standard. The first case in which the ICTY addressed this issue in-depth was in *Kupreškić et al.* In this case, the Trial Chamber held that human rights law forms the standard by which the inhumanity of an act can be judged. Referring to the UDHR, the ICCPR, the ICESCR, the ECHR, the Inter-American Convention on Human Rights and the Convention against Torture, the Trial Chamber argued that the provisions of the most important international human rights instruments may be used ‘to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.’⁹⁰⁵

In a judgement published three years after the *Kupreškić et al.* judgement, Trial Chamber II of the ICTY greatly nuanced the unbridled use of human rights to identify parameters for the interpretation of ‘other inhumane acts’. In its judgement in the *Stakić* case, Trial Chamber II explicitly stated that it disagreed with the approach taken by the Trial Chamber in *Kupreškić et al.* and cited the report of the Secretary-General which states that the legality principle requires the ICTY to ‘apply rules of international humanitarian law which are beyond

⁹⁰⁰ Jyrkkö 2011, p. 196.

⁹⁰¹ *Kupreškić et al.* Trial Judgement, para. 565.

⁹⁰² *Kupreškić et al.* Trial Judgement, para. 565; and *Kayishema* Trial Judgement, para. 150.

⁹⁰³ *Kupreškić et al.* Trial Judgement, para. 564.

⁹⁰⁴ *Kupreškić et al.* Trial Judgement, para. 566.

⁹⁰⁵ *Kupreškić et al.* Trial Judgement, para. 566.

doubt part of customary law'. Since human rights do not necessarily amount to norms of international criminal law, the Chamber did not want to use human rights instruments automatically as a basis for such legal criminal norms.⁹⁰⁶

In principle, the ICC can use human rights law as a source for determining the scope of the clause 'other inhumane acts'. This claim is substantiated by four arguments.

First, the material jurisdiction of the ICC is not limited to the rules of international humanitarian law. Pursuant to Article 21 of the Rome Statute, the Court's first source of law is the Rome Statute together with the EoC and the Rules of Procedure and Evidence. The second source of law consists of applicable treaties and the principles and rules of international law, including the established principles of the international law of conflict. As a third source, the Court can apply general principles of law that it derives from national laws and legal systems of the world. In accordance with the third paragraph of this Article, the Court must apply and interpret the law in a way that is consistent with internationally recognised human rights.⁹⁰⁷

Secondly, 'crimes against humanity are to a great extent predicated upon international human rights law',⁹⁰⁸ and therefore it can be argued that the violation of human rights may be indicative of the seriousness and moral wrongness of certain conduct.⁹⁰⁹

Thirdly, the view that human rights law can be used for determining what acts constitute inhumane acts is further supported by earlier Draft Codes of Offences against the Peace and Security of Mankind prepared by the International Law Commission. In its 1991 Draft Code, the Commission did not use the term 'crimes against humanity' to refer to the acts that were later listed as such in the 1996 Draft Statute and are now enumerated in the Rome Statute.⁹¹⁰ Instead, the Commission referred to these inhumane acts under the article header 'systematic or mass violations of human rights'.⁹¹¹ On occasion, the ICTY referred to this 1991 Draft Code and the congruence between mass violations of human rights and crimes against humanity.⁹¹²

Fourthly, it can be argued that the changes in the chapeau requirements of crimes against humanity also support using human rights law when determining

⁹⁰⁶ *Stakić* Trial Judgement, para. 721. 'Not all human rights violations amount to crimes, and not all crimes amount to crimes against humanity' (Robinson 2001, p. 70).

⁹⁰⁷ The ICC Pre-Trial Chamber has held that 'inhumane acts are to be considered as serious violations of (...) the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute', (*Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 448).

⁹⁰⁸ Cassese 2008, p. 99, as referred to in Anderson 2010, p. 52.

⁹⁰⁹ *Saul* 2008, p. 233.

⁹¹⁰ Jyrkkiö 2011, p. 192.

⁹¹¹ *Draft report of the Commission on the work of its forty-third session, Draft Code of Crimes against the Peace and Security of Mankind*, UN Doc. A/CN.4/L.464/Add.4, see Article 21.

⁹¹² *Kunarac et al.* Trial Judgement, para. 537.

what acts are ‘inhumane’. At its inception, crimes against humanity required a nexus with an armed conflict. Consequently, the standard that was applied to judge the inhumanity of an act used to be rooted in international humanitarian law, the body of law which deals with crimes committed in conflict situations.⁹¹³ However, this nexus requirement was later departed from and as a consequence, the standard against which the inhumanity of an act can be judged is no longer restricted to international humanitarian law.⁹¹⁴ The ECCC Pre-Trial Chamber also considered the question of how to determine what constitutes inhumane conduct and in this context referred to serious violations of international humanitarian law and serious violations of fundamental human rights protected under international law.⁹¹⁵

It would seem, however, that not every human rights violation constitutes an inhumane act.⁹¹⁶ Although all listed crimes against humanity constitute a violation of human rights, the reverse is not the case and there is valid reason for advocating a restrictive approach for the use of human rights in the context of crimes against humanity. As stated, the category of crimes against humanity pertains to the most serious crimes of concern to the international community as a whole: only the most atrocious acts committed as part of a widespread or systematic attack directed against a civilian population will rise to the level of this international crime. In accordance with the theories of international criminalisation discussed above in paragraph 2.2, crimes against humanity have been internationally criminalised because they violate universal values. The acts that are currently listed in the Rome Statute as inhumane acts protect the right to life (murder, extermination and enforced disappearance of persons), bodily integrity (torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity), and liberty (enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law).⁹¹⁷ Pursuant to the definition of ‘other inhumane acts’, only those acts that are of a character (meaning nature and gravity) *similar* to any other act referred to in Article 7 Rome Statute can qualify

⁹¹³ Jyrkkiö 2011, p. 190. See Article 6(c) IMT Charter and Article 5 ICTY Statute. Control Council Law No. 10, however, did not require a nexus with an armed conflict (Cryer *et al.* 2010, p. 234).

⁹¹⁴ Cryer *et al.* 2010, pp. 234–235; and see *Tadić* Decision on Jurisdiction, para. 140. See also Jyrkkiö 2011, pp. 190–191.

⁹¹⁵ Case 002 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, para. 164. As examples of fundamental human rights, the Pre-Trial Chamber lists the right to life, to be free from torture, cruel, inhuman or degrading treatment or punishment, to liberty and security, to be treated with humanity and with respect for the inherent dignity of the human person when deprived of liberty and to a fair trial. See para. 118.

⁹¹⁶ As an illustration, Article 24 UDHR stipulates that ‘everyone has the right to (...) periodic holidays with pay.’ It is difficult to imagine a violation of this right alone amounting to an inhumane act.

⁹¹⁷ The crimes of persecution and apartheid require a link with any of the enumerated inhumane acts, see Elements of Crimes Article 7(1)(h)(4) and Article 7(1)(j)(1)-(2).

as ‘other inhumane acts’. In this sense, the *eiusdem generis* standard limits the extent of the catch-all clause. Therefore, human rights law can be used as a source for determining the scope of other inhumane acts, but only those human rights violations that are of a character similar to listed inhumane acts in Article 7(1) of the Rome Statute (which will especially be the case when they involve violations of the right to life, physical integrity and liberty), and that result in great suffering on the part of the victim, or serious injury to their body or to their mental or physical health, will qualify as other inhumane acts. As noted by the ICTR Trial Chamber in *Kayishema*, this will have to be determined on a case-by-case basis, taking into consideration all the factual circumstances.⁹¹⁸ Standards derived from human rights law can assist in this exercise, especially those human rights norms that prohibit inhumane treatment.^{919, 920}

If the conclusion is that a certain act qualifies as an ‘other inhumane act’, then the next step may be adding this act to the list of inhumane acts as a distinct crime against humanity. As explained (paragraph 4.1), this happened with many acts which initially were not listed as specific inhumane acts: they were qualified as ‘other inhumane acts’ in the case law of the international criminal tribunals and were later codified as specific inhumane acts, for instance in the Rome Statute and the SCSL Statute.

5. CRIMINALISATION AND WAR CRIMES

5.1. INTRODUCTION AND OPTIONS FOR CRIMINALISATION

War crimes are serious violations of the laws and customs of war that give rise to individual criminal responsibility. Conduct in armed conflict is regulated by international humanitarian law, which encompasses *inter alia* the 1907 Hague Regulations Respecting the Laws and Customs of War on Land (annex to Hague Convention IV) and the four 1949 Geneva Conventions with their Additional Protocols.⁹²¹

Traditionally, a distinction is made in international humanitarian law between war crimes committed in international armed conflicts and war crimes committed in non-international armed conflicts. This bifurcated structure was maintained in the Rome Statute: Article 8(2)(a) and (b) deal with international

⁹¹⁸ *Kayishema* Trial Judgement, para. 151.

⁹¹⁹ Such as Article 5 UDHR; Article 7 ICCPR; Article 3 ECHR; Article 5 American Convention on Human Rights; Article 5 African Charter on Human and Peoples’ Rights.

⁹²⁰ See also Article 21(3) Rome Statute: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’.

⁹²¹ Cryer *et al.* 2010, pp. 267 and 269; and Boas, Bischoff & Reid 2009, pp. 214–219.

conflicts; Article 8(2)(c)-(e) deal with internal conflicts. The category of war crimes committed in international armed conflicts encompasses the so-called grave breaches of the Geneva Conventions – the different grave breaches were reproduced verbatim in the Rome Statute – and a list of ‘other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law’. This latter category consists of a mix of serious violations of international humanitarian law codified in Additional Protocol I to the Geneva Conventions and various other sources.⁹²² The category of war crimes committed in internal armed conflicts encompasses serious violations of Article 3 common to the four Geneva Conventions and a list of ‘other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law’. This latter category contains *inter alia* violations of the Hague Regulations and Additional Protocol II to the Geneva Conventions.

Although all war crimes are violations of international humanitarian law, not all violations of international humanitarian law give rise to individual criminal responsibility and amount to war crimes: only the most serious violations of international humanitarian law constitute war crimes under international criminal law.⁹²³ A test for identifying violations of international humanitarian law that amount to war crimes was set out by the ICTY Appeals Chamber in the *Tadić* case. The four-pronged test reads as follows: first, the conduct must constitute a violation of a rule of international humanitarian law. Secondly, this rule must be part of customary international law or applicable treaty law. Thirdly, the violation must be serious, which means the breached rule protects important values and the breach of the rule resulted in grave consequences for the victim. Finally, the violations of the rule must, under customary or conventional law, give rise to individual criminal responsibility.⁹²⁴ When these requirements are met, the violation of international humanitarian law constitutes a war crime.

The *Tadić* criteria, developed in the specific context of the ICTY, inspired the drafters of the Rome Statute and were used both by the 1995 Ad Hoc Committee as well as by the delegates during the Rome Conference in the process of selecting war crimes for the Statute.⁹²⁵ Indeed, a similar set of criteria can be distilled from the negotiations of the Rome Statute. The 1995 Ad Hoc Committee, which was established by the UN General Assembly to review the work done by the ILC, made a selection of war crimes from several sources of international humanitarian law. This selection process was influenced by considerations regarding the concepts of ‘seriousness’ (how to determine which violations of international humanitarian law are considered serious enough to warrant inclusion as a war crime in the Rome

⁹²² Cryer *et al.* 2010, p. 275; and Von Hebel & Robinson 1999, p. 106.

⁹²³ Cryer *et al.* 2010, p. 271; Cassese 2008, p. 85; and *Tadić* Decision on Jurisdiction, para. 94.

⁹²⁴ *Tadić* Decision on Jurisdiction, para. 94.

⁹²⁵ Cryer *et al.* 2010, p. 272. See e.g. Summary record of the 2nd plenary meeting held during the Rome Conference (15 June 1998), UN Doc. A/CONF.183/SR.2, 20 November 1998, para. 44.

Statute?) and ‘individual criminal responsibility’ (which violations of international humanitarian law give rise to individual criminal responsibility under customary international law?).⁹²⁶ These issues were echoed in the negotiations that took place during the Rome Conference with regard to certain crimes. The adjective ‘serious’, however, did not play a prominent role during any stage of the creation of the Rome Statute. In general, delegates agreed relatively easily on the seriousness of violations of international humanitarian law and only on a few occasions were proposed norms not included because they were deemed not serious enough (see *infra*).⁹²⁷ The second question, namely whether a particular violation of a rule of international humanitarian law gives rise to individual criminal responsibility under customary international law, did lead to some discussion in Rome. This is evidenced by the negotiations on the inclusion of the use of child soldiers in the list of war crimes.⁹²⁸ This particular crime was not included as a war crime in the Draft Statute of the ILC, but was added in the 1996 Draft Statute prepared by the Preparatory Committee.⁹²⁹ During the negotiations which took place in Rome, the United States delegates expressed the view that the use of children in hostilities was at that time not a crime under customary international law and that it was in fact more a human rights norm than a criminal law provision.⁹³⁰ The majority disagreed⁹³¹ and argued that the prohibition on child soldiering was not only regulated in many human rights instruments, including the Convention for the Rights of the Child and the African Charter on Rights and Welfare of the Child, but also in international humanitarian law, namely in the two Additional Protocols to the Geneva Conventions.⁹³² The majority argued that inclusion of this crime as a war crime was justified because the prohibition was virtually universally accepted and because the use of child soldiers is a serious violation of a rule of international humanitarian law which protects important values⁹³³ and warrants disapprobation and criminalisation.⁹³⁴

⁹²⁶ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, GAOR 50th Session Supplement No. 22 (A/50/22), 1995, paras. 72–76; and Von Hebel & Robinson 1999, p. 104.

⁹²⁷ Von Hebel & Robinson 1999, p. 104.

⁹²⁸ This crime in fact encompasses two distinct crimes: the war crime of conscripting or enlisting children into armed forces and the war crime of using children to participate actively in hostilities.

⁹²⁹ Bassiouni 2005(II), p. 91; and M. Bothe, ‘War Crimes’, in: A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: a commentary (Vol. I)*, Oxford: OUP 2002, p. 416.

⁹³⁰ Von Hebel & Robinson 1999, p. 117; and Summary record of the 4th meeting held during the Rome Conference (17 June 1998), UN Doc. A/CONF.183/C.1/SR.4, 20 November 1998, para. 54.

⁹³¹ Summary record of the 4th meeting held during the Rome Conference (17 June 1998), UN Doc. A/CONF.183/C.1/SR.4, 20 November 1998, para. 39.

⁹³² See Article 77(2) Additional Protocol I and Article 4(3)(c) Additional Protocol II.

⁹³³ Note the similarity to the *Tadić* test.

⁹³⁴ Cryer *et al.* 2010, pp. 309–310; Cottier 2008, margin no. 227; and Von Hebel & Robinson 1999, p. 117.

It follows from the (drafting history of the) Rome Statute that, in order for conduct to be criminalised as a war crime in the Rome Statute, that conduct must constitute a serious violation of a rule of international humanitarian law which is part of customary international law and which gives rise to individual criminal responsibility under international criminal law.⁹³⁵ There are two ways in which an act can be criminalised as a war crime: first, it is possible that this act is subsumed under a war crime that is listed in the Rome Statute (e.g. torture, inhuman treatment or outrages upon personal dignity). Secondly, it is possible that this act is not covered by any listed war crime. If this is the case, the question may be asked whether this act ought to be included in the Rome Statute as a 'new', distinct war crime, which would necessitate amendment of the Rome Statute.⁹³⁶ This results in the following overview:

1. The conduct is subsumed under serious violations of customary international law that are listed in the Rome Statute. In other words, it is termed a war crime in the Rome Statute; or
2. The conduct amounts to a war crime which is not codified in the Rome Statute:
 - a. The conduct is considered to be a breach of a rule of customary international humanitarian law;
 - b. The violation can be qualified as 'serious'; and
 - c. The breach gives rise to individual criminal responsibility under customary international law.

It is generally acknowledged that the case law of the *ad hoc* tribunals ought not to be transferred mechanically to the sphere of the ICC.⁹³⁷ Nevertheless, there are several reasons for basing the set of sub-criteria under step 2 on the *Tadić* test for identifying war crimes. First, these criteria assisted the drafters of the Rome Statute in making a selection of war crimes to be included in the statute. In addition, the relevance of this particular test is also evidenced by the fact that it was applied by the SCSL when determining whether the use of child soldiers was a crime under customary international law.⁹³⁸ Moreover, several authors have affirmed that, irrespective of the differences between the Rome Statute and the ICTY Statute,⁹³⁹ the *Tadić* criteria can be used to identify war crimes which have

⁹³⁵ See e.g. Article 8(2)(b) concerning 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'.

⁹³⁶ Jurisdiction of the ICC over a particular offence can only be activated by inclusion in the Rome Statute (Article 22(1) Rome Statute and paragraph 3.3 *supra*).

⁹³⁷ G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', *Journal of International Criminal Justice* 2007–5, pp. 961–962; and *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 508 (see *infra*).

⁹³⁸ CDF Decision on Lack of Jurisdiction Child Recruitment, paras. 25–53.

⁹³⁹ The lists of war crimes in the statutes of the ICTY and ICTR are not exhaustive; whereas the list in the Rome Statute, currently containing 53 offences, is. These 53 offences include the three

not (yet) been codified in the Rome Statute.⁹⁴⁰ If criterion 2 is fulfilled, this means that the conduct in question is criminalised as a war crime under customary international law. However, because it is not included in the Rome Statute, this war crime, irrespective of its customary status, falls outside the jurisdiction of the ICC. To be charged before and adjudicated by the ICC, the war crime will have to be included in the Rome Statute.

In the following paragraphs, the different steps will be elaborated, but first the importance of customary international law in the context of the Rome Statute will have to be assessed.

5.2. PRELIMINARY REMARK: QUALIFYING THE IMPORTANCE OF CUSTOMARY INTERNATIONAL LAW

The test set out above corresponds with the initial goal of the drafters of the Rome Statute, that is: including in the Rome Statute only those crimes that are recognised as such under customary international law. This was necessary in order to reach consensus and have as many states as possible adopt the Rome Statute. States had only two options: opt in or opt out – making reservations to provisions of the Statute was not allowed.⁹⁴¹ Therefore, limiting the scope of the Statute to customary international law was believed to contribute to general agreement among delegates.⁹⁴² For that reason, the status of a crime under customary international law was of great importance during the negotiation and drafting process of the Rome Statute. Now the Statute has been promulgated, this is no longer the case. The Rome Statute is a treaty and is binding only to the states

war crimes that were added to Article 8(2)(e) as a result of the 2010 Review Conference (see Resolution 5 of the Review Conference, 12th plenary meeting, 10 June 2010).

⁹⁴⁰ Cryer *et al.* 2010, p. 275; and Shaw 2008, p. 436.

⁹⁴¹ See Article 120 Rome Statute. However, see also Article 124 Rome Statute ('a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory').

⁹⁴² In the end, however, at some points at least, the Rome Statute turned out to be broader than customary international law. Not all war crimes codified in the Rome Statute, for example, are considered to be part of customary international law. According to Cassese, this follows from the sentence 'within the established framework of international law', which is part of the chapeau of Article 8(2)(b) and 8(2)(e). Cassese stated that this means that for each case concerning Article 8(2)(b) and 8(2)(e) crimes, the Court will have to verify whether or not the indicted war crime is also part of customary international law (Cassese 2008, p. 95). This will not, however be an issue when the accused are subjects of states parties to the Rome Statute: for those parties, the Rome Statute is binding, irrespective of its (non)conformity with customary international law. (Cottier 2008 margin nos. 19–20 and 33). The war crimes listed in Article 8(2)(a) en 8(2)(c) are grave breaches and serious violations of Common Article 3 and those *are* regarded as being part of customary international law.

party to it.⁹⁴³ In accordance with Article 121 Rome Statute it can be amended in any way, as long as at least a two-thirds majority of states parties agree to adopt the amendment. As regards those states parties that do not wish to adopt the amendment, the Court will not exercise jurisdiction regarding the amended crime when it is committed by nationals of those states parties or on those parties' territories (Article 121(5) Rome Statute). This underlines that the Rome Statute, as stated by Werle, is an independent system of criminal law in itself.⁹⁴⁴ This was affirmed by the ICC Pre-Trial Chamber I in the Decision on the confirmation of charges against Katanga. The Chamber discussed the validity of the liability theory of co-perpetration of a crime through another person. In the *Stakić* case, the ICTY Appeals Chamber had rejected this mode of liability by stating that it did not form part of customary international law. The ICC Pre-Trial Chamber held that this did not preclude the validity of this mode of liability under the Rome Statute by stating that:

‘under article 21(l)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the “joint commission through another person” is not relevant for this Court. This is a good example of the need not to transfer the ad hoc tribunals’ case law mechanically to the system of the Court.’⁹⁴⁵

So the ICTY *Tadić* test described in the previous paragraph and elaborated on in the following paragraphs (that particular conduct is considered to be a serious violation of a rule of customary international humanitarian law that gives rise to individual criminal responsibility under customary international law) would be the ideal situation, but contains no hard requirements. This test is not *condicio sine qua non* for conduct to be included in the Rome Statute as a war crime. As long as a two-thirds majority of states parties agree, virtually any act could be included as a war crime – or crime against humanity, or act of genocide – in the Rome Statute. Nevertheless, an act that is recognised as a (war) crime under customary international law will greatly add to the authority of that prohibition and will increase the likelihood that all states parties to the Rome Statute accept

⁹⁴³ Note that the ICC will also be able to exercise jurisdiction if a non-state party accepts its jurisdiction, and if a situation was referred to the Prosecutor by the United Nations Security Council. In those cases the Court may exercise its jurisdiction irrespective of the nationality of the accused or the location of the crime (see e.g. Security Council Resolution referring the situation in Libya to the ICC Prosecutor, S/RES/1970 (2011), 26 February 2011). See Articles 12 and 13 Rome Statute.

⁹⁴⁴ G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, *Journal of International Criminal Justice* 2007–5, pp. 961–962.

⁹⁴⁵ *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 508.

the amendment. In this sense, the status of a crime under customary international law is of importance.

5.3. THE CRIME IS MATERIALLY DISTINCT FROM SERIOUS VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW LISTED IN THE ROME STATUTE

All war crimes listed in the Rome Statute are regarded as serious violations of rules of international humanitarian law. Therefore, when asking the question of whether certain conduct constitutes a serious violation of international humanitarian law, the first logical step is to verify whether this conduct is included in serious violations of customary international law listed in Article 8 Rome Statute. This is done by comparing the elements of the respective crimes. During the comparative exercise, the *lex stricta* norm must be taken into consideration: pursuant to Article 22(2) Rome Statute, definitions of crimes must be strictly construed and may not be extended by analogy. If it turns out that the conduct in question is subsumed under one of the crimes listed in Article 8 Rome Statute, it means that the conduct is already criminalised. The conduct could be caught, for example, by a specific war crime (such as wilful killing), or by one of the more general war crimes provisions (such as ‘outrages upon personal dignity’). When the conduct is covered by one or more of the listed war crimes, yet is nevertheless materially distinct from these crimes, the question may be asked whether that conduct could be added to the list of war crimes as a specific war crime. The following three criteria assist in addressing this issue.

5.4. THE CONDUCT AMOUNTS TO A WAR CRIME WHICH IS NOT CODIFIED IN THE ROME STATUTE

5.4.1. *The conduct is a breach of a rule of customary international humanitarian law*

International humanitarian law is the field of law that regulates the conduct of hostilities, also referred to as the *ius in bello*.⁹⁴⁶ International humanitarian law seeks to protect the parties to a conflict and contains rules on the treatment of prisoners of war, civilians, combatants *hors de combat*, but also on the means and methods of warfare. This particular branch of law dates back to the second half of the nineteenth century, to the work of the Swiss banker Henry Dunant,

⁹⁴⁶ As opposed to the *ius ad bellum* which refers to the field of law that governs the resort to war (Shaw 2008, p. 1167).

who founded the Red Cross. Dunant had witnessed the horrors of the aftermath of the 1859 battle of Solferino and was determined to improve the care for wounded soldiers in times of war. As a result of his effort, in 1864, the first Geneva Convention for the Amelioration of the Condition of the Wounded in the Field was adopted.⁹⁴⁷ In the following decades, especially just before and right after the *fin de siècle*, more treaties followed which codified the laws of war, most notably the 1907 Hague Conventions.⁹⁴⁸ After the Second World War, four new Geneva Conventions followed and in the 1970s, their two Additional Protocols were promulgated.

As regards the question of whether a rule of international humanitarian law is part of customary international law, the following can be remarked. The 1907 Hague Regulations Respecting the Laws and Customs of War on Land (annex to Hague Convention IV) and the four 1949 Geneva Conventions are regarded as part of customary international law. The same cannot be unequivocally said of the two Additional Protocols. Although the majority of the delegates involved in the drafting process of the Rome Statute were of the opinion that both protocols are part of customary international law, several other delegates believed that only parts of these protocols can be seen as customary law.⁹⁴⁹ Most relevant to this issue are two studies undertaken by the International Committee of the Red Cross (ICRC) in 2005 and 2011. In these reports, the ICRC drew on empirical data on state practice and opinions collected from almost 50 countries to identify the rules of international humanitarian law that are currently part of customary international law.⁹⁵⁰ These studies can serve as a guide. Indeed, the studies are also used by international courts and tribunals in determining the customary law status of prohibitions.⁹⁵¹

After it has been verified that conduct is laid down in one of the rules of customary international humanitarian law, the seriousness of a violation of that rule must be assessed.

5.4.2. *The violation can be qualified as 'serious'*

The Appeals Chamber in the *Tadić* case held that a violation of a rule of international humanitarian law can be qualified as 'serious' when (i) the violated rule protects important values and (ii) the breach of the rule results in grave

⁹⁴⁷ This treaty formed the basis of the current first Geneva Convention.

⁹⁴⁸ Shaw 2008, p. 1168.

⁹⁴⁹ Cryer *et al.* 2010, pp. 267 and 269; and Von Hebel & Robinson 1999, p. 104. The provisions of the Additional Protocols that are not considered part of customary international law are still binding law for the states that are party to these treaties (Shaw 2008, pp. 1168 and 1170).

⁹⁵⁰ J.M. Heckaerts & L. Doswald-Beck, *Customary International Humanitarian Law. Volume I and II*, Cambridge: CUP 2005; and F. Kalshoven & L. Zegveld, *Constraints on the waging of war: an introduction to international humanitarian law*, Cambridge: CUP 2011.

⁹⁵¹ Meron 2005, p. 833. E.g. *Hadžihasanović* Appeal of Decision on Acquittal, 11 March 2005, paras. 29–30; and RUF Trial Judgement, para. 216.

consequences for the victim.⁹⁵² As an example of a violation of a rule of customary international humanitarian law that does not fulfil the seriousness requirement, the Appeals Chamber referred to the theft of a loaf of bread in an occupied village by a combatant.⁹⁵³

The *Tadić* test was applied by the SCSL in the context of the crime of child soldiering. To determine whether a rule of international humanitarian law protects important values, the Appeals Chamber examined Additional Protocol II and concluded that the protection of children is one of the fundamental guarantees contained in this document. In addition, the Appeals Chamber referred to a UN Security Council Resolution in which the recruitment and use of child soldiers was condemned and labelled an ‘inhumane and abhorrent practice.’⁹⁵⁴

To determine whether the breach of the rule of international humanitarian law resulted in grave consequences for the victim, recourse can be had to the *Krstić* case. As explained in paragraph 4.3.1 *supra*, the ICTY Trial Chamber held that ‘serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’⁹⁵⁵ The SCSL Appeals Chamber has held that recourse can be taken to NGO reports as these documents can provide information on the consequences of the violation of the rule of international humanitarian law for the victim.⁹⁵⁶

5.4.3. *The breach gives rise to individual criminal responsibility under customary international law*

The question of whether the violation of a particular norm gives rise to individual criminal responsibility under customary international law has been discussed in several fora. The factors set out in doctrine and case law mentioned below can assist in answering this question.

The issue of how to determine whether the violation of a norm entails individual criminal responsibility under customary international law was addressed in the context of the *Tadić* case. When faced with an appeal lodged by the defence against a judgement rendered by the Trial Chamber in which the defence’s motion challenging the jurisdiction of the Tribunal was denied, the

⁹⁵² See also *Kunarac et al.* Appeal Judgement, para. 66.

⁹⁵³ This particular rule of customary international humanitarian law is enshrined in Article 46(1) of the Hague Regulations, see *Tadić* Decision on Jurisdiction, para. 94(iii). Another example is the prohibition of ‘unjustifiable delay in the repatriation of prisoners of war or civilians’. Even though this norm is classified as a grave breach in Additional Protocol I, it was not considered to be serious enough to justify inclusion as a war crime in the Rome Statute (Von Hebel & Robinson 1999, p. 104).

⁹⁵⁴ CDF Decision on Lack of Jurisdiction Child Recruitment, para. 28.

⁹⁵⁵ *Krstić* Trial Judgement, para. 513.

⁹⁵⁶ CDF Decision on Lack of Jurisdiction Child Recruitment, para. 29.

ICTY Appeals Chamber had to address the international criminality of atrocities committed in internal armed conflicts. In this regard, the Appeals Chamber referred to the factors the Nuremberg Tribunal listed when determining whether a prohibition incurs individual criminal responsibility. If a rule of warfare is clearly and unequivocally recognised in international law and there is state practice which indicates an intention to criminalise violations of this rule, individuals can be held criminally responsible for such violations. The Nuremberg Tribunal considered that state practice indicating an intention to criminalise a prohibition includes punishment of violations by national courts and military tribunals and statements by government officials and international organisations.⁹⁵⁷ The ICTY Appeals Chamber then proceeded to apply these criteria to serious breaches of customary rules and principles applicable to internal conflicts. Specifically with regard to international humanitarian law, the ICTY Appeals Chamber held that evidence of state practice indicating an intention to criminalise a prohibition can be derived from 'official pronouncements of States, military manuals and judicial decisions.'⁹⁵⁸ Summing up examples of prosecutions for violations of rules of international humanitarian law committed in internal conflicts, listing national laws and military manuals criminalising violations of norms codified in the Geneva Conventions, and bringing to mind two Security Council Resolutions, the Appeals Chamber concluded that violations of rules of international humanitarian law concerning non-international armed conflicts undoubtedly entail individual criminal responsibility.⁹⁵⁹

The matter of how to determine whether a violation of international humanitarian law amounts to a war crime has also been addressed in doctrine. Meron, for example, listed several factors that can indicate that international law creates individual criminal responsibility for the violations of a rule of international humanitarian law. These factors include considerations such as whether the prohibition addresses individuals and whether it is unequivocal in character. Other relevant factors in determining whether an act entails individual criminal responsibility are the gravity of the act and the interests of the international community.⁹⁶⁰

Cassese, finally, also addressed the issue and to this end, distinguished three situations. First, the fact that a violation has been criminalised can be evidenced by legal precedent, i.e. when a breach of international humanitarian law has been consistently classified as a war crime by national or international courts. Secondly, a violation is criminalised when it is classified as a war crime in a statute of an international tribunal (this possibility was discussed in paragraph 5.3), although this does not mean the violation also amounts to a war crime outside of

⁹⁵⁷ *Tadić* Decision on Jurisdiction, para. 128.

⁹⁵⁸ *Tadić* Decision on Jurisdiction, para. 99.

⁹⁵⁹ *Tadić* Decision on Jurisdiction, paras. 129–134.

⁹⁶⁰ Meron 1995, p. 562 (Meron's article focuses on the international criminalisation of atrocities committed in internal conflicts).

the context of the statute. A third possibility is that neither case law nor statutes of international tribunals make mention of the violation. Cassese analysed case law of international courts and tribunals (*inter alia* Tadić) and concluded that in those cases, the following sources can be examined:

‘(i) military manuals; (ii) the national legislation of states belonging to the major legal systems of the world; or, if these elements are lacking, (iii) the general principles of criminal justice common to nations of the world, as set out in international instruments, acts, resolutions and the like; and (iv) the legislation and judicial practice of the state to which the accused belongs or on whose territory the crime has allegedly been committed.’⁹⁶¹

If all criteria are fulfilled – so if particular conduct constitutes a serious breach of a rule of customary international humanitarian law that gives rise the individual criminal responsibility under customary international law and if this conduct is materially distinct from listed war crimes – there may be a legitimate reason to include this conduct in the Rome Statute’s list of war crimes.

6. CRIMINALISATION AND GENOCIDE

6.1. INTRODUCTION

The purpose of the prohibition of genocide is to protect specific groups from (attempted) extermination.⁹⁶² The act of genocide was first defined in the 1948 Genocide Convention. The genocide provision contains an exhaustive list of specified acts which amount to genocide when they are committed with the required genocidal intent. The definition of genocide laid down in the Genocide Convention is considered to be part of customary international law, and, what is more, has reached the status of *ius cogens*.⁹⁶³ The definition of genocide included in the Rome Statute was taken verbatim from the 1948 Genocide Convention, rendering the discussions before and during the Rome Conference relatively simple. Any proposals to amend the definition were rejected on the basis that alternations would devalue the customary law status of the definition.⁹⁶⁴

⁹⁶¹ Cassese 2008, p. 85.

⁹⁶² *Akayesu* Trial Judgement, para. 469.

⁹⁶³ *Inter alia* Cassese, Gaeta & Jones 2002, pp. 337–338. See also *Akayesu* Trial Judgement, para. 495, *Krstić* Trial Judgement, para. 541; and Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 ICJ 1, 28 May 1951.

⁹⁶⁴ Von Hebel & Robinson 1999, pp. 89–90 and 123.

Article 6 Rome Statute exhaustively lists the acts that amount to genocide when they are committed with genocidal intent, that is with 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.

These five acts have in common that they can all result in the (partial) destruction of a group of people – which is also reflected by the specific intent listed in the chapeau (intent to destroy) and the term ‘genocide’ itself, which is a combination of the ancient Greek *genos* (race, tribe) and the Latin suffix *cida* (one who kills/cuts).⁹⁶⁵ What is unique about the genocide definition is that it lists broad, inclusive categories of acts. The expansive nature of the definition allowed the ICTR to bring rape within the scope of genocidal acts.⁹⁶⁶ It has been argued, however, that the genocidal acts are so broad that they ‘fail to adequately specify the actions which are prohibited.’⁹⁶⁷ For example, imposing measures intended to prevent births within a group may encompass such acts as forced sterilisation, sexual mutilation, enforced pregnancy, prohibiting marriages, forced abortion and (indirectly) forced marriages (see Chapter 10). may include acts such as depriving groups of people from food, shelter or medication.⁹⁶⁸

6.2. EXPANDING THE DEFINITION OF GENOCIDE?

In the previous paragraphs, with regard to the other two core crimes – crimes against humanity and war crimes – the question was raised as to under which circumstances particular conduct could be included as a separate crime in the provisions pertaining to these crimes. Can the same question be posed in relation to the crime of genocide? Is it possible to amend the definition of genocide, to expand it by adding additional genocidal acts? And if so, are there any criteria that could guide this decision-making process? In order to answer these questions, it is important to first delve into the history of the criminalisation of genocide.

⁹⁶⁵ The term ‘genocide’ was coined by Raphaël Lemkin, see R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, Washington, D.C.: Carnegie Endowment for International Peace 1944, p. 79.

⁹⁶⁶ *Akayesu* Trial Judgement, para. 731.

⁹⁶⁷ M. Lippman, ‘Genocide’, in: M.C. Bassiouni (ed.), *International criminal law. Volume I: Sources, subjects and contents*, Leiden: Martinus Nijhoff Publishers 2008, p. 418.

⁹⁶⁸ See *Akayesu* Trial Judgement paras. 502–507; and Boas, Bischoff & Reid 2009, pp. 183–188.

As stated, the current definition of genocide under customary international law was drafted in the 1940s in reaction to the Second World War: the drafters explicitly used to atrocities committed upon the Jews during the Holocaust as guidance in developing the definition of genocide.⁹⁶⁹ It could be argued, therefore, that the definition of genocide is no longer up-to-date⁹⁷⁰ and was, perhaps, from the outset too restrictive, in the sense that it was based on the Holocaust. Nevertheless, this definition has become part of customary international law. However, like all law, the definition of genocide is not set in stone and there is no reason to believe this definition might not change over time.⁹⁷¹ Indeed, over the years, there have been proposals concerning reform of the Genocide Convention. There have, for example, been suggestions to change the specific intent requirement, to include more protected groups (such as gender) and to include additional acts of genocide, such as the expulsion of indigenous populations from territories.⁹⁷² Yet these proposals have not resulted in any amendments, which is, perhaps, due to a lack of political will.⁹⁷³

The definition of genocide in the Rome Statute could be amended independently of customary law (see paragraph 3.3), and could even – theoretically at least – act as a catalyst for the amendment of the definition under customary law. But how to assess which acts are eligible for inclusion in the list of genocidal acts? There are no hard criteria that could assist in this matter. But looking at the negotiation history of the Genocide Convention and studying the crime of genocide from a grammatical and a teleological perspective, two standards rise to the surface; one concerning the type of acts that can be classified as genocide, and the other concerning the gravity of such acts.

As regards the type of acts that (may) amount to genocidal acts, it is important to emphasise that genocide, *ultimately*, concerns the (attempted) destruction of groups of people. Indeed, the very term conveys this. As was stated by the UN General Assembly in Resolution 96(I): '(g)enocide is a denial of the right

⁹⁶⁹ See the *travaux préparatoires* of the Genocide Convention (e.g. Basic Principles of a Convention on Genocide (Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948), UN Doc. E/AC.25/7, 7 April 1948). See also D.S. Bettwy, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?', *Notre Dame Journal of International & Comparative Law* 2011, p. 168.

⁹⁷⁰ Cf. De Brouwer 2005, p. 83: 'with the passage of time treaties may need to be amended according to new insights or developments in society.' For a discussion of the weaknesses of the current definition of genocide, relating *inter alia* to the types of protected groups, see Bassiouni 2013, p. 154.

⁹⁷¹ Indeed, definitions of genocide in several national laws demonstrate this: several states have incorporated a broader set of genocidal acts in their domestic laws criminalising genocide, see e.g. Article 607 Spanish Penal Code, which specifically includes sexual assault in the list of genocidal acts. See De Brouwer 2005, pp. 83–84, footnote 246 for more examples.

⁹⁷² See *inter alia* Study of the Question of the Prevention and Punishment of the Crime of Genocide, UN ESCOR, 31st Session, 120, UN Doc. E/CN.4/sub.2/416, 1978.

⁹⁷³ See also C. O'Sullivan, 'Dying for the bonds of marriage', *22 Hastings Women's Law Journal* 2011, p. 290: 'The international community has been reluctant to alter the definition of genocide'.

of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.⁹⁷⁴ Consequently, ‘genocidal acts’ are limited to those acts that could (ultimately) result in the destruction of (a part of) a group of people. ‘Ultimately’ implies that acts resulting in a slow death/destruction also fall within the scope of the crime of genocide. Thus, it follows from *inter alia* the negotiation history of the Genocide Convention that acts linked to so-called biological genocide, i.e. restrictions on birth such as sterilisation and forced abortion,⁹⁷⁵ and intentional HIV/AIDS infection⁹⁷⁶ may also qualify as genocide.

Secondly, as regards the gravity of genocidal acts, the following can be remarked. In general, it is said that there is no hierarchy between the core crimes, but genocide is usually seen as the gravest crime, the crime of crimes.⁹⁷⁷ In the words of ICTY Prosecutor Ostberg ‘in the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation. Indeed, it should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of humankind and which, therefore, justify the appellation of genocide as the “ultimate crime”.’⁹⁷⁸ This implies that only the very worst of acts could qualify as genocide, i.e. those acts resulting in the destruction of a particular group of people.⁹⁷⁹ That genocidal acts are limited to the gravest of acts may also be deduced from the fact that cultural genocide was excluded from the definition. The very first draft of the Genocide Convention contained three categories of genocide: physical, biological and cultural genocide. In the end, acts of cultural genocide – which refer to destruction ‘by brutal means of the specific characteristics of a human group, that is to say, its moral and sociological characteristics’⁹⁸⁰ – were not included in the Genocide Convention, for several reasons, one of them being that cultural genocide was not on a par with physical and biological genocide when it comes to gravity.

Therefore, this author argues that any additional genocidal acts should be added to the definition of genocide in the Rome Statute on the basis of an *eiusdem generis* standard: only those acts that are comparable in gravity and in nature to enumerated genocidal acts are eligible for inclusion in the definition of genocide.

⁹⁷⁴ G.A. Res. 96 (I), UN Doc. A/64/Add.1 (11 December 1946).

⁹⁷⁵ The Secretary-General, *Draft Convention on the Crime of Genocide*, 25, delivered to the Economic and Social Council, UN Doc. E/447 (June 26, 1947).

⁹⁷⁶ See e.g. De Brouwer 2005, p. 81 and S.L. Russel-Brown, ‘Rape as an Act of Genocide’, *Berkeley Journal of International Law* 2003, p. 354.

⁹⁷⁷ *Akayesu* Trial Judgement, para. 470. See also Schabas 2000.

⁹⁷⁸ *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case No. IT-95-18-I, Opening Statement of Eric Ostberg, Prosecutor of the ICTY (Transcript), 27 June 1996, p. 25.

⁹⁷⁹ G.A. Res. 96 (I), UN Doc. A/64/Add.1 (11 December 1946).

⁹⁸⁰ Examples of cultural genocide are prohibiting the use of the language of a group, destroying or preventing the use of libraries, museums, places of worship or other cultural institutions of a group (see Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from 5 April to 10 May 1948, 7 UN ESCOR Supp. (No. 6) at 1, UN Doc. E/794 (1948), p. 14). See also Schabas 2000, pp. 178–205.

7. CONCLUDING REMARKS

The history of international criminal law is, like that of the egregious acts and conflicts that necessitated its creation, a turbulent one. Created and amended in reaction to atrocities committed during various conflicts and continuously put to the test by man's ingenuity when it comes to inflicting harm upon others, the special part of international criminal law has traditionally not been founded on elaborate, crystallised theories. As a result of the *ad hoc* character of bringing conduct within the ambit of international criminal law, the weaving process of international criminalisation bears more resemblance to a patchwork quilt than to a tightly woven coherent carpet.⁹⁸¹ Several authors have tried to retroactively derive criteria from this history marked by lack of systematisation in order to uncover a doctrinal basis for international criminalisation that can be applied in the future. In addition to these theories, the legislative history of the Rome Statute offers insights in the motivations for including specific crimes in the Rome Statute and reasons for not (separately) criminalising certain other acts. The decisions to include certain specific acts in the provisions of crimes against humanity and war crimes in the Rome Statute were the result of negotiations between delegations of more than 160 countries and were in the end based on consensus, rather than a set of strict criteria pertaining to criminalisation. Often, it seems, practical rather than principled arguments were decisive.⁹⁸² These practical considerations, such as the requirement that a new crime is not completely subsumed under existing crimes, in the sense that it is distinct from these crimes, are reflected in the road maps constructed in this chapter.

As has been stated several times, the ICC only has jurisdiction over those crimes codified in the Rome Statute. Therefore, the question of how particular conduct could be criminalised in the Rome Statute in fact demands an answer to the question if and how this conduct can be included in the Statute. In order to address this issue, a distinction must be made between the core crimes: does particular conduct constitute a crime against humanity, a war crime and/or an act of genocide?

To answer these questions, two steps need to be taken. The first step is to verify whether the conduct in question is perhaps included in criminal acts that are already listed in the Rome Statute. The requirement that crimes are legally distinct from each other is especially important with regard to crimes against humanity, as is evidenced by the aspiration of the majority of the drafters of the Rome Statute to include in the provision of crimes against humanity as few duplicitous acts as possible. Although less stringent, the argument against duplicity also applies to war crimes. Even though the drafters of the Rome Statute set out to include as many war crimes under customary international law as possible – as

⁹⁸¹ Compare Ratner 1998, p. 250.

⁹⁸² Although certain crimes, such as forced pregnancy, did lead to highly principled discussions.

a consequence of which many of the serious violations listed in Article 8 Rome Statute overlap – it would hardly be desirable to incorporate new war crimes in the Rome Statute when they are already completely covered by existing war crimes. It would appear that the same logic applies to the crime of genocide. Limiting the number of duplicitous and thus possibly superfluous crimes contributes to the overall coherence and applicability of the Rome Statute and prevents this statute from turning into an unoperationalisable and impenetrable morass of offences. If the conduct in question is included in any of the listed crimes, the conclusion will therefore be that the act is criminal and falls within the jurisdiction of the ICC under the nomenclature of existing offences.

If it has been established that the conduct under consideration does *not* fall within the scope of any of the specific crimes listed in the Rome Statute, *or* if this conduct is caught by an umbrella clause, the second step raises the question of whether this conduct could be included as a distinct crime against humanity, war crime or genocidal act in the Rome Statute. Crimes against humanity require an act to constitute an inhumane act, war crimes require a serious violation of international humanitarian law, and genocide requires an act that could potentially result in the destruction of (part of) a group of people.

Schematically, this results in the following overview.

Crimes against humanity

1. Is the act subsumed under or materially distinct from listed crimes against humanity (is it an *other* inhumane act)?
2. Does this act cause great suffering? and
3. Is the act similar in nature and gravity to listed crimes against humanity (*iusdem generis*)?

War crimes

1. Is the conduct subsumed under serious violations of customary international law that are listed in the Rome Statute? or
2. Does the conduct amount to a war crime which is not codified in the Rome Statute:
 - a. Is the conduct considered to be a breach of a rule of customary international humanitarian law; and
 - b. Can the violation be qualified as ‘serious’; and
 - c. Does the breach give rise to individual criminal responsibility under customary international law?

Genocide

- 1a. Is this act subsumed under listed genocidal acts? or
- 2a. Is the act of such a nature that it may (ultimately) result in the destruction of (part of) a group of people? and
- 2b. Is the gravity of this act comparable to the listed genocidal acts (*eiusdem generis*)?

If the questions listed above are answered positively, there exist valid reasons to include the act in question as a 'new' crime against humanity (e.g. as an 'other inhumane act'), war crime or act of genocide in the Rome Statute. Especially when this particular act has certain prevalence in conflict situations and is likely to reoccur, it stands to reason to consider including it in the Rome Statute. Amending the Rome Statute, however, is something that cannot be done overnight: it will take time and effort.

CHAPTER 6

COMPARING NATIONAL AND INTERNATIONAL CRIMINALISATION

1. INTRODUCTION

In the previous two chapters, criteria for criminalisation on the level of national and international law were discussed. As announced in the General Introduction to this book, the procedure to uncover these principles differs markedly between the two levels. National criminal law has the benefit of being able to draw from a rich tradition of doctrinal discussions concerning the issue of criminalisation. For international criminal law, this is not (yet) the case; rather, acts have been criminalised on an *ad hoc* basis throughout the years.⁹⁸³ Whereas the framework for criminalisation on the level of national law contains a number of clear principles, the same cannot be said for international criminalisation. Due to the specific nature of international criminal law – created, mainly, by diplomats and based on consensus – and the regime of the Rome Statute – limiting the ICC’s jurisdiction to the crimes listed in the Statute – the criminalisation framework presented in Chapter 5 looks more like a road map of criminalisation than a schematic collection of principles.

In this chapter, the two ‘frameworks’ for criminalisation are compared to each other. This is done by applying the national criteria listed in Chapter 4 to the international level. This comparison opens up the possibility of cross-pollination between the two levels: some principles that were uncovered as relevant to criminalisation in national law may also be applicable to international law and vice versa. Such a comparison may prove to be fruitful for criminalisation (doctrine) discussions.

⁹⁸³ This is not to say, of course, that in national jurisdictions such as the Netherlands, conduct is only ever criminalised after thorough examination and consideration of criminalisation theories. Indeed, the news of the day, especially when coupled with the prospect of upcoming elections, may very well result in what may be labelled ‘*ad hoc*’ criminalisation in national law.

2. HARM AND WRONG: A HIGHER THRESHOLD

International criminal law is a special sort of law: it only deals with the worst crimes imaginable. Crimes against humanity are inhumane acts that cause victims great suffering. War crimes are serious violations of the laws applicable in armed conflict. Genocide, the crime of crimes, is aimed at the destruction of a group of people. In other words, it does not get more serious than that. As a consequence, the harm and wrong principles – which are also *condiciones sine quibus non* for criminalisation in international law – have higher thresholds in international criminal law than on the level of national criminal law. Minor harms and minor wrongs will not, and should not, be codified in the Rome Statute.

In addition to the harm principle that is invoked in national criminalisation debates, there also exists a so-called international harm principle. This principle was discussed in Chapter 5 as part of May's normative account of international criminalisation. May uses the 'international harm principle' as a moral justification for the legitimacy of international criminalisation of and prosecutions for crimes against humanity. This principle implies that group-based crimes violate a strong interest of the international community and in some cases even humanity as a whole. As a result, this conduct is raised to the status of an international crime. The international harm principle therefore mainly concerns the chapeau elements of crimes against humanity, war crimes and genocide.

3. PROPORTIONALITY AND EXTERNAL SUBSIDIARITY: SIDE-LINED

Proportionality and external subsidiarity carry less weight in criminalisation decisions in international criminal law than on the national level. They are by-passed by the high harm and wrong threshold, or, perhaps more accurately: proportionality and subsidiarity are *inherent* in the requirements of severe harm and wrong.

This requires some illumination. The quest for criteria for criminalisation presented in Chapter 5 is split into three parts: one part concerns crimes against humanity, one concerns war crimes and the last part focuses on genocide. The reason for discussing each crime separately is that each core crime has its own criminalisation checklist: the crimes against humanity provision requires an inhumane act that causes serious suffering and that is comparable to listed crimes against humanity; war crimes require a serious breach of a rule of customary international humanitarian law that gives rise to individual criminal responsibility under customary international law; and genocide requires an act that could cause the destruction of (part of) a group of people and that was committed with specific intent. So each core crime has its own list of characteristics that must be fulfilled in order for an act to be criminalised as such. One of the

characteristics that all core crimes share is a requirement of grave harm. This high harm threshold essentially disables the proportionality principle. It is reiterated that the prospective proportionality principle serves the goal of assessing whether the harm and wrong caused by a certain act are severe enough to justify the criminalisation of that act. Pursuant to the characteristics of the core crimes, only very severe forms of harm will fall within the ambit of international criminal law. Only the most severe acts can qualify as crimes against humanity, war crimes and genocide. In other words: when an act qualifies as one of the core crimes, it will be deemed so severe, so serious that the use of international criminal law will be justified. Prospective proportionality will therefore not be directly relevant to what may be termed ‘intra-core crime criminalisation’ – that is criminalisation of conduct *within* the three distinct regimes of crimes against humanity, war crimes and genocide.^{984, 985}

The principle of external subsidiarity is side-lined in a similar manner: any act that falls within the ambit of the core crimes codified in the Rome Statute can be considered to be so reprehensible that it requires the condemnatory response of international criminal law. In addition, there are no real alternatives to international criminal law (yet). On the level of national law, there are alternatives such as tax law, tort law and administrative law. But there is no international tort law, for example, that could (or should) deal with crimes against humanity. Currently, the only alternative to international criminal law is restorative justice, e.g. in the form of a truth and reconciliation commission. Especially in situations of mass victimisation, restorative justice may be a suitable tool to provide reparation,⁹⁸⁶ but in general it can be argued that international crimes are so grave that they (also) require the condemnatory response of criminal law. Especially the so-called ‘big fish’ are best dealt with through criminal law. Restorative justice approaches do not form an impediment to criminalisation of conduct on the international level.

4. INTERNAL SUBSIDIARITY: EQUALLY IMPORTANT

As was explained in Chapter 4, the principle of subsidiarity has two different components: one refers to alternatives other than criminal law, the other to alternatives within the field of criminal law (i.e. alternatives to separate

⁹⁸⁴ When it comes to adding new *core* crimes to the Rome Statute, prospective proportionality will (ideally) play a role.

⁹⁸⁵ Obviously, *retrospective* proportionality will be of importance during the sentencing stage: the punishment must fit the crime.

⁹⁸⁶ See e.g. R. Letschert, R. Haveman, A. de Brouwer & A. Pemberton, *Victimological Approaches to International Crimes: Africa*, Cambridge/Antwerp/Portland: Intersentia 2011, pp. 59–63 and 145 *ff.*

criminalisation). On the level of international criminal law, external subsidiarity carries little weight; internal subsidiarity, on the other hand, has proven to be particularly relevant in the form of what has been termed ‘material distinctiveness’ in Chapter 5.

The criterion of material distinctiveness surfaced during the analysis of the drafting history of the Rome Statute. When discussing the crime of sexual slavery, delegates debated the differences between sexual slavery and enslavement on the one hand and sexual slavery and enforced prostitution on the other hand. Material distinctiveness between different crimes arose as a means to avoid repetition or overlap in the Rome Statute. In this way, the requirement that criminal offences are materially distinct from each other contributes to the internal coherence and consistency of the Rome Statute; an aim that is also relevant to national criminal law. This requirement is subsumed under the internal subsidiarity criterion. More specifically: material distinctiveness is the test that is used to apply the internal subsidiarity criterion.

The law ought to be clear and it should be consistent. Civilians should be able to understand which acts are criminal and which acts are not, so that they may adjust their behaviour accordingly. One way to keep the law clear and consistent is to limit the body of crimes. As an illustration: it is estimated that in total there are more than 10,000 different criminal offences in England and this number is growing steadily: between 2010 and 2011 634 criminal offences were created in England.^{987, 988} There are no figures concerning the number of (new) criminal offences created in the Netherlands, but in this jurisdiction there seems to be a comparable increased willingness to penalise, which might cause a similar proliferation of criminal offences. Obviously, the number of criminal offences does not necessarily convey any information about the extent of criminalisation in a given jurisdiction: one country may, for example, have ten different offences relating to theft; another country may have only one broad offence of theft and yet the latter may very well criminalise more larcenous acts than the former.⁹⁸⁹ An explosion of criminal offences may, however, be detrimental to the clarity of the law: it could cause the criminal law to turn into a dense and obscure collection of crimes. In order to keep the law as clear and consistent as possible and to combat the proliferation of offences, one of the first questions that needs to be answered

⁹⁸⁷ Ashworth & Horder 2013, p. 20. Chalmers & Leverick 2013, pp. 548 and 551 believe that the total number of criminal offences in existence is considerably higher than 10,000, but do not provide any figures in this regard.

⁹⁸⁸ Chalmers & Leverick 2013, p. 551. Chalmers & Leverick counted the number of criminal offences created between 1997–1998 and 2010–2011; they did not count the number of criminal offences that were repealed in these periods. Therefore, there exists no reliable data with regard to this matter for the period 2010–2011, but according to the Ministry of Justice, basing its estimates on the Police National Legal Database, approximately 155 offences were repealed between May 2010 and May 2011.

⁹⁸⁹ Chalmers & Leverick 2013, p. 546.

in a criminalisation debate is whether or not the act is already covered by existing crimes.

This is where the internal component of the subsidiarity principle comes into play. After determining what kind of harm the conduct causes and in which ways it can be qualified as wrongful, the next step ought to be checking how the act differs from existing crimes. What unique harms and wrongs that are not yet subsumed under or covered by existing crimes does the act in question cause? Tadros argues that when we identify criminal wrongs:

‘we ought to be searching for what is intrinsically wrong about a certain form of conduct. A mere tendency to have a particular negative effect is insufficient to mark out a distinct wrong that is worthy of recognition by the creation of a new criminal offense.’⁹⁹⁰

Increasingly often, governments create new legislation for conduct that is already subsumed under existing criminal offences because they believe it is necessary to send out a clear signal that this conduct is unacceptable.⁹⁹¹ Indeed, this point is addressed in the Criminal Offences Gateway Guidance, a mechanism introduced in 2010 to assess government proposals to create or change criminal offences enforceable in England and Wales. This instrument considers the necessity of the creation of a new offence with the help of a lengthy list of factors. One of these factors concerns the question of ‘whether the behaviour is already caught by the existing criminal law’.⁹⁹²

5. EFFECTIVENESS: NO DEAL BREAKER

In criminalisation debates in national jurisdictions, considerations regarding the effectiveness of a criminal offence can carry some weight. It is considered to be important that an offence is prosecutable and enforceable – and with good

⁹⁹⁰ V. Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’, *Louisiana Law Review* (65) 2005, p. 1003.

⁹⁹¹ See for the Netherlands e.g. *Parliamentary Papers II (Lower House) 2010/2011*, 32 840, no. 3, p. 7 (Explanatory Memorandum): ‘A tendency has developed to create separate criminal offences for conduct that is already captured by broad provisions’ (my translation). Also, see the *Parliamentary Papers I and II 2012/2013*, 33 478, concerning the separate criminalisation of the act of financing terrorism. See for England the proposal to hold managers and hospital trusts criminally liable if they manipulate figures on waiting times or death rates (R. Winnett, ‘New criminal offence to stop NHS hospitals “fiddling” figures to be introduced’, *The Telegraph* 15 March 2013, available at <www.telegraph.co.uk/health/healthnews/9934211/New-criminal-offence-to-stop-NHS-hospitals-fiddling-figures-to-be-introduced.html>, last accessed December 2013).

⁹⁹² *Ministry of Justice, Criminal Offences Gateway Guidance (2011)*, available at <www.justice.gov.uk/downloads/legislation/criminal-offences-gateway-guidance.pdf> last accessed December 2013.

reason – although practical objections will never constitute absolute injunctions. The offence of rape, for example, is generally considered to be difficult to prove, but this would never be a decisive argument against criminalising it. International criminal law deals with different forms of criminal behaviour than national criminal law: it deals with mass victimisation and mass criminality.⁹⁹³ In those cases where a particular crime against humanity, war crime or act of genocide would be difficult to prove, this would not constitute a relevant argument against criminalisation of that act. Effectiveness and other practical constraints, therefore, are not relevant factors for assessing the proposal to create a new crime against humanity, war crime or act of genocide. It is important, obviously, that new crimes are defined as clearly as possible: this requirement based on the *lex certa* principle (see *infra*) will also influence the effectiveness of (the prosecution of) a criminal offence.

Considerations regarding effectiveness and the ICC's capacity may, however, come to the fore when it comes to codifying a new *core* crime in the Rome Statute. The 'effectiveness' of the Court was a buzzword during the Rome Conference.⁹⁹⁴ When the Preparatory Committee discussed the inclusion of drug trafficking as a separate core crime in the Rome Statute, some delegates believed that this would undermine the Court's functioning in light of the Court's limited resources and the magnitude of the problem of drug trafficking coupled with the complex investigations that it would require.⁹⁹⁵ At the Rome Conference, drug trafficking was not included in the Statute because no acceptable definition could be agreed upon.⁹⁹⁶ Some delegates also believed that the incorporation of treaty crimes such as drug trafficking would overburden the Court.⁹⁹⁷ Expanding the jurisdiction of the ICC by including more core crimes in the Rome Statute would unquestionably increase the workload of the Court, which would probably have implications for its effectiveness and efficiency.

⁹⁹³ A single inhumane act (e.g. a murder or rape) may also constitute a crime against humanity, but only against the background and as part of a widespread or systematic attack against a civilian population. See *Nahimana et al.* Appeal Judgement, para. 924; *Blaškić* Appeal Judgement, para. 101; and Chapter 8.

⁹⁹⁴ The word 'effective' was recorded 366 times in the *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, UN Doc. A/CONF.183/13 (Vol. II).

⁹⁹⁵ J. Windle, 'Afghanistan, Narcotics and the International Criminal Court: From Port of Spain to Kabul, via Rome', *European Journal of Crime, Criminal Law and Criminal Justice* 2012 (20), pp. 297–314.

⁹⁹⁶ See Annex I(E) to the Rome Statute.

⁹⁹⁷ See also *Summary Records of the Meetings of the Committee of the Whole*, 6th meeting, 18 June 1998, UN Doc. A/CONF.183/13 (Vol. II), para. 99; and *Summary Records of the Meetings of the Committee of the Whole*, 25th meeting, 8 July 1998, UN Doc. A/CONF.183/13 (Vol. II) para. 32 (both available at <http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf>; last accessed December 2013).

6. LEGALITY: EQUALLY IMPORTANT

The principle of legality is interpreted in a more liberal sense under general international law and indeed by the ICTY and ICTR. In the context of the Rome Statute, on the other hand, the principle of legality is applied more strictly.⁹⁹⁸ As was discussed in Chapter 5, the legality principle is entrenched in Articles 22–24 Rome Statute and its four sub-norms have been affirmed by the ICC Pre-Trial Chamber. Legality and especially the *lex certa* sub-norm will consequently also play an important part during the process of codifying new crimes. When formulated as a new, distinct crime against humanity, war crime or act of genocide, the offence must be defined and demarcated as precisely as possible so that criminal liability for violating the crime is foreseeable. The *lex certa* principle, therefore, is as important for international criminalisation as it is for national criminalisation – at least for the purpose of this book.

It is worth noting that the majority of individual criminal offences are not defined in the Rome Statute: their different elements are delineated and described in the Elements of Crimes document. Pursuant to Article 9 Rome Statute, the EoC assist the Court in the interpretation of the different crimes against humanity, war crimes and acts of genocide. The Court can therefore, theoretically, deviate from the definitions codified in the EoC. This could be seen as detracting from the importance of the *lex certa* (and the *lex scripta*) principle, but the EoC are authoritative and it is to be expected that the Court will not lightly depart from them.

7. CONCLUDING REMARKS

After applying the criteria of national criminalisation to the level of international criminal law, it appears that these criteria are not so ‘national’ after all. There are many similarities. The core crimes in the Rome Statute have their own requirements for criminalisation, their own criminalisation frameworks, but all ‘national’ criteria are also, to some extent, present on the international level. Harm, wrong, internal subsidiarity and legality are indispensable criteria on both levels; the higher harm and wrong threshold of international criminal law encompasses the principles of proportionality and external subsidiarity.

As was explained in Chapter 4, the approach to criminalisation taken in this book is one of minimalism. The concept of minimalism has two implications. First, there ought to be very persuasive reasons for using the criminal law to prohibit certain conduct, because in many cases, criminal law must be regarded as the *ultimum remedium*. There exists, in the author’s opinion, a presumption

⁹⁹⁸ Broomhall 2008, margin no. 15.

against criminalisation.⁹⁹⁹ Secondly (and linked to the first observation), the volume of criminal law, i.e. the number of criminal provisions, should preferably not snowball and get out of control. Many acts that cause serious harm have already been criminalised. Before the decision is made to create a new criminal offence, the legislator ought to give heed to the internal subsidiarity principle by assessing the tools that are already available: is the conduct in question caught by existing criminal offences or are the harms and wrongs caused by the conduct so specific, so unique that they are not covered and might require a criminal prohibition of their own? If the act is subsumed under existing criminal offences, then care must be taken that new criminal offences are not created just for the sake of it. There must be compelling reasons to criminalise conduct that is already completely caught by existing offences. Sending out a message that the conduct in question is unacceptable (symbolic function of criminalisation) could be a reason, but this should be assessed on a case-by-case basis.

The criminalisation frameworks constructed in the previous chapters will be applied to the practice of forced marriage in Part IV of this book, but first the relevant legal frameworks will be analysed.

⁹⁹⁹ This presumption against criminalization mainly applies to minor harms and wrongs, not to *mala in se* such as murder and rape (see also Chapter 4 paragraph 3.2.1).

PART III
THE LAW AND
FORCED MARRIAGE

**Legal frameworks concerning forced
marriage in Dutch, English and
International Criminal Law**

CHAPTER 7

DUTCH AND ENGLISH LAW AND FORCED MARRIAGE

1. INTRODUCTION

In this chapter, the Dutch and English legal frameworks relevant to forced marriages are discussed, starting with the former. Forced marriages have been on the Dutch political agenda since 2005 and the wish to tackle this issue has resulted in several legal amendments.¹⁰⁰⁰ In 2009, the Dutch government drafted a broad set of measures for the purpose of combating the problems associated with protracted integration and emancipation of family migrants. These measures include changes in the civil and criminal law pertaining to polygamy, forced marriage, marriages between cousins and raising the minimum age for marriage in private international law.¹⁰⁰¹ Forced marriage was also included in the Public Prosecution Service Instruction on domestic violence and honour related violence, in the sense that the Public Prosecution Service (PPS) will have to act pursuant to this instruction if forced marriage or abandonment are in any way connected with honour-related offences.¹⁰⁰² In 2012, after looking into the possibilities of creating a separate offence of forced marriage, the Dutch government decided against separate criminalisation and instead presented a two-year action plan concerning the prevention of forced marriages, containing a set of preventative measures, mainly aiming at providing information, raising awareness and training professionals.¹⁰⁰³

This chapter first describes the civil law remedies in detail. Next, other remedies that can be used to tackle forced marriages are briefly examined,

¹⁰⁰⁰ See e.g. De Koning & Bartels 2005, p. 6.

¹⁰⁰¹ See *Parliamentary Papers II (Lower House)* 2009/2010, 32 175, no. 1.

¹⁰⁰² *Aanwijzing huiselijk geweld en eengerelateerd geweld* (2010A010), Government Gazette 2010, no. 6462. Note that the PPS is developing a new Instruction concerning violence in dependency relationships (see Letter of the State Secretary of Health Welfare and Sport to the President of the Lower House, 15 July 2013).

¹⁰⁰³ *Parliamentary Papers II (Lower House)* 2011/12, 32 175, no. 35 (Prevention of Forced Marriages 2012–2014). See also *inter alia* the motion of MP Dibi, requesting the Government to criminalise forced marriage (*Parliamentary Papers II (Lower House)* 2006/07, 30 388, no. 11).

including remedies that have their basis in administrative law.¹⁰⁰⁴ The focus is then directed towards criminal law: which crimes are relevant in cases of forced marriage and what amendments did the government propose in response to the call for the creation of a distinct offence of forced marriage?

The second part of this chapter describes the English legal framework in the context of the practice of forced marriage. English courts have quite a long history when it comes to dealing with cases of forced marriage,¹⁰⁰⁵ but the phenomenon entered the political limelight only relatively recently. In the late 1990s, several high profile cases attracted media attention and outraged the British public, causing two Members of Parliament to place the issue of forced marriage on the political agenda.¹⁰⁰⁶ In 2005, the government consulted on the possibility of separately criminalising the practice of forced marriage, but, considering that the arguments against the creation of a specific offence outweighed the arguments in favour, the government decided not to criminalise the practice. Instead, a civil law approach was favoured and in 2007 legislative action was taken with the creation of the Forced Marriage (Civil Protection) Act, but the debate on criminalisation of forced marriage kept resurfacing.¹⁰⁰⁷ After a consultation late 2011, the government decided to create a specific criminal offence of forced marriage, arguing that this would send a strong message that the practice is unacceptable and will not be tolerated.¹⁰⁰⁸ The UK government subsequently signed the Council of Europe Convention on preventing and combating violence against women and domestic violence, which requires parties to criminalise several forms of violence against women, including forced marriage.¹⁰⁰⁹ In May 2013, the Anti-social Behaviour, Crime and Policing Bill (ABCP Bill) was introduced in the House of Commons.¹⁰¹⁰ This Bill proposes to create two offences concerning forced

¹⁰⁰⁴ Immigration law and the Compulsory Education Act 1969 could also be used in case of a (threatened) forced marriage. The Compulsory Education Act 1969 could be useful especially if a forced marriage is coupled with abandonment abroad: violations of the Compulsory Education Act 1969 (which requires parents to make sure their children attend school) are qualified as misdemeanours, punishable with a maximum of one month detention. Immigration laws can be used to terminate the stay in the Netherlands of previously admitted aliens who have been convicted of a criminal offence, depending on the time spent in the Netherlands and the length of their sentence (see *Parliamentary Papers II (Lower House)* 2009/2010, 32 175, no. 2). These options will not be discussed in further detail because these instruments are not specifically aimed at tackling forced marriages (and the Compulsory Education Act 1969 only concerns minors). The same could be said for divorce and annulment. However, the rules concerning annulment in particular are interesting and relevant because they offer guidance in defining coercion in the context of the solemnisation of marriages. This is of importance for the legal comparison with England, as will be demonstrated in Chapter 9.

¹⁰⁰⁵ See e.g. *Scott (Falsely Called Sebright) v. Sebright* (1886) 12 PD 31; and *Hussein (otherwise Blitz) v. Hussein* (1938) P 159.

¹⁰⁰⁶ Gill & Anitha 2011, p. 140.

¹⁰⁰⁷ See Heaton, McCallum & Jogi 2009, p. v.

¹⁰⁰⁸ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 7.

¹⁰⁰⁹ See <www.conventions.coe.int> and Chapter 1.

¹⁰¹⁰ It is expected that the new legislation will be promulgated in 2014 (<www.lawgazette.co.uk/news/forced-marriage-be-criminalised> last accessed January 2014).

marriage and proposes to criminalise the breach of a so-called Forced Marriage Protection Order, which is a civil measure. These measures will be discussed in detail below, but the second part of this chapter will first describe the English law on marriage, the measures available in the Forced Marriage (Civil Protection) Act 2007 and other remedies that can be used to tackle forced marriages. Where applicable, reference will be made to the amendments proposed by the ABCP Bill.

2. THE DUTCH LEGAL LANDSCAPE

2.1. CIVIL LAW: THE LEGAL REQUIREMENTS FOR MARRIAGE

Title 5 of the first Book of the Dutch Civil Code (CivC) deals with the institution of marriage. Marriage is not defined in the CivC but in literature it has been described as the legally recognised joining together of two persons (of the opposite or of the same sex) for the purpose of a (long-)lasting community.¹⁰¹¹ The marriage is officially entered into when the spouses exchange the legally prescribed vows: they must declare in the presence of the Registrar and two to four witnesses that they accept each other as spouses and that they will faithfully fulfil all duties which the law connects to their marital status.¹⁰¹² Accordingly, the only type of marriage that is recognised under Dutch law is the civil marriage; religious weddings are legally invalid (Article 1:30(2) CivC). Indeed, a religious ceremony can only take place *after* the spouses have made apparent to the server of the ceremony that the civil marriage has been solemnised (Article 1:68 CivC). Performing a religious marriage ceremony before a civil marriage has been solemnised is even qualified as a misdemeanour (Article 449 Criminal Code). Because a religious marriage has no legal basis under civil law, civil law remedies (discussed below) offer no relief to forced religious marriages: interruption, annulment and divorce do not apply in case of religious marriages.

Freedom of marriage is not enshrined in the Dutch Constitution. But marriage is a legal act that requires the consent of both parties: the parties must have the will to enter into marriage and they must declare this intention, which is done by exchanging vows in the presence of a Registrar and a number of witnesses. The consent requirement, however, is not positively laid down in the law. Instead, it is formulated negatively: someone who suffers from a mental disorder – whether chronically or temporarily¹⁰¹³ – of such a kind or to such an extent that this person is incapable of determining his will or of grasping the full significance of the

¹⁰¹¹ Vlaardingerbroek *et al.* 2011, p. 104. Asser/De Boer 2010, margin no. 105.

¹⁰¹² Article 1:67(1) CivC. These duties are listed in Article 1:81–92a CivC and include mutual fidelity, assistance and support and providing each other with what is necessary.

¹⁰¹³ E.g. induced by alcohol or drugs (Asser/De Boer 2010, margin no. 113).

marriage vows is not allowed to enter into a marriage (Article 1:32 CivC).¹⁰¹⁴ If a marriage is nevertheless contracted in such a case, it is voidable.¹⁰¹⁵

During the parliamentary debate on the first book of the CivC in the 1960s, some Members of Parliament suggested a provision be included in the Code which would stipulate that the free consent of both spouses is required for a marriage.¹⁰¹⁶ This provision would ensure that consent to a marriage formed under pressure by parents or others could not be qualified as ‘free’ and would thus open the possibility of annulment. The then Minister of Justice decided against inclusion of such a free consent clause, arguing that this could result in the annulment of marriages on the basis of every subjective lack of freedom. Someone might, for example, petition for annulment on the ground that he entered into the marriage because he believed himself to be bound by a promise and the law explicitly states that a promise of marriage does not constitute a ground for legal action (Article 1:49(1) Dutch Civil Code (CivC)), not even after a certificate of formal notice of marriage has been issued by the Registrar. In addition, it was thought that such an ‘easy way out’ would encourage people to enter into marriage rashly.¹⁰¹⁷

Finally, a few words on registered partnerships.¹⁰¹⁸ In Dutch civil law, marriage and registered partnership are equated: the two associations are equal with regard to the legally prescribed conditions for entering into the unions and the rights and obligations that exist between the partners (Article 1:80b CivC).¹⁰¹⁹ There are only a few differences. Most importantly, a registered partnership, as opposed to a marriage, does not create a family relationship between a man and his child, which means the male partner needs to formally acknowledge any children in order to establish legal paternity (Article 1:199(a) CivC).¹⁰²⁰ Secondly, judicial intervention is not required for the termination of a partnership (Article 1:80c

¹⁰¹⁴ A mental disorder in itself therefore does not form an impediment to marriage (P. Vlaarderingbroek, *Burgerlijk Wetboek 1*, Art. 32, Groene Serie Personen- en Familierecht, comment no. 2). A person who is placed under guardianship on the grounds of a mental disorder will also need to acquire the consent of the court or his curator (article 1:38 CivC).

¹⁰¹⁵ See e.g. District Court Utrecht 13 April 2011, ECLI:NL:RBUTR:2011:BQ0539: the court annulled a marriage on the grounds that the woman suffered from advanced dementia and because of this, was not capable of determining her will at the time the marriage was entered into. See also District Court Utrecht 24 November 2010, ECLI:NL:RBUTR:2010:BO6170.

¹⁰¹⁶ Notably, the previous Dutch Civil Code (which was in force until 1970) did include a provision that referred to the ‘free consent of the prospective spouses’ (in Article 85, see Asser/De Boer 2010, margin no. 113).

¹⁰¹⁷ C.J. van Zeben, W.G. Belinfante & O.W. van Ewijk, *Parlementaire geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 1 Personen- en Familierecht*, Deventer: Kluwer 1969, p. 131; Vlaardingerbroek *et al.* 2011, p. 122; and Asser/De Boer 2010, margin no. 113.

¹⁰¹⁸ In Dutch law, these partnerships are referred to as registered (*geregistreerd*) partnerships; in English law, they are referred to as civil partnerships.

¹⁰¹⁹ In criminal law, marriages and partnerships are also equated (see Article 90*octies* Criminal Code).

¹⁰²⁰ A Bill introduced in the Lower House on 29 January 2013 proposes to eliminate this particular distinction between marriage and civil partnerships (*Parliamentary Papers II (Lower House) 2012/2013*, 33 526, no. 2).

CivC).¹⁰²¹ Finally, a religious ceremony can take place before a partnership is officially registered (Article 1:80a CivC). This implies that most of what is said below applies *mutatis mutandis* to forced registered partnerships and where applicable, the relevant sections in the CivC are listed in footnotes. However, by their nature, any forced associations will most commonly be forced *marriages*.^{1022, 1023}

Dutch civil law offers several possibilities in case of a (threatened or intended) forced marriage: interruption, annulment and divorce. These remedies are discussed below.

2.1.1. *Interruption of an intended marriage*

The CivC provides for the possibility of submitting formal objections to an intended marriage resulting in the interruption (*stuiting*) of that marriage, meaning it cannot take place until the interruption has been lifted or withdrawn (Article 1:56 CivC).¹⁰²⁴ A marriage can be interrupted on the basis that the prospective spouses do not fulfil the requirements to enter into a marriage with each other, or on the grounds that the marriage would be a sham marriage. The legal requirements to enter into marriage are listed in Article 1:31–42 CivC and are as follows: minimum age of 18 years, soundness of mind, monogamy, and consent of a third party (such as parents, guardian(s) or the court) is required in case of a minor or someone who is placed under guardianship.¹⁰²⁵ Further, a marriage cannot be contracted between persons who, either by birth or otherwise, have a certain legal familial relationship with each other.¹⁰²⁶ When any of these requirements are not fulfilled, blood relatives in the direct line, brothers, sisters and guardians of one of the parties are authorised to interrupt the intended marriage (Article 1:51 CivC). If the PPS or the Registrar knows of the impediments to the marriage stipulated in Article 1:31, 32, 33, 41 and 42 CivC, they are obliged to interrupt the marriage (Article 1:53(1) and 1:57 CivC). If one

¹⁰²¹ Annulment of a marriage does require judicial intervention.

¹⁰²² Coercion to enter into a registered partnership is very well imaginable, but this would be more related to motives such as greed (e.g. concerning an inheritance) and less to traditional or cultural motivations. To the author's knowledge, there are no known cases of forced registered partnerships.

¹⁰²³ Marriage has a more traditional and symbolic value, whereas registered partnerships are mainly entered into on the basis of practical considerations (see K. Boele-Woelki *et al.*, *Huwelijk of geregistreerd partnerschap? Een evaluatie van de Wet openstelling huwelijk en de Wet geregistreerd partnerschap*, The Hague: WODC 2006, pp. 82, 177 and 200).

¹⁰²⁴ For the possibility of interrupting a registered partnership, see Article 1:80a(5) CivC.

¹⁰²⁵ There are certain exceptions to the maximum age of 18 (Article 1:31 CivC); in some cases a pregnant 16-year-old girl would be allowed to marry. Note, however, that the Marital Coercion (civil law) Bill proposes to amend the civil law in such a way that minors are no longer allowed to marry (see *infra* paragraph 2.1.5).

¹⁰²⁶ More specifically between persons who are relatives in the ascending or descending line or who are brothers, sisters or brothers and sisters. Note that the Marital Coercion (civil law) Bill proposes to widen the circle of prohibited degrees of relation (see *infra* paragraph 2.1.5).

of the parties is married or in a registered partnership with someone else, that other spouse is authorised to interrupt the marriage (Article 1:52 CivC). When a (forced) marriage involves minors or individuals with severe learning disabilities, interruption can be used as a means to prevent the marriage from taking place.

As was noted in Chapter 1, there are cases in which a forced marriage and a sham marriage overlap. Sham marriages are used to gain access to the Netherlands and are not aimed at fulfilling the marital duties which the law attaches to the marital status. As such, they are considered contrary to Dutch public policy and this gives the PPS the authority to interrupt such marriages (Article 1:53(3) CivC). When an intended forced marriage is a 'real' marriage, that is to say when it is aimed at the fulfilment of marital duties, the PPS will not be able to prevent it from taking place by interrupting it. This is curious: a solemnised marriage can be annulled on the grounds that it was entered into as a result of an unlawful serious threat (see *infra* paragraph 2.1.2); but the PPS cannot interrupt an intended marriage on the same grounds. Arguably, the PPS should be able to prevent such marriages from taking place, for example by interrupting them.¹⁰²⁷

2.1.2. Annulment of marriage

According to Dutch family law, marriages are never legally void: unless a marriage is annulled, it is considered to be valid.¹⁰²⁸ Annulment is an *ex tunc* ruling, meaning that the consequence of an annulment is that the marriage never existed.¹⁰²⁹ It is necessary, however, that there was a valid marriage in the first place, annulment is only possible if a valid marriage exists, i.e. a marriage solemnised by the exchange of legally prescribed vows in the presence of an authorised Registrar. Consequently, a union that is only solemnised by a cleric is not a legally valid marriage (a non-existent marriage) and will therefore not have to be annulled – that is to say it *cannot* be annulled.¹⁰³⁰ This can be problematic, seeing as many cultures regard a religious marriage as a real and valid marriage, which would mean the man and woman would be married in the eyes of their culture and/or religion. Pursuant to Dutch law, they would be free to marry someone else; pursuant to their culture and/or religion, they would not and such a marriage could even be regarded as adulterous, which in some countries, such as Iran, is punishable by death.¹⁰³¹

¹⁰²⁷ Note that the Marital Coercion (civil law) Bill proposes to make coercion a ground for interruption (see *infra* paragraph 2.1.5).

¹⁰²⁸ Vlaardingerbroek *et al.* 2011, p. 130.

¹⁰²⁹ Annulment has the same effects as a divorce (which dissolves a marriage from the ruling date and therefore works *ex nunc*) with regard to children of the spouses, the *bona fide* spouse and *bona fide* third parties who acquired certain rights before the marriage was annulled (Article 1:77 CivC).

¹⁰³⁰ Vlaardingerbroek *et al.* 2011, pp. 130–131.

¹⁰³¹ *Appendix to the Proceedings (Lower House)* 2011/12, no. 3114; *Parliamentary Papers II (Lower House)* 2011/12, 32 175, no. 31; and S.W.E. Rutten, 'Het recht van de gescheiden vrouw om

If the marriage was contracted abroad, the legal validity of this union is judged by that country's legal standards, meaning that a religious marriage contracted in a country in which it is regarded as a valid marriage, will also be recognised as valid – and therefore possibly voidable – in the Netherlands (see *infra* paragraph 2.1.4 on private international law).¹⁰³²

The CivC exhaustively lists the grounds on which a marriage can be annulled.¹⁰³³ Three of those grounds can be relevant in the case of forced marriage: an unlawful serious threat, a mistake of identity or a mistake as regards the meaning of the marriage vows, or a sham marriage. The authority to request the annulment of a marriage on grounds of threat or mistake lapses once the spouses have lived together for six months since the threat ceased to exist or the mistake was discovered without such a request having been made in the meantime (Article 1:71(3) CivC).¹⁰³⁴ In those cases, it is assumed that the spouse who erred or who was threatened has accepted the marriage.¹⁰³⁵

The first ground for annulment enshrined in Article 1:71 CivC is referred to as an unlawful serious threat.¹⁰³⁶ As stated, consent is a necessary element of marriage. When consent has been obtained by extreme means, it would be unjust to bind the unwilling spouse to the marital union and its concomitant duties. Therefore, in some very serious cases of vitiated consent, the law offers a way out: pursuant to Article 1:71(1) CivC, a spouse can request the annulment of his marriage when this marriage was contracted under influence of an unlawful serious threat. The parliamentary history of Article 1:71(1) CivC provides two requirements for the threat element: the threat must be unlawful within the meaning of Article 6:162 CivC – pertaining to tort – and the threat must have been such that it could not have been nullified by the person who was threatened unless with very disadvantageous results for that person.¹⁰³⁷ Apart from this, the legislator did not pay more attention to this ground for annulment, probably because, at the time – the late 1960s – it was not much of an issue.¹⁰³⁸ Case law concerning Article 1:71(1) CivC is sparse and from the handful of available judgements it becomes evident that courts have set high standards for the proof of the presence of an unlawful serious threat and are not easily satisfied that such

verlost te worden uit het huwelijk', NJCM-Bulletin (33) 2008–6, pp. 755–769, esp. p. 760.

¹⁰³² Schmidt & Rijken 2005, p. 35.

¹⁰³³ These grounds also apply to the annulment of a registered partnership (Article 1:80a(7) CivC). See for a case concerning the annulment of a registered partnership District Court The Hague 21 February 2011, ECLI:NL:RBSGR:2011:BP7696. The decree of nullity was upheld in appeal (Court of Appeal The Hague, 8 February 2012, ECLI:NL:GHSGR:2012:BV4099).

¹⁰³⁴ Note that the Marital Coercion (civil law) Bill proposes to extend this period from six months to three years (see *infra* paragraph 2.1.5).

¹⁰³⁵ Asser/De Boer 2010, margin no. 175.

¹⁰³⁶ Note that the Marital Coercion (civil law) Bill proposes replace the ground of 'unlawful serious threat' by the broader ground that the marriage came about as a result of coercion (see *infra* paragraph 2.1.5).

¹⁰³⁷ Vlaardingerbroek *et al.* 2011, p. 132.

¹⁰³⁸ Asser/De Boer 2010, margin no. 174.

a threat existed.¹⁰³⁹ Threat is a serious form of coercion. Those forms of coercion that do not amount to threats – i.e. the more subtle forms of pressure often used in cases of forced marriage, such as emotional blackmail and societal pressure – are not covered by the annulment ground of Article 1:71(1) CivC. Threatening someone with a gun,¹⁰⁴⁰ threatening to commit suicide,¹⁰⁴¹ and kidnapping someone, bringing them to another county, locking them in a house and physically assaulting them¹⁰⁴² are examples of acts that would qualify as unlawful serious threats.

A 1998 Supreme Court Judgement deals with the case of a young Dutch woman of Pakistani descent. She requested the annulment of her marriage with a Pakistani man on the grounds that she entered into it as a result of unlawful serious threats. She argues that when she was 20 years old, her father and five other family members severely pressurised her to sign a marriage agreement. Her father threatened to send her to Pakistan where she would be married off anyway: *that* she would be married was an established fact according to her father. This pressure brought her to go ahead with the marriage. After she had signed the marriage agreement, the family pressure did not subside as her father wanted her to cooperate in the procedure of requesting a residence permit for her husband so he could come to the Netherlands. Several months later, the woman moved to a women's shelter. The Court of Appeal held that the circumstances under which the woman signed the marriage agreement did not amount to an unlawful serious threat. The Court based its conclusion that the woman was sufficiently assertive to resist the pressure exerted by her family members on the combination of three facts: the woman's education (higher tertiary education at a vocational school (*hoger beroepsonderwijs*)), the period of time she had lived in the Netherlands (since she was six years old) and the fact that she had fled her family home several months after signing the marriage agreement while the family pressure was still present. The Supreme Court held that the Appeals Court's conclusion that the woman, in light of the circumstances, was capable of resisting the pressure exerted on her – she was able to independently set out a course of action – was not incomprehensible.¹⁰⁴³

It can be argued that, in spite of the Supreme Court's finding, the Appeals Court decision is dubious: it seems questionable to deduce from the facts listed above that the woman could have resisted the pressure. The circumstance that someone has a good education and has lived in the Netherlands for the better

¹⁰³⁹ ACVZ 2005, p. 45.

¹⁰⁴⁰ District Court Groningen 1 July 2008, ECLI:NL:RBGRO:2008:BF0508.

¹⁰⁴¹ District Court The Hague 10 March 1987, *NIPR* 1987, 234. Several decades before, in 1950, the Amsterdam Appeals Court had held that threats to commit suicide made by one of the spouses (in this case the wife) did *not* amount to an unlawful serious threat, meaning that it opined that moral pressure would not be serious enough (Court of Appeal Amsterdam 28 June 1950, *NJ* 1950, 736 and Vlaardingerbroek *et al.* 2011, p. 132).

¹⁰⁴² District Court Arnhem 6 June 1991, *NIPR* 1991, 330.

¹⁰⁴³ Supreme Court 16 October 1998, *NJ* 1999, 6. The marriage could not be annulled, but the road to divorce was still open.

part of his life does not necessarily mean that this person is able to resist pressure exerted by close family members, especially parents, or, in this case, the father in particular. Indeed, as argued by Van Den Eeckhout, the Court could also have reasoned that the pressure exerted by the father must have been very severe for a woman who is well educated and has lived in the Netherlands for the better part of her life to surrender to it.¹⁰⁴⁴

The second ground for annulment enshrined in Article 1:71 CivC is that of mistake. Two forms of mistake are recognised. A spouse may request annulment of his marriage when at the time the marriage was contracted, he was mistaken about the person (*error personae*), that is to say mistaken as to the *identity* of the other spouse; mistakes with regard to the other spouse's character, financial or social status or any personal matters will not qualify. A spouse may also request annulment when he was mistaken about the meaning of the marriage ceremony, i.e. when he did not know that the exchange of marriage vows made in front of the Registrar would result in a marriage between him and the other spouse. This could be the case for example when the spouse in question does not speak Dutch or when his mental faculties were disturbed.¹⁰⁴⁵ As was explained, forced marriages can also come about as a result of fraud/deception, for example when one or both parties are deceived; tricked into marriage as it were.¹⁰⁴⁶ Deception in general is not a ground for annulment.¹⁰⁴⁷ However, if the deception caused any of the mistakes described above, then it will be a ground for annulment. Other forms of deception will not amount to mistake within the meaning of Article 1:71(2) CivC.¹⁰⁴⁸

The third and final ground of annulment that can be relevant in forced marriage cases is enshrined in Article 1:71a CivC. As explained above, the PPS has the authority to interrupt a marriage when it is not aimed at the fulfilment of the marital duties which the law connects to a marriage, but aimed at enabling one of the spouses to acquire legal residence in the Netherlands. When such a marriage has already taken place, the PPS can request the court to annul this sham marriage.^{1049, 1050}

¹⁰⁴⁴ V. Van Den Eeckhout, 'Noot bij: HR (1998–10–16)', *Nemesis* 2000, p. 14.

¹⁰⁴⁵ District Court Alkmaar 20 February 1992, *NJ* 1993, 541. See also District Court Amsterdam 6 June 1979, *NJ* 1980, 182: the Court granted the annulment request of a man with severe learning disabilities.

¹⁰⁴⁶ Schmidt & Rijken 2005, pp. 29–30.

¹⁰⁴⁷ Vlaardingebroek *et al.* 2011, p. 133.

¹⁰⁴⁸ See Court of Appeal 's-Hertogenbosch 13 October 1994, ECLI:NL:GHSHE:1994:AC3237 where a woman tried to have her marriage annulled because she did not realise that her husband married her for the sole reason of gaining admission to the Netherlands. The Court held that this did not constitute mistake: she knew the identity of the man she married and she intended to marry him.

¹⁰⁴⁹ For examples of the annulment of a sham marriage see Court of Appeal The Hague 14 April 2004, ECLI:NL:GHSGR:2004:AO8640.

¹⁰⁵⁰ A sham marriage contracted abroad does not have to be recognised as a valid marriage in the Netherlands (Asser/De Boer 2010, margin no. 164). And if it has not been recognised, it is non-existent pursuant to Dutch law and therefore not voidable. See private international law

2.1.3. Divorce and judicial separation

Divorce is another remedy that can be used to end a forced marriage.¹⁰⁵¹ Divorce, which requires the parties to instruct a lawyer to bring the case before the court, is possible on the ground that the marriage has broken down irretrievably (Article 1:151 CivC), meaning that the continuation of the association has become unbearable and that there exists no prospect of reconciliation. The ground is objective, meaning that the focus is on the *existence* of an irretrievable breakdown; in principle, the causes that resulted in this breakdown, or which of the spouses was responsible, are irrelevant. The criterion is very broad and is relatively easily fulfilled: when both of the spouses petition for divorce, the court will grant it. When one spouse requests a divorce, he will have to motivate and prove the existence of the irretrievable breakdown, unless the other spouse does not put forward a defence.¹⁰⁵² Examples of reasons for an irretrievable breakdown include adultery, the fact that the spouses have lived apart for a considerable period of time, and the fixed opinion of one of the spouses that the marriage has, in his or her view, broken down. The defence of the respondent spouse that the marriage has not irretrievably broken down is generally rejected by the court.¹⁰⁵³

In the case of a forced marriage, divorce has several advantages over annulment: it does not require proof of a threat or mistake at the time the marriage was contracted; nor does the authority to file for divorce lapse after a certain period of time.¹⁰⁵⁴ On the other hand, divorce, as opposed to annulment, does not operate retroactively: a divorce takes effect from the day on which the divorce decree is registered in the Registers of Civil Status onwards (*ex nunc*). For the very reason that the consequence of an annulment is that the marriage never existed, victims of forced marriage might prefer annulment to divorce. Then again, the retroactive effect of annulment can have consequences in the spheres of property and immigration law. After an annulment, the partners no longer have any mutual financial rights or duties (because a community property regime was never created),¹⁰⁵⁵ which could leave the victim of a forced marriage in a disadvantageous position, whereas in case of divorce, the court can determine that one of the spouses has a duty to pay maintenance.¹⁰⁵⁶ If one of the spouses does not have Dutch nationality, and a residence permit was issued on the basis

(paragraph 2.1.4): a sham marriage is contrary to Dutch public policy, which can be used as a bar to recognition (Article 10:32 CivC).

¹⁰⁵¹ Divorce is not possible in case of registered partnership (Article 1:80c CivC). Registered partnerships have to be dissolved at the request of the registered partners. They can also be terminated with mutual consent of the partners (see Article 1:80c CivC).

¹⁰⁵² Vlaardingerbroek *et al.* 2011, pp. 156–157.

¹⁰⁵³ Wortmann & Van Duijvendijk-Brand 2012, pp. 159–160.

¹⁰⁵⁴ ACVZ 2005, p. 46.

¹⁰⁵⁵ Wortmann & Van Duijvendijk-Brand 2012, pp. 159–160.

¹⁰⁵⁶ Article 1:157(1) CivC. In case of annulment, only the *bona fide* spouse, i.e. the spouse who did not know that there was some flaw in the establishment of the marriage, may be entitled to receive maintenance, see Article 1:77(1) CivC.

of the existence of the marriage, annulment of that marriage can result in the withdrawal of the permit.¹⁰⁵⁷

As an alternative to divorce, one or both of the spouses may present to the court a petition for judicial separation on the ground that the marriage has broken down irretrievably (Article 1:169 in conjunction with Article 1:151 CivC). Judicial separation (*a mensa et thoro*) ends the cohabitation between the spouses – although Dutch law no longer recognises a legal duty to cohabit – but it does not alter the legal effects of a marriage.¹⁰⁵⁸

2.1.4. *Private International Law*

As was explained above, a forced marriage can have international dimensions: someone who has Dutch nationality may be forced to marry someone with another nationality, either abroad or in the Netherlands. Likewise, a foreigner may be forced to marry in the Netherlands. Up until 2012, the Marriages (Conflict of Laws) Act¹⁰⁵⁹ dealt with any issues arising from marriages with international dimensions. This act was repealed on 1 January 2012 and replaced with a new, tenth Book in the CivC comprising all Dutch law pertaining to Private International Law.¹⁰⁶⁰

As regards forced marriages, the following rules regarding the celebration and recognition of a marriage with international aspects are important. In accordance with Article 10:28 CivC, a marriage can be celebrated in the Netherlands (1) when each of the prospective spouses fulfils the requirements for entering into a marriage enumerated in Article 1:31–42 CivC (see paragraph 2.1) and when one of them either has Dutch nationality or is habitually resident in the Netherlands; or (2) when each of the intending spouses fulfils the requirements for entering into a marriage pursuant to the state of which they are nationals. Article 10:29 CivC then stipulates that a marriage cannot be celebrated in the Netherlands if it would be incompatible with Dutch public policy.¹⁰⁶¹ The Article continues by listing a number of absolute grounds for refusal based largely on the catalogue of grounds listed in the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages: a marriage cannot be celebrated in the

¹⁰⁵⁷ Cornelissens, Kuppens & Ferwerda 2009, pp. 44–45.

¹⁰⁵⁸ Wortmann & Van Duijvendijk-Brand 2012, pp. 178–179.

¹⁰⁵⁹ And the Registered Partnerships (Conflict of Laws) Act.

¹⁰⁶⁰ Title 3 of this Book deals with the institution of marriage and the first section of the title implements the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages. Title 4 deals with registered partnerships. The Hague Marriage Convention of 14 March 1978 regulates the celebration and the recognition of the validity of marriages between contracting states. This convention was signed by six countries: Egypt, Finland, Portugal, Australia, the Netherlands and Luxembourg, and was ratified only by the three last-mentioned countries (see <www.hcch.net> > conventions > Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages > status table).

¹⁰⁶¹ In accordance with Article 10:6 CivC which stipulates that foreign law is not applied if its application would be manifestly incompatible with Dutch public order.

Netherlands when the prospective spouses have not yet reached the age of 15,¹⁰⁶² when the spouses are related to one another (by blood or by adoption in the direct line or as brother and sister), when one or both of them are already married, when they are already registered partners, or, notably, when the free consent of one of the prospective spouses is lacking or when the mental faculties of one of them are disturbed to such an extent that they cannot determine their will or understand the meaning of the marriage vows. The free consent requirement may be relevant in case of an intended forced marriage. The requirement should be interpreted restrictively though: the parliamentary history reveals that it substantively corresponds with the provision of Article 1:71(1) CivC, meaning that free consent is only considered to be absent in case of an unlawful serious threat.¹⁰⁶³

A marriage that was celebrated outside of the Netherlands and that is valid in the country in which it was contracted is also recognised as valid in the Netherlands. Article 10:32 CivC holds that recognition of a marriage contracted abroad is withheld if recognition would be manifestly contrary to Dutch public policy. The word ‘manifestly’ indicates that the public policy exception will not easily be accepted: the starting principle is that the different norms and values of the legal systems of the world must be respected.¹⁰⁶⁴ Only those foreign rules that are contrary to the fundamental principles of the Dutch legal order – i.e. those values that are inextricably linked with the Dutch legal community – will justify the use of the public policy exception.¹⁰⁶⁵ This is in accordance with the principle of *favor matrimonii* that is at the heart of Private International Law concerning marriages: bars to the international establishment and recognition of marriages should be kept to a minimum.¹⁰⁶⁶ Unlike Article 10:29, Article 10:32 CivC does not provide a list of cases in which the public policy exception must be applied. This has to do with the difference in the degree of connection with the Dutch public policy. Article 10:29 CivC contains such a list because it concerns the celebration of a marriage – with international aspects – in the Netherlands. Accordingly, Dutch public policy is closely involved in those marriages, which makes it possible to list a set of cases in which the celebration of such marriages must be denied on the basis of said policy. However, when it comes to recognising marriages that have already been contracted abroad, the domain of Article 10:32 CivC, Dutch public policy is less closely involved, especially when neither of the marriage parties has Dutch nationality. This means that withholding recognition

¹⁰⁶² See *infra* paragraph 2.1.5 on the proposal to increase the legal age of marriage to 18 in Private International Law (*Parliamentary Papers II (Lower House) 2009/10*, 32 175, p. 3 (Explanatory Memorandum)).

¹⁰⁶³ See *Parliamentary Papers II (Lower House) 1987/1988*, 20 507, no. 3 (Explanatory Memorandum to the Marriages (Conflict of Laws) Act), p. 7 (Article 10:29(c) CivC is identical to Article 3(1)(c) of the repealed Marriages (Conflict of Laws) Act) and Vonken 2012, margin no. 2(c).

¹⁰⁶⁴ Vonken 2012, margin no. 2(c).

¹⁰⁶⁵ Vonken 2012, margin no. 2(c), 3 and 4(a).

¹⁰⁶⁶ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 10.

to a legal *fait accompli* on the basis that it is contrary to Dutch public policy will be more difficult than preventing a marriage that has yet to take place and is contrary to public policy. The grounds listed in Article 10:29 CivC, such as marriages involving children younger than 15 and marriages to which one or both parties did not freely consent, can all be a reason for withholding recognition to a foreign marriage, but they are not absolute grounds: whether or not recognition should be withheld will have to be determined in each specific case.¹⁰⁶⁷

Summarising: lack of consent of either of the spouses is not an absolute bar to recognition of a foreign marriage as valid in the Netherlands. If the country where the marriage was contracted does not list consent to marriage as a requirement for validity, it will be regarded as valid in the Netherlands even though consent of either or both of the spouses was absent. However, a marriage that was the result of a serious threat would be contrary to public policy and would consequently not be recognised as valid, meaning that, as far as Dutch law is concerned, the marriage has never existed (which means annulment is not possible). This means that the recognition of a forced marriage *can* be barred.

2.1.5. *Marital Coercion (civil law) Bill*

In May 2012, a Bill concerning the reinforcement of marital freedom and the countering of marital coercion was drafted; it was revised in December 2012. This Bill further implements the state's positive obligation to guarantee that the right to marry can be exercised in complete freedom. This obligation stems from a series of international human rights treaties that the Netherlands is party to, including the ICCPR, ICESCR, CEDAW and the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.¹⁰⁶⁸ The Bill proposes amendments in four areas of the law of marriage as codified in Books 1 and 10 of the Dutch Civil Code.¹⁰⁶⁹

First, it aims to raise the minimum age for marriage to 18 years in virtually all cases. The options currently available in Article 1:31 CivC for 16- and 17-year-olds to request the court for dispensation to marry – which, in practice, appears to

¹⁰⁶⁷ *Parliamentary Papers II (Lower House) 1987/1988*, 20 507, no. 3 (Explanatory Memorandum to the Marriages (Conflict of Laws) Act), pp. 8–9. See for example District Court Almelo 20 February 2002, *NIPR* 2002, 85, para. 11: the court held that the PPS could not invoke public policy in the case of a marriage between a Turkish man and a Turkish girl who was 14 at the time the marriage was contracted. Because a Turkish court had granted the girl permission to marry, the parents of the girl had consented, the girl, who turned 15 eight days after the marriage had taken place, had married out of free will, and because the marriage was contracted in Turkey, the District Court Almelo found no grounds to withhold recognition of the marriage.

¹⁰⁶⁸ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 2.

¹⁰⁶⁹ All measures also apply to registered partnerships, see *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 1.

be used on a very limited basis only¹⁰⁷⁰ – will be deleted. As a result, the age of 18 becomes the minimum age for marriage,¹⁰⁷¹ and Article 1:35 and 36 CivC concerning the marriage of minors will be deleted. This measure is intended to afford minors the maximum level of protection that is associated with their age.¹⁰⁷²

Secondly, the Bill aims to widen the circle of prohibited degrees of relation. Research has indicated that in cases of marriage between extended family members, there is a higher chance that forms of force or pressure are exerted than in cases of marriage between non-related parties,¹⁰⁷³ and this, according to the government, justifies the proposed amendments. If the Bill enters into force, marriages between blood relatives in the collateral line up to the fourth degree (i.e. aunt-nephew/niece, uncle-nephew/niece and cousins) will be allowed only under the condition that the parties, at a time before the actual solemnisation of the marriage, have declared under oath and in the presence of a Registrar that they both freely consent to the marriage (Article 1:41a (new) CivC). Because these degrees of kinship are not registered anywhere, parties will have to make an official declaration during the registration of their marriage (*aangifte*) that they are not blood relatives in the third or fourth degree of the collateral line as part of the preliminary formalities to their marriage (Article 1:43(2) (new) CivC). If parties have not made such a declaration and the Registrar is aware of their kinship, he shall not cooperate with the solemnisation of the marriage (Article 1:57 (new) CivC). If a marriage is contracted and it later becomes known that the spouses are within the prohibited degrees of relationship and did not make the required declaration under oath or that they made a false declaration, the marriage will be voidable (e.g. on request of the PPS) on the ground that the spouses do not fulfil the requirements to enter into a marriage with each other, pursuant to Article 1:69(1) CivC.¹⁰⁷⁴ According to the government, this conditional impediment provides parties who might be under pressure to marry with a more formal moment of

¹⁰⁷⁰ Each year, approximately ten 16-year-old girls and 30 17-year-old girls receive dispensation to marry on the ground of pregnancy; in recent years, no 16-year-old boys and only a handful of 17-year-old boys have married. Each year, between five and ten requests for dispensation on other grounds than pregnancy are made: since 2007, none of these requests have been granted (*Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 7).

¹⁰⁷¹ There are no exceptions to this rule: even a 16- or 17-year-old girl who has been declared an adult in accordance with Article 1:253ha CivC because the court considers it desirable that she be able to exercise parental authority over her own child will *not* be able to marry before reaching the age of 18 (see *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 16); and *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 2 (Marital Coercion (civil law) Bill), Article 1 sub M and Article III sub B).

¹⁰⁷² *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 10.

¹⁰⁷³ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 8, referring to De Koning & Bartels 2005. See also Chapters 1 and 2.

¹⁰⁷⁴ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 8.

reflection so that they may determine whether or not they want to marry each other. It is believed that requiring parties to make a declaration under oath will deter those parties who are in fact coerced from making a false statement.¹⁰⁷⁵ Such a false statement made under oath would qualify as perjury (Article 207 Dutch Criminal Code). It should be added that the government indicates that it expects the number of marriages between cousins to be very low.¹⁰⁷⁶

Thirdly, the Bill proposes to broaden the grounds on which a marriage can be interrupted by adding the possibility of interruption if it appears that the marriage will be contracted under influence of coercion (Article 1:50 (new) CivC). The PPS will be given the power to interrupt the marriage if it has become sufficiently evident that the intending spouses, or one of them, would enter into the marriage under the influence of coercion, but only *after* the court has authorised the PPS to this extent (Article 1:53(3) and (4) (new) CivC). If the parties do not agree with the interruption, they can request that the PPS lift the interruption. If the PPS is not willing to do this, parties can present their case to a court.¹⁰⁷⁷

Fourthly, the Bill proposes to broaden the grounds on which a marriage is voidable in case of coercion.¹⁰⁷⁸ The requirement that a marriage was entered into as a result of an unlawful serious threat is considered to be too strict: the government opines that forced marriages are contrary to Dutch public policy to such an extent that the degree of coercion or the extent to which the coerced spouse could have been expected to resist this pressure should not be decisive in determining whether or not the marriage should be annulled.¹⁰⁷⁹ Consequently, the ground of ‘unlawful serious threat’ will be replaced by the broader criterion that the marriage was entered into under coercion (Article 1:71(1) (new) CivC).

It is difficult to determine the distinction between coercion and influence, but some examples of situations that could be qualified by the court as coercion are mentioned in the Explanatory Memorandum to the Bill. Isolating a person, especially a minor, from their social environment can be a strong indication of coercive circumstances: no longer allowing a youngster to attend school or higher education, threatening with disownment, and not allowing that person to go outside the house without an escort are three forms of isolation. Especially when

¹⁰⁷⁵ *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 3 (Explanatory Memorandum), p. 9.

¹⁰⁷⁶ *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 3 (Explanatory Memorandum), p. 17.

¹⁰⁷⁷ *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 3 (Explanatory Memorandum), p. 19.

¹⁰⁷⁸ Annulment on the ground that a marriage was entered into under coercion (Article 1:71 CivC) should be distinguished from annulment on the ground that the spouses do not fulfil the requirements to enter into a marriage with each other (Article 1:69(1) CivC).

¹⁰⁷⁹ *Parliamentary Papers II (Lower House)* 2010/11, 32 175, no. 17, p. 2; and *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 3 (Explanatory Memorandum), p. 4.

the victims are young, this pressure can be very difficult to challenge. This implies that more subtle forms of coercion can also influence the freedom to marry.¹⁰⁸⁰

In addition to broadening the grounds on which a marriage can be annulled, the Bill also proposed to broaden the circle of people who are authorised to petition for annulment. In addition to the spouses themselves, the PPS will be authorised to request the annulment of the marriage, but only after it has given the spouses the opportunity to give their opinion about its intention, so it may become clear why the (allegedly) coerced spouse did not petition for annulment in the first place (Article 1:71(1) (new) CivC).¹⁰⁸¹ When both spouses express their wish that the marriage remain valid, even though they recognise that they initially did not enter into it completely out of their free will, the PPS will most likely withdraw the annulment request.¹⁰⁸²

Further, the period after which the authority to request annulment on the grounds of coercion lapses¹⁰⁸³ is extended from six months to three years: once the spouses have lived together for three years with the purpose of preserving their marriage in the absence of any coercion, an annulment request can no longer be made (Article 1:71(3) (new) CivC). This period of three years is considered to be more in line with the customary expiry periods in family law and will offer both the forced spouse(s) as well as the PPS the opportunity to take steps against the forced marriage. Moreover, the sponsor of this Bill (the State Secretary of Security and Justice) considered a period of six months to be too short to evaluate the situation correctly since establishing the existence of coercion can be a time-consuming exercise.¹⁰⁸⁴

In addition to Book 1 of the Civil Code, the Bill also affects provisions of Private International Law, more specifically, it proposes to restrict both the possibility of celebrating a marriage between two foreigners in the Netherlands, and the possibility of recognising marriages celebrated abroad. As regards the first issue, a marriage between two foreigners will be contracted only if each of the parties fulfils the requirements to enter into marriage according to Dutch civil law (*inter alia* the minimum age of 18), irrespective of whether they would be allowed to marry according to their own state's law (Article 10:28 (new) CivC). Because Dutch marriage law would be applicable to anyone wanting to celebrate a marriage in the Netherlands, Article 10:29 CivC, which stipulates that a marriage

¹⁰⁸⁰ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), pp. 3–4.

¹⁰⁸¹ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 20.

¹⁰⁸² *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 6.

¹⁰⁸³ Note that the period after which the authority to request annulment on the grounds of *mistake* lapses, remains six months (Article 1:71(3) new CivC).

¹⁰⁸⁴ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 20.

cannot be celebrated in the Netherlands if that would be incompatible with Dutch public policy, will be deleted.

As regards the recognition of marriages celebrated abroad, the Bill proposes to include in the law a set of absolute grounds on which such a marriage cannot be recognised in the Netherlands. These grounds, which are intended to increase legal certainty and assist the courts,¹⁰⁸⁵ are based in part on the catalogue of grounds listed in Article 11 of the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages. A marriage cannot be recognised in the Netherlands if at the time of the solemnisation of the marriage at least one of the spouses had not yet reached the age of 18 (unless both spouses are 18 or older when they request recognition of their marriage), was not mentally capable of giving consent (unless this person is capable to do so when recognition is requested and he expressly agrees with the recognition of the marriage), or did not freely consent to the marriage (unless he expressly agrees with the recognition of the marriage).¹⁰⁸⁶ Nor can a marriage be recognised if at the time of the celebration at least one of the spouses was already married to or in a registered partnership with a Dutch national, or with someone domiciled in the Netherlands (unless that previous marriage or registered partnership had been dissolved or annulled),¹⁰⁸⁷ or if the spouses are related to one another by blood or by adoption in the direct line or as brother and sister (Article 10:32 amended CivC).¹⁰⁸⁸ This amendment therefore – at least in theory – gives parties to a forced marriage the opportunity to have their marriage recognised (or not). This does not solve the problem that the parties, if their marriage is not recognised in the Netherlands because of a lack of consent, might still be married according to the law of another state or states.

2.1.6. *Analysis of the Bill*

The Bill proposes a couple of valuable amendments, such as replacing the narrow annulment ground of ‘unlawful serious threat’ with the broader ground of coercion, and giving the PPS the possibility of interrupting an intended marriage in the case of suspected coercion. But several critical remarks can be made with regard to other amendments proposed by the Bill.

¹⁰⁸⁵ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Explanatory Memorandum), p. 11.

¹⁰⁸⁶ Such marriages are recognised in the Netherlands once they have been included in the official registers by the Registrar in The Hague (see Article 1:25 CivC).

¹⁰⁸⁷ Note that bigamy is a criminal offence, punishable with a maximum prison sentence of four years (or six years if the bigamist concealed from his spouse the fact that he was already married) see Article 237 Criminal Code.

¹⁰⁸⁸ Note that, unless at least one of the spouses did not consent, a marriage between cousins celebrated abroad will still be recognised in the Netherlands when it is valid according to that state’s law.

First, the effectiveness of the proposed formal requirement in the form of a declaration of free consent in case of a marriage between third/fourth degree relatives is questionable. This extra requirement is promoted as an extra check and balance, as a formal moment of reflection for spouses which allows them to determine whether or not they want to marry each other. And it is believed that requiring parties to make a declaration under oath will deter those parties who are in fact coerced from making a false statement. This ignores the reality of forced marriages. When a person is coerced to enter into a marriage against their will, an extra formal requirement preceding the actual marriage will not necessarily deter the coercer(s); it is reasonable to assume that they would merely force the coeree to make a false statement, in addition to forcing them to lie during the wedding ceremony.¹⁰⁸⁹ And especially in those cases in which the pressure takes the form of (threats of) physical harm, the coeree would probably not be more inclined to seek help.¹⁰⁹⁰ Indeed, the State Secretary of Security and Justice who introduced the Bill in the Lower House contradicts himself when he states that the consent declaration provides intending spouses with an additional moment of reflection, which is necessary because ‘in cases of close consanguinity between intending spouses, the pressure exercised by (both sides of) the family can take on such large proportions that it can become very difficult to resist this pressure.’¹⁰⁹¹ The pressure on the coeree to make a false statement regarding his or her free consent to the marriage will be similarly difficult to resist. Moreover, in its advice on the Bill, the Council of State rightly remarked that the requirement of a declaration of consent to the marriage made under oath and in the presence of a Registrar might actually act as an additional barrier to the coeree to seeking help. A spouse who was coerced to make a false declaration and was later coerced to enter into a marriage against his or her will might, for example, believe they would be prosecuted for perjury.¹⁰⁹² The Council of State further refers to the possible discriminatory nature of creating an extra formal requirement for marriages between blood relatives in the collateral line up to the fourth degree.¹⁰⁹³ While there exist reasons to believe that in general, marriages between cousins and niece/nephew-uncle/aunt might be coupled with certain pressure from family members, these types of marriages are certainly not the only ones with an increased risk of some form of coercion: research indicates that levirate marriages

¹⁰⁸⁹ In those cases, the coercers could be prosecuted for influencing the victim’s freedom to make an official statement pursuant to Article 285a CrC (see *infra* paragraph 2.3.1).

¹⁰⁹⁰ Also noted by the Council of State, see *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 4 (Advice of the Council of State), p. 3.

¹⁰⁹¹ Council of State, see *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 4 (Report of the State Secretary), p. 4 (my translation).

¹⁰⁹² Even though the PPS would probably not decide to prosecute, and even if it would prosecute, the coeree could plead duress (*Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 4 (Advice of the Council of State), p. 3).

¹⁰⁹³ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 4 (Advice of the Council of State), p. 2.

and marriages as a result of unplanned pregnancy can also be accompanied by a higher risk of pressure.¹⁰⁹⁴

In addition, from a more practical perspective, it would seem that intending spouses – unless they have the same surname – would relatively easily be able to circumvent this conditional impediment since degrees of kinship in the collateral line in the third and fourth degree are not registered anywhere and will not be readily deducible from their birth certificates. This would make it very difficult for the Registrar to verify their statement regarding any kinship.¹⁰⁹⁵ In addition, the question might be asked whether Registrars are able to recognise marital coercion. It might be a good idea to publish guidelines for Registrars and have experts on this topic make a list of indicators of force, as was done for sham marriages.¹⁰⁹⁶

Secondly, the Bill proposes to include in the law a set of absolute grounds, which will bar recognition of marriages celebrated abroad. It is remarkable that marriages between cousins and other blood relatives in the third and fourth degree are recognised *unless* there was an element of coercion at the time the marriage was celebrated. Marriages between such relatives in the Netherlands can only take place on the condition that both spouses solemnly declare that they marry each other out of free will. It would perhaps be more consistent if marriages between cousins celebrated abroad would only be recognised when both spouses declare that they married each other out of free will.¹⁰⁹⁷

Thirdly, as pointed out by the Board of Procurators General, the definition of ‘coercion’ (*dwang*) requires elaboration.¹⁰⁹⁸ The Bill proposes to authorise the PPS to interrupt a marriage if it has become sufficiently clear that the intending spouses, or one of them, was entering into the marriage as a result of coercion. The term ‘sufficiently clear’ would also need elaboration.¹⁰⁹⁹

2.2. COERCIVE MEASURES: CIVIL, CRIMINAL AND ADMINISTRATIVE PROTECTION ORDERS

Victims or potential victims of forced marriages might also benefit from orders prohibiting their (ex) spouse, or any family members or community members from contacting them and coming near them (since a forced marriage situation

¹⁰⁹⁴ Cornelissens, Kuppens & Ferwerda 2009, p. 10.

¹⁰⁹⁵ Also noted by the Council of State, see *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 4 (Advice of the Council of State), p. 3.

¹⁰⁹⁶ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 5 (Report), p. 14.

¹⁰⁹⁷ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 5 (Report), p. 13.

¹⁰⁹⁸ For the definition of coercion in the context of Article 284 CriC, see paragraph 2.3 *infra* and Chapter 10.

¹⁰⁹⁹ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 3 (Advice of the Board of Procurators General), p. 3.

will very often have characteristics of stalking; see paragraph 2.3.5).¹¹⁰⁰ If the victim and the coercer(s) live in the same house, a house ban will prohibit the coercer(s) from entering that house. These restraining¹¹⁰¹ protection orders might offer relief in the case of a threatened forced marriage, but also when the forced marriage has already taken place or has been annulled or otherwise ended. There are three ways for an order to be made: via the interlocutory proceedings court at the instigation of the victim, via the criminal court, or via the mayor.

The victim of a forced marriage can instruct a lawyer to commence interlocutory proceedings and request a civil restraining order,¹¹⁰² which can be especially relevant in case of stalking or behaviour similar to stalking. Interlocutory proceedings are used in urgent matters where immediate judicial relief is required.¹¹⁰³ If the court is satisfied that there exists a real threat of unlawful conduct and a restraining order is needed urgently, it can prohibit the respondent from contacting the petitioner and/or other parties in any way during a certain period of time.¹¹⁰⁴ The court can also prohibit him from going near a certain street or area, such as the petitioner's house. The bans may be subject to an incremental non-compliance penalty (*dwangsom*) of a certain amount of money per breach.¹¹⁰⁵ In addition to imposing such an incremental penalty payment, the court can also, if requested by the petitioner, order that the person in question be committed (*lijfsdwang*) if he fails to comply with the judicial order.¹¹⁰⁶ This is a drastic coercive measure that may only be applied if the court is satisfied that other measures would produce insufficient results and the interest of the petitioner justifies the application of committal.¹¹⁰⁷

The civil law also offers several possibilities for a victim of domestic violence to request that the court awards him or her exclusive occupancy of the (marital) home.¹¹⁰⁸ Further, in interlocutory proceedings, a victim of a (threatened) forced marriage, or third parties, could also request that someone hands over the passports of their child(ren).¹¹⁰⁹ This actually prevents parents from taking their

¹¹⁰⁰ To the author's knowledge, such measures have not (yet) been used specifically in case of (intended) forced marriages.

¹¹⁰¹ In English law, the term 'restraining order' is used to refer to an order made by a criminal court to prevent a person from continuing to pursue a course of conduct towards another, with the aim of protecting a victim of crime from the defendant.

¹¹⁰² Article 254 and 255(1) CCivP.

¹¹⁰³ Article 254(1) CCivP.

¹¹⁰⁴ Article 6:162 CivC (tort) in conjunction with Article 3:296 CivC (right to legal action to claim specific performance; on the basis of this article, the court can order a person to give, to do or not to do something).

¹¹⁰⁵ See e.g. Court of Appeal The Hague 19 July 2011, ECLI:NL:GHSGR:2011:BR2925; and District Court Haarlem 24 December 2004, ECLI:NL:RBHAA:2004:AR8233.

¹¹⁰⁶ E.g. District Court Leeuwarden 30 July 2008, ECLI:NL:RBLEE:2008:BD9742.

¹¹⁰⁷ Articles 585 and 587 CCivP.

¹¹⁰⁸ For married couples, see Article 822 CCivP.

¹¹⁰⁹ Court of Appeal Leeuwarden 18 January 2011, ECLI:NL:GHLEE:2011:BP4870: a case concerning parental authority.

children abroad to marry them off and/or abandon them.¹¹¹⁰ Not handing over the passports when a civil servant demands them, is a misdemeanor (Article 447b CriC).

In case of (suspected) criminal behaviour – which, in forced marriage cases could be specific crimes such as coercion, threatening behaviour, stalking and rape – the Criminal Code (CriC) and Code of Criminal Procedure (CCriP) offer four different ways in which restraining orders can be imposed.

First, a restraining order can be imposed as a special condition in the pre-trial stage: the Prosecutor can decide to conditionally dismiss a case or can request the court to conditionally grant the suspect release from pre-trial detention. If the order is breached, the suspect can be remanded again and/or prosecuted.¹¹¹¹ Naturally, a court will only be able to conditionally grant a suspect release from pre-trial custody when he is suspected of committing a crime that allows for pre-trial custody. These offences are listed in Article 67 CCriP.

Secondly, in accordance with Article 509hh CCriP, the PPS can issue a behavioural order (*gedragsaanwijzing*), in the form of an area or contact ban,¹¹¹² with the aim of terminating severe nuisance. The Prosecutor can issue such orders against persons who are suspected of a criminal offence *and* there is the fear that these suspects will cause serious burdensome behaviour for one or more persons.¹¹¹³ Orders may be imposed for a maximum of 90 days. This period can be extended, but only if the suspect is being prosecuted. Intentionally acting contrary to a behavioural order (and thereby breaching it) is a criminal offence and may be punished with up to a year of imprisonment (Article 184a CriC). If the Prosecutor imposed a behavioural order on grounds of fear of serious burdensome behaviour against a person, the coercive measures of police custody and pre-trial detention may be used.¹¹¹⁴

Thirdly, in the sentencing stage, the court can make contact and street orders as special conditions attached to a (partly) suspended sentence. If the convicted person breaches the conditions, the court can order that (part of) the suspended sentence be executed.¹¹¹⁵

¹¹¹⁰ The Act concerning the Registration of citizens in the Municipal Database of 3 July 2013 (*Wet basisregistratie personen*, *Bulletin of Acts and Decrees* 2013, no. 315) makes it impossible for parents to deregister their children from the Municipal Personal Records Database. It requires children older than 12 years to come to the municipality and deregister themselves. The government hopes that this measure will prevent abandonment.

¹¹¹¹ Movisie, *Juridische aspecten van huiselijk geweld*, January 2009, p. 26. See Article 167 in conjunction with 244(3) (conditional dismissal) and Article 80 (conditional release from pre-trial detention) CCriP.

¹¹¹² Or in the form of a duty to report oneself to a police officer at designated times or to get relevant help or treatment.

¹¹¹³ Two others grounds on the basis of which the Prosecutor can make a behavioural order are listed in Article 509hh(1)(a) and (c).

¹¹¹⁴ Sackers 2012, margin no. 7. See Article 67(1)(b) CCriP.

¹¹¹⁵ See for example District Court Zutphen 25 January 2011, ECLI:NL:RBZUT:2011:BP1973.

Finally, since April 2012, criminal courts have the possibility to impose a separate, independent measure restricting the liberty of a person for up to two years in the case of a conviction. This restraining order, which can be declared immediately enforceable, can take the form of a contact or street ban, a duty to report, or a combination of these (Article 38v CriC). If there are serious reasons for presuming that the convicted person did not comply with the order, the PPS can order the arrest of that person. Breach of the order may result in imprisonment for up to six months (Article 38w CriC). Criminal courts may impose restraining orders to prevent criminal offences or burdensome behaviour with respect to persons, which will be especially relevant in cases of convictions for coercion, threatening behaviour, intimidation or stalking.¹¹¹⁶

If a (threatened) forced marriage is accompanied or was followed by (a threat of) domestic violence, the mayor – who will often mandate this authority to a deputy Public Prosecutor – can impose a house ban, meaning that the person on whom the ban is imposed will have to leave the house immediately, hand over any keys and will be prohibited from returning to the house and from contacting anyone who lives there. The ban, which may or may not have been imposed at the request of the victim, is valid for ten days and may be extended up to a maximum of four weeks.¹¹¹⁷ This period can be used by the victim(s) of the (threatened) forced marriage to report any crimes to the police in order to start criminal proceedings, to petition for a contact or street ban in interlocutory proceedings, and/or initiate divorce proceedings.¹¹¹⁸ A house ban is especially relevant in those situations where any (demonstrable) criminal offences have not (yet) been committed, but the victim does live in a risky and threatening situation.¹¹¹⁹ Breach of a house ban is a criminal offence for which pre-trial detention is allowed and it is punishable by a prison sentence of up to two years.¹¹²⁰ The police are largely dependent on victims to report any breaches of the ban, but the law gives the police the authority to enter any premises where the person on whom the ban was imposed is not allowed to be pursuant to that ban.¹¹²¹

¹¹¹⁶ Articles 284, 285, 285a and 285b Criminal Code respectively. See *Parliamentary Papers II (Lower House)* 2010/11, 32 551, no. 3 (Explanatory Memorandum), p. 7.

¹¹¹⁷ See Temporary House Ban Act, especially Articles 2, 3 and 9. See also Article 172a Municipalities Act which authorises the mayor to order an individual to *inter alia* stay away from certain areas of the municipality in case of repeated disturbance of the peace.

¹¹¹⁸ Movisie, *Juridische aspecten van huiselijk geweld*, January 2009, pp. 25–26.

¹¹¹⁹ B. Beke & J. Rullens, *Wet tijdelijk huisverbod. Een handreiking voor de burgemeester*, p. 10.

¹¹²⁰ Article 11 Temporary House Ban Act and Article 67(1)(c) CCriP.

¹¹²¹ See Article 4 Temporary House Ban Act and B. Beke & J. Rullens, *Wet tijdelijk huisverbod. Een handreiking voor de burgemeester*, p. 35.

2.3. CRIMINAL LAW

Dutch criminal law contains no separate offence of forced marriage, yet the Criminal Code offers a spectrum of offences that could be used in cases of forced marriage.¹¹²² These crimes include several offences against personal liberty, such as human trafficking, abduction in the context of human trafficking (*mensenroof*), child abduction, and intentional or negligent false imprisonment.¹¹²³ Other examples are different forms of assault (Articles 300–304 CriC), rape or other forms of sexual violence (Articles 242–250 CriC), theft (Articles 310, 312 and 316 CriC for example of a passport, a document that is state property¹¹²⁴), embezzlement (Article 321 CriC, e.g. of a passport), blackmail, harassment, aiding and abetting a criminal offence, murder, and giving a religious marriage precedence over a civil marriage (Article 449 CriC). These crimes may be committed in the course of forcing someone to enter into a conjugal association against their will, and they may also be committed within that marriage, but these crimes do not go to the heart of the matter of forced marriage and are therefore not discussed in detail here. The five crimes that *are* of particular relevance in the context of forced marriage are: influencing someone's freedom to make an official statement, abduction of a woman/girl (*schaking*), coercion, threatening to commit serious criminal offences, and stalking. In case of suspicion of any of these crimes, pre-trial detention is possible.¹¹²⁵ The five crimes are discussed below.

2.3.1. *Influencing someone's legal statement*

Article 285a CriC criminalises the act of intentionally influencing a person's freedom of making a statement truthfully or in good conscience before a judge or any public servant. The crime was created as a result of a bill concerning the protection of witnesses in criminal cases who are being threatened, but the crime encompasses more types of cases: it protects anyone who wants or has to make a statement that can have legal consequences before a judge or public servant.¹¹²⁶ The influencing can take place through words and gestures, in writing or with the use of pictures. It is not necessary that the victim was actually influenced: the crime requires that the perpetrator's behaviour was obviously meant to influence

¹¹²² At the time of writing, there is no case law on forced marriage from criminal courts: up until January 2014 the practice of forced marriage had not been subjected to the scrutiny of a Dutch criminal court. The Council of State has dealt with a couple of cases concerning (alleged) forced marriages, but the Council did not discuss the issue of force (Council of State, Administrative Disputes Division, 4 June 1991, ECLI:NL:RVS:1991:AJ7788; and Council of State, Administrative Disputes Division, 15 June 1993, ECLI:NL:RVS:1993:AJ8383).

¹¹²³ Articles 273f, 278, 279, 282, 283 CriC.

¹¹²⁴ See also Article 447b CriC.

¹¹²⁵ Article 67(1)(a) and (b) CCriP.

¹¹²⁶ Machielse 2010, comments on Article 285a, margin no. 1; and *Parliamentary Papers II (Lower House)* 1991/92, 22 483, no. 3, p. 39 (Explanatory Memorandum).

the victim's freedom to make a statement ('*kennelijk om diens vrijheid (...) te beïnvloeden*'). Like stalking (see *infra* paragraph 2.3.5), therefore, this criminal offence focuses on the intended effect of the perpetrator's acts; not on the actual effect they had on the victim.¹¹²⁷ The offence is punishable with a prison sentence of up to four years.

It is remarkable that (government) documents and reports do not refer to this specific offence in the context of forced marriages as it may be of specific relevance to this practice. A marriage is entered into when the future spouses make a statement (in the form of legally prescribed vows) in the presence of a Registrar and a Registrar is a public servant.¹¹²⁸ The act of forcing someone to declare, against their will, that they will accept the other person as their spouse and that they will faithfully fulfil all duties which the law connects to the marital status (as prescribed by Article 1:67(1) CivC), can fall within the scope of this crime.¹¹²⁹ According to the parliamentary history, this particular crime protects the freedom of individuals to make statements and declarations without hindrance, and not so much the truth of these statements.¹¹³⁰ This in particular is of importance to forced marriages. The interest in prohibiting forced marriage is not so much the fact that people lie in an official statement,¹¹³¹ but that an individual's freedom to decide whether or not to marry is influenced. Yet this particular crime will not cover all instances of forced marriage: the definition refers to a statement that is made before a judge or any public servant, which means that religious marriages, for example, fall outside of its scope.

2.3.2. (Criminal) coercion

A second criminal offence that is closely related to the act of forced marriage is coercion. Forcing someone to enter into a marriage – be it a civil marriage, a religious marriage or any other type of association – is punishable as a form of criminal coercion under Article 284 CriC. The maximum prison sentence for coercion is two years.¹¹³² The crux of this provision is to warrant people's physical and psychological freedom, and this includes protecting people from forced marriage.¹¹³³ He who, by using violence, threats of violence or another hostile act, unlawfully coerces someone to do something, to refrain from doing

¹¹²⁷ Supreme Court 27 May 2008, ECLI:NL:HR:2008:BC7910 (concerning Article 285a CriC).

¹¹²⁸ See Article 84 CriC for the the definition of 'public servant' in the context of the Criminal Code.

¹¹²⁹ See also Schmidt & Rijken 2005, p. 43.

¹¹³⁰ *Parliamentary Papers II (Lower House)* 1991/1992, 22 483, no. 3, p. 39 (Explanatory Memorandum); and Supreme Court 30 August 2005, ECLI:NL:HR:2005:AT7093.

¹¹³¹ This concern is addressed by a list of forgery offences, see Articles 225–235 CriC.

¹¹³² Up until July 2013, the maximum penalty for criminal coercion was nine months. This was amended by the Marital Coercion (criminal law) Act 2013.

¹¹³³ *Parliamentary Papers II (Lower House)* 2009/10, 32 175, no. 2 (Letter from the Minister of Justice), p. 5. See also Cornelissens, Kuppens & Ferwerda 2009.

something or to tolerate something, is guilty of the crime of coercion. In cases of forced marriage, specific emphasis will be put on the element ‘doing something’: entering into a marriage requires an active attitude of the spouses; they will have to exchange wedding vows in the presence of the Registrar and witnesses. Pressure exerted during the stage leading up to the wedding will be aimed at forcing the prospective bride/groom to say ‘I do’. Forcing an individual to tolerate something in the context of a forced marriage might refer to the wedding preparations.

Courts have given a broad meaning to the word violence: physical violence, but also forms of psychological violence fall within the ambit of this element. For example, the Supreme Court held that pressurising the victim by making her believe that there are spiritual forces present and that she might suffer from an epileptic fit or a heart attack, constitutes ‘violence’.¹¹³⁴ Hostile acts (*feitelijkheden*) are those acts that cannot be qualified as violence or threats.¹¹³⁵ The act must be of such a nature that it, given the specific circumstances of the case, can be used as a means of coercion, meaning that the victim is not able to offer resistance. Subtle forms of psychological pressure can amount to hostile acts and may therefore constitute criminal coercion.¹¹³⁶ Examples of hostile acts from case law and mentioned in literature include accompanying the victim on a flight to the Netherlands in order to have him withdraw large amounts of money while his mother is kept hostage abroad, and threatening to publish the victim’s name and address on the internet accompanied by the announcement that he is interested in being contacted by gay men.¹¹³⁷

Further, it is important that a causal link exists between the means of coercion and the consequence.¹¹³⁸ In certain cases of forced marriage, this cause-and-effect relationship may very well be either completely absent or very difficult to establish. If someone goes along with a marriage out of fear for consequences that no one has threatened them with, there will probably be no causal relationship. Parents may resort to arguments related to duty, personal affection, religion, social and family obligations and little pressure is needed when it is applied by parents or other important and dominant figures in an individual’s life. However, if no pressure whatsoever was exerted, but the person in question merely did not dare to say ‘no’, for example out of reverence for his or her culture or parents, Article 284 CriC will not be applicable as there was no criminal coercion. In other words,

¹¹³⁴ HR 21 February 1989, *NJ* 1989/668; and Van Maurik & Van der Meij 2012, comments on Article 284, margin no. 9b.

¹¹³⁵ Lindenberg 2007, pp. 208–218; and Machielse 2012, comments on Article 284, margin no. 4.

¹¹³⁶ Machielse 2012, comments on Article 284, margin no. 4; and Machielse 2012, comments on Article 242, margin no. 2. For an example of psychological pressure, see Supreme Court 13 September 2005, *ECLI:NL:HR:2005:AT5834*.

¹¹³⁷ Court of Appeal Amsterdam 19 November 2002, *ECLI:NL:GHAMS:2002:AF3799*; and District Court Alkmaar 30 July 2003, *ECLI:NL:RBALK:2003:AI0650*, respectively, referred to in Supreme Court 21 February 1989, *NJ* 1989, 668; and Van Maurik & Van der Meij 2012, comments on Article 284, margin no. 9c.

¹¹³⁸ Lindenberg 2007, pp. 175–178; and Machielse 2012, comments on Article 284, margin no. 5.

there will be no criminal coercion when no one intentionally contributed to this internalised pressure the victim felt. This may also be the case if the person who is being forced to marry has not told those who exert the pressure that he or she does not want to marry. In Chapter 2, it was explained that victims may be afraid to speak their mind, even though no coercion whatsoever was exerted, and that they might feel they cannot refuse a marriage candidate selected by their parents, whereas they may in fact have the possibility to do so. Such a discrepancy between the perpetrator's and victim's perception may lead to difficulties with regard to proof of criminal coercion: the perpetrator must have had the intent to coerce, his behaviour must have been aimed at making the victim marry against his or her will (*bijkomend oogmerk*), the victim must have felt coerced and must not have been able to resist the pressure.¹¹³⁹ According to the legislator, forms of economic and socio-cultural pressure will not necessarily amount to criminal coercion.¹¹⁴⁰ Nor will exerting pressure on someone to marry merely by repeatedly talking to them without uttering threats.¹¹⁴¹

How to determine whether the pressure that was exerted crosses the threshold of criminal coercion? It is important to look at the nature of the pressure as well as at the effect it had on the victim. If the pressure was of such a nature that it can be regarded as *prima facie* coercive, such as forcing someone to marry at gunpoint, there will be no problem. This might change, however, once the forms of pressure that were used were more subtle. Here, the effect the pressure had on the victim will be of importance. Someone may be said to have been coerced to marry in the sense of Article 284 CriC when this person was pressured into unwillingly entering into the marriage as a result of any kind of pressure beyond his or her control. This pressure must have inspired in the victim a genuine and reasonably held fear. As a result of this fear, the party consented to the marriage; they would not have given their consent absent this fear. The form of the pressure is irrelevant: it can be physical, emotional, social or financial. It must, however, have caused both a genuine and a reasonable (well-founded) fear. Fear is a subjective concept; it is a state of mind, which is based on the perspective of the person experiencing it. However, requiring that the fear be reasonably held, incorporates an objective element into the test.¹¹⁴²

The question of whether the threat inspired genuine and reasonably held fear in the subject will depend on the particular circumstances of the individual case. Objective elements that may substantiate a reasonable fear of forced marriage

¹¹³⁹ Machiels 2012, comments on Article 284, margin no. 4.

¹¹⁴⁰ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, pp. 1 and 6 (Explanatory Memorandum).

¹¹⁴¹ Schmidt & Rijken 2005, p. 70.

¹¹⁴² The definition of a reasonably held fear set forth in this paragraph is inspired by the way in which 'well-founded fear of persecution' is defined in the context of human-trafficking and refugee status (see UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, paras. 37–50).

could include family history, for example a history of previous forced marriages having taken place in the family. The question of what happened to any siblings/ other family members who refused forced arranged marriages is relevant in this context: were they disowned, ostracised or assaulted, or did the family accept the refusal? Other circumstances that could cause reasonable fear include being in a foreign country with no means to leave.

Subjective elements¹¹⁴³ to be taken into consideration include age, nationality, religion and cultural background. Also, long-term pressure and ingrained, socialised notions of shame will feed into a person's subjective fear when it comes to forced marriage. A second element that is of importance, in addition to the reasonably held fear, is that the coercion was of such a nature that the victim, under the specific circumstances of the case, could not reasonably resist it.¹¹⁴⁴

2.3.3. Abduction of a women/girl (*schaking*)

It is a criminal offence to abduct a woman with the specific intent of having sexual intercourse with her (*schaking*). The provision distinguishes two categories: (1) where an underage girl is taken away by a man with her permission, but without her parents' or guardians' permission, and (2) where a woman (either underage or of age) is taken away by means of a ruse, force or threat of force. The first category is punished with a maximum prison sentence of six years; the second with nine years (Article 281(1) CriC). This offence is not prosecuted *ex officio*, but is subject to prosecution only on complaint: if the victim is a minor, she herself or someone whose permission she needs to marry can file a complaint; if the woman is of age, she or her husband can file such a complaint (Article 281(3) CriC). If the abductor has entered into a marriage with the abductee, he can be convicted only after the marriage has been annulled (Article 281(4) CriC). This means that the abductor cannot be convicted if the marriage has instead been terminated by divorce (!).

As the text of the provision makes clear, the crime is not gender neutral: only women can become victims of this offence and only men can commit it.¹¹⁴⁵ As stated, this particular crime focuses on the perpetrator's intent of having sexual intercourse with the woman; proof that the perpetrator only had the intention

¹¹⁴³ The idea that not the perception of the coercer (A), but that of the coerced (B) is decisive in determining whether or not A coerced B to do, omit or tolerate C is proffered, amongst others, by M.R. Rhodes, 'The nature of coercion', *The Journal of Value Inquiry* (34) 2000, pp. 372 and 376.

¹¹⁴⁴ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 6, pp. 6 and 14. This standard is also used as a requirement for the excuse of duress (*psychische overmacht*). But using duress as an excuse for causing harm and/or engaging in wrongdoing is a different proposition than using duress/coercion to *impose* criminal liability as is done with the offence of coercion. The standard for duress as an excuse is more restrictive. In other words: the excuse of duress (especially when applied to grave offences such as murder) will demand more resilience from a citizen than the offence of coercion.

¹¹⁴⁵ Machiels 2004, comments on Article 281, margin no. 2.

of marrying the woman is insufficient.¹¹⁴⁶ Nevertheless, the offence can still be used in some cases of forced marriage: *schaking* may be committed in preparation of forcing someone to enter into a marriage against that person's will, as was recognised by the Advocate-General of the Supreme Court in 1991.¹¹⁴⁷ Further, it would appear that if the perpetrator abducts a woman with the specific intent of having sexual intercourse with her, but forced her to marry him before having intercourse with her, this abduction would classify as *schaking*.¹¹⁴⁸

2.3.4. *Threatening to commit serious criminal offences*

If, in the course of forcing someone to enter into a marriage against their will, serious threats are uttered, Article 285 CriC may prove useful. Pursuant to this provision, it is a criminal offence, punishable with a maximum prison sentence of two years, to threaten someone with certain offences, such as rape, indecent assault, a crime against a person's life, hostage taking, aggravated assault or arson. If this threat was made in writing and under certain conditions, the maximum sentence is four years imprisonment (Article 285(2) CriC). This may be applicable when, for example, an uncle sends his niece an email saying that he will kill her if she doesn't marry X. It is not necessary that the victim actually felt threatened, as long as the threat was of such a nature and was made under such conditions that it *could* have inspired a reasonable fear in the victim.¹¹⁴⁹ The threatened crime does not have to be aimed at the threatened person; it can also be aimed at third parties, such as a person's children, friends or parents.¹¹⁵⁰

2.3.5. *Stalking*

The third crime that may be of significance in case of forced marriage is the offence of stalking. Both the process during which someone is forced into a marriage (situation 1) as well as a concluded forced marriage (situation 2) can amount to stalking. The focus here will be on the former: stalking as a means to force someone to marry. Stalking is defined as the unlawful systematic intentional intrusion upon a person's privacy with the direct intent of forcing that person to do something, to refrain from doing something, or to tolerate something, or to instil fear in that person (Article 285b CriC). Harassing behaviour is at the

¹¹⁴⁶ Van Maurik & Van der Meij 2012, comments on Article 281, margin no. 8; and Supreme Court 27 February 1990 *NJ* 1991, 109: in this case a Turkish man had abducted a Turkish girl with the intent of getting her to marry him. Because it could not be proved that he had intended to have sexual intercourse with her, he could not be convicted of *schaking*.

¹¹⁴⁷ Opinion Advocate-General Meijers, Supreme Court 2 July 1990, *NJ* 1991, 110.

¹¹⁴⁸ Annotation Advocate-General Mulder, Supreme Court 2 July 1990, *NJ* 1991, 110.

¹¹⁴⁹ Van Maurik & Van der Meij 2012, comments on Article 285, margin no. 8. See also Supreme Court 25 January 2011, ECLI:NL:HR:2011:BO3400, BP1834, BO4022, and BP1858.

¹¹⁵⁰ Van Maurik & Van der Meij 2012, comments on Article 285, margin no. 8. See also Supreme Court 25 January 2011, ECLI:NL:HR:2011:BO3400.

basis of the offence. Stalking is generally used to prosecute those persons who try to force someone to start or restore a (romantic) relationship with them.¹¹⁵¹ In most stalking cases, one or more persons are harassed by one stalker; in forced marriages, it will often be the other way around. Usually, several persons are involved in forcing someone to enter into a marriage and it is possible that the entire complex of their acts could be qualified as a systematic invasion of the victim's privacy.¹¹⁵² Community members who keep a close watch on the victim, informing her parents of her movements, the victim's brother following her going home from school to make sure she doesn't speak with boys, and, most of all, the parents' and relatives' insistent talk of the intended marriage, trying to convince, persuade, pressurise the victim into going along with it. Yet, here there may also be a problem: parents may not always know their child does not want to marry, or even if they are aware that their child is not very keen, some may even feel that what they are doing is best for their child. Would parents still have the intent that is required for the offence of stalking in those situations? That would depend on the circumstances of the case: if the victim did not, on any occasion, inform her parents that she did not want to marry, then it will be very difficult to prove that they had the aim of *forcing* the victim to marry (see also *supra* on coercion). It could be argued that they might have (unknowingly) forced the victim to tolerate something, i.e. the marriage (arrangements), but if the parents had no intent of forcing their child to tolerate this, then this behaviour will not qualify as stalking. In order to assess whether the perpetrator systematically intruded upon a person's privacy, courts use the following criteria: the nature, duration, frequency and intensity of the perpetrator's behaviour, the circumstances in which the behaviour took place and the influence it had on the life of the victim.¹¹⁵³

Prosecution of the offence of stalking is subject to complaint by the victim (Article 285b(2) CriC): the victim can lodge a complaint during the period of three months after she became aware that the offence was committed (Article 66(1) CriC). This may be challenging, seeing as 'stalking is a continuous offence and the point of commencement of this crime depends on the sum of the subsequent incidents'.¹¹⁵⁴ In practice, courts appear to be lenient: a complaint is considered to be lodged in time if there has been an act of stalking within three months prior to

¹¹⁵¹ Schmidt & Rijken 2005, p. 44.

¹¹⁵² Machielse 2012, comments on Article 285b Sr, margin no. 5. See Chapter 10 on forced marriage and co-perpetration.

¹¹⁵³ Supreme Court 12 March 2013, ECLI:NL:HR:2013:BZ3626, para. 2.3.

¹¹⁵⁴ District Court Breda 14 June 2012, ECLI:NL:RBBRE:2012:BW8443 (my translation).

the lodging.¹¹⁵⁵ This means that the victim has to have lodged a complaint within three months after the final day of the indicted stalking period.¹¹⁵⁶

Cumulative convictions are possible for criminal coercion (Article 284 CriC), threats to commit serious criminal offences (Article 285 CriC), stalking (Article 285b CriC) and the crime of influencing a person's statement, since there is no *lex specialis* relation between the four crimes.¹¹⁵⁷

3. THE DUTCH CRIMINALISATION DEBATE

3.1. MARITAL COERCION (CRIMINAL LAW) ACT

Since 2005, there have been calls for separate criminalisation of forced marriage. But so far, instead of amending substantive criminal law to include a specific crime of forced marriage, the government has responded to this practice by enforcing existing criminal prohibitions. In November 2009, the Minister of Security and Justice stated he intended to take stronger action against forced marriages and for that purpose, he announced legislative action. In May 2012, in conjunction with the civil law Bill discussed above (paragraph 2.1.5), the Marital Coercion (criminal law) Act was drafted, aiming at broadening the possibilities of dealing with forced marriages through criminal law.¹¹⁵⁸ In March 2013, the Marital Coercion (criminal law) Act was promulgated in the Dutch Bulletin of Acts and Decrees.¹¹⁵⁹ The Act officially entered into force on 1 July 2013.

¹¹⁵⁵ Supreme Court 2 November 2004, ECLI:NL:HR:2004:AQ4289; District Court Breda 14 June 2012, ECLI:NL:RBBRE:2012:BW8443 (where the court held that the complaint period of three months will begin running on the final day on which the perpetrator performs a stalking act); and S. van der Aa, *Stalking in the Netherlands: Nature and prevalence of the problem and the effectiveness of anti-stalking measures*, Antwerp/Portland: Maklu 2010, p. 99.

¹¹⁵⁶ District Court Rotterdam 28 March 2012, ECLI:NL:RBROT:2012:BW0234.

¹¹⁵⁷ Supreme Court 17 January 1984, NJ 1984, 479. NB the Supreme Court has not yet addressed the question of whether there is a *lex specialis* relation between Article 284 (as the more general provision) and Article 285a and 285b CriC (as the more specific provisions). For the relation between Article 285 and 285b CriC, see Supreme Court 30 May 2006, ECLI:NL:HR:2006:AW0476.

¹¹⁵⁸ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 2 (Voorstel van Wet: *Wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en het Wetboek van Strafrecht BES met het oog op de verruiming van de mogelijkheden tot strafrechtelijke aanpak van huwelijksdwang, polygamie en vrouwelijke genitale verminking*). The Act is named 'countering marital coercion', but is actually aimed at countering all forms of criminal coercion. Initially, the Bill contained a few amendments specifically aimed at forced marriages (e.g. concerning the extraterritorial jurisdiction in cases of forced marriages), but the government felt these changes in the criminal law should also be applied to other forms of coercion, such as religious coercion and the practices that can take place within sects. Therefore, the amendments in the Act were broadened and applied to all acts that fall within the scope of the offence of criminal coercion.

¹¹⁵⁹ Act of 7 March 2013, *Bulletin of Acts and Decrees* 2013, no. 95.

Before presenting the proposed measures in the Explanatory Memorandum, the Minister of Security and Justice discussed the possibility of creating specific criminal legislation for forced marriage and summed up the arguments in favour of separate criminalisation. Reasons for turning forced marriage into a distinct criminal offence include the need to send a clear message that forced marriage is not tolerated (establishing clear standards) and the possible deterrent effect of a separate offence. Specific legislation might also be needed if it turns out that the current maximum penalty of the general offence (in this case ‘coercion’) would not offer the possibility of adequately responding to this distinct form of coercion, or if there is a lacuna in the law as a result of which the general offence is not applicable in all cases, and a specific offence would offer more effective protection to victims.¹¹⁶⁰ The Minister explained, however, that he believed that creating specific criminal legislation for forced marriage was neither necessary nor desirable as this would be contrary to the system of the Dutch Criminal Code, which is characterised by generic provisions.¹¹⁶¹ He stated that the general offence of criminal coercion provides sufficient basis for criminal prosecution of forced marriage and a specific crime is not required for sending out a message: making clear that forced marriage is prohibited and raising awareness can be done by other means, including PPS Instructions and the measures proposed in the Marital Coercion (criminal law) Act. One of these measures pertains to increasing the maximum statutory penalty for coercion, which, in the eyes of the Minister, offers courts the possibility to take into account the seriousness of particular cases of coercion and adequately sentence them.¹¹⁶² These arguments were also put forward with regard to the criminalisation of female genital mutilation: instead of drafting specific provisions for this practice, it was criminalised as a form of assault. At the same time, a set of amendments were introduced in support of a more effective approach to female genital mutilation, such as an extension of the prescription period and the abolishment of the requirement of double criminality.¹¹⁶³ The Act has amended the criminal law in four areas.

First, it has broadened the extraterritorial jurisdiction of Dutch criminal courts in relation to the crime of criminal coercion by giving them jurisdiction over aliens who are domiciled in the Netherlands (either at the time they committed the crime or afterwards), as well as over Dutch nationals who commit the crime of coercion abroad. For this purpose, the requirement of double criminality – which

¹¹⁶⁰ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, p. 6 (Explanatory Memorandum).

¹¹⁶¹ In a written reply to questions posed by the Upper House, the Minister repeated that in general, the legislator will think twice before creating a new criminal offence (*lex specialis*) for behaviour that is already caught by a broader, general criminal offence (*lex generalis*). *Parliamentary Papers I (Upper House)* 2011/2012, 32 840, C, p. 12.

¹¹⁶² Note that the judiciary had not in any way indicated that the maximum penalty on coercion (nine months) was too low.

¹¹⁶³ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, pp. 6–7 (Explanatory Memorandum).

requires an act to be criminal both in the Netherlands and in the country where it was committed – was abolished. In addition, the passive personality principle has become applicable in cases of forced coercion, meaning that Dutch courts now have jurisdiction over those people who commit the crime of criminal coercion in relation to a Dutch citizen, for example those who force a Dutch citizen to enter into a marriage abroad.¹¹⁶⁴

Secondly, the Act has extended the statute of limitations with regard to the offence of coercion: this means that if coercion was committed with respect to a minor, the *dies a quo* of the statutory prescription period of six years will be the day after the victim's eighteenth birthday.¹¹⁶⁵

Thirdly, the Act has increased the maximum penalty for the offence of coercion from nine months to two years.¹¹⁶⁶ The Minister argued that a higher maximum penalty was necessary because the maximum of nine months imprisonment did not adequately reflect the gravity of certain particular forms of coercion, one of them marital coercion. Other examples of grave coercion mentioned by the Minister are the practices that take place in sects, the practice known as religious coercion¹¹⁶⁷ (*geloofsdwang*) and integration-related coercion.¹¹⁶⁸ In determining the maximum penalty of criminal coercion, the Minister looked at comparable criminal offences. The main source of inspiration was found in the crime of threatening behaviour (Article 285 CriC), that also has a maximum penalty of two years imprisonment and is also a so-called pre-trial detention offence.¹¹⁶⁹

Fourthly, the Act has added the offence of coercion to Article 67(1)(b) CCriP, which means that certain coercive measures, such as pre-trial detention, have become applicable in case of criminal coercion.¹¹⁷⁰ The Minister stated that these coercive measures may be necessary for the benefit of the criminal investigation,

¹¹⁶⁴ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, pp. 7–9 (Explanatory Memorandum).

¹¹⁶⁵ This amendment is in line with prescription periods of other serious offences involving minors, such as sexual abuse, female genital mutilation and trafficking in children, see *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, p. 13 (Explanatory Memorandum).

¹¹⁶⁶ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, p. 1 (Explanatory Memorandum).

¹¹⁶⁷ Forcing someone to convert to a religion against that person's will, or forcing someone to remain in a religion against that person's will (*Parliamentary Papers II (Upper House)* 2012/2013, 32 840, C, p. 14 (Memorandum of Reply)).

¹¹⁶⁸ The AIVD, the General Intelligence and Security Service of the Netherlands, reported that some salafi imams in the Netherlands systematically sabotage the integration of young people into Dutch society by trying to radicalise them. Where these imams exert severe psychological or even physical pressure on these individuals and force them to do something or refrain from doing something against their will, this will qualify as criminal coercion (see *inter alia* AIVD, *Radicale dawa in verandering, de opkomst van islamitisch neoradicalisme in Nederland*, The Hague: AIVD 2007. See *Parliamentary Papers II (Lower House)* 2011/2012, 32 840, no. 6, p. 16; and *Parliamentary Papers II (Upper House)* 2012/2013, 32 840, C, p. 14 (Memorandum of Reply)).

¹¹⁶⁹ *Parliamentary Proceedings (Lower House)* 2012/2013, 11, p. 51.

¹¹⁷⁰ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, p. 14 (Explanatory Memorandum).

in order to prevent escalation and/or to protect the victim. Turning the crime of criminal coercion into a pre-trial detention offence also allows for several extra investigative powers to be used in the case of a suspected forced marriage, such as the authority to demand telecommunication data.¹¹⁷¹ The Minister pointed out that the coercive measures made possible by virtue of inclusion in Article 67 CCriP could also be of use in other cases of criminal coercion, such as those concerning practices within sects.¹¹⁷²

3.2. ANALYSIS OF THE MARITAL COERCION (CRIMINAL LAW) ACT

As stated above, the Marital Coercion (criminal law) Act amended the criminal law in four areas. One of these amendments concerns the broadening of the extraterritorial jurisdiction of Dutch criminal courts and the abolition of the requirement of double criminality for the offence of criminal coercion in general. It is important not to overestimate the effect (i.e. the number of (successful) prosecutions) of broadening the extraterritorial jurisdiction over forced marriages. Parliamentary discussions regarding the Act are peppered with concerns about the evidentiary aspects of forced marriage cases. All parties agree that collecting substantial evidence to secure a successful prosecution will be difficult.¹¹⁷³ This is a legitimate concern. When a Dutch national is involved in the commission of a forced marriage in a foreign country, it will usually be more difficult to gather evidence than when that marriage takes place in the Netherlands. In many cases, Dutch police and prosecution services will for a large part be dependent on the authorities of a foreign country when gathering evidence. If these foreign authorities refuse to cooperate, the chances of a successful prosecution might be slim. Especially in those cases where the alleged forced marriage took place in a country which does not regard this particular marriage as ‘forced’ or which has different ideas about the criminal nature of forced marriages in general, the chances are that the authorities will not cooperate.¹¹⁷⁴ So, as rightly put forward by the Board of Procurators General, the Council of State and several other organisations that advised the government, broadening the jurisdiction of Dutch criminal courts will not necessarily result in a higher number of successful

¹¹⁷¹ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, p. 14 (Explanatory Memorandum).

¹¹⁷² *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3, p. 14 (Explanatory Memorandum). See also *Parliamentary Papers II (Lower House)* 2009/2010, 32 123 XVIII, no. 57, motion Van der Burg en Van Toorenburg; and *Parliamentary Papers II (Lower House)* 2011/2012, 32 840, no. 6.

¹¹⁷³ See *inter alia* *Parliamentary Proceedings (Lower House)* 2012/2013, 11, p. 49.

¹¹⁷⁴ *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 3 (Advice Board of Procurators General), p. 2; and *Parliamentary Papers II (Lower House)* 2010/2011, 32 840, no. 4, p. 6 (Advice of the Council of State and Report of the Minister).

prosecutions.¹¹⁷⁵ The expected low rate of cases is not restricted to forced marriages that took place abroad: it is expected that the willingness to report forced marriages in the Netherlands will also remain low. Coercion in general is a difficult offence to prosecute and this is reflected by the number of court cases: between 2000 and 2012, ten cases concerning criminal coercion went to court; seven of these cases resulted in a conviction.¹¹⁷⁶

4. THE ENGLISH LEGAL LANDSCAPE BEFORE CRIMINALISATION

4.1. CIVIL LAW: THE LEGAL REQUIREMENTS FOR MARRIAGE

The Marriage Acts 1949, 1983 and 1994, and the Matrimonial Causes Act 1973 (MCA) deal with matters concerning marriage. Marriage was traditionally defined as ‘the voluntary union for life of one man and one woman to the exclusion of all others’,¹¹⁷⁷ but the Marriage (Same Sex Couples) Act 2013 has extended the possibility of marriage to same sex couples. English law recognises four main types of marriage ceremonies: civil marriages; marriages according to the rites of the Church of England; Quaker and Jewish marriages; and other non-Anglican religious marriages.¹¹⁷⁸ For a valid marriage to be celebrated, both parties must have the capacity to marry, meaning that they are 18 years or older or between 16 and 18 with parental consent, are of sound mind, are not within the prohibited degrees of relationship of each other and are not already married to or in a civil partnership with someone else.¹¹⁷⁹

A valid marriage is preceded by a set of preliminary formalities. The specific preliminaries that are prescribed by law depend on the nature of the ceremony: the preliminaries which must take place before the celebration of a civil marriage also have to be used for all non-Anglican religious weddings; the Church of England, on the other hand, has its own set of preliminary formalities.¹¹⁸⁰ Irrespective of this distinction between Anglican on the one hand, and civil and non-Anglican on the other, the aim of the preliminary formalities is the same: to ensure that notice of the intended marriage is given, which gives third parties – such as a person who

¹¹⁷⁵ *Parliamentary Papers II (Lower House) 2010/2011*, 32 840, no. 4, pp. 7–8 (Advice of the Council of State and Report of the Minister).

¹¹⁷⁶ *Parliamentary Proceedings (Lower House) 2012/2013*, 11, p. 48.

¹¹⁷⁷ *Hyde v. Hyde and Woodhouse* (1866) LR 1 PD 130, p. 133, referred to in Herring 2011, p. 43.

¹¹⁷⁸ Cretney’s *Principles of Family Law 2008*, margin no. 1–031. See Part II Marriage Act 1949 (marriages according to the rites of the Church of England).

¹¹⁷⁹ See Herring 2011, pp. 50–57 and Article 1–3 Marriage Act 1949. Paragraphs 26 and 27 of the Marriage (Same Sex Couples) Act 2013 amend Article 11(c) MCA so that the fact that a couple are not a man and a woman no longer makes a marriage void.

¹¹⁸⁰ Cretney’s *Principles of Family Law 2008*, margin no. 1–013.

is already married to one of the intending spouses, or a parent whose consent has not (yet) been obtained – the opportunity to make objections to the marriage.¹¹⁸¹ In the case of a civil marriage or non-Anglican religious marriage, notice will have to be given to the superintendent registrar of the district where the parties live or where they have resided for at least seven days (Article 27(1) Marriage Act 1949). Once notice has been given, members of the public who object to the intended marriage can enter a caveat with the superintendent registrar against the issue of a marriage certificate, and any person whose consent is required for the marriage may forbid the issue of such a certificate (Articles 29 and 30 Marriage Act 1949). The registrar then investigates the validity of the objections and also verifies for himself whether the parties in question are free to marry (Articles 28A and 29(2) Marriage Act 1949).¹¹⁸² In order to prevent sham marriages, the superintendent registrar has a duty to report to the Home Office Immigration Department any intended marriages that give rise to suspicion, i.e. cases in which the intended marriage does not appear to be genuine.¹¹⁸³ When no objections have been made and no impediments have been found, the superintendent registrar will issue a certificate that authorises the solemnisation of the marriage.¹¹⁸⁴ In the case of a marriage according to the rites of the Church of England, an intended marriage is usually announced in each party's parish church during morning or evening service on three Sundays preceding the solemnisation, which allows for the discovery of any impediments to the marriage.¹¹⁸⁵

The marriage ceremony in itself is in effect an exchange of marriage vows: the parties must declare that they know of no lawful impediment to the marriage and that they take each other to be their lawful wedded husband or wife.¹¹⁸⁶ A civil marriage must be celebrated in the presence of a registrar and two witnesses and on approved premises (such as the registrar's office).¹¹⁸⁷ The form of the ceremony of a non-Anglican religious marriage is left almost entirely to the religious authorities;

¹¹⁸¹ Cretney's Principles of Family Law 2008, margin no. 1–012.

¹¹⁸² Cretney's Principles of Family Law 2008, margin no. 1–014–015.

¹¹⁸³ Cretney's Principles of Family Law 2008, margin no. 1–017; and Article 24 Immigration and Asylum Act 1999 and Reporting of Suspicious Marriages and Registration of Births Deaths and Marriages (Miscellaneous Amendments) Regulations 2000, S.I. 2000, no. 3164. See for an example of three people who were convicted for taking part in a sham marriage plot: <www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/march/65-sham-marriage-polish> last accessed December 2013.

¹¹⁸⁴ Cretney's Principles of Family Law 2008, margin no. 1–016.

¹¹⁸⁵ See Articles 6 and 7 Marriage Act 1949. This procedure is known as banns and is used in approximately 90% of Anglican weddings (Cretney's Principles of Family Law 2008, margin no. 1–021). For a discussion of the two other preliminary procedures that are available to Anglican marriages see Cretney's Principles of Family Law 2008, margin no. 1–025–030 and Article 5 Marriage Act 1949.

¹¹⁸⁶ Article 45 in conjunction with Article 44(3) Marriage Act 1949: 'I do solemnly declare that I know not of any lawful impediment why I, AB, may not be joined in matrimony to CD' and 'I call upon these persons here present to witness that I, AB, do take thee, CD, to be my lawful wedded wife (or husband).'

¹¹⁸⁷ Article 46A Marriage Act 1949; and Cretney's Principles of Family Law 2008, margin no. 1–034.

the state only prescribes the preliminary formalities which must have been abided by (including, most importantly, the issue of a registrar's marriage certificate) and the state licenses the premises where such marriages can take place (such as registered, designated Sikh temples and mosques)¹¹⁸⁸ and appoints those who can solemnise them (usually a minister of the religious group in question).¹¹⁸⁹ Such an authorised person is allowed to act instead of a registrar, meaning that religious marriages do not have to be celebrated in the presence of a registrar.¹¹⁹⁰ As regards the actual ceremony, there is only one important qualification, namely that at one point during the ceremony, the parties make the same statements that are prescribed for those marrying in a civil ceremony.¹¹⁹¹ In the case of an Anglican marriage, a clergyman celebrates the marriage in the presence of two witnesses according to the rites prescribed in the Book of Common Prayer.¹¹⁹² The presence of a registrar is not required.

Jews and Quakers can marry according to their own marriage customs, as long as they adhere to the set of preliminaries required for civil marriages (i.e. obtain a registrar's certificate or certificate and licence) and follow specific rules for registration (see Part IV Marriage Act 1949). The marriages do not need to be celebrated by an authorised person, in public or in a registered building.¹¹⁹³

The requirements and formalities described above form the basis of a valid marriage. A marriage is not valid but legally void when there is an element of public policy against the marriage.¹¹⁹⁴ The grounds are exhaustively set out in Article 11 MCA.¹¹⁹⁵ Pursuant to this provision, a marriage is void when the parties are within the prohibited degrees of relationship,¹¹⁹⁶ when either party

¹¹⁸⁸ A religious ceremony that did not take place in a registered building is not recognised in English law; that couple would have to go through an additional civil ceremony (Cretney's Principles of Family Law 2008, margin no. 1-040).

¹¹⁸⁹ Articles 41 and 43 Marriage Act 1949.

¹¹⁹⁰ Cretney's Principles of Family Law 2008, margin no. 1-041.

¹¹⁹¹ Articles 44(3) and 45A(2) Marriage Act 1949, and Cretney's Principles of Family Law 2008, margin no. 1-040. The formula of the declaration may be substituted by any of the alternatives listed in Article 44(3) Marriage Act 1949.

¹¹⁹² Article 22 Marriage Act 1949 and Cretney's Principles of Family Law 2008, margin no. 1-037.

¹¹⁹³ Article 43(3) Marriage Act 1949; and Cretney's Principles of Family Law 2008, margin no. 1-038.

¹¹⁹⁴ Herring 2011, p. 49. In a 2008 case, the Court of Appeal rendered a marriage void on the basis of public policy. This case concerned the marriage performed over the telephone between a woman in Bangladesh and a man with severe intellectual impairment. The Court held that the man lacked capacity to understand the nature of the marriage and described the marriage as exploitative of both the woman and the man. Lack of capacity usually renders a marriage voidable rather than void (*City of Westminster v. IC (by his Friend the Official Solicitor) and KC and NN* (2008) 2 FLR 267, and Herring 2011, p. 57).

¹¹⁹⁵ For the grounds on which a marriage according to the rites of the Church of England is void, see Article 25 Marriage Act 1949.

¹¹⁹⁶ See Marriage (Prohibited Degrees of Relationship) Act 1986: parent-child (including adoptive child), grandparent-grandchild, brother-sister, uncle-niece, aunt-nephew. A marriage between cousins is allowed under English law (Herring 2011, p. 50). Affinity restrictions pertain to step-parent-stepchild.

is under the age of 16,¹¹⁹⁷ when the parties have intermarried in disregard of certain requirements as to the formation of marriage,¹¹⁹⁸ or when at the time of the marriage either party was already lawfully married or a civil partner.

4.2. THE FORCED MARRIAGE (CIVIL PROTECTION) ACT 2007

In November 2008, the Forced Marriage (Civil Protection) Act 2007 (FMCPA) entered into force.¹¹⁹⁹ This Act, which provides a civil remedy and which was inserted after Part 4 of the Family Law Act 1996 (FLA 1996),¹²⁰⁰ was the result of a Private Member's Bill introduced in the House of Lords by Lord Lester of Herne Hill.¹²⁰¹ Multi-agency statutory guidance was implemented alongside the FMCPA, directing all persons and bodies in England and Wales on how to act when exercising public functions in relation to safeguarding children and vulnerable adults in cases of forced marriage.¹²⁰²

The FMCPA defines a forced marriage as any religious or civil ceremony of marriage – whether or not legally binding – that a person is forced to enter into without his free and full consent.¹²⁰³ The FMCPA stipulates that force includes physical violence, but also coercion by threats or other psychological means. This broad definition of 'force' recognises that the element of coercion underlying a forced marriage may consist of more complex factors than physical violence and can include a wide range of pressures. As stated, the coercion exerted in most forced marriages often consists in socio-cultural expectations and emotional pressure.¹²⁰⁴ A family may force a marriage using emotional blackmail (for example by telling someone their mother, grandfather, aunt or other family member will get very ill and die if they do not agree to go along with the planned marriage, or by threatening to commit suicide) or deception (such as by planning a trip abroad under the guise of a family holiday but with the actual motive of

¹¹⁹⁷ This correlates with the criminal law policy that it is prohibited for a man to have sex with a girl younger than 16 (Herring 2011, p. 52).

¹¹⁹⁸ As explained, the kind or formalities that are applicable depend on whether the marriage is performed in rites of the Church of England or outside (Herring 2011, p. 52). A marriage is only void on the ground of breach of any of the formalities if the parties were aware of the breach and married willfully in breach of the requirement, see Articles 25 and 49 Marriage Act 1949 for an overview of such formalities (Herring 2011, p. 53).

¹¹⁹⁹ Forced Marriage (Civil Protection) Act 2007 (Commencement No.1) Order 2008, SI 2008/2779 (C. 122).

¹²⁰⁰ Adding Part 4A to the Family Law Act, consisting of Articles 63A-63S.

¹²⁰¹ House of Lords Debate 16 November 2006, vol 687, col 19; and Heaton, McCallum & Jogi 2009, pp. v and vi.

¹²⁰² *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010.

¹²⁰³ Article 63A(4) FLA 1996, in conjunction with Article 63S.

¹²⁰⁴ Proudman 2011, p. 30.

forcing a marriage).¹²⁰⁵ Telling someone they are no longer allowed to go to school or university if they do not agree to marry is another example of psychological pressure, as is threatening with disownment.¹²⁰⁶ Especially when the victims are young, this pressure can be very difficult to challenge.

In order to protect someone who is being forced into a marriage or who has already been forced into a marriage, the court – i.e. the High Court or a designated county court – can make a forced marriage protection order (FMPO). This civil order, which can be used as a protective as well as a preventative measure, is comparable to an injunction.¹²⁰⁷ The FMCPA entrusts the court with wide discretionary powers when it comes to making protection orders. Pursuant to Article 63B FLA 1996, forced marriage protection orders can contain prohibitions, restrictions, requirements and other terms the court considers appropriate for the purpose of protection against a forced marriage. The terms of such orders can relate to anyone who is or may become involved in a forced marriage (such as by aiding, abetting, counselling, procuring, encouraging or assisting another person to (attempt to) force someone to enter into a marriage, or conspiring to do so) and can pertain to conduct both within as well as outside England and Wales.¹²⁰⁸

The words ‘may become involved’ imply that FMPOs cannot only be directed against specifically named respondents, but also against unnamed persons, which is a notable feature of the FMCPA.¹²⁰⁹ A protection order can thus be directed against virtually anyone and relate to virtually anything. A court could for example use a protection order to stop a potential victim of forced marriage from being taken abroad by requiring respondents to hand in the passport of the potential victim (i.e. the person to be protected) to the court or to forfeit their own passports,¹²¹⁰ or it can require respondents to return the person to be protected to the jurisdiction of England and Wales. An order can also include a blanket provision, forbidding anyone from threatening or harassing the person to be protected, or from making any arrangements in relation to the marriage of that person.¹²¹¹ These sections, which give the court a wide discretion with respect to determining the contents and the subjects of FMPOs, were drafted so as to reflect

¹²⁰⁵ Heaton, McCallum & Jogi 2009, p. 5; and *NS v. MI* (2006) 1 FLR 444.

¹²⁰⁶ Heaton, McCallum & Jogi 2009, p. 32.

¹²⁰⁷ Injunctions are court orders that require a party to do or refrain from doing specified acts and are often used in cases of stalking, domestic violence and harassment (Martin 2010, pp. 19 and 120).

¹²⁰⁸ Article 63B(2) and (1) FLA 1996.

¹²⁰⁹ Heaton, McCallum & Jogi 2009, p. 35.

¹²¹⁰ In 2009, a man who was suspected of wanting to force his daughter into a marriage was ordered to forfeit his passport and was barred from taking his daughter abroad (see A. Bellard, ‘Blackburn “forced marriage order” dad banned from going near family’ *Lancashire Telegraph* 18 November 2009, available at <www.lancashiretelegraph.co.uk/news/blackburn/4744691>. Blackburn__forced_marriage_order__dad_banned_from_going_near_family> last accessed December 2013).

¹²¹¹ Heaton, McCallum & Jogi 2009, p. 43; and L. McCallum, ‘Forced Marriage, Local Authorities and Applications without Leave: The New Provisions’ (30 October 2009) <www.familylawweek.co.uk/site.aspx?i=ed42867> last accessed December 2013.

and correspond with the nature of forced marriage.¹²¹² As was recognised during the third reading of the Forced Marriage (Civil Protection) Bill in the House of Commons and explained in Chapter 2, in the process of forcing someone to enter into a marriage or attempting to do this, many people may become involved. Pressure may come from a large selection of people, making it difficult both for the applicant (either the victim or a third party) as well as for the court to foresee which persons may become involved at a certain stage. Specifically naming all respondents in an order may therefore be an impossible task. Article 63B allows the court to anticipate unforeseen circumstances.¹²¹³

The court can make a forced protection order on an application made either by the person who is to be protected by the order, by a relevant third party or by other third parties.¹²¹⁴ Relevant third parties may apply for a protection order without first obtaining leave of the court, and, significantly, without the knowledge or consent of the person to be protected.¹²¹⁵ Other third parties, such as friends, relatives, voluntary workers, neighbours and police officers, can also apply for a forced marriage protection order, but can only do so with leave of the court.¹²¹⁶ In addition to making orders on an application, the court also has the power to make a forced marriage protection order on its own initiative.¹²¹⁷

When the court considers it just and convenient to do so, it can make forced marriage protection orders *ex parte*, meaning without the respondents being served with any documents. This would happen, for example, in those cases in which a protection order is needed immediately: the court can then consider the application for an order straightaway and make the order without giving the respondents notice of the proceedings. At a later stage, the respondents will be given the opportunity to make representations about the protection order during an *inter partes* hearing.¹²¹⁸

¹²¹² Heaton, McCallum & Jogi 2009, p. 32.

¹²¹³ See House of Commons Debate 23 July 2007, vol. 463, col. 643.

¹²¹⁴ Relevant third parties are those persons specified by order of the Lord Chancellor, Article 63C(1), (2) and (7) FLA 1996. Examples of relevant third parties are local authorities, including *inter alia* county councils in England (The Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009, SI 2009/2023). Note that the FMU is not designated as a relevant third party (Heaton, McCallum & Jogi 2009, p. 29; and FMCPA Explanatory Notes, para. 29).

¹²¹⁵ Heaton, McCallum & Jogi 2009, p. 29; and L. McCallum, 'Forced Marriage, Local Authorities and Applications without Leave: The New Provisions' (30 October 2009) <www.familylawweek.co.uk/site.aspx?i=ed42867> last accessed December 2013).

¹²¹⁶ FLA 1996, s 63C(3). The possibility for third parties and others to make applications is an innovative aspect of the FMCPA and goes beyond the possibilities in other acts (see Gill & Anitha 2011, p. 141).

¹²¹⁷ When the court considers that an order is required to protect someone, it can make such an order on its own initiative under the condition that the person who would be a respondent to any proceedings for a forced marriage protection order is a party to other family proceedings that are currently before the court. The person to be protected does not have to be a party to any existing family proceedings. Article 63C(6)-(7) FLA 1996 defines the term 'family proceedings', this definition is broader than that set out in Part 4 FLA 1996.

¹²¹⁸ Article 63D(3) FLA 1996.

4.3. AMENDMENTS TO THE FMCPA PROPOSED BY THE ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL 2013

Initially, breaches of FMPOs were qualified as contempt of court, punishable with a custodial sentence of up to two years imprisonment or a fine.¹²¹⁹ The Anti-Social Behaviour, Crime and Policing Bill 2013 (ABCP Bill) proposes to insert a section in the FLA 1996 which makes the breach of an FMPO a criminal offence. This construction is known as a two-step prohibition: an FMPO is a civil order, but *breach* of this order will become a criminal offence.¹²²⁰ As a result of the criminalisation, the police will always be able to arrest for a suspected breach of an FMPO; courts no longer need to attach a power of arrest. Article 63CA(1), which is to be inserted in the FLA 1996, proposed by the ABCP Bill 2013 describes the offences as follows: ‘a person who without reasonable excuse does anything that the person is prohibited from doing by a forced marriage protection order is guilty of an offence.’¹²²¹ A person found guilty of this offence is liable, on summary conviction (i.e. in a trial heard in the magistrates’ court), to imprisonment for a term not exceeding twelve months, or a fine, or both. In case of conviction on indictment (i.e. in a trial by jury heard in the Crown Court), the term of imprisonment may not exceed five years.¹²²²

During the government consultation in 2012 on the possible criminalisation of forced marriage, several NGOs stated that they believed many victims may not want to pursue criminal proceedings against family members who forced or tried to force them into a marriage. Mindful of this fact, the government will allow the person who applied for the FMPO to choose how a breach is dealt with: in the criminal courts (by calling the police), or in the civil court (by making an application to the court who issued the order to have the breach dealt with as civil contempt of court).¹²²³ If the victim wishes to stick to the civil route, he or she can also apply for an arrest warrant for breach of an FMPO in the civil court.¹²²⁴

¹²¹⁹ Article 14(1) Contempt of Court Act 1981, in conjunction with Article 63O FLA 1996. In February 2011, a London woman was found guilty of contempt of court and sentenced to eight months imprisonment. She had been issued with a forced marriage protection order to return her son, who was believed to be in Nigeria and at risk of being forced into a marriage, back to England and failed to do so ‘First person jailed for breaking forced marriage laws’, *Solicitor First*, 15 February 2011; and ‘Edirin Onogeta-Idogun mother jailed over “missing” son’, BBC News 14 February 2011 (<www.bbc.co.uk/news/uk-england-london-12455820> last accessed December 2013).

¹²²⁰ Ashworth & Horder 2013, pp. 5 and 53: ‘the consequence of a breach of such an order (an anti-social behaviour order, but also an FMPO; IH) is the commission of a strict liability offence’. See also Simester & Von Hirsch 2011, pp. 212–232.

¹²²¹ ABCP Bill (HL Bill 66) as amended by the Committee, 12 December 2013.

¹²²² New Article 63CA(5) FLA 1996.

¹²²³ ABCP Bill, Fact sheet: forced marriage (available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/201096/Fact_sheet_bill_overview.pdf> last accessed December 2013). See also *infra* paragraph 5.2 on the two new offences of forced marriage.

¹²²⁴ ABCP Bill, Explanatory notes (Bill 7 55/3) 9 May 2013, para. 223. See Article 63J(2) FLA 1996.

Paragraphs 3 and 4 of the new section 63CA prevent double jeopardy: a person who has been convicted for breach of an FMPO cannot be punished for contempt of court in relation to this breach.¹²²⁵

The FMCPA does not address the issue of the validity of (forced) marriages; this issue is regulated by the MCA 1973.

4.4. ANNULMENT OF FORCED MARRIAGE

When a forced marriage has taken place, a victim can seek a decree of nullity under the MCA within three years of the date of the marriage.¹²²⁶ Annulment does not have retroactive effect: a decree of nullity operates to annul the marriage only as regards any time after the decree has been made absolute, meaning that the marriage shall be treated as if it had existed up to the time of annulment.¹²²⁷

The MCA lists a set of grounds on which a marriage is voidable. With regard to forced marriages the most relevant of these eight grounds is enshrined in Article 12(c) MCA: a marriage is voidable on the ground that either party to the marriage did not validly consent to it, as a consequence of duress, mistake, unsoundness of mind or otherwise.¹²²⁸ These four categories of circumstances that invalidate consent are discussed below.

4.4.1. Duress

The existence of duress, a concept which is not defined in the MCA, depends on the question of whether the subject's will was overborne by fear caused by a threat for which the party himself is not responsible.¹²²⁹ The overborne will theory implies that the coercion that was exercised negated the psychological possibility of consent.¹²³⁰ The Court of Appeal originally limited the nature of threats that could amount to duress to threats to life, limb or liberty.¹²³¹ However, in its 1984 judgement in the case *Hirani v. Hirani*, the Court of Appeal adopted a more

¹²²⁵ ABCP Bill, Explanatory Notes (Bill 7 55/3) 9 May 2013, para. 224.

¹²²⁶ After the expiration of the period of three years from the date of the marriage, the court can grant leave for the institution of proceedings for the grant of a decree of nullity if the petitioner at some point during that period suffered from mental disorder within the meaning of the Mental Health Act 1983 and the court considers that it would be just to grant such leave (Article 13(4) MCA). For a definition of 'mental disorder', see Article 1 Mental Health Act 1983.

¹²²⁷ Article 16 MCA.

¹²²⁸ The marriage is *void* when either of the parties was younger than 16 at the time of the marriage (article 11(a)(ii) MCA).

¹²²⁹ See *inter alia* *Hirani v. Hirani* (1984) 4 FLR 232 (CA); *Singh v. Singh* (1971) 2 W.L.R. 963; *Szechter v. Szechter* (1971) 2 WLR 170; and *Buckland v. Buckland* (1967) 2 W.L.R. 1506.

¹²³⁰ Bradney 1994, p. 964.

¹²³¹ *Buckland v. Buckland* (1967) 2 W.L.R. 1506; *Singh v. Singh* (1971) 2 W.L.R. 963; *Singh v. Kaur* (1981) Fam Law 152, CA.

inclusive definition of ‘threat’, considering that any kind of threat will amount to duress, provided it has overborne the will of the subject. The case concerned the forced marriage of a 19-year-old Hindu woman, whose parents, upon whom she was financially dependent, had threatened to oust her from their home if she refused to marry the man they had selected for her. The woman gave in to this pressure, married the man of her parents’ choice, left him after six weeks and petitioned for a decree of nullity on the ground of duress. The judge in first instance held there was no duress because there had been no threat to life, limb or liberty, as required by earlier Court of Appeal case law.¹²³² The woman appealed and the Court of Appeal amended the duress test, considering that the question of whether duress, ‘whatever form it took’, was present depends on the question of ‘whether the threats or pressure were such as to overbear the will of the individual and destroy the reality of consent.’¹²³³ Applying this subjective¹²³⁴ test, the court found that this case was a clear example of pressure overbearing the will of the individual, vitiating any consent.¹²³⁵ As noted by Anitha and Gill, in subsequent cases, courts have recognised that duress in the context of emotional pressure can take different forms, such as threats of suicide made by the coercer¹²³⁶ and being made to feel responsible for someone’s death.¹²³⁷ Duress can therefore include physical and psychological coercion, but also financial, sexual and

¹²³² Compare *Singh v. Singh* (1971) 2 W.L.R. 963, this case concerned a Sikh woman who had entered into a marriage arranged by her parents: she was told her husband-to-be was educated and handsome, but when she met him for the first time on the day of the wedding, she found he was neither and went through with the marriage only out of obedience to her parents’ wishes and out of deference to Sikh custom. She then sought annulment of the marriage on grounds of duress. The Court held that there was no duress because there had been no threats of immediate danger to the woman’s life, limb or liberty. In *Singh v. Kaur* (1981) Fam Law 152, CA a Sikh man sought annulment of his marriage on grounds of duress. He had entered into a marriage arranged by his parents after they told him that refusal would cause disgrace for his family and would mean that he would have to leave the family home and give up his place in the family business. As there had only been social and psychological pressure and as there had been no threats to the man’s life, limb or liberty, a decree of nullity on grounds of duress was not granted.

¹²³³ *Hirani v. Hirani* (1984) 4 FLR 232 (CA).

¹²³⁴ In *Szechter v. Szechter* (1971) 2 WLR 170; and *Buckland v. Buckland* (1967) 2 W.L.R. 1506, an objective test was used, requiring that the fear held by the petitioner was *reasonably* entertained. The subjective test which is currently applied by the courts was first formulated in *Scott (Falsely Called Sebright) v. Sebright* (1887) L.R. 12 P.D. 21, 24: ‘Whenever from natural weakness of intellect or from fear – whether reasonably entertained or not – either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.’ This test therefore does not require that the state of mind of the person claiming duress is measured against any objective standard of steadfastness (see also Harris-Short & Miles 2011, pp. 82–84; and compare Bradney 1994, p. 966).

¹²³⁵ *Hirani v. Hirani* (1984) 4 FLR 232 (CA).

¹²³⁶ *Sohrab v. Khan* (2002) SCLR 663; see Sundari Anitha & Aisha Gill 2009, p. 170.

¹²³⁷ *Mahmud v. Mahmud* (1994) SLT 599 (Scottish case).

emotional pressure.¹²³⁸ This is confirmed by the CPS in their Legal Guidance on honour-based violence and forced marriage:

‘Duress can take the form of overt behaviour, for example assault, or more subjective factors which may depend on the victims perception of the situation. This can include the applying of subtle pressures such as a sense of duty and emotional blackmail (e.g. threats to disown or ostracise the victim; accusations of bringing disgrace and dishonour onto the family or community); sexual or financial pressure.’¹²³⁹

In other words, in the case of duress, a person’s will has been overborne as a result of which consent has not been freely given, which means the marriage can be qualified as ‘forced’.¹²⁴⁰ This subjective analysis allows the court to consider all the peculiarities of the particular case, such as a person’s cultural background.

But what does ‘freely given’ mean? Will consent be considered to be given freely if someone is persuaded by relatives and reluctantly consents, or agrees to marry out of a sense of duty to their parents or out of deference to cultural customs and traditions? Three Scottish cases concerning forced marriage in which reference is made to the English cases discussed above shed some light on this matter and provide some guidance with respect to distinguishing between (parental) influence and duress. The facts of these cases, *Mahmood v. Mahmood*, *Mahmud v. Mahmud* and *Singh v. Singh*,¹²⁴¹ are comparable to *Singh v. Singh*, *Singh v. Kaur* and *Hirani v. Hirani*: the pressure that was applied was of a social and psychological nature; no threats to life, limb or liberty were uttered.

The case of *Mahmood v. Mahmood* concerned the arranged marriage of a 21-year-old woman. She had protested against the marriage arranged by her parents, but finally entered into the marriage because her parents, upon whom the woman was financially reliant, had threatened to disown her, cut off all financial support and send her to live in Pakistan if she did not marry the man they had selected for her. In addition, the parents told their daughter that she would bring shame upon the family and the Pakistani community in Edinburgh if she refused to marry. The woman took her parents’ threats seriously, as they had already disowned her elder sister and brother after they had refused to go along with their arranged marriages. Lord Sutherland held that the question of whether or not the threats made were of such a degree such as to overwhelm the person’s will, depends on the particularities of the individual case. He considered that parental influence is both legitimate and proper ‘when the parents consider that

¹²³⁸ *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 4.

¹²³⁹ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 7.

¹²⁴⁰ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 7.

¹²⁴¹ The last-mentioned is not to be confused with the 1971 English case of *Singh v. Singh* discussed above in footnote 1232.

what they are advising is in the best interest of their child'.¹²⁴² In this particular case, however, Lord Sutherland held that the threats uttered by the young woman's parents went beyond the limits of proper parental influence. Lord Sutherland took into consideration the woman's age and cultural background when holding that especially the threat to cut off all financial support and send her to Pakistan were of such a nature that they could be regarded as matters which could overcome the woman's will. It was also held that when determining whether the consent given was genuine, circumstances leading up to the threats should be explored, as should what transpired after the marriage ceremony. Obiter, it was observed that fear of disapproval of parents or of the community will not be of a sufficient degree to amount to duress.¹²⁴³

In *Mahmud v. Mahmud*, a Muslim man of Pakistani origin sought the annulment of his arranged marriage to one of his cousins. Mahmud had been under pressure from his parents and other family members for twelve years to enter into the marriage and was told that refusal would bring shame and degradation to his family. His family had blamed him for his father's death, who had died of a stroke and whose last wish had been that Mahmud would agree to the marriage. Then his mother's health began declining and his family used this as another means to put pressure on him: he would need a wife who would take care of his mother. He eventually relented and married his cousin. At the time of this marriage, he was living with his girlfriend with whom he had a child and whom he intended to marry. Lord Prosser held that the key question in such cases was whether the consent to the marriage was free consent, which demonstrated an agreeing mind. If the consent has been compelled by force, it cannot be considered as such. In this particular case, Lord Prosser held that the sustained pressure (especially upon his conscience after his father's death) had been so great as to amount to force, with the result that the man's will was overborne and his consent vitiated.¹²⁴⁴ His family members, with the aim of forcing Mahmud to accept the marriage, had applied this pressure intentionally. In addition, Lord Prosser opined:

'that the method by which a person's consent was vitiated need not take any specific form, the crucial matter being the state of mind produced in the person giving the forced consent (...); and (...) that parents and other persons were entitled to apply pressure upon a person who was refusing to marry with a view to producing a change of mind: the marriage would be invalid only if the consent which had thus been induced could not sensibly be described as a genuine change of mind, but was rather to be categorised as an act contrary to the party's own true intent.'¹²⁴⁵

¹²⁴² *Mahmood v. Mahmood* (1993) SLT 589, p. 592.

¹²⁴³ *Mahmood v. Mahmood* (1993) SLT 589, p. 592.

¹²⁴⁴ *Mahmud v. Mahmud* (1994) SLT 599. See also Chapter 3, paragraph 7.

¹²⁴⁵ *Mahmud v. Mahmud* (1994) SLT 599, p. 599.

Obiter, Lord Prosser observed ‘that it would be less difficult to infer that the consent resulted from force when the consent was to a change in legal status and not to consummation and long term cohabitation.’¹²⁴⁶ In other words, when a person consented to go through with the marriage ceremony, but does not agree to the inherent implications of marriage, such as consummation of the marriage and cohabitation, then it is possible that the consent to marry was not freely given, but given as a result of force.^{1247, 1248} He also reiterated the importance of taking into account a person’s cultural and social background, as was done in *Mahmood v. Mahmood*, but emphasised that it was not possible to make any generalisations with regard to a person’s susceptibility to moral pressure on the basis of sex or age.¹²⁴⁹

In the third and most recent case, the presiding judge further nuanced the distinction between duress and parental influence and took a less inclusive approach with regard to threats that are sufficient to constitute duress. *Singh v. Singh* concerned an 18-year-old woman who went on holiday to India with her mother and then discovered that her mother wanted her to marry. She adamantly refused, but her mother was in possession of her passport and travel documents and threatened to destroy them and leave her behind in India if she refused to marry. In addition, her mother made it clear that rejecting the arranged marriage would bring great shame upon herself and her family. Her elder sister had previously refused an arranged marriage and had been ostracised by the family as a result. Isolated and vulnerable, having no means to travel back to England, the woman gave in to the threats and married the man her family had selected.¹²⁵⁰ She subsequently refused to have sexual intercourse with him, lived with him for a week and then went back to England and resumed her relationship with her boyfriend. Judge Macdonald held that the threats in this case were serious and amounted to immediate danger to the woman’s liberty: she was without support in a foreign country, not in possession of her passport and had no one to turn to for help. Accordingly, her will was overborne and the marriage was contracted under duress.¹²⁵¹ In Macdonald’s view, the same cannot be said for the

¹²⁴⁶ In this case, the man had never seen or corresponded with his wife prior to the marriage ceremony. On the day of the ceremony, the man went to the registration office in his ordinary working clothes and left immediately afterwards. He did not see his wife again (*Mahmud v. Mahmud* (1994) SLT 599, p. 599).

¹²⁴⁷ However, this need not be the case. In sham marriages, for example, both parties will consent to the marriage with the sole purpose of changing their legal status, e.g. in order to enter another country.

¹²⁴⁸ Compare *Singh v. Singh* (1971) 2 W.L.R. 963: as described *supra*, the woman in this case had entered into the marriage out of a sense of duty towards her parents, but she immediately made it very clear that she did not wish to consummate the marriage or live with her husband. In *Singh v. Singh* (2005) SLT 749 the woman also refused to have sexual intercourse with her husband and left him after a week.

¹²⁴⁹ *Mahmud v. Mahmud* (1994) SLT 599, pp. 601–602.

¹²⁵⁰ *Singh v. Singh* (2005) SLT 749, pp. 750–751.

¹²⁵¹ *Singh v. Singh* (2005) SLT 749, pp. 756 and 757.

threats uttered in *Mahmud v. Mahmud*: he doubted whether the parental pressure exerted in that case would be sufficient to constitute duress. In the opinion of Judge Macdonald, there must be limits to the nature of the threats that the law regards as being capable of overbearing a person's will. He opined that threats of immediate danger to life, limb or liberty, or equally serious threats, are required before it can be said that the party 'is compelled by force to marry, or by some rational fear is terrified into compliance'.¹²⁵² Accordingly, Judge Macdonald considered that a threat by parents to, for example, break a promise to buy a new car, new clothing, or even a house, would not be serious enough.¹²⁵³

In other words, it seems that duress requires some form of grave external pressure (such as fear of homelessness and ostracism) that was applied 'upon a person who was refusing to marry with a view to producing a change of mind'.¹²⁵⁴

4.4.2. *Mistake, unsoundness of mind or otherwise*

A second circumstance that can negate consent is mistake. The law recognises two kinds of mistake: mistake as to the other party's identity, for example in case of impersonation or some other kind of fraud, and mistake as to the nature of the ceremony, e.g. because one party believed the ceremony was an engagement ceremony.¹²⁵⁵

A marriage can also be rendered voidable if at the time of the marriage, either of the parties was of unsound mind. To determine whether someone has the capacity to marry, it is necessary to ask whether that person is capable of appreciating the nature of the contract of marriage, which means that this person must be mentally capable to understand the responsibilities attached to marriage.¹²⁵⁶

Finally, the MCA recognises a category of circumstances other than duress, mistake or unsoundness of mind that negate consent. The words 'or otherwise' in Article 12(c) MCA imply that the itemisation in this section is not exhaustive. Examples of other circumstances under which a party to the marriage did not validly consent to it are extreme intoxication¹²⁵⁷ and fraud and misrepresentation. Fraud or misrepresentation can also result in a mistake as to the identity of the other party or the nature of the ceremony, which will also render the marriage voidable, as discussed above.¹²⁵⁸

¹²⁵² Note that this is the requirement for annulment of marriage on the ground of duress under Scottish law; English law does not require that someone was 'terrified into compliance'.

¹²⁵³ *Singh v. Singh* (2005) SLT 749, p. 756.

¹²⁵⁴ *Mahmud v. Mahmud* (1994) SLT 599, p. 599.

¹²⁵⁵ Herring 2011, p. 62.

¹²⁵⁶ *Estate of Park* (1954) P 112, and Herring 2011, p. 62.

¹²⁵⁷ Although there is some discussion on the question of whether voluntary intoxication should render a marriage voidable (Herring 2011, p. 63).

¹²⁵⁸ Harris-Short & Miles 2011, p. 90; and Herring 2011, p. 63.

4.5. DIVORCE AND JUDICIAL SEPARATION

Petitioning for a divorce may also offer a possibility for victims of a forced marriage to end the association. Divorce, however, might for three reasons be a less appealing remedy for victims of such marriages than annulment.

First, a petition for divorce may be presented to the court only after the expiration of one year from the date of the marriage.¹²⁵⁹ In other words: during the first year of the marriage, parties are barred from divorce, although they can separate *de facto*. In the case of a forced marriage, this could mean in practice that the victim(s) is/are locked in the marriage and is/are unable to dissolve it for the duration of a year.

Secondly, the law strictly limits the grounds for divorce, meaning that a decree of divorce is granted only under certain specific circumstances. A petition for divorce may be presented on the ground that the marriage has broken down irretrievably. However, the court will hold a marriage to have broken down irretrievably only when the petitioner has satisfied the court of one or more of the following facts:

- a. that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- b. that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- c. that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- d. that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as “two years’ separation”) and the respondent consents to a decree being granted;
- e. that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to as “five years’ separation”).¹²⁶⁰

In the case of a forced marriage sub (b) would be most relevant: when X behaved in such a way that Y cannot reasonably be expected to live with X, for example because of domestic violence, divorce could be granted by the court (once one year has passed since the solemnisation of the marriage). However, not all forced marriages will result in domestic violence or other serious misbehaviour, especially not when both spouses can be considered victims of the coerced marriage. In those cases, options (c), (d) and (e) would remain, requiring the parties to have lived apart for at least two or five years, thus requiring the parties to remain in

¹²⁵⁹ Article 3 MCA. This restriction aims ‘to assert the state’s interest in upholding the stability and dignity of marriage’ (Cretney’s Principles of Family Law 2008, margin no. 10–009).

¹²⁶⁰ Article 1(2) MCA.

the forced marriage for a prolonged period of time.¹²⁶¹ For victims, this will not be the ideal solution. Particularly not option (d), which requires the other spouse to consent to a decree of divorce being granted: it is very well imaginable that, specifically in those cases where only one of the spouses can be regarded as a victim of the forced marriage, the other spouse will not consent to such a decree being granted, effectively blocking the victim's possibility to exit the marriage and forcing him or her to wait for an additional three years.

However, as often seems to be the case, the strict law in the books on divorce differs from the more lenient law in action: divorces are rarely defended, and in the 1970s, a special procedure was introduced for undefended divorces.¹²⁶² This special procedure, which has since become the norm, allows a divorce to be granted on the basis of affidavit evidence¹²⁶³ only without the parties having to attend court. In practice, this means that 'the petitioner's solicitor lodges an affidavit in the form required to verify the particular ground alleged in the petition' (e.g. that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent).¹²⁶⁴ This special procedure virtually precludes any inquiry into whether a marriage has indeed broken down irretrievably or into the genuineness of the facts alleged.¹²⁶⁵ Courts do not usually investigate statements made in undefended divorce petitions.¹²⁶⁶

The third disadvantage of divorce relates to stigma and is particularly relevant to members of certain cultures and/or communities. In many South Asian communities, for example, divorce is severely stigmatised and can have serious consequences, especially for women. Annulment, on the other hand, is not automatically associated with such stigma. Yet, annulment cannot be seen as a panacea: the community might still blame the victim(s) for not making the marriage work.¹²⁶⁷ Nevertheless, for some victims annulment might be a more satisfactory solution, albeit merely psychologically.

Yet, irrespective of these disadvantages, the remedy of divorce also has a positive aspect: by withholding the final (i.e. absolute) decree of divorce – a decree of divorce is in the first instance a decree *nisi* ('unless'); after a period of six months

¹²⁶¹ Moreover, the court can dismiss a petition for divorce in five year separation cases on the ground that dissolution of the marriage would result in grave financial or other hardship to the other party and that it would in all circumstances be wrong to dissolve the marriage (Article 5 MCA).

¹²⁶² Cretney's Principles of Family Law 2008, margin no. 10–010–016; and rule 2.36 of the Family Proceedings Rules 1991.

¹²⁶³ An affidavit is a voluntary declaration of facts written down and sworn to by the declarant (Black's Law Dictionary 2006).

¹²⁶⁴ Cretney's Principles of Family Law 2008, margin no. 10–010.

¹²⁶⁵ Cretney's Principles of Family Law 2008, margin no. 10–016.

¹²⁶⁶ Cretney's Principles of Family Law 2008, margin no. 10–017.

¹²⁶⁷ Gupta & Sapnara 2011, p. 165; *P v. R (Marriage: Nullity: Forced Marriage)* (2003) 1 FLR 661, para. 17; and Lucy Carroll, 'Arranged marriages: Law, custom and the Muslim girl in the U.K.' *Women Living Under Muslim Laws Dossier 20*, July 1998, p. 1; and Proudman 2011, p. 20.

it can be made absolute¹²⁶⁸ – the court can make sure that, if applicable, the parties actually dissolve their religious marriage in accordance with the usages of the religion in question.¹²⁶⁹ This forestalls undesirable situations in which two parties are divorced in the eyes of the law, but not in the eyes of their religion. Certain religions, such as Islam and Judaism, require the consent and/or collaboration of the husband and if the husband refuses to cooperate, the religious marriage cannot be dissolved, irrespective of whether the civil marriage has been dissolved. For example, according to Jewish law, divorce can only be obtained by a *get* given by the husband to the wife; pursuant to Islamic law, divorce is automatic and unilateral for the husband (*talaq*), but a wife must acquire divorce via a *sharia* council, imam or scholar (*khula*).¹²⁷⁰ Article 10A MCA stipulates that on the application of either party, the court may order that a decree of divorce is not to be made absolute until a declaration by both parties that they have taken steps such as are required to dissolve the marriage in accordance with the usages of the religion, is presented to the court. This section applies to those cases in which a decree of divorce has been granted but not made absolute and the parties to the marriage were married in accordance with Jewish or other prescribed religious usages and, in accordance with those usages, are required to cooperate if the marriage is to be dissolved in the eyes of the religion in question.¹²⁷¹ The provisions pertaining to the annulment of marriages do not contain such a possibility.

As an alternative to divorce, a spouse may present to the court a petition for judicial separation on the basis of any of the facts listed in the provision concerning the ground for divorce (i.e. adultery, serious misbehaviour, desertion, factual separation, see Article 1(2) MCA, quoted above). The difference with divorce is that the court will not have to consider whether the marriage has broken down irretrievably. The effect of a judicial separation is that the petitioner will no longer have to cohabit with his spouse.¹²⁷²

4.6. COERCIVE MEASURES: RESTRAINING ORDERS AND OTHER REMEDIES FOR DEALING WITH FORCED MARRIAGES

In addition to forced marriage protection orders and decrees of nullity, a range of other remedies is available for (potential) victims of forced marriages. Alongside FMPOs, the FLA 1996 contains two other remedies that may be used in cases

¹²⁶⁸ Article 1(5) MCA. Cretney's Principles of Family Law 2008, margin no. 10–012.

¹²⁶⁹ Chapter 9, paragraph 2.3.2 explains why English courts can also (to a certain extent) rule in some religious matters.

¹²⁷⁰ S.W.E. Rutten, 'Het recht van de gescheiden vrouw om verlost te worden uit het huwelijk', NJCM-Bulletin (33) 2008–6, pp. 755–769.

¹²⁷¹ Article 10A was inserted in the MCA by the Divorce (Religious Marriages) Act 2002.

¹²⁷² See Articles 17 and 18 MCA.

of (threatened) forced marriage: non-molestation orders and occupation orders made by the High Court, a county court or a magistrates' court. Under Part 4 of the FLA 1996, a person can seek a non-molestation order against their (future) spouse, relatives, or anyone who lives in the same household. The court will grant such an order when there is evidence of molestation and the applicant needs protection. A non-molestation order forbids the respondent from using violence or in any other way harassing the applicant. Breach of a non-molestation order is a criminal offence, punishable with a fine or prison sentence.¹²⁷³ The FLA 1996 further allows for a person to seek an occupation order against their spouse, resulting in the removal of their spouse from the house.¹²⁷⁴

Another possibility for someone facing a forced marriage is to seek a restraining order under the Protection from Harassment Act 1997 against anyone who knowingly harasses them. These restraining orders can be made by criminal courts when passing a sentence, or even after finding a defendant not guilty, if it holds that there has been harassment or conduct that causes fear of violence. Restraining orders are similar to non-molestation orders and the injunctions described above and can include a variety of conditions such as prohibiting the defendant from contacting the victim and visiting the victim's home or work place.¹²⁷⁵ The breach of a restraining order is a criminal offence and can result in a prison sentence of up to five years.¹²⁷⁶

Domestic Violence Protection Notices and Orders (DVPN/DVPO), introduced by the Crime and Security Act 2010 can also offer relief to victims of those cases of forced marriages that are linked to forms of (domestic) violence. A DVPN may be issued by a member of a police force not below the rank of superintendent when that officer has reasonable grounds for believing that a particular person has been violent towards, or has threatened violence towards, another person, and the issue of the DVPN is necessary to protect that person from that (threat of) violence.¹²⁷⁷ If a police officer has reason to believe that the person against whom a notice has been issued is in breach of the DVPN, he may arrest this person.¹²⁷⁸ Once a DVPN has been issued, a constable must apply for a domestic violence protection order (DVPO) by complaint to a magistrates' court.¹²⁷⁹ The court may make such an order even if the person for whose protection it is made does not consent to the

¹²⁷³ Article 42A FLA 1996 and Article 1 Domestic Violence, Crime and Victims Act 2004. As is the case with FMPOs, the court can make non-molestation orders on its own initiative if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child (Article 42(2)(b) FLA1996).

¹²⁷⁴ Article 33 FLA 1996. Heaton, McCallum & Jogi 2009, pp. 21–26.

¹²⁷⁵ Article 5 Protection from Harassment Act 1997; Article 12 Domestic Violence, Crime and Victims Act 2004 and <www.cps.gov.uk/publications/prosecution/domestic/domv_guide_for_victims_and_witnesses_faqs.html> last accessed December 2013.

¹²⁷⁶ Article 5(5) Protection from Harassment Act 1997. See also *NS v. MI* (2006) 1 FLR 444.

¹²⁷⁷ Article 24 Crime and Security Act 2010.

¹²⁷⁸ Article 25(1) Crime and Security Act 2010.

¹²⁷⁹ Article 27 Crime and Security Act 2010.

making of a DVPO.¹²⁸⁰ A person who breaches a DVPO may be arrested without warrant and brought before the magistrates' court which may remand him.¹²⁸¹

In criminal proceedings, a court can remand the arrested defendant in custody or release him by granting bail, with or without conditions attached. When granting bail a court can, for example, prohibit the defendant from contacting a particular person or persons or going to a particular place. If this bail condition is breached, the police can arrest the defendant and the court can remand the defendant in custody.¹²⁸² Orders prohibiting a person from contacting another person can also be imposed in the form of license conditions for offenders who have been convicted to a determinate or indeterminate sentence and who are being released on licence.¹²⁸³

If the person who is at risk of being forced into a marriage, or who already has been forced to marry is below the age of 18, the Children Act 1989 offers several remedies. A child may be placed under police protection for up to 72 hours when there is reasonable cause to believe that this child is at risk of significant harm.¹²⁸⁴ When after 72 hours, the child is still considered to be at risk of significant harm, the police or social care services can apply to the court for an emergency protection order.¹²⁸⁵ Pursuant to Article 31 Children Act 1989, this protection order may be followed by a care order, placing the child in the care of a designated local authority. Further, when a child is at risk of being forced into marriage or has already entered into a marriage¹²⁸⁶ against its will, any interested party can ask the High Court to exercise its inherent jurisdiction¹²⁸⁷ and make the child a ward of court.¹²⁸⁸ Wardship can be used alongside FMPOs.¹²⁸⁹ The High Court can also invoke inherent jurisdiction to order injunctions to prevent a child from being taken abroad, ordering, for example, the surrender of the passport of a child or ordering that the child may not leave the jurisdiction without permission of the Court. The High Court has also invoked inherent jurisdiction to prevent adults at risk of being forced into marriage, in particular with regard to adults with a

¹²⁸⁰ Article 28 Crime and Security Act 2010.

¹²⁸¹ Article 29 Crime and Security Act 2010.

¹²⁸² See Part II of the Criminal Justice Act 2003.

¹²⁸³ A court that sentences an offender to a term of imprisonment of twelve months or more in respect of any offence may, when passing sentence, recommend to the Secretary of State particular conditions which in its view should be included in any licence granted to the offender on his release from prison (Articles 2 and 3 Criminal Justice (Sentencing) (Licence Conditions) Order 2005; Article 238 and 250 Criminal Justice Act 2003).

¹²⁸⁴ See Article 46 Children Act 1989; and CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 26.

¹²⁸⁵ Article 44 Children Act 1989.

¹²⁸⁶ It is reiterated that marriages to which either of the parties is younger than 16 are void in accordance with Article 11 MCA.

¹²⁸⁷ Inherent jurisdiction is a common law doctrine stating that a superior court has jurisdiction to hear any matter that comes before it, unless its authority is expressly limited by a statute or rule (S. Sime, *A practical approach to civil procedure*, Oxford: OUP 2007, p. 21).

¹²⁸⁸ CPS Legal Guidance Honour-Based Violence and Forced Marriage, pp. 27–28.

¹²⁸⁹ CPS Legal Guidance Honour-Based Violence and Forced Marriage, 29.

(learning) disability that prevents them from making a free choice or giving real and genuine consent.¹²⁹⁰ In *M v. B* the court used its inherent jurisdiction to make orders to prohibit the parents of S, a 23-year-old woman suffering from learning disabilities, from entering S into a formal or informal marriage contract.¹²⁹¹

4.7. PRIVATE INTERNATIONAL LAW

A large proportion of the forced marriages that take place in England, or that involve UK citizens have international characteristics: either because the marriage takes place overseas, or because a non-British citizen comes to England to enter into a marriage.¹²⁹² The standard theories used to determine the validity of a marriage in England are *lex loci celebrationis*, i.e. the law of the place where the marriage was celebrated, and the dual domicile theory. The exact choice of rules depends on the issue involved: the formal validity of a marriage, in other words whether all requisite formalities were observed, is determined by the law of the place of celebration.¹²⁹³ This means that a marriage celebrated in Italy will be recognised as valid in England if all formalities required by Italian law were fulfilled. English law will therefore also recognise the marriage of a person under the age of 16 celebrated overseas, if the country where the marriage took place permits marriage below that age.¹²⁹⁴

The essential validity of a marriage, which concerns the parties' capacity to marry – so their age, sex, soundness of mind, degree of relationship (consanguinity) and status – can be determined using several theories of conflict of laws, such as the dual domicile test, the intended matrimonial home test, and the so-called most real and substantial connection test.¹²⁹⁵ With regard to consent to marriage in particular, two different theories have been advocated: that of the dual domicile and that of the *lex loci celebrationis*. Although courts have not given a conclusive answer as to which of these tests ought to be applied in cases concerning (lack of) consent, it would appear they favour the dual domicile test.¹²⁹⁶ The Law Commission, as well as Rule 67 of Dicey and Morris' leading textbook on the conflict of laws also provide that as a general rule, capacity to marry, which includes consent, is governed by the law of each party's ante-nuptial

¹²⁹⁰ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 28; and see *NS v. MI* (2006) 1 FLR 444, and Probert 2008, pp. 395–402.

¹²⁹¹ *M v. B* (2005) EWHC 1681 (Fam), and Herring 2011, p. 69.

¹²⁹² Article 14(1) MCA concerns marriages governed by foreign law.

¹²⁹³ Probert 2008, p. 396; and Reed 2000, p. 392.

¹²⁹⁴ Probert 2008, p. 402.

¹²⁹⁵ Reed 2000, p. 393.

¹²⁹⁶ Probert 2008, pp. 399–401; and Reed 2000, p. 394.

domicile, more specifically the laws of the country of the spouse who claims not to have freely consented to the marriage.¹²⁹⁷

Even if a marriage would be valid according to rules of Private International Law, English courts still have the possibility to refuse recognition on the basis of public policy.¹²⁹⁸ The public policy ground is criticised in literature because courts often fail to clarify the exact policy justification for refusing to recognise a marriage.¹²⁹⁹ Nevertheless, forced marriages can be regarded as being contrary to English public policy.¹³⁰⁰ Therefore, when two individuals, who married in a country where consent is not an essential requirement for the validity of a marriage, want this marriage to be recognised in England, the court can decide to refuse recognition on the basis that the marriage is contrary to English public policy if either of the spouses were forced to marry.¹³⁰¹

5. THE ENGLISH CRIMINALISATION DEBATE

5.1. A POLARISED DEBATE

As was explained above, debates on the criminalisation of forced marriages kept flaring up from the end of the 1990s onwards, resulting in a 2005 government consultation on this issue. The government decided not to take any criminal legislative action, maintaining the *status quo*. In 2011, the Home Affairs Select Committee published a report¹³⁰² in which it recommended the creation of a specific offence of forced marriage as this would ‘send out a very clear and positive message to communities within the UK and internationally’.¹³⁰³ During a speech on immigration on 10 October 2011, Prime Minister David Cameron announced that the government intended to criminalise breaches of FMPOs and would

¹²⁹⁷ L. Collins (general ed.), *Dicey, Morris & Collins on the conflict of laws (Vol. II)*, London: Sweet & Maxwell 2006, para. 17R-054; and. Rule 68 states that ‘no marriage is (*semble*) valid if by the law of either party’s domicile he or she does not consent to marry the other’. Law Commission Working Paper No. 89 (1985), paras. 3.36, 5.9 and 5.18.

¹²⁹⁸ Probert 2008, p. 401. See also *Vervoeke v. Smith* (1983) 1 A.C. 145, 164.

¹²⁹⁹ Probert 2008, p. 401.

¹³⁰⁰ See *inter alia* Probert 2008, pp. 396–401

¹³⁰¹ Sham marriages, to which both parties did validly consent, are valid and will be recognised as such in England (C.M.V. Clarkson & J. Hill, *The conflict of laws*, Oxford: OUP 2006, p. 295).

¹³⁰² Home Affairs Committee, *Forced Marriage* (HC 2010–12, 880), p. 3.

¹³⁰³ Home Affairs Committee, *Forced Marriage* (HC 2010–12, 880), p. 18. Because the Committee based its findings on evidence taken from a narrow group of activists, some researchers have questioned the (soundness of the) methodology and outcome of this report. Several NGOs took part in the round table discussion organised by the Committee and the FMU, but in its report, the Home Affairs Select Committee focused on the oral evidence given by one NGO (Karma Nirvana) and one solicitor, both from the North East and both in favour of criminalisation. No oral evidence was given by parties opposing criminalisation, nor were courts, local authorities, police, lawyers and other relevant parties canvassed. See Demos 2012, p. 54; Diversity Subcommittee of the Family Justice Council 2012, para. 9; and Gill 2011, p. 1.

look into the options of criminalising the act of forced marriage itself.¹³⁰⁴ In December 2011, the government launched a consultation, seeking views on how the criminalisation of breaches of the civil FMPOs might be implemented and on whether forced marriage should be made a criminal offence.¹³⁰⁵ As regards the latter issue, a small majority (54%) of the 297 respondents were in favour of the creation of a new offence; 37% were against and 9% were undecided.¹³⁰⁶ As these figures indicate, the debate on the criminalisation of forced marriage has strongly polarised public opinion, dividing NGOs, charities, legal practitioners and academics.¹³⁰⁷ Especially among the NGOs and charity organisations that deal with violence against women, there is great disparity. An example illustrates this: in February 2012, the Iranian Kurdish Women's Rights Organisation (IKWRO), a London-based charity which advocates criminalisation of forced marriage, held a focus group with 15 Iranian, Afghan and Kurdish women ranging in age from 20 to 60 years old. All were in favour of creating a specific criminal offence of forced marriage.¹³⁰⁸ In March 2012, Southall Black Sisters, a London-based charity which is opposed to criminalisation, held a focus group with ten 15 year-old Asian girls. All were against criminalisation.¹³⁰⁹ What the majority of charity organisations do have in common, however, is that they all plead for a holistic approach: a robust and effective implementation of (existing) criminal law and monitoring of FMPOs and breaches, combined with awareness raising campaigns, training for frontline professionals and education programmes at schools.¹³¹⁰

5.1.1. Arguments against criminalisation

The arguments put forward by opponents of criminalisation can be broadly divided into three categories: arguments pertaining to the negative impact that criminalisation would have on victims, the redundancy of a specific crime, and practical issues, such as evidentiary difficulties.

¹³⁰⁴ D. Cameron, 'A transcript of Prime Minister David Cameron's speech on immigration, given on 10 October 2011', available at <www.number10.gov.uk/news/prime-ministers-speech-on-immigration> (last accessed December 2013).

¹³⁰⁵ Respondents were members of the public (175), statutory agencies such as the police (40), NGOs (40), legal experts (20), representative bodies (15) and self-identified victims (7), see Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 4.

¹³⁰⁶ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 5.

¹³⁰⁷ The results of a 2011 consultation carried out by Gill underline this dichotomy: of the 74 respondents, 50% were against, 38% were in favour of and 12% were unsure of the creation of a specific criminal offence of forced marriage. The sample consisted of organisations concerned with domestic violence/violence against women (25), police and legal experts (17), individuals (9), public sector organisations/workers (6), voluntary sector organisations/workers (6), faith groups (5), local councils (5) and one educational organisation, see Gill 2011, p. 8.

¹³⁰⁸ IKWRO 2012, p. 1.

¹³⁰⁹ Note, however, that at the start of the meeting, all girls supported the idea of criminalising forced marriage. Southall Black Sisters 2012, para. 37.

¹³¹⁰ *Inter alia* Southall Black Sisters 2012, para. 14; IMKAAN 2012, p. 5; IKWRO 2012, p. 9; and Diversity Subcommittee of the Family Justice Council 2012, para. 20.

Most arguments relate to the expected negative consequences that the creation of a specific offence of forced marriage would have for victims. Many organisations that work with victims of forced marriage believe that criminalising the practice would cause more problems than it would solve.¹³¹¹ They argue that criminalisation would disempower victims and act as a deterrent for them to step forward because they would not want to see their relatives prosecuted.¹³¹² This would drive the practice further underground, making it even more invisible than it already is.¹³¹³ The argument that victims would no longer report instances of forced marriage is especially relevant for minors, adults with learning disabilities, and for people from cultures in which shame and honour are important (such as South Asian communities).¹³¹⁴ Those who do dare to report their plight to the police may be ostracised or disowned by their family and the wider community. In addition, some organisations fear an increase in violent reprisals against women who sought help from the authorities, especially after a failed prosecution (see *infra*).¹³¹⁵ As a result of the prospect of such reprisals, victims, even if they want to see the alleged perpetrators prosecuted, are often too afraid to testify.

Furthermore, it is believed that criminalisation will decrease chances of reconciliation between victim and family.¹³¹⁶ Southall Black Sisters states that this is an advantage of the FMCPA: an FMPO, as a civil remedy, is less public.¹³¹⁷ Opponents further fear that criminalisation of forced marriage will lead parents to take their children overseas, marry them off and abandon them there in order to circumvent the law.¹³¹⁸

A second line of argumentation used by those against criminalisation of forced marriage centres around the question of whether a new criminal offence is needed. In this context, it is proffered that criminalising forced marriage as a

¹³¹¹ A.K. Gill & K. Sapnara, 'Forced marriages blight lives, but criminalising them would not work', *The Guardian* 9 April 2012, available at <www.guardian.co.uk/commentisfree/2012/apr/09/forced-marriages-criminalising-newsfeed=true> last accessed December 2013.

¹³¹² IMKAAN 2012, p. 6; Southall Black Sisters 2012, paras. 11 and 33–39. Ashiana Network, an organisation that specialises in helping girls and young women from South Asian, Turkish and Iranian communities, held a consultation with residents across their three refuges (two specifically for women at risk of forced marriage). 19 of the 20 women said that if forced marriage were to be a criminal offence they would not report it (Ashiana Network 2012, p. 9).

¹³¹³ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, pp. 9–10; IMKAAN 2012, p. 10; and Southall Black Sisters 2012, para. 30.

¹³¹⁴ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 10; FMU *Forced Marriage and Forced Marriage and Learning Disabilities: Multi-Agency Practice Guidelines*, London: FMU, December 2010; and Coram Children's Legal Centre 2012, p. 5.

¹³¹⁵ Southall Black Sisters 2012, para. 7; Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, pp. 9–10.

¹³¹⁶ Gill 2011, p. 18: 49% of the 74 respondents was of the opinion that turning forced marriage into a specific criminal offence and the prospect of prosecution would make it harder for victims to be reconciled with their families. Also IMKAAN 2012, p. 6; and Southall Black Sisters 2012, paras. 45–50.

¹³¹⁷ Southall Black Sisters 2012, para. 48.

¹³¹⁸ Southall Black Sisters 2012, para. 31; and Diversity Subcommittee of the Family Justice Council 2012, p. 14.

separate criminal offence does not add much to the existing criminal law. Two reasons can be distinguished. First, crimes committed in the course of forcing someone to marry (e.g. assault and rape) already exist and are already used to prosecute instances of forced marriage.¹³¹⁹ Secondly, looking at the number of FMPOs that have been issued during the past few years, the FMCPA is considered to be a valuable remedy.¹³²⁰ Protection orders are lauded as useful remedies that capture the specific dynamics of a forced marriage – i.e. prolonged (physical/emotional) pressure, manipulation, and direct and indirect coercion exerted by multiple perpetrators.¹³²¹ It is acknowledged, however, that the existing civil remedies and criminal law can and should be used more effectively: between 2008 and December 2010, 257 FMPOs were issued, but only five breaches were recorded.¹³²² This is mainly ascribed to a lack of understanding and awareness: both on the side of professionals and the general public. An inconsistent approach, lack of enforcement, and lack of engagement from schools and other institutions have to be addressed in order for existing legislation to be used to its full potential.¹³²³

In addition, it has been argued that it would be difficult to bring the forms of coercion used in forced marriage cases within the ambit of criminal law.¹³²⁴ Forced marriage, as it generally takes place in England, is rarely a one-off situation where a person, out of the blue, is forced to marry at gunpoint.¹³²⁵ Often, consent obtained in these marriages is the result of intense and prolonged emotional pressure, or because victims agree out of a sense of duty. Bringing these pressures within the ambit of criminal law would ‘undermine fundamental principles of criminal law’.¹³²⁶ Even if it were possible to capture the reality of forced marriage in a criminal offence, those opposing criminalisation argue that this would be accompanied by a host of evidentiary difficulties, for example with regard to the intent of the perpetrator, but also in relation to the criminal standard of proof.¹³²⁷ Because of the blurred distinction between forced and arranged marriages, and because the coercion used in many cases consists in social expectations, those against criminalisation argue that in many cases it would be difficult to decide whether the threshold for forced marriage was reached.¹³²⁸ Further, emotional pressure will be difficult to establish as a result of the higher evidential threshold

¹³¹⁹ Southall Black Sisters 2012, para. 25–26; and Diversity Subcommission of the Family Justice Council 2012, p. 23.

¹³²⁰ Southall Black Sisters 2012, para. 9.

¹³²¹ IMKAAN 2012, p. 2.

¹³²² IMKAAN 2012, p. 5; and IKWRO 2012, p. 3.

¹³²³ Southall Black Sisters 2012, paras. 28, 75 and 106.

¹³²⁴ Southall Black Sisters 2012, para. 42.

¹³²⁵ IMKAAN 2012, p. 2.

¹³²⁶ Southall Black Sisters 2012, para. 53; the consultation reply does not explain what is meant by ‘fundamental principles of criminal law’.

¹³²⁷ Southall Black Sisters 2012, para. 7; Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 5.

¹³²⁸ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, pp. 9–10.

of the standard of proof in criminal cases (proof beyond a reasonable doubt).¹³²⁹ In addition, those against invoking the criminal law believe that the difficulty in obtaining victim and witness evidence – because victims may be scared and unwilling to testify against their relatives – will also result in a low number of successful prosecutions.¹³³⁰ Between 2008 and 2010, two of the total of five recorded breaches of FMPOs were not prosecuted because there was not enough evidence and the victims were not prepared to cooperate.¹³³¹ In this context, reference is also made to female genital mutilation; this practice has been outlawed for several years, but, to date, there have been no prosecutions, turning the prohibition into a dead letter.¹³³² The failure of the CPS to secure convictions for forced marriage might cause victims to feel let down.¹³³³

5.1.2. *Arguments in favour of criminalisation*

The arguments put forward by those in favour of criminalisation can be divided into two categories: arguments relating to the symbolic value and the positive impact criminalisation would have on victims, and the current lacuna in criminal law regarding forced marriages.

Those who welcome the separate criminalisation of forced marriage argue that this would act as a deterrent for potential perpetrators and send out a strong message with regard to the unacceptability of the practice. Specific criminal legislation could provide potential victims of forced marriage with a bargaining tool when it comes to convincing their parents that they have the right to decide if, when and whom they wish to marry, thus empowering them. At the same time, parents who are pressured by others – for example by members of the extended family – to marry their children off may use the criminality of forced marriage as a tool for negotiation, convincing their relatives that forced marriage is not an option.¹³³⁴

In addition, it is argued, criminalisation could possibly relieve feelings of guilt on the part of the victims: many do not even know they have the right to decide if, when and whom to marry.¹³³⁵ Specifically condemning coercive interference with decisions relating to marriage would send out the message that victims can

¹³²⁹ IMKAAN 2012, p. 6; and Coram Children's Legal Centre 2012, p. 5.

¹³³⁰ Southall Black Sisters 2012, para. 40; and Diversity Subcommittee of the Family Justice Council 2012, p. 24.

¹³³¹ Diversity Subcommittee of the Family Justice Council 2012, p. 13.

¹³³² Although in September 2013, the CPS was preparing several cases concerning female genital mutilation (see 'First female genital mutilation prosecution 'close', says CPS', BBC News 6 September 2013 <www.bbc.co.uk/news/uk-23982767> last accessed December 2013).

¹³³³ Southall Black Sisters 2012, para. 7; and Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 16.

¹³³⁴ Gill 2011, pp. 21–22.

¹³³⁵ IKWRO 2012, p. 11.

challenge their parents' actions and that they have the right to seek help and report forced marriages.¹³³⁶

Interestingly, where opponents argue that criminalisation would deter victims from reporting forced marriage, which would drive the practice even further underground, those who welcome the creation of a specific criminal offence argue the opposite: specific criminal legislation would, in their view, empower victims and encourage them to report incidents of forced marriage. In this context, reference is made to statistics provided by LOKK, a Danish organisation concerned with violence against women and children. Since forced marriage was criminalised in Denmark in 2008, LOKK has seen an increase in people coming forward to report instances of forced marriage.¹³³⁷ In 2012, the Leeds-based charity Karma Nirvana conducted a postcard campaign where they asked members of the public key questions on forced marriage. The vast majority of the more than 3,000 respondents believed that a criminal offence would not deter victims from reporting forced marriage.¹³³⁸ Some of the self-identified victims who responded to the 2011 government consultation confirmed this, stating that a specific criminal offence of forced marriage would have caused them to come forward sooner.¹³³⁹

In addition, it is stated that criminalisation would positively impact victims in the sense that civil law places the burden of responsibility on the victim, whereas criminal law would place the onus of proof on the CPS.¹³⁴⁰ Proponents of criminalisation do not believe that reluctance of victims to testify would be a problem: the CPS has extensive experience with domestic violence cases in which victims are often also too afraid to testify in court against suspects. When the CPS has enough evidence, the victim might not even need to testify.¹³⁴¹ In addition, several support and security measures can be taken in order to shield a victim, such as witness protection, video recorded statements and live links.¹³⁴² It is believed that criminalisation would serve a strong symbolic function by clearly and unambiguously sending the message that forced marriage is unacceptable and will not be tolerated.¹³⁴³ Criminalisation could bring about a change in

¹³³⁶ Demos 2012, p. 51 and IKWRO 2012, p. 9.

¹³³⁷ IKWRO 2012, p. 9.

¹³³⁸ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 4; and C.R. Proudman, 'In criminalising forced marriage the UK joins a Europe-wide movement', *The Independent* (blog), 10 June 2012 (available at <<http://blogs.independent.co.uk/2012/06/10/in-criminalising-forced-marriage-the-uk-joins-a-europe-wide-movement>> last accessed December 2013).

¹³³⁹ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 11.

¹³⁴⁰ Demos 2012, p. 51; and Gill 2011, p. 12.

¹³⁴¹ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012.

¹³⁴² Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 19; and T. Kazi, 'Forced Marriages Undermine the Values of Islam', Huffington Post Blog 13 April 2012, available at <www.huffingtonpost.co.uk/tehminka-kazi/forced-marriages-undermines-islam_b_1420033.html> last accessed December 2013.

¹³⁴³ Home Office, *Forced marriage – a consultation. Summary of responses*, June 2012, p. 14; and CentreLGS, *Response to the Home Office Consultation Document – 'Forced Marriage: A Wrong*

attitude and public opinion: some – even professionals such as police officers and educators – still perceive forced marriage as a legitimate cultural practice.¹³⁴⁴

The second category of arguments in favour of criminalisation concerns the legal lacuna when it comes to forced marriages. Traditionally, English criminal law does not recognise psychological coercion and therefore does not offer victims of such pressure access to criminal justice. Therefore, a crime of forced marriage with an inclusive definition of force would fill a lacuna in the law by providing protection to those who were coerced into a marriage as a result of emotional and psychological coercion.¹³⁴⁵ Others argue that creation of a specific criminal offence is necessary because existing criminal offences do not sufficiently reflect the severity of forced marriages which often result in continuous ill-treatment.¹³⁴⁶ In addition to filling a hiatus in the existing criminal legislation, a specific crime of forced marriage is also needed because the FMCPA on its own is not sufficient to deal with the practice. Those who welcome the creation of a separate crime of forced marriage contend that in the majority of cases, the person who is protected by the FMPO is the one who will have to report any breaches of this order. IKWRO identified several reasons why victims might not report breaches, for example because they do not realise that certain conduct constitutes a breach of the order, or because they believe that reporting a breach will hamper reconciliation with their family. Victims may also be threatened and/or afraid of bringing shame on the family.¹³⁴⁷

5.1.3. Discussion of arguments

One of the issues those in favour and those against the creation of an offence of forced marriage are most divided on is the possible deterrent effect criminalisation may have on victims. Gill's consultation illustrates this dichotomy: 57% of her respondents believed that criminalising forced marriage would deter victims from reporting the practice; 43% believed this would not be the case.¹³⁴⁸ IKWRO has stated that 'the impact of criminalisation of forced marriage on levels of reporting has been exaggerated'¹³⁴⁹ by other NGOs and charities. In this regard they point towards evidence from LOKK Denmark which demonstrates that victims do not stop seeking help, on the contrary, more victims have stepped

not a Right November 2005, p. 7 (available at <www.kent.ac.uk/clgs/documents/pdfs/clgsforcedmarriageresponse.pdf> last accessed January 2014).

¹³⁴⁴ IKWRO 2012, p. 6.

¹³⁴⁵ Proudman 2011, pp. 25–26.

¹³⁴⁶ T. Kazi, 'Forced Marriages Undermine the Values of Islam', Huffington Post Blog 13 April 2012, available at <www.huffingtonpost.co.uk/tehmima-kazi/forced-marriages-undermines-islam_b_1420033.html> last accessed December 2013.

¹³⁴⁷ IKWRO 2012, p. 4.

¹³⁴⁸ Gill 2011, p. 9.

¹³⁴⁹ IKWRO 2012, p. 8.

forward since forced marriage became a criminal offence in Denmark.¹³⁵⁰ Those opposing criminalisation argue that victims of forced marriages might not go to the police because they do not want to see their relatives prosecuted and because they are afraid that going to the police will alienate them from their families and make reconciliation more difficult.¹³⁵¹

The actual impact of criminalisation on victims' willingness to report forced marriages cannot currently be assessed; only after legislation criminalising forced marriage has been enacted and has been in place for some time will the true effects be known. However, it is obvious that seeking help *in general* (whether it is from the police or another party) can have severe consequences, especially in communities where high value is attached to family honour.¹³⁵² Research indicates that victims who decide to do something about their situation and seek external help – either from the police, an NGO, a teacher or another third party – are often alienated from their families, making reconciliation difficult.¹³⁵³ This is underscored by the argument used by some proponents of criminalisation of forced marriage that a specific crime is needed because the current legal framework, more specifically the FMCPA, places responsibility for reporting breaches of FMPO on the victim, who may decide not to report any breaches, for example because they fear this would impede reconciliation with their family. However, for the exact same reasons, victims might not report forced marriage to the police if it became a specific criminal offence. This argument used by proponents of criminalisation therefore contradicts their own stance that criminalisation of forced marriage would *not* deter victims from reporting this crime.

Those against criminalisation contend that the FMCPA has a less severe negative impact on reconciliation between the victim and her family because it is a civil remedy and therefore less public.¹³⁵⁴ It should be noted, however, that several breaches of FMPOs have been reported in the national newspapers, naming and shaming the breachers.¹³⁵⁵ Arguably, this could also make reconciliation between the victims and perpetrators more difficult. Nevertheless, the FMCPA does have a clear advantage over the criminal law: pursuant to the FMCPA, protection orders

¹³⁵⁰ IKWRO 2012, p. 9; and conversation with IKWRO Campaigns Officer (14 May 2012).

¹³⁵¹ The argument that criminalisation might drive the practice underground should be nuanced: the practice is already hidden (HC Public Bill Committee Deb, 4th sitting, 20 June 2012, col 104; and Demos 2012, p. 50).

¹³⁵² See the story of Jasvinder Sanghera who, aged 16, was faced with the prospect of a forced marriage. She did not report her plight to the authorities, but refused to marry the man her parents had selected for her and ran away from home with her boyfriend, as a result of which she was disowned by her family (Sanghera 2007).

¹³⁵³ Demos 2012, pp. 49–50

¹³⁵⁴ Southall Black Sisters 2012, para. 48.

¹³⁵⁵ E.g. 'Edirin Onogeta-Idogun mother jailed over "missing" son', BBC News 14 February 2011 (<www.bbc.co.uk/news/uk-england-london-12455820> last visited December 2013); and A. Bellard, 'Blackburn "forced marriage order" dad banned from going near family' *Lancashire Telegraph* 18 November 2009.

can be made *ex parte*, which doesn't require the presence or notification of the other party.¹³⁵⁶

Proponents of criminalisation also contend that the creation of a specific criminal offence would provide potential victims with a useful and powerful bargaining tool. Those against criminalisation argue that this would only be true for those victims who already dare to stand up against their relatives; it is uncertain if it would empower those who currently do not dare to do so.¹³⁵⁷ Further, opponents fear that criminalisation of forced marriage would cause parents to take their children overseas to marry them off in order to circumvent the law. For this reason, the government has decided to create an offence of luring someone abroad with the intention of forcing them into a marriage (see *infra* paragraph 5.2). What is more, taking someone abroad with the aim of forcing them into a marriage would also qualify as assisting or encouraging a crime under the Serious Crimes Act 2007.

Several remarks can also be made with regard to pro and contra arguments concerning the symbolic function of criminalisation. Proponents contend that creating a specific criminal offence would send out a clear message that forced marriages are unacceptable, which would raise awareness. Obviously, this message can also be sent in a different way, as was done in the case of domestic violence. Domestic violence is not a crime in itself, but aspects of domestic violence have been criminalised. The UK government has sent a strong message across authorities, agencies and the general public that the UK has a zero tolerance approach to domestic violence. A similar approach, coupled with compulsory training for relevant professionals, could be used to tackle the practice of forced marriage.¹³⁵⁸ In addition, although the law may have a symbolic value, legislation alone cannot change public opinion or shift attitudes.¹³⁵⁹

Moreover, enforcement is an important goal of (criminal) legislation and those opposing criminalisation believe it highly unlikely that many successful prosecutions would follow. Without successful prosecutions, opponents argue, the symbolic value of the prohibition will also be relatively small.¹³⁶⁰ Both sides agree that front-line professionals, such as police and educators, and the general public are not aware of the capacities of the existing legal framework.¹³⁶¹ In 2010,

¹³⁵⁶ Pursuant to new Article 63CA(2) proposed by the ABCP Bill 2013, in the case of an FMPO made *ex parte* 'a person can be guilty of an offence under this section (i.e. breaching an FMPO; IH) only in respect of conduct engaged in at a time when the person was aware of the existence of the order.'

¹³⁵⁷ Gill 2011, p. 22.

¹³⁵⁸ IMKAAN 2012, p. 8; Southall Black Sisters 2012, para. 25; and Ashiana Network 2012, p. 15.

¹³⁵⁹ Southall Black Sisters 2012, para. 29; and Ashiana Network 2012, p. 17.

¹³⁶⁰ Southall Black Sisters 2012, paras. 41 and 44; and Diversity Subcommittee of the Family Justice Council 2012, para. 30. 45% of Gill's respondents believed that the potential of few prosecutions would have a negative effect; 47% believed this would not have a negative effect; 8% were not sure (Gill 2011, p. 26).

¹³⁶¹ Gill 2011, p. 11.

there were 116 applications for FMPOs,¹³⁶² but this number is relatively low seeing as the FMU alone gave advice and support in 1735 instances of forced marriage in that year.¹³⁶³ It is important to note, however, that these figures only reflect FMPOs and do not take into account the cases of forced marriage that are dealt with via other remedies, such as by the family courts in care proceedings pursuant to the Children Act 1989.¹³⁶⁴ Still, awareness in general is low, and those in favour of criminalisation agree that penalisation is not a panacea and endorse the opponents' view that awareness raising campaigns and more and improved training for those who are likely to encounter instances of forced marriage are required.¹³⁶⁵

5.2. THREE OFFENCES OF FORCED MARRIAGE: THE ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL 2013

In June 2012, the government announced that forced marriage would become a criminal offence. The ABCP Bill introduced in the House of Commons in May 2013 creates three new offences relating to forced marriage: the offence of breaching an FMPO (discussed above in paragraph 4.3), the offence of forcing someone to enter into a marriage and the offence of causing someone to leave the UK with the intention of a forced marriage taking place abroad.

Section 109(1) of the ABCP Bill 2013 defines the offence of forced marriage as follows:

- A person commits an offence under the law of England and Wales if he or she –
- (a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and
 - (b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.¹³⁶⁶

This offence requires the perpetrator to have used coercion with the intention ('purpose') of causing someone to enter into a marriage.

¹³⁶² In total, 149 orders were made in 2010. Between November 2008 and February 2011, 293 FMPOs were issued (Gill 2011, p. 6).

¹³⁶³ Equality and Human Rights Commission 2012, paras. 5 and 19.

¹³⁶⁴ Equality and Human Rights Commission 2012, para. 16.

¹³⁶⁵ For the purpose of this book, the example of England and English law serves as a source of inspiration with regard to the (separate) criminalisation of the practice of forced marriage. The question of whether or not it was necessary to create new legislation criminalising forced marriage in England is therefore not answered. This question *is* addressed and answered with regard to the Netherlands (see Chapter 10).

¹³⁶⁶ ABCP Bill (HL Bill 66) as amended by the Committee, 12 December 2013.

Section 109(2) of the ABCP Bill 2013 defines the third offence related to forced marriage as follows:

- A person commits an offence under the law of England and Wales if he or she –
- (a) practices any form of deception with the intention of causing another person to leave the United Kingdom, and
 - (b) intends the other person to be subjected to conduct outside the United Kingdom that is an offence under subsection (1) or would be an offence under that subsection if the victim were in England or Wales.¹³⁶⁷

As the provisions make clear, the offences are committed irrespective of whether the forced marriage takes place. On summary conviction, the maximum penalty for both offences is twelve months imprisonment and/or a fine. On conviction on indictment the maximum penalty is seven years imprisonment and/or a fine.¹³⁶⁸

In the context of these two offences, ‘marriage’ is defined in the same way as in the FMCPA: it refers to any religious or civil form of marriage, i.e. a ceremony of marriage that is recognised by the customs of the parties to it, whether or not binding according to English law.¹³⁶⁹ But where the FMCPA uses the term ‘force’ and explains that this includes coercion by threats or other psychological means, the ABCP Bill uses the terms ‘violence’, ‘threats’ and ‘coercion’, but does not define them. Using a grammatical interpretation of Article 104(1) ABCP Bill 2013 (‘violence, threats or *any other form* of coercion’, emphasis added), it may be expected that coercion is not limited to (threats of) physical violence, but that it also includes psychological coercion such as emotional blackmail. This appears to fill the lacuna (i.e. that English criminal law traditionally did not recognise psychological coercion) noted by some of the proponents of the criminalisation of forced marriage discussed in paragraph 5.1.2.

Mindful of the warning of several consultation participants that some victims of forced marriage might not step forward because they would not want to see their relatives prosecuted, the government announced that the civil remedy (in the form of FMPOs) will continue to exist alongside the two new criminal offences of forced marriage.¹³⁷⁰ Victims will thus be given the choice between the criminal law track and the civil law track. Yet in cases of forced marriage where

¹³⁶⁷ ABCP Bill (HL Bill 66) as amended by the Committee, 12 December 2013.

¹³⁶⁸ Section 109(7) ABCP Bill (HL Bill 66) as amended by the Committee, 12 December 2013. The government estimates that on an annual basis the two new offences will result in an estimated £1.18 million additional costs for the criminal justice system (ABCP Bill, Explanatory notes (Bill 7 55/3) 9 May 2013, para. 381).

¹³⁶⁹ Section 109(3) ABCP Bill 2013 (HL Bill 66) as amended by the Committee, 12 December 2013; and ABCP Bill, Explanatory notes (Bill 7 55/3) 9 May 2013, para. 232.

¹³⁷⁰ ABCP Bill, Fact sheet: forced marriage (available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/201096/Fact_sheet_bill_overview.pdf> last visited December 2013).

very severe forms of coercion were used, it is doubtful that the victim will be given the opportunity to keep the case outside the criminal courts.

5.3. (NON-) SPECIFIC CRIMINAL OFFENCES

In addition to the three specific crimes of forced marriage that are introduced by the ABCP Bill 2013, several other (non-)specific criminal offences can be used in cases of forced marriage. These crimes include common assault, threatening behaviour, kidnapping, battery, conspiracy, (child) abduction, cruelty to persons under 16, theft, blackmail, false imprisonment, harassment, threats to kill, people trafficking, rape, aiding and abetting a criminal offence, and even murder.¹³⁷¹ The crimes may be committed in the course of forcing someone to enter into a conjugal association against their will, and they may also be committed after the forced marriage has taken place. Case law demonstrates that criminal law has indeed been used to deal with cases of forced marriage. In May 2009, for example, the Manchester Crown Court convicted a mother for child sex offences and attempting to pervert the course of justice sentencing her to three years imprisonment for forcing her 14- and 15-year-old daughters to marry their cousins in Pakistan.¹³⁷² In July 2012, Burnley Crown Court jailed three people for committing offences related to forced marriage: in 2009 a young woman fled her home for fear of being forced to marry her cousin. She ran away to Newcastle where she married someone else. Her mother, brother and brother-in-law went to Newcastle, broke into her apartment and threatened her and her husband. They then took her to her brother-in-law's house and tried to persuade her to divorce her husband and marry her cousin. After having kept her in the house for two days, they drugged her with lorazepam, and transported her back to her home town. The Crown Court found the mother, brother and brother-in-law guilty of false imprisonment, kidnap and two counts of administering a drug with intent of committing an indictable offence, and sentenced them to four, five and three years imprisonment respectively.¹³⁷³

Finally, the Sexual Offences Act 1956 contains several provisions that may be particularly relevant in forced marriage cases. Article 17 of this act stipulates that

‘(i) it is felony for a person to take away or detain a woman against her will with the intention that she shall marry or have unlawful sexual intercourse with that or any

¹³⁷¹ CPS Legal Guidance Honour-Based Violence and Forced Marriage, p. 8; *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 13; *NS v. MI* (2006) 1 FLR 444, para. 17; Summary of responses to the consultation on the criminalisation of forced marriage 2006, p. 6; and *Choice by Right* 2000, p. 9.

¹³⁷² Unreported, see Heaton, McCallum & Jogi 2009, p. 8.

¹³⁷³ ‘Family jailed in forced marriage row kidnap of Bradford woman’, BBC News 27 July 2012, available at <www.bbc.co.uk/news/uk-england-19019538> last accessed December 2013.

other person, if she is so taken away or detained either by force or for the sake of her property or expectations of property.’

The maximum penalty for this felony is 14 years imprisonment. Pursuant to Article 17 Sexual Offences Act 1956, parents who lock their daughter in their house by force and with the intention that she shall marry a man of their choosing may be guilty of this felony. This cannot be said for parents who do the same with their son: only women can be the victim of this felony. Articles 19 and 20 of the Sexual Offences Act 1956 further prohibit the abduction of an unmarried girl from their parent or guardian with the intention that she shall have unlawful sexual intercourse.

6. CONCLUDING REMARKS

Dutch law recognises only one type of marriage: civil marriage celebrated in accordance with the requirements set out in Book 1 of the Civil Code. The Dutch government has, on several occasions, stated that forced marriages are unacceptable and that free and full consent to marriage is a sacrosanct human right. Yet the Dutch Civil Code does not contain a free consent clause which stipulates that the free consent of both spouses is required for a valid marriage. The inclusion of such a provision was suggested during the parliamentary debate on the first book of the Civil Code in the 1960s. Lack of consent would make the marriage eligible for annulment. The then Minister of Justice decided against inclusion of such a free consent clause, arguing that this would constitute a devaluation of the institution of marriage by offering people an ‘easy way out’ of a marriage. Secondly, it could result in the annulment of marriages on the basis of every subjective lack of freedom which would be detrimental to legal certainty. Thirdly, it was argued that including a provision concerning the requirement of free consent to marriage would be contrary to the system of civil law, which does not contain such a provision for any other legal act.

In 2013, half a century later, the State Secretary of Security and Justice stated that a general requirement that all spouses declare that they enter into the marriage of their own free will would not be necessary as he believed that it may be assumed that everyone in the Netherlands knows about and supports the right and freedom of choice in marriage.¹³⁷⁴ This may be true, but it seems that including a free consent requirement for marriage in the Civil Code would reaffirm the right to freedom of choice in marriage. The argument used in the 1960s that this would offer people an ‘easy way out’ and thereby devalue the institution of marriage, seems to be outdated.

¹³⁷⁴ *Parliamentary Papers II (Lower House) 2012/2013*, 33 488, no. 6, p. 10.

There are several civil law remedies that can be used in the case of a threatened forced marriage or if a forced marriage has already taken place. Annulment currently has a high bar, requiring an ‘unlawful serious threat’, which means that a marriage that was the result of more subtle forms of coercion, such as psychological pressure, does not qualify for annulment. After promulgation of the Marital Coercion (civil law) Bill, marriages that were entered into as a result of *any* form of coercion will be eligible for annulment. This will offer victims of forced marriage better possibilities to dissolve the unwanted union. As argued above, in some cases, an annulment may be a better response than a divorce, because the consequence of an annulment is that the marriage never existed. A divorce decree does not have this *ex tunc* effect. Yet in other cases, a divorce will be a more obvious choice as it offers relief more quickly and does not require the party (parties) to prove that the marriage came about as a result of coercion. Judicial separation, the third option to dissolve a marriage, results in a separation between the spouses, but has limited added value in the context of forced marriages. When it comes to preventing forced marriages, it appears that the Registrar is a key figure. The Registrar is the person who actually weds a couple and if he suspects that coercion is involved, for example because the bride or groom looks very frightened and/or cries a lot,¹³⁷⁵ he is compelled by law to report this to the PPS (Article 162(1)(c) CriC).

The Criminal Code contains a number of offences that may be applicable to forced marriages. Especially relevant in this regard are the offence of coercion (Article 284 CriC) and the offence of influencing someone’s statement (Article 285a CriC). In government documents, the offence of coercion is generally heralded as most applicable to forced marriages, but as was discussed above and will be further argued in Chapter 10, the offence of influencing someone’s statement appears to be a blueprint for the act of forcing someone to enter into a marriage against that person’s will.

English law also offers a varied number of tools that can be used to tackle forced marriages. A forced marriage that has already taken place can be annulled within three years from the date of the marriage ceremony on the ground that a party to the marriage did not validly consent to it, as a consequence of duress. Pursuant to the case law, there is no valid consent when a person’s will has been overborne, that is to say, the relevant question in these cases is ‘whether the threats or pressure were such as to overbear the will of the individual and destroy the reality of consent.’¹³⁷⁶ It has been recognised that duress in the context of consent to marriage can include physical and psychological coercion, but also financial, sexual and emotional pressure. Divorce can also be used to end a forced marriage,

¹³⁷⁵ This is very subjective, obviously, but a Registrar may be able to distinguish between tears of happiness and tears of desperation – in some cases at least.

¹³⁷⁶ *Hirani v. Hirani* (1984) 4 FLR 232 (CA).

but is not preferable to annulment as a petition for divorce may be presented to the court only after the expiration of one year from the date of the marriage and the law strictly limits the grounds for divorce. A decree of divorce is granted only under certain specific circumstances; the fact that one or both of the spouses were forced to enter into the marriage against their will is not one of them. Pursuant to the Matrimonial Causes Act, the petitioner would have to demonstrate that the marriage has broken down irretrievably by satisfying the court that his/her spouse has behaved in such a way that the petitioner cannot reasonably be expected to live with him/her. Someone who faces the risk of being forced into a marriage or who has already been forced to marry can also, depending on the circumstances, apply to the court for non-molestation orders and occupation orders under the FLA 1996, restraining orders under the Protection from Harassment Act 1997, or Domestic Violence Protection Notices and Orders under the Crime and Security Act 2010.

The most notable legal tools at the government's disposal are the FMCPA 2007 and the criminal offences of forced marriage proposed by the ABCP Bill 2013. The FMCPA was implemented in 2008 and enables courts to make injunctions to protect people who are faced with a forced marriage or who have already been forced to enter into a marriage against their will. The content of these protection orders is entirely up to the discretion of the court: a protection order may for example prohibit the great uncle of the woman who has applied for the order to make arrangements for her wedding. Breach of an order is considered civil contempt of court. In 2011, the government announced that a breach of an FMPO would be made into a criminal offence, punishable with up to five years imprisonment. After an extensive consultation in 2012, the government concluded that the two-step prohibition was not sufficient and that the practice of forced marriage requires the creation of a specific criminal offence. The ABCP Bill 2013 makes it a criminal offence to use violence, threats or other forms of coercion for the purpose of causing another person to enter into a marriage without that person's free and full consent. Practising any form of deception with the intention of causing someone to leave the UK and intending that person to be subjected to a forced marriage abroad is also a criminal offence. In addition, the crime listed in Article 17 of the Sexual Offences Act 1956 may be of particular relevance.

The legal frameworks of the Netherlands and England described in this chapter are compared in Chapter 9.

CHAPTER 8

INTERNATIONAL CRIMINAL LAW AND FORCED MARRIAGE

1. INTRODUCTION

None of the statutes of any of the international(ised) courts or tribunals specifically list the act of forced marriage as a crime against humanity, a war crime or an act of genocide. The offence was first explicated in the case law of the SCSL in 2004, when the Prosecutor of that court encountered the phenomenon of ‘bush wives’ during his investigations into the atrocities committed during the civil war in Sierra Leone. The Trial Chamber granted the Prosecutor leave to add a new count of ‘other inhumane acts’ (Article 2(i) SCSL Statute) pertaining to the offence of forced marriage to the indictments in two cases (against former AFRC and RUF leaders), but dismissed the Prosecutor’s motion for leave to amend the indictment in the case against two former CDF leaders in a similar manner.¹³⁷⁷ As a result, the Trial Chamber could hear evidence supporting forced marriage as a (new) crime against humanity, which, for the first time in the history of international criminal law, opened the door for the prosecution of the crime of forced marriage as a crime against humanity. In subsequent SCSL judgements, the crime of forced marriage was defined, but this did not happen without problems or disagreements.

Paragraph 2 will discuss and evaluate in detail the proceedings before the SCSL Trial Chambers and Appeals Chamber in the AFRC, RUF and Taylor cases. The second part of this chapter focuses on the Extraordinary Chambers in the Courts of Cambodia (ECCC). Forced marriage is charged as an ‘other inhumane act’ in the case that is commonly referred to as Case 002. When the proceedings in this case commenced, in 2007, there was no indication that this case would take longer than the average international criminal case to complete.¹³⁷⁸ However, the proceedings continue to drag on and are marked by delay upon delay. At the time of writing (January 2014), there was not a single (trial) judgement in Case 002. As

¹³⁷⁷ Toy-Cronin 2010, p. 576; ‘Office of the Prosecutor welcomes arraignment of RUF and AFRC indictees on charges related to forced marriage’, Press Release, Special Court for Sierra Leone, 17 May 2004; and AFRC Trial Judgement, Annex A: Procedural History, paras. 1–13.

¹³⁷⁸ Indeed, when the research for this book commenced in the second half of 2010, there was reason to believe that the ECCC would issue a trial judgement in time for it to be included in this book.

a result, there is no relevant case law to discuss and analyse. Only the pre-trial proceedings offer some insight into the offence of forced marriage within the legal framework of the ECCC. They are briefly addressed in paragraph 3.

The legal framework of forced marriage in international criminal law is based on the case law of the SCSL and – to a lesser extent – the ECCC.¹³⁷⁹ This case law demonstrates that the legal framework for forced marriage under international criminal law is formed by several (categories of) crimes: the war crimes and crimes against humanity of enslavement and sexual slavery, the crime against humanity of other inhumane acts, and the war crime of outrages upon personal dignity. These crimes and their applicability to cases of forced marriage are studied in Chapter 10. The current chapter focuses, as stated, on the case law of the SCSL and ECCC.

2. THE CASE LAW OF THE SPECIAL COURT FOR SIERRA LEONE

2.1. TRYING THOSE WHO BEAR GREATEST RESPONSIBILITY: THE SPECIAL COURT FOR SIERRA LEONE

After an official request by the President of Sierra Leone for assistance of the international community to try members of the RUF and their accomplices, the UN and the government of Sierra Leone concluded, on 16 January 2002, a bilateral agreement establishing an internationalised – or hybrid – court with a mandate to try those who bear greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed during this conflict.¹³⁸⁰ As a hybrid court, the SCSL is neither an organ of the UN Security Council, nor part of the domestic legal system. It is best described as a mixed court, with both international and national elements; the Statute of the SCSL, for example, incorporates domestic Sierra Leonean law in addition to international law.¹³⁸¹ Article 1(1) SCSL Statute limits the Court's jurisdiction to 'those who bear greatest responsibility' for crimes committed in Sierra Leone since November 1996.

¹³⁷⁹ For the (limited) ICC, ICTY and ICTR case law pertaining to forced marriages, see Chapter 3.

¹³⁸⁰ UNSC Res. 1315 (14 August 2000) UN Doc. S/RES/1315 and Article 1(1) SCSL Statute. It is worth mentioning that the report of the Truth and Reconciliation Commission also touches upon the phenomenon of forced bush marriages, elaborating on the rebels' practice of abducting young girls and women and forcing them to become their wives (TRC Report 2004–2, pp. 16, 102 and 250; TRC Report 2004–3A, pp. 398, 479 and 503). In the eyes of the TRC, forced marriage is a form of sexual slavery and is in fact synonymous with sexual slavery (TRC Report 2004–3B, pp. 131 and 163). See Chapter 10 for a discussion on the differences and similarities between forced marriage and (sexual) slavery. See also Haenen 2013(II), pp. 895–915.

¹³⁸¹ However, none of the accused were charged under Sierra Leonean law.

In its short lifespan, the SCSL has delivered several landmark decisions, such as the first convictions in the history of international criminal law for sexual slavery and the conscription of child soldiers; and, notably, the first ever convictions for forced marriage.¹³⁸² The Court has dealt with four cases: the case against the former President of Liberia, Charles Taylor, and three cases concerning accused that were associated with the AFRC, RUF and CDF. In the following sub-paragraphs the proceedings before the SCSL Trial Chambers and Appeals Chamber in the AFRC, RUF and Taylor cases are discussed and evaluated. The CDF case is not considered because the act of forced marriage was not discussed in this case, even though several witnesses had testified that one of the accused had taken several captured girls and young women as his wives.^{1383, 1384}

2.2. THE AFRC CASE

2.2.1. *The trial*

On 7 March 2005, the trial against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, three officials and senior members of the AFRC, opened in Freetown before Trial Chamber II. The Chamber heard evidence on 14 counts, three of which were relevant with regard to the bush marriages that had taken place: sexual slavery and any other form of sexual violence (count 7), other inhumane acts, including forced marriage (count 8), and the war crime of outrages upon personal dignity (count 9). The Trial Chamber commenced the discussion of the counts pertaining to sexual violence by dismissing count 7 in its entirety, because it charged the accused with two separate offences in one count,

¹³⁸² L. Côté, 'Special Court for Sierra Leone', in: A. Cassese (Ed.), *Oxford Companion to International Criminal Justice*, Oxford: OUP 2009, pp. 516–517.

¹³⁸³ See CDF Transcripts 2 November 2004, pp. 47–60, CDF Transcripts 10 March 2005, pp. 43–44; CDF Transcript, 31 May 2005, pp. 24 and 33–34; see also *inter alia* Human Rights Watch 2003a, pp. 46–48.

¹³⁸⁴ The initial CDF Indictment did not contain charges relating to sexual violence or forced marriage. The Prosecutor's requests to amend the indictment to include *inter alia* the crime of forced marriage were dismissed by the Trial Chamber on the grounds that granting leave for amendment at that stage of the trial would prejudice the rights of the Accused to a fair and expeditious trial and cause undue delay as the defence would have to investigate the new counts (CDF Decision on leave to amend the indictment, paras. 6, 63 and 86). Leave to appeal this decision was denied (CDF Decision on Leave to Appeal the decision on amending the indictment). Questions regarding the topic of sexual violence and forced marriage during the trial were resolutely interrupted by the Court (see e.g. CDF Transcript 2 November 2004, p. 50 and CDF Transcript, 31 May 2005, pp. 24 and 33–34). The Prosecutor's attempts to remedy these issues during the Appeal were also fruitless (CDF Appeal Judgement, paras. 426–427, 435–436 and 450).

which violates the rule against duplicity.^{1385, 1386} The Trial Chamber then proceeded with the discussion of count 8 (forced marriage as an ‘other inhumane act’).

The Trial Chamber first examined the nature of the clause ‘other inhumane acts’ and held that it is a residual category. This implies that it should be restrictively interpreted as applying only to acts that are not otherwise subsumed under crimes listed in Article 2 SCSL Statute (the crimes against humanity provision). The act of forced marriage, therefore, can only qualify as an ‘other inhumane act’ if it involves conduct that is not caught by listed crimes against humanity.

The Trial Chamber had difficulty distinguishing the forced marriages that took place during the conflict from acts of sexual slavery, but the Prosecution submitted that the two offences ought to be distinguished: a forced marriage as an ‘inhumane act’ can include sexual violence or sexual slavery – and usually *will* involve sexual acts – but in addition to this, a forced marriage also has its own distinctive elements that are different from sexual acts, namely the conferral of the status of marriage on the victim. Similarly, a sex slave – or a victim of sexual violence in general for that matter – is not necessarily obliged to perform ‘all the tasks that are attached to a marriage’, such as cooking and cleaning.¹³⁸⁷ In the view of the Prosecution, the factual elements of forced marriage include sexual slavery in a marital-like union, the imposition of marital status by coercion or threat, forced labour, reduction to a servile status, the impossibility of escape or seeking assistance from relatives, and widespread stigmatisation and discrimination against bush wives, which complicates their return to their communities.¹³⁸⁸ The Prosecution stated that forced marriage:

‘consists of words or other conduct intended to confer a status of marriage by 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.’¹³⁸⁹

¹³⁸⁵ AFRC Trial Judgement, paras. 92–95. The rationale behind the rule against duplicity is as follows: when an accused is charged with more than one offence under the same count, it becomes difficult for him to completely understand the nature and cause of the charges brought against him (this requirement is codified in Article 17(4)(a) SCSL Statute) and to understand which of the crimes he should be defending himself against, which may prejudice a fair trial (AFRC Trial Judgement paras. 92–94 and AFRC Rule 98 Decision, Separate concurring opinion of Justice Sebutinde, paras. 3–9).

¹³⁸⁶ In her dissent, Justice Doherty argued it would have been more appropriate to leave the sexual slavery charge intact by only severing ‘and any other form of sexual violence’ from this charge (AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 12 and Oosterveld 2009, p. 106). This suggestion was taken to heart by the RUF Trial Chamber (see paragraph 2.3.1).

¹³⁸⁷ AFRC Trial Judgement, paras. 697 and 701–703. See also AFRC Rule 98 Decision, Separate concurring opinion of Justice Sebutinde, para. 14. However, research shows that many wives in fact did not have to perform any domestic duties, or had to do fewer domestic duties than non-married girls (*inter alia* Coulter 2009, p. 112). See also Chapter 3.

¹³⁸⁸ Summarised in the AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 16.

¹³⁸⁹ AFRC Trial Judgement, para. 701.

The Trial Chamber, after examining the whole of the evidence in the case, found that the evidence of forced marriage adduced by the Prosecution did not establish the elements of an offence of forced marriage independent of the crime of sexual slavery under Article 2(g) SCSL Statute.¹³⁹⁰ The Trial Chamber held that the Prosecution did not succeed in presenting evidence of a single forced marriage that did not amount to sexual slavery. In other words, the Chamber found that the evidence completely corresponded with the crime of sexual slavery meaning that it cannot amount to a separate crime under the clause of ‘other inhumane acts’.

The Trial Chamber defined sexual slavery as ‘the perpetrator’s exercising any or all of the powers attaching to the right of ownership over one or more persons by imposing on them a deprivation of liberty, and causing them to engage in one or more acts of a sexual nature’.¹³⁹¹ The Chamber considered that the forced marriages involved the abduction of women and their detention with AFRC troops, where the individual rebels took these women as their wives. In the view of the Chamber, the relationship between the perpetrator and the victim was one of ownership (element 1 of the crime of sexual slavery) and involved the exercise of control over the victim’s sexuality, movements and labour. For example, in addition to acts of a sexual nature (element 2 of the crime of sexual slavery) the bush wives were forced to wash, cook and clean for their husbands.¹³⁹²

In the eyes of the Trial Chamber, the use of the term ‘wife’ by the rebels was an indication of their intent to exercise ownership over the victims and not an indication of their intent to assume a conjugal relationship with the victims, with mutual rights and obligations.¹³⁹³ In this regard the Trial Chamber considers that ‘while the relationship of the rebels to their “wives” was generally one of exclusive ownership, the victim could be passed on or given to another rebel at the discretion of the perpetrator’.¹³⁹⁴ The Chamber deemed that there were in fact no ‘marriages’: the victims did not consider themselves to be married; they testified that they had been ‘taken as wives’, and there was no evidence that any of the women stayed on with their husbands after the conflict.¹³⁹⁵ In light of these deliberations, the Trial Chamber found by a majority, with Justice Doherty

¹³⁹⁰ AFRC Trial Judgement, para. 704.

¹³⁹¹ AFRC Trial Judgement, para. 708.

¹³⁹² Although there were also exceptions to this rule, as some women were not forced to work around the house (see AFRC Trial Judgement, para. 1093). And Coulter found that the majority of wives, especially those married to rebels of higher rank, were not forced to perform domestic duties (Coulter 2009, p. 112).

¹³⁹³ See *infra* outrages upon personal dignity.

¹³⁹⁴ AFRC Trial Judgement, para. 711.

¹³⁹⁵ AFRC Trial Judgement, para. 712. Later, it became evident that some victims did in fact stay on with their rebel husbands, but at the time of the Trial Judgement there was no hard evidence that this was the case. However, experts *had* testified that some of the victims remained in the forced marriage after the conflict, for various reasons, including rejection by their family and community or a sense of obligation to raise the children born from the forced marriage (see AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 45; AFRC Expert report Bangura, *inter alia* p. 20 and AFRC Expert report Thorsen, p. 16).

dissenting (see paragraph 2.2.3), that the evidence of forced marriage adduced by the Prosecution was completely subsumed under the crime of sexual slavery and saw no lacuna in the law that would necessitate a separate crime of forced marriage as an ‘other inhumane act.’ The Chamber further dismissed count 8 (other inhumane acts) for redundancy by reasoning that forced marriage is subsumed under the crime of sexual slavery and this crime is addressed by count 9. It should be reiterated that count 7, which charged the accused with sexual slavery and any other form of sexual violence, had been dismissed entirely as constituting duplicity.¹³⁹⁶

The Chamber then proceeded to discuss the evidence of sexual slavery as an outrage upon personal dignity. The Trial Chamber found that the fact that women were forcibly abducted, put in detention with the rebels and made to travel together with the troops, that they were executed or severely punished when they tried to escape, that they were placed under full control and were distributed to rebels to be their wives, that they were labelled as ‘wife’ (which is in this context a label of possession), that they were physically punished if the exclusive relationship with their husbands was violated or if they misbehaved in the eyes of their husbands,¹³⁹⁷ and that they were forced to work for the rebels, are all indicative of the deprivation of the abducted women’s liberty and the rebels’ exercise of ownership over them. Combined with the fact that the rebels forced their wives to engage in acts of a sexual nature under circumstances that were so coercive that the victims were unable to give genuine consent, the Chamber concluded that the *actus reus* and *mens rea* of the crime of sexual slavery were satisfied.¹³⁹⁸ The Trial Chamber considered that some women were accorded certain benefits as the wife of a rebel with a high rank and were, for example, not forced to cook or clean. However, this did not change the status of these women who remained in sexual slavery. Hence, these benefits were only relative and did not in any way undermine the seriousness of the acts committed against them.¹³⁹⁹ The Trial Chamber thus found all three accused criminally responsible for sexual slavery as a form of outrages upon personal dignity, pursuant to Article 3(e) SCSL Statute. Brima and Kanu were each sentenced to a single term of imprisonment of 50 years, and Kamara to a single term of imprisonment of 45 years.¹⁴⁰⁰

¹³⁹⁶ AFRC Trial Judgement, paras. 713–714 and 719.

¹³⁹⁷ According to several witnesses, the marriages in the Koinadugu and Bombali districts were regulated by one of the rebels in charge (‘Five-Five’, which was one of the aliases of the accused Kanu). He distributed the women among his men, issued a disciplinary order regulating the conduct of the women and punished adultery (AFRC Trial Judgement, paras. 1122–1123 and 1138–1139).

¹³⁹⁸ AFRC Trial Judgement, paras. 1105, 1114, 1126, 1130, 1141, 1159, 1165, 1169, 1183 and 1185.

¹³⁹⁹ AFRC Trial Judgement, paras. 1156, 1160 and 1184. See also AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 41.

¹⁴⁰⁰ The accused were also found guilty of, *inter alia*, the crimes against humanity of extermination, murder, rape and enslavement.

Appended to the Trial Judgement are a separate concurring and a partly dissenting opinion of two of the Trial Chamber judges. Both opinions offer a further exploration of the issue of forced marriage and are discussed below.

2.2.2. *The separate concurring opinion of Justice Sebutinde*

Because she was of the opinion that the relatively novel offence of forced marriage, which had thus far not received much attention, merited deeper analysis, Justice Sebutinde wrote a separate concurring opinion in which she examined the phenomenon of forced marriage in the context of the Sierra Leone conflict and its characterisation as a crime under international law.¹⁴⁰¹ Sebutinde agreed with the Trial Chamber that the forced marriages that occurred in the context of the civil war in Sierra Leone are a form of sexual violence and bear all the hallmarks of the crime against humanity of sexual slavery. This is because ‘the sexual element inherent in these acts tends to dominate the other elements therein such as forced labour and other forced conjugal duties.’¹⁴⁰² She therefore fully endorsed the Trial Chamber’s finding in this matter and saw no reason for recognising a separate crime of forced marriage as an ‘other inhumane act’.¹⁴⁰³

Sebutinde’s concurring opinion is interesting, because she used the report of the Prosecution Expert to draw a distinction between early or arranged marriages in peace time and forced marriages during (armed) conflict. To characterise forced marriage during armed conflict as a crime under International Humanitarian Law, Sebutinde relies on the description of the relationship between the victim and her husband that was given by Prosecution expert witness Zainab Bangura. At the request of the Prosecution, Bangura wrote an expert report on forced marriages in the context of the civil war in Sierra Leone.¹⁴⁰⁴ Bangura wrote that women had to endure terrible ordeals during the civil war, ranging from repeated rapes to beatings and mutilations. However, in her opinion, the most devastating effect of the war on women was the phenomenon ‘bush wife’.¹⁴⁰⁵ She emphasises that the rebels’ use of the word ‘wife’ was strategic and deliberate. By labelling a girl ‘wife’, a rebel demonstrated the permanence of the association and his control over the victim, and made it clear that no other man could touch her.¹⁴⁰⁶ As regards the role expected of these bush wives, Bangura noted that they were required to carry out all duties of a wife and more: a bush wife had to carry her husband’s

¹⁴⁰¹ AFRC Trial Judgement, Separate concurring opinion of Justice Sebutinde, paras. 1–2.

¹⁴⁰² AFRC Trial Judgement, Separate concurring opinion of Justice Sebutinde, paras. 16 and 18; and AFRC Rule 98 Decision, Separate concurring opinion of Justice Sebutinde, para. 14.

¹⁴⁰³ AFRC Trial Judgement, Separate concurring opinion of Justice Sebutinde, paras. 16 and 18.

¹⁴⁰⁴ For the purpose of Bangura’s report, over 100 (former) bush wives living in several districts in Sierra Leone were interviewed. In addition, parents of victims of forced marriages were questioned, as were numerous religious and traditional leaders (AFRC Expert report Bangura, pp. 7–8).

¹⁴⁰⁵ See AFRC Expert report Bangura, p. 6.

¹⁴⁰⁶ AFRC Expert report Bangura, p. 15.

belongings while she journeyed through the country with him, cook, wash and clean for him, gratify his sexual wishes without question, show him loyalty and reward him with love and affection for his protection. Regarding the element of sexual abuse, Justice Sebutinde stated that the Prosecution Expert found that all the victims that were interviewed for the purpose of her expert report, admitted, without exception, that they had been repeatedly raped or sexually abused by their rebel husbands while in confinement.¹⁴⁰⁷

On the basis of this report as well as on the basis of numerous witness testimonies, Judge Sebutinde was of the view that the elements of the act of forced marriage are satisfied by the elements of the crime of sexual slavery. However, Justice Doherty was diametrically opposed to this conclusion.

2.2.3. *The partly dissenting opinion of Justice Doherty*

Justice Doherty's partly dissenting opinion relates to the Trial Chamber's findings on count 7 (sexual slavery and any other form of sexual violence) and count 8 ('other inhumane acts').¹⁴⁰⁸ Important with respect to forced marriage are her remarks about count 8, as she argues that forced marriage should be distinguished from sexual slavery because it constitutes a crime against humanity in itself. Doherty pays much attention to the specific consequences of the forced marriages that took place during the Sierra Leonean conflict. She takes into consideration the long-term stigmatisation and discrimination of the bush wives and the fact that many were rejected by their families and/or communities. The victims feared reprisals, due to the widespread belief that they were tainted and had acquired rebel behaviour and as a consequence, many women remained in their forced marriages.¹⁴⁰⁹ Justice Doherty also takes into account the serious psychological and moral traumas the women endured, who in most cases were forced to live with men whom they feared and/or hated.¹⁴¹⁰ It is especially the stigmatisation as 'bush wife' that leads Doherty to the conclusion that forced marriages must be distinguished from sexual slavery. The label of 'wife' indicated a more or less exclusive relationship with one man and caused mental trauma, stigmatised the victim and stymied her reintegration into her community. Doherty asserts that a forced marriage does not necessarily involve acts of physical or sexual violence, but that the crime is primarily concerned with the mental and moral suffering of the victim.¹⁴¹¹ In her opinion, the crucial element is 'the imposition, by threat or

¹⁴⁰⁷ AFRC Trial Judgement, Separate concurring opinion of Justice Sebutinde, paras. 13–15.

¹⁴⁰⁸ Partly Dissenting Opinion, para. 12.

¹⁴⁰⁹ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, paras. 33 and 45.

¹⁴¹⁰ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 48.

¹⁴¹¹ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 70. See also T. Doherty, 'Developments in the prosecution of gender-based crimes – the Special Court for Sierra Leone experience', *American University Journal of Gender, Social Policy & The Law* (17) 2009, p. 332.

physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim.¹⁴¹²

Doherty continues by discussing several international treaties and domestic laws and concludes that a marriage is a relationship that is founded on the mutual consent of both spouses. In a forced marriage, the consent of one or both parties is absent, as a result of which the victim – or victims if both spouses were forced to marry – is forced into a conjugal relation which leads to a severe violation of the right to self-determination. The next question that she addresses is whether a forced marriage inflicts great suffering, or serious injury to body or to mental or physical health, and whether it is of a gravity similar to the acts listed under Article 2(a) to (h) SCSL Statute. Doherty is satisfied that the circumstances as described above meet this threshold. On these accounts, Doherty found that the *actus reus* and the *mens rea* of the clause 'other inhumane acts' are satisfied, and stated that in her view, forced marriage constitutes a crime against humanity, distinct from sexual slavery.¹⁴¹³

2.2.4. *The appeal*

The Trial Judgement – in which the Trial Chamber had ruled that forced marriage constitutes sexual slavery – was appealed by the Prosecutor and the Accused on different grounds. For the purpose of this book, the analysis is limited to the Prosecution's seventh ground of appeal: the ground that concerns the Trial Chamber's dismissal of count 8 of the indictment, which charged the Accused with the crime against humanity of 'other inhumane acts'. The Prosecution argued that the Trial Chamber erred by finding that the evidence adduced by the Prosecution did not establish the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery under Article 2(g) SCSL Statute.¹⁴¹⁴ In its Appeal Brief, the Prosecution contended that forced marriage is distinct from sexual slavery, as the former is aimed at forcibly conferring the status of marriage, resulting in a forced conjugal association which is not predominantly sexual since it does not necessarily involve non-consensual sex.¹⁴¹⁵ The Prosecutor asserted that forced marriage constitutes a human rights violation, even outside the context of an armed conflict or widespread or systematic attack against a civilian population. But when committed in an armed conflict or as part of such an attack, the gravity of forced marriage is enhanced. In that situation, the victim is held captive as the wife of one of the perpetrators of the attack, which causes great suffering to the victim, regardless of whether she is forced to have sex with her rebel husband or forced to perform domestic labour.¹⁴¹⁶ On these grounds, the

¹⁴¹² AFRC Trial Judgement, Dissenting Opinion Justice Doherty, paras. 52–53.

¹⁴¹³ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, paras. 50–51, 57, 69 and 71.

¹⁴¹⁴ AFRC Prosecution Appeal Brief, paras. 584–587 and AFRC Appeal Judgement, para. 177.

¹⁴¹⁵ AFRC Prosecution Appeal Brief, paras. 614–616.

¹⁴¹⁶ AFRC Prosecution Appeal Brief, paras. 618–621.

Prosecution submitted that the imposition of forced marital status is as grave as other crimes against humanity such as imprisonment and therefore amounts to an ‘other inhumane act’.¹⁴¹⁷

Based on the evidence in the record, the Appeals Chamber found that, while sexual slavery and forced marriage do have certain elements in common (non-consensual sex and deprivation of liberty), there are also distinguishing factors, as a consequence of which the forced marriages that took place in the context of the civil war in Sierra Leone are not subsumed under the crime of sexual slavery. The Appeals Chamber based its conclusion that forced marriage is distinct from sexual slavery on two theses.

First, a forced marriage involves a coerced conjugal association, which results in great suffering, or serious physical or mental injury on the part of the victim.¹⁴¹⁸ The Appeals Chamber concluded that the perpetrators intended to impose a conjugal association rather than exercise ownership over women and girls.¹⁴¹⁹ The Chamber based this conclusion on the fact that the women were coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour and forced pregnancy. In return, the rebel husband was expected to give food, clothing and protection to his wife, acts that were not required when a woman was used for sexual purposes only.¹⁴²⁰

The second reason why forced marriage should be distinguished from sexual slavery is that forced marriage implies a relationship of exclusivity between the perpetrator and his wife, whereas victims of sexual slavery are often subjected to multiple rapists.¹⁴²¹ In some cases, breach of this exclusive relationship was sanctioned with physical punishment.¹⁴²²

The Appeals Chamber concluded that the act of forced marriage satisfies the elements of ‘other inhumane acts’. The first requirement (i.e. infliction of great suffering, or serious injury to body or mental or physical health, by means of an inhumane act) is fulfilled, seeing as the victims of forced marriages endured physical injury (repeated rape and sexual violence, forced labour, corporal punishment and deprivation of liberty) as well as psychological trauma (by being forced to watch the killing or torture of close family members before becoming wives of the rebels who committed these nefarious acts and by being labelled ‘wife’ which caused stigma).¹⁴²³ Concerning the gravity of the conduct – the

¹⁴¹⁷ AFRC Prosecution Appeal Brief, paras. 617 and 624; and AFRC Appeal Judgement, para. 178.

¹⁴¹⁸ AFRC Appeal Judgement, para. 190.

¹⁴¹⁹ Whereas the Trial Chamber found the opposite when it stated that the use of the term ‘wife’ by the perpetrator indicates an intent to exercise ownership over the victim rather than an intent to assume a (quasi-)marital status with the victim (AFRC Trial Judgement, para. 711).

¹⁴²⁰ AFRC Appeal Judgement, para. 190. In traditional Sierra Leonean marriages, a husband is required to provide his wife with food, clothing and shelter (Coulter 2009, p. 79).

¹⁴²¹ The expert witness in the RUF Trial Judgement noted that numerous women were abducted and not assigned as bush wives. They remained under the control of the RUF fighters and were forced to have sex with various rebels (RUF Trial Judgement, para. 1409, footnote 2619).

¹⁴²² AFRC Appeal Judgement, paras. 192 and 195.

¹⁴²³ AFRC Appeal Judgement, para. 199.

second requirement of other inhumane acts – the Appeals Chamber was satisfied that forced marriages are of similar gravity to several listed crimes against humanity.¹⁴²⁴

In other words, the Appeals Chamber recognised, for the first time in the history of international criminal law, that forced marriages can constitute a crime against humanity, charged as an ‘other inhumane act’, under international law. Even though the Appeals Chamber was aware that convicting the Accused of this crime would reflect their full culpability, it did not enter such convictions, irrespective of the fact that entering cumulative convictions for both ‘outrages upon personal dignity’ and ‘other inhumane acts’ on the same facts was possible (see paragraph 2.3.1 for cumulative convictions in the RUF case). The Appeal Chamber confined itself to holding that it was convinced that society’s disapproval of the forced marriages that took place in Sierra Leone was adequately reflected by recognising that this practice is criminal and that it constitutes an ‘other inhumane act’.¹⁴²⁵

2.2.5. *Appraisal of the AFRC judgements*

Based on the same evidence, the Trial Chamber and the Appeals Chamber reached entirely different conclusions with regard to the issue of forced marriage: whereas the former was of the opinion that the forced marriages that occurred during the armed conflict in Sierra Leone could be classified as sexual slavery, the latter went to great lengths to invalidate this conclusion and concluded that forced marriage is distinct from sexual slavery, because it involves a forced conjugal association and because it implies a relationship of exclusivity between the victim and the perpetrator. On the basis of those two distinctions, the Appeals Chamber held that forced marriage is not a predominately sexual crime and found ‘that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery.’¹⁴²⁶

The Appeals Chamber’s statement that the exclusivity of the relationship is one of the factors that distinguish forced marriage from sexual slavery is remarkable when taking into consideration that the ICTY in the *Kunarac et al.* case held that exclusivity can be indicative of slavery: witness D.B. testified that she was taken to a house in Miljevina where ‘each soldier took one girl exclusively for himself.’¹⁴²⁷ The ICTY Trial Chamber stated that assertion of exclusivity is one of the factors that should be taken into consideration when determining whether enslavement

¹⁴²⁴ AFRC Appeal Judgement, para. 200.

¹⁴²⁵ AFRC Appeal Judgement, para. 202.

¹⁴²⁶ AFRC Appeal Judgement, para. 195.

¹⁴²⁷ *Kunarac et al.* Trial Judgement, para. 225. Reiterating: the ICTY Statute does not contain the crime of sexual slavery.

was committed.¹⁴²⁸ Moreover, ‘exclusivity’ is also a remarkable element because it does not do justice to the reality of many of the forced marriages in Sierra Leone: although many women were abused exclusively by their rebel husband, some were also given to other rebels.¹⁴²⁹ This makes it difficult to comprehend exactly how the Appeals Chamber envisaged that exclusivity makes a forced marriage substantively different from (sexual) slavery.

As regards the second distinctive element of forced marriage: the Appeals Chamber held that the AFRC rebels intended to impose a conjugal association instead of exercise ownership over women and girls. It seems that the Appeals Chamber believes that the two are mutually exclusive: yet is exercise of ownership not also possible within a conjugal association?¹⁴³⁰

This brings to the fore the definition of forced marriage. The Appeals Chamber held that forced marriage involves:

‘a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.’¹⁴³¹

The only clarification the Appeals Chamber offers is that this forced conjugal association is exclusive in nature, but it does not define any of the other elements.¹⁴³² This leaves several questions unanswered: What exactly constitutes a ‘forced conjugal association’? Is domestic labour (or, as the Appeals Chamber labels it: ‘conjugal duties’¹⁴³³) required in this association? Is the perpetrator’s mere declaration that the victim is his wife enough to satisfy the *actus reus* of the crime, or are further acts of force and violence, such as rape or forced labour necessary? In other words: is forced marriage a declarative act that does not require additional criminal acts? Are there any temporal requirements such as the duration of the conjugal association?¹⁴³⁴ Is it relevant that the bush marriages were not regarded

¹⁴²⁸ *Kunarac et al.* Trial Judgement, para. 543. These factors were confirmed by the ICTY Appeals Chamber (*Kunarac et al.* Appeal Judgement, para. 119).

¹⁴²⁹ TRC Report 2004–3B, p. 164: ‘women’s so-called “husbands” would offer them to fellow combatants for sexual purposes’.

¹⁴³⁰ See also Chapter 10, paragraph 3.3.2.3.

¹⁴³¹ AFRC Appeal Judgement, para. 195.

¹⁴³² Which is not surprising, since the Appeals Chamber evaluated forced marriage in the context of the elements of ‘other inhumane acts’ (Oosterveld 2011, p. 65).

¹⁴³³ AFRC Appeal Judgement, paras. 190–191.

¹⁴³⁴ Gong-Gershowitz 2009, p. 71. Gong-Gershowitz also raises a question concerning the element of exclusivity: she wonders whether the relationship needs to be bilaterally exclusive, or whether ‘the exclusivity factor (is; IH) solely determined by reference to the victim.’ It would seem that the Appeals Chamber assumed the exclusivity to be reciprocal in nature: ‘forced marriage implies a relationship of exclusivity *between* the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement’ (AFRC Appeal Judgement, para. 195, emphasis added).

as valid marriages outside of the bush context? As will be demonstrated below in paragraph 2.3, these definitional ambiguities led to difficulties in the RUF trial.

Further, it appears that the Appeals Chamber struggled to determine the specific harm caused by a forced marriage. The Appeals Chamber argued that the act of forcing someone to enter into a conjugal association *in itself* causes great suffering and can therefore amount to an ‘other inhumane act’. But in order to substantiate this claim, the Chamber referred to the fact that the victims endured physical injury (repeated rape and sexual violence, forced labour, corporal punishment and deprivation of liberty) as well as psychological trauma (by being forced to watch the killing or torture of close family members before becoming wives of the rebels who committed these nefarious acts and by being labelled ‘wife’).¹⁴³⁵ Obviously, the Chamber conflates the facts: a forced marriage in itself does not cause physical injury – it is the (sexual) violence that takes place within this forced marriage that causes this injury.

Another point that is worth mentioning is that the Appeals Chamber, by classifying sexual intercourse and household tasks such as cooking and cleaning as conjugal *duties*,¹⁴³⁶ instead of defining them as rape and forced labour respectively, reinforced stereotypes of women’s roles in international jurisprudence, allowing them to perpetuate.¹⁴³⁷ Finally, it deserves to be noted that the reason the Appeals Chamber gave for its decision not to enter convictions – a decision which is within the discretion of the Appeals Chamber – for forced marriages as an ‘other inhumane act’ is slightly curious. The Appeals Chamber did not enter new convictions because it held that society’s disapproval of the forced marriages that took place in Sierra Leone was adequately reflected by the Appeals Chamber’s recognition that this practice is criminal and constitutes an ‘other inhumane act’. This may be so, but society (and victims) would arguably benefit more from an actual conviction.

2.3. THE RUF CASE

2.3.1. *Pre-trial proceedings and the trial*

The trial against Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, five former leaders of the RUF, commenced on 5 July 2004. The Trial Chamber heard evidence on 18 counts, three of which are relevant in the context of forced marriage: the crimes against humanity of sexual slavery and any other form of sexual violence (count 7) and other inhumane acts, encompassing forced marriage (count 8), and the war crime of outrages upon

¹⁴³⁵ AFRC Appeal Judgement, para. 199.

¹⁴³⁶ AFRC Appeals Chamber, para. 190; and also RUF Trial Chamber, para. 1293.

¹⁴³⁷ See also Gong-Gershowitz 2009, p. 60.

personal dignity (count 9). The similarities with the AFRC indictment are obvious and like the AFRC Trial Chamber, the RUF Trial Chamber deemed count 7 to be bad for duplicity as it charged the two separate and distinct crimes of sexual slavery and any other form of sexual violence. However, instead of dismissing the count in its entirety, as was done in the AFRC trial, the Chamber considered the remedies available to it as outlined by the Appeals Chamber in the AFRC case¹⁴³⁸ and concluded that the appropriate remedy was to strike out the charge of ‘any other form of sexual violence’ and hear evidence regarding sexual slavery only.¹⁴³⁹

The Trial Chamber stated that it would adopt the Appeals Chamber’s definition of forced marriage as set out in the AFRC Appeal Judgement and held that the imposition of a forced conjugal association forms the *actus reus* of this offence.¹⁴⁴⁰ It was satisfied that in relation to Count 8 (other inhumane acts) this requirement was fulfilled by the conduct described by multiple reliable witnesses that RUF rebels captured women and took them as their wives.¹⁴⁴¹ Trapped in unwanted wedlock, the victims were forced to serve their husbands, meaning they were compelled to be subject to their husbands’ sexual desires and wash, cook and clean for them.¹⁴⁴² On the basis of these factual findings, the Trial Chamber also concluded that the perpetrators exercised powers attaching to the right of ownership over these women and thus committed the crime of sexual slavery.¹⁴⁴³ The Chamber justified these cumulative convictions by stating that the offence of forced marriage is distinct from the offence of sexual slavery. The Trial Chamber referred to the Appeals Chamber which has explicitly held that the former crime is not subsumed under the latter: the distinctive elements being ‘a forced conjugal association based on exclusivity between the perpetrator and victim’. And this forced conjugal association carries with it ‘a lasting social stigma which hampers (the victims’; IH) recovery and reintegration into society.’¹⁴⁴⁴ For this reason, the Trial Chamber found a conviction for both crimes permissible.¹⁴⁴⁵ Furthermore, the Trial Chamber was satisfied that these forced marriages also constituted ‘a severe humiliation, degradation and violation of the dignity of the victims’ and thus constituted the war crime of outrages upon personal dignity.¹⁴⁴⁶ In addition, the Chamber held that forced marriages were committed with the specific intent

¹⁴³⁸ According to AFRC Appeal Judgement, para. 108, these remedies include, *inter alia*, ‘quashing the count, ordering that the Indictment be amended, (...) and refusing to consider evidence of one of the two charges so as to eliminate the duplicity of Count 7.’

¹⁴³⁹ RUF Trial Judgement, paras. 457–458. As was suggested in the AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 12.

¹⁴⁴⁰ The AFRC Appeals Chamber chose different words to describe the *actus reus*, viz. ‘to compel a person (...) to serve as a conjugal partner’ (AFRC Appeal Judgement, paras. 190 and 196).

¹⁴⁴¹ RUF Trial Judgement, para. 1295.

¹⁴⁴² RUF Trial Judgement, paras. 1155, 1212 and 1293.

¹⁴⁴³ RUF Trial Judgement, para. 1581.

¹⁴⁴⁴ RUF Trial Judgement, para. 1296.

¹⁴⁴⁵ RUF Trial Judgement, para. 2307.

¹⁴⁴⁶ RUF Trial Judgement, paras. 1298, 1301 and 1474.

of terrorising the Sierra Leonean civilian population and break family and social bonds, and therefore amounted to an act of terror.¹⁴⁴⁷

Concluding, the Trial Chamber found the Accused guilty of *inter alia* the war crimes of extermination, collective punishment, pillage, acts of terrorism and outrages upon personal dignity, and the crimes against humanity of murder, rape, sexual slavery, forced marriage (as an inhumane act) and enslavement.¹⁴⁴⁸ Sesay, Kallon and Gbao were each sentenced to total terms of imprisonment of 52, 40 and 25 years respectively.¹⁴⁴⁹

2.3.2. *The appeal*

Both the Prosecution and the Accused appealed the Trial Chamber's judgement, filing a considerable number of grounds for appeal.¹⁴⁵⁰ Regarding the offence of forced marriage, Sesay's 39th ground for appeal is interesting. This ground argued that the Trial Chamber should have assessed whether the forced marriages became consensual during the indictment period and that it had erred because it had not done so.¹⁴⁵¹ Moreover, Sesay contended that the Trial Chamber erred in law and fact several times with regard to the consideration of coercive circumstances and the absence of the victim's consent to and within forced marriages.¹⁴⁵² The Appeals Chamber replied by stating that the absence of consent is not an element of forced marriage. Referring to the Appeal Judgements in the *Kunarac et al.* and *Gacumbitsi* cases, the Appeal Chamber stated that the Trial Chamber is free to infer non-consent from the background circumstances of a crime. In this case the victims were forced into conjugal relationships resulting in severe suffering as part of a widespread and systematic attack against a civilian population. These hostile and coercive circumstances serve to prove that genuine consent was impossible.¹⁴⁵³

2.3.3. *Appraisal of the RUF judgements*

In the RUF case, the Trial Chamber applied the definition of forced marriage given by the Appeals Chamber in the AFRC case, and concluded that the *actus reus* of this crime consists of 'the imposition of a forced conjugal association'.¹⁴⁵⁴ But

¹⁴⁴⁷ RUF Trial Judgement, paras. 1349, 1352 and 1365.

¹⁴⁴⁸ Sesay, Kallon and Gbao were found guilty of committing forced marriages by participating in a joint criminal enterprise (RUF Trial Judgement, Disposition). On the doctrine of joint criminal enterprise, see L.D. Yanev, *Joint Criminal Enterprise. A Flawed Legal Doctrine or a Cornerstone of International Criminal Law?* (forthcoming).

¹⁴⁴⁹ RUF Sentencing Judgement, Disposition.

¹⁴⁵⁰ Sesay, Kallon and Gbao each filed a total of 58, 75 and 42 grounds for appeal respectively. The Prosecution filed three grounds for appeal.

¹⁴⁵¹ RUF Appeal Judgement, para. 728.

¹⁴⁵² RUF Appeal Judgement, paras. 728–730.

¹⁴⁵³ RUF Appeal Judgement, paras. 733, 734 and 736.

¹⁴⁵⁴ RUF Trial Judgement, para. 1295.

because of the indeterminateness of this element, the Trial Chamber experienced several difficulties when applying it. For example, as mentioned earlier, the Trial Chamber entered cumulative convictions for *inter alia* sexual slavery and forced marriage. The test to determine the permissibility of cumulative convictions that was used by the Trial Chamber was formulated in the *Čelebići* Appeal Judgement: an accused may be convicted under different statutory provisions based on the same conduct to the extent that each provision requires proof of a materially distinct element that is not required by the other provision. If this is not the case, cumulative conviction is impermissible and instead, the more specific provision (*lex specialis*) should be applied.¹⁴⁵⁵ When justifying the cumulative convictions, the Trial Chamber held that the distinctive elements of forced marriage with regard to sexual slavery are (1) a forced conjugal association which is (2) based on exclusivity between the perpetrator and victim.¹⁴⁵⁶ However, during the evaluation of the evidence and the discussion of the legal and factual findings, the Trial Chamber failed to draw (such) a clear distinction between the two crimes and in fact conflated them, by using the same facts interchangeably to prove both charges.¹⁴⁵⁷ For example, the Trial Chamber alternatively used the label ‘wife’ to demonstrate an ‘exclusive relationship’ required for forced marriage, and to demonstrate ‘the exercise of powers attaching to the right of ownership’ required for sexual slavery.¹⁴⁵⁸ At other times, the Trial Chamber used evidence of the perpetrator’s exercise of control and ownership over his victim as support for finding that this conduct constituted forced marriage:

“The Chamber also finds that the perpetrators intended to exercise control and ownership over their victims who were unable to leave or escape for fear that they would be killed or sent to the front lines as combatants. Accordingly, the Chamber finds that young girls and women were intentionally forced into conjugal relationships with rebels.”¹⁴⁵⁹

And by holding that a rebel commander known as ‘Superman’ ‘exercised the rights of ownership over TF1–093 by virtue of this (forced; IH) exclusive conjugal

¹⁴⁵⁵ *Čelebići* Appeal Judgement, paras. 412–413.

¹⁴⁵⁶ The Trial Chamber also adopted ‘assertion of exclusivity’ as identified by the ICTY in *Kunarac et al.* as an indication of enslavement (RUF Trial Judgement, para. 160).

¹⁴⁵⁷ Gong-Gershowitz 2009, p. 73. Compare Oosterveld 2011, pp. 72–73, who calls this approach (i.e. analysing the evidence of sexual slavery and forced marriage together) intersectionality and argues that it allowed for a better recognition of the actual context in which the crimes took place. She does, however, acknowledge that this approach could be criticised for potentially blurring the lines between the two acts.

¹⁴⁵⁸ Gong-Gershowitz 2009, p. 75. See also RUF Trial Judgement, para. 1466: ‘The Chamber finds that the use of the term “wife” by the rebels was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions.’ Whereas the Appeals Chamber in the AFRC case held that the use of the term “wife” was indicative of the perpetrator’s intent to confer a marital status on the victim.

¹⁴⁵⁹ RUF Trial Judgement, para. 1467.

relationship with the victim,¹⁴⁶⁰ the Trial Chamber mixed up the different material elements of sexual slavery and forced marriage. Whereas the Appeals Chamber held that exclusivity distinguishes forced marriage from sexual slavery, the Trial Chamber seems to share the view of the *Kunarac et al.* Trial Chamber that it may be indicative of enslavement (see paragraph 2.2.5 on the appraisal of the AFRC judgements).

In opaque prose, the Trial Chamber probably meant to say that whereas forced marriage is not subsumed under sexual slavery, the reverse may be possible: where a forced marriage entails the perpetrator's exercising powers attaching to the right of ownership over the victim (his 'wife'), the act of (sexual) slavery is subsumed under the act of forced marriage. Indeed, in several instances the Trial Chamber found that forced marriage constituted sexual slavery *and* an 'other inhumane act'.¹⁴⁶¹ This seems to indicate that the Trial Chamber in fact opines that forced marriage could be a specific form of sexual slavery: sexual slavery *plus* as it were.¹⁴⁶² That is to say, forced marriage may subsume sexual slavery, but at the same time has one or more additional elements that make it broader than sexual slavery.

2.4. THE TAYLOR CASE

2.4.1. *The trial*

The former president of Liberia, Charles Taylor, was arrested and handed over to the SCSL in 2006. Taylor was accused of supporting the AFRC and RUF during the armed conflict in Sierra Leone by providing military training, personnel, financial support, and arms and ammunition.¹⁴⁶³ He was charged with 17 different counts. Most relevant with regard to forced marriage is count 5: the crime against humanity of sexual slavery.¹⁴⁶⁴ Unlike the AFRC and RUF consolidated indictments, the Taylor indictment makes no mention of forced

¹⁴⁶⁰ RUF Trial Judgement, para. 1463.

¹⁴⁶¹ RUF Trial Judgement, para. 1464.

¹⁴⁶² Gong-Geshowitz 2009, p. 69, who introduced the term, also regards the Appeals Chamber's analysis of forced marriage as 'sexual slavery plus': '(w)ithout 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".'

¹⁴⁶³ *Prosecution v. Charles Taylor*, Case No. SCSL-03-I, Indictment, 7 March 2003.

¹⁴⁶⁴ The initial and first amended indictments contained a count of 'sexual slavery *and any other form of sexual violence*', but on 14 May 2007 (probably in light of the AFRC Trial Judgement), the Prosecution filed a motion for leave to amend the indictment and was granted leave to do so by Trial Chamber II. After the amendment, the words 'and any other form of sexual violence' were deleted from count 5 (see *Prosecution v. Charles Taylor*, Case No. SCSL-03-01-PT, Decision on the Prosecution motion requesting leave to amend indictment, 25 May 2007).

marriages, but focuses on the use of women as sex slaves.¹⁴⁶⁵ Part of the evidence relating to charges of sexual slavery included extensive testimony by women and girls regarding bush marriages. Therefore, the Trial Chamber decided to address the issue of forced marriage in the context of the charges in the indictment.¹⁴⁶⁶

The Trial Chamber departed from the conclusion in the AFRC Appeal and the RUF judgements and returned to the Court's initial (AFRC Trial Chamber) point of view: namely that forced marriage is *not* a new crime, that it is *not* a distinct inhumane act, but that it is in fact a specific form of (sexual) slavery, which it termed 'conjugal slavery'.¹⁴⁶⁷ At this point, it may be worth noting that the Trial Chamber in the Taylor case was composed of the same judges as the Trial Chamber in the AFRC case. The Trial Chamber considered that conjugal slavery does have certain specific characteristics, such as a forced conjugal association, exclusivity of the relationship and forced domestic labour, but it concluded that these characteristics do not require the conceptualisation of a new crime: rather they are descriptive components that fall within the scope of (sexual) enslavement. The Trial Chamber made a comparison with specific forms of rape: gang rape is a distinctive form of rape with distinctive features, yet it still falls within the scope of the crime of rape. Conjugal slavery is a distinctive form of (sexual) slavery, yet it still falls within the scope of the crime of (sexual) slavery.¹⁴⁶⁸ The Trial Chamber further considered the term 'forced marriages' to be a wrong and inappropriate label for the ordeal the victims of these forced conjugal associations went through. What happened to the victims should be regarded as a form of conjugal enslavement: the perpetrators exercised powers attaching to the right of ownership over their bush wives and imposed on them a deprivation of liberty. All forced acts that took place within these associations, sexual as well as non-sexual, fall within the definition of enslavement.¹⁴⁶⁹ Indeed, in the Chamber's view, 'the Prosecution erred in other Indictments by charging "forced marriage" as a crime that falls within the scope of the crime against humanity of other inhumane acts.'¹⁴⁷⁰

The Chamber further considered sexual slavery, including the practice of bush marriages, to fall within the scope of the war crime of outrages upon personal dignity, because it is humiliating and degrading and constitutes a serious attack on human dignity.¹⁴⁷¹

¹⁴⁶⁵ *Taylor* Second Amended Indictment, p. 5. However, in the Opening Statement, the Prosecution did draw attention to the bush wife phenomenon, see *Taylor* Prosecution Opening Statement, p. 304.

¹⁴⁶⁶ *Taylor* Trial Judgement, para. 422. See e.g. *Taylor* Transcript, 29 January 2009, p. 23862; *Taylor* Transcript, 20 October 2008, pp. 18678 and 18685–18686; and *Taylor* Transcript 5 March 2008, p. 5327.

¹⁴⁶⁷ *Taylor* Trial Judgement, para. 427.

¹⁴⁶⁸ *Taylor* Trial Judgement, paras. 429–430.

¹⁴⁶⁹ *Taylor* Trial Judgement, paras. 425–427.

¹⁴⁷⁰ *Taylor* Trial Judgement, para. 424.

¹⁴⁷¹ *Taylor* Trial Judgement, para. 432. Sexual slavery is not listed as a war crime in the SCSL Statute. It is listed as such in the Rome Statute.

2.4.2. *The appeal*

The Appeals Chamber only briefly addressed the forced marriages that took place during the civil war, seeing as none of the grounds of appeal were related to this practice:

‘The RUF/AFRC leadership not only endorsed and perpetrated sexual violence and slavery, but also set up an organised system for the commission of these crimes. The RUF/AFRC leadership promoted sexual violence and slavery by promulgating “Operation Pay Yourself”, where fighters were encouraged to take anything they wanted from the civilians, including wives, who were perceived as chattel. Many captured young women lived with RUF/AFRC commanders, in conjugal servitude, and commanders perpetrated rapes. There was a recognised system of ownership and hierarchy among captured women in the rebel forces, demonstrated by the fact that commanders’ “wives” were accorded “special” treatment. RUF/AFRC commanders also screened civilians captured by fighters, after which women and girls were allowed to be taken by fighters, who then said they had “married” the women.’¹⁴⁷²

2.4.3. *Appraisal of the Taylor judgements*

In the Trial Judgement, only nine paragraphs are devoted to the bush marriage phenomenon (this is not remarkable seeing as forced marriage was not charged in the Taylor case), yet in just three pages, the Trial Chamber manages to get down to the heart of the matter. The Trial Chamber rightly emphasises that the bush marriages that took place during the civil war in Sierra Leone are unlawful marriages:

‘What happened to the girls and women abducted in Sierra Leone and forced into this conjugal association was not marriage in the universally understood sense of a consensual and sacrosanct union, and should rather, in the Trial Chamber’s view, be considered a conjugal form of enslavement.’¹⁴⁷³

Yet it is important to keep in mind that the bush marriages could have qualified as marriage in the universally understood sense of a sacrosanct union had they been recognised as such by the Sierra Leonean community. It goes without saying that the treatment of people within a ‘marriage in the universally understood sense of a consensual and sacrosanct union’ could also amount to enslavement.¹⁴⁷⁴

¹⁴⁷² *Taylor Appeal Judgement*, para. 266.

¹⁴⁷³ *Taylor Trial Judgement*, para. 427.

¹⁴⁷⁴ See Chapter 10. See also Haenen 2013(II), pp. 895–915.

3. THE CASE LAW OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

3.1. TRYING THOSE WHO WERE MOST RESPONSIBLE: THE ECCC

The creation of the ECCC was the result of a long process of negotiations (starting in 1997) between the government of Cambodia and the UN. In 2003, the two parties reached and signed an agreement concerning the prosecution of crimes committed during the period of Democratic Kampuchea (ECCC Agreement).¹⁴⁷⁵ The ECCC are mandated to try senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed between 17 April 1975 and 6 January 1979.¹⁴⁷⁶ Articles 3 through 8 ECCC Law determine the subject matter jurisdiction of the Tribunal. Pursuant to these articles, the Extraordinary Chambers have the power to bring to trial all suspects who committed certain specified crimes under the 1956 Cambodian Penal Code, the crime of genocide as defined in the Genocide Convention, specified crimes against humanity, grave breaches of the Geneva Conventions, crimes set forth in the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and crimes committed against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations.

Investigations have been opened in four cases. Case 001 concerns Kaing Guek Eav, also known as ‘Duch’. The case against Duch, deputy and later chairman of the Khmer Rouge’s security prisons 21 and 24 (S-21 and S-24) primarily focused on the detention, torture and killings of Cambodians in these security facilities. Case 002 concerns the two most senior surviving leaders of the Khmer Rouge regime and is discussed below. Investigations with regard to Cases 003 and 004 are ongoing.¹⁴⁷⁷ In these cases, another five persons may be charged; their identity is currently confidential.

3.2. CASE 002: NUON CHEA AND KHIEU SAMPHAN

In what is generally referred to as Case 002, the two most senior surviving leaders of the Khmer Rouge regime are tried: Former Deputy Secretary of the Communist Party Nuon Chea and former Head of State Khieu Samphan.¹⁴⁷⁸ Nuon Chea and

¹⁴⁷⁵ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003.

¹⁴⁷⁶ Article 2 ECCC Law.

¹⁴⁷⁷ See <www.eccc.gov.kh/en>.

¹⁴⁷⁸ Initially, Case 002 also included former Minister of Social Actions Ieng Thirith and former Minister of Foreign Affairs Ieng Sary, but the proceedings against them were terminated as a result of Sary’s death in 2013 and Thirith’s unfitness to stand trial due to dementia.

Khieu Samphan are charged with several counts of genocide, grave breaches of the Geneva Conventions, and crimes against humanity (including enslavement, rape and other inhumane acts).¹⁴⁷⁹ According to the Closing Order in Case 002, the CPK leaders, including the two accused, had a common purpose which consisted of implementing a ‘rapid socialist revolution in Cambodia through a “great leap forward” and defend(ing; IH) the Party against internal and external enemies, by whatever means necessary.’¹⁴⁸⁰ To achieve this common purpose, the CPK leaders designed and implemented several policies, one of them being the regulation of marriage.¹⁴⁸¹ Regulating marriages all over Cambodia enabled the CPK to control the sexuality of individuals and their interpersonal interaction. The forced marriages as ordered by the CPK leaders are charged as an ‘other inhumane act’. On 13 January 2011, the Pre-Trial Chamber confirmed the indictment and sent the case to the Trial Chamber.

In April 2013, motivated by the advanced age of the accused and uncertainty regarding funding of the ECCC, the Trial Chamber decided to split the proceedings in Case 002 in three smaller trials in order to reach a timely verdict. Trial 002/01 deals with forced movements and related crimes against humanity, and the executions of Khmer Republic Soldiers committed at Tuol Po Chrey in the aftermath of the evacuation of Phnom Penh. This trial also considers the roles of the accused in the Khmer Rouge regime, such as their roles in the creation and implementation of the Khmer Rouge policies, relevant to all charges set out in the indictment, including the act of forced marriage. Trial 002/02 deals with charges of genocide and several grave breaches of the Geneva Conventions, including torture, inhumane treatment and unlawful deportation of civilians. Trial 002/03 concerns the remaining crimes charged in the Closing Order, i.e. twelve counts of crimes against humanity, including forced marriage.¹⁴⁸²

At the start of the proceedings in Case 002, in 2007, there was no indication that this case would take more than a decade to be concluded. As a result of the severance of Case 002 into three separate trials, which will not be held concurrently, it is now expected that the entire case will take until 2021 to complete. Based on experiences with Case 001, the Trial Chamber estimated in 2013 that a first-instance verdict in Case 002/01 would be issued in the first quarter of 2014 and an Appeal Judgement 18 months thereafter (late 2015). This means that the proceedings in Case 002/02 shall commence late 2015/early 2016 and the proceedings in Case 002/03 ‘(approximately 2016–2017), with a first-instance verdict following a trial (approximately 2019–2020) and decision on any appeal

¹⁴⁷⁹ Case 002 Closing Order, para. 1613. Nuon Chea and Khieu Samphan were also indicted for homicide, torture and religious persecution as violations of the 1956 Cambodia Penal Code, but in September 2011, the Trial Chamber ruled out all charges under the 1956 Penal Code of Cambodia from the Case 002 indictment (see Case 002 Severance Order).

¹⁴⁸⁰ Case 002 Closing Order, para. 156.

¹⁴⁸¹ Case 002 Closing Order, para. 157.

¹⁴⁸² Case 002, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013 (Annex 6).

to follow (approximately 2020–2021).¹⁴⁸³ Taking into consideration the advanced age of the accused, the chances of them both living to see the conclusion of all sub-trials are slim. Indeed, at the rate the proceedings are currently going, Case 002/01 may very well be the only trial to ever reach verdict. This would be a missed opportunity, seeing as the majority of alleged crimes would not be addressed. In order to expedite the proceedings, the Supreme Court Chamber ordered in July 2013 that the evidentiary hearings in Case 002/02 are to commence as soon as possible after the closing submissions in Case 002/01, meaning that a second trial panel will begin to hear proceedings in Case 002/02 while the Trial Chamber is occupied with drafting the judgement in Case 002/01.¹⁴⁸⁴

The author is not in a position to criticise the Trial Chamber's decision to sever the proceedings in Case 002, yet it seems as though the total length of the trial has been extended rather than reduced by severing the proceedings first into two different trials and subsequently, after the Supreme Court Chamber's annulment of this order – a process which also caused delay – into three separate trials.

4. CONCLUDING REMARKS

The SCSL was the first court that was faced with the daunting task of deciding whether the act of forced marriage should be subsumed under existing crimes against humanity or whether it constitutes a separate crime against humanity. Since no other international or international(ised) criminal court or tribunal had ever addressed this issue, the SCSL entered uncharted legal area. Understandably, the Court faced several challenges, the main problem being the definition of the act of forced marriage, i.e. its *actus reus* and (to a lesser degree) *mens rea*. The legacy of the Court is unprecedented and constitutes without question an enrichment of international criminal law, but nonetheless presents several difficulties and ambiguities: no clear definition of forced marriage is given, as a concomitant circumstance of which no clear and convincing distinction is made between sexual slavery and forced marriage: the SCSL often conflated the two offences. The Trial Chamber in the AFRC case held that the Prosecution did not succeed in presenting evidence of a single marriage which did not amount to sexual slavery. This is correct: virtually all bush marriages in Sierra Leone resulted in sexual slavery. But the question is whether the bush marriages that took place during the Sierra Leonean conflict were *more* than sexual slavery. Numerous authors have answered this question with a straightforward yes, having pleaded in favour of recognising forced marriage as a distinct crime and have consequently applauded

¹⁴⁸³ Case 002, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013 (Annex 6), p. 72, footnote 272.

¹⁴⁸⁴ Case 002, Decision on immediate appeals against Trial Chamber's second decision – summary of reasons, 23 July 2013.

the AFRC Appeal and RUF Trial and Appeal judgements.¹⁴⁸⁵ However, as argued by other authors and in the Taylor Trial Judgement, these particular kinds of ‘marriages’ bear all the hallmarks of sexual slavery (and enslavement). It seems, therefore, that the last chapter on the legal qualification of the practice of forced marriage has yet to be written.

The overlap between the Khmer Rouge marriages and the crimes of enslavement and sexual slavery is less evident, but this practice did result in a complete deprivation of people’s autonomy and right to self-determination.¹⁴⁸⁶ So could the Khmer Rouge marriages (also) qualify as a form of enslavement? Phrased differently: could the act which consists of forcing a person to enter into a conjugal(-like) association amount to an exercise of powers attaching to the right of ownership? Or does this particular act constitute a unique crime which is currently not adequately reflected in the statutes of international(ised) courts and tribunals, but ought to be included (in the Rome Statute) as a separate offence?

These and other questions are addressed in Chapter 10.

¹⁴⁸⁵ See e.g. Frulli 2008.

¹⁴⁸⁶ Case 002 Civil Parties’ Co-Lawyers’ Second Investigative Request concerning forced marriages and forced sexual relations, para. 17.

CHAPTER 9

TWO-LEVEL LEGAL COMPARISON

1. INTRODUCTION

Specific legislation criminalising the act of forcing someone to enter into a marriage is on the rise. During the past decade, many European countries, including Belgium, Norway, Denmark, Germany, Austria and England (as of 2014), have introduced a specific offence of forced marriage in their criminal laws. On the international level, the Sierra Leonean bush wife phenomenon sparked the question of whether forced marriage ought to be classified as a ‘new’ crime against humanity (i.e. as an ‘other inhumane act’), or whether it is caught by existing crimes against humanity such as (sexual) enslavement.

In the previous two chapters, the legal landscapes of Dutch and English criminal (and civil) law and international criminal law were described; in this chapter, they will be compared with each other on two different levels. The first part of this chapter (paragraph 2) compares the English and Dutch legal landscapes with each other. In England as well as in the Netherlands, the fight against forced marriages is high on the political agenda: MPs and NGOs have examined existing and new measures that could be taken to tackle this phenomenon and discussions on involving the criminal law have resulted in new legislation in both jurisdictions. What will be demonstrated below is the large overlap in available measures when it comes to dealing with (intended) forced marriages. Specific legislation comparable to the FMCPA does not exist in the Netherlands. Nevertheless, as will become evident, there are several comparable measures in Dutch law. Two landscapes that at first glance seem very different, appear, upon closer inspection, to have many similarities.

The second part of the chapter (paragraph 3) compares the national legal frameworks with the international framework.

2. LEVEL 1: COMPARING DUTCH AND ENGLISH LAW

2.1. THE STARTING POINT: A DIFFERENT POLICY AND DIFFERENT LEGISLATION

The quintessential difference between the legal measures in the Netherlands and in England described in Chapter 7, is that England has specific civil and criminal legislation for dealing with forced marriages and even has a special taskforce that deals exclusively with cases of (threatened) forced marriage. There are several explanations for the differences between the English and the Dutch forced marriage policy.

First, in England, the practice of forced marriage has been in the spotlight for a longer period of time. As a result, more research has been done and a large number of NGOs and shelters were created to offer support and advice to victims of forced marriage. Although there are no exact figures, it does appear (with specific emphasis on the word ‘appear’) that relatively more forced marriages take place in England than in the Netherlands.¹⁴⁸⁷ The (relatively) higher number of cases of forced marriages in England could be a consequence of the fact that the practice is more visible than in the Netherlands because forced marriages have received media attention since the 1990s (meaning that due to higher awareness, more forced marriages are reported). But another explanation might be found in the difference in the ethnic composition of minority groups in England, where the largest immigrant groups originate from India, Pakistan and Bangladesh, and the Netherlands, where the largest immigrant groups come from Turkey and Morocco.¹⁴⁸⁸

Secondly, it would appear that the colonial past of the United Kingdom plays a significant role, at least to some extent, with regard to the approach that is taken in tackling the practice of forced marriage. The British policy (centralised in the Home Office and Foreign and Commonwealth Office) is closely tied up with the presence of large migrant communities from former British colonies that currently form part of the Commonwealth, the main three being India, Pakistan and Bangladesh.¹⁴⁸⁹ The majority of forced marriages in England, approximately 90%, take place among people with a background in these countries.¹⁴⁹⁰ These historical ties might also explain the success of the FMU: the UK has had dealings with India, Pakistan and Bangladesh since the seventeenth century.

¹⁴⁸⁷ It is estimated that each year, between 5,000 and 8,000 forced marriages take place in England and Wales. In the Netherlands, the government estimates that ‘hundreds’ of forced marriages take place every year (see *Parliamentary Papers II (Lower House)*, 2013/13, 32 175, no. 50, p. 1, the government has commissioned research into the number of forced marriages taking place in the Netherlands).

¹⁴⁸⁸ To the author’s knowledge no research has been done into this matter.

¹⁴⁸⁹ ACVZ 2005, pp. 51–52.

¹⁴⁹⁰ Kazimirski *et al.* 2009, p. 22.

As Commonwealth countries, the links between countries such as India and the UK are of a different nature than the links between the Netherlands and Morocco or Turkey.¹⁴⁹¹ Especially relevant in the context of the forced marriage policy is the senior diplomatic post of High Commissioner. This post is unique to Commonwealth countries. A High Commissioner is the ambassador of one Commonwealth nation to another Commonwealth nation, and the High Commission is its embassy.¹⁴⁹² In this capacity, High Commission(er)s also play a key role in rescue missions carried out by the FMU. Indeed, rescue missions were already carried out by diplomats of High Commissions in *inter alia* Pakistan, India and Bangladesh years before the FMU was created.¹⁴⁹³ British diplomats carrying a British court order backed by, for example, a Pakistani judge and accompanied by armed bodyguards and sometimes local police officers drive to (remote) villages to rescue (mostly) women and girls with British or dual nationality from the houses in which they are being held against their will by relatives, thus saving them from a (threatened) forced marriage. Once safely in an embassy car, they are taken to a refuge, given an emergency passport and put on a flight back to the UK.¹⁴⁹⁴ The success of the FMU and the rescue missions of the British High Commissions may be a result of the diplomatic ties between the UK and Commonwealth countries. This cannot be the only explanation, however, seeing as British embassies carry out similar rescue and repatriation missions in non-Commonwealth countries.¹⁴⁹⁵ The best explanation is probably the explicit choice made by the British government: the decision to take a proactive approach when it comes to forced marriages and to provide assistance to British nationals who are taken abroad and forced to marry.

It seems that the Dutch government has now decided to take a more proactive approach as well. Inspired by the ways in which England and also Norway tackle forced marriages, the Dutch government has decided to centralise the approach

¹⁴⁹¹ It is important to mention, however, that irrespective of the different (historical) ties between the Netherlands and Morocco, the police in The Hague, for example, has close working ties with the Moroccan police, especially in the field of honour-based violence (<www.parlement.com/9353000/1/j4nvgs5kjg27kof_j9vvhy5i95k8zx1/viededtsb5zr/f=/blg60417.pdf> last accessed December 2013).

¹⁴⁹² See <www.gov.uk/government/world/organisations/british-high-commission> last accessed December 2013.

¹⁴⁹³ In 2004, this 'diplomatic snatch squad' rescued 105 young people. See D. Walsh, 'The rescuers', *The Guardian* 9 December 2005 (<www.theguardian.com/world/2005/dec/09/pakistan.declanwalsh> last accessed December 2013).

¹⁴⁹⁴ *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*, London: FMU, January 2010, p. 16; and C. Freeman, 'Diplomats dash to rescue 15-year-old British girl from threat of forced marriage in Pakistan', *The Telegraph* 22 November 2008 (<www.telegraph.co.uk/news/worldnews/asia/pakistan/3501442/Diplomats-dash-to-rescue-15-year-old-British-girl-from-threat-of-forced-marriage-in-Pakistan.html> last accessed December 2013).

¹⁴⁹⁵ British diplomats have also carried out rescue missions in African countries and the Middle East (<www.theguardian.com/world/2005/dec/09/pakistan.declanwalsh> last accessed December 2013).

to forced marriage and abandonment by creating a national expertise centre. This centre will not unilaterally deal with individual cases of forced marriage, but will focus on gathering and spreading knowledge and offering assistance in forced marriage cases (to victims as well as to embassies) and in the coordination of the repatriation of victims who have been abandoned abroad.¹⁴⁹⁶ Embassies will be encouraged to take a more active stance: in case of a (suspected) forced marriage, embassies should contact the Ministry of Foreign Affairs. The Ministry will then initiate the repatriation and, if necessary, supply an emergency passport, travel documents and/or financial support. The Expertise Centre will meet the victim at the airport in the Netherlands and offer support and guidance, and arrange housing and protection.¹⁴⁹⁷

A third reason for the different approach taken, more specifically for the creation of the FMCPA, in England is of a legal systematic nature. One of the most fundamental system-related differences between the jurisdictions of England and the Netherlands, is that the English system provides for the possibility of court injunctions, a legal instrument that is not known as such in the Netherlands. The FMPOs that can be issued on the basis of the FMCPA are similar to these injunctions and give the courts large discretionary powers; a court can make protection orders, whether on application of a petitioning party or *sua sponte* (of its own initiative), against virtually anyone relating to virtually anything. The origin of injunctions can be traced back to the unique English system of equity. Whereas the Netherlands has a civil law tradition, the legal system of England is based on the common law tradition. The common law started evolving after the Norman invasion in 1066 and is founded on judicial decisions. Because the common law was unjust in some cases, another branch of law evolved alongside the common law that was meant to remedy these flaws in justice and fairness.¹⁴⁹⁸ This branch of law is known as equity, which literally means ‘fair’ or ‘impartial’. Equity, therefore, ‘was born as a jurisdiction to deal with difficult cases’¹⁴⁹⁹ and brought remedies such as injunctions. Not complying with injunctions qualifies as contempt of court and in some cases amounts to a criminal offence. Breaching an FMPO, for example, constitutes a criminal offence (as of 2014). The Dutch legal system is unfamiliar with this so-called two-step prohibition scheme. Dutch law does have certain remedies that are very similar to injunctions such as provisional arrangements (*voorlopige voorzieningen*) and restraining orders, for instance prohibiting the respondent from contacting the petitioner (*straat-/contactverboden*). But breaching these court orders is not regarded as

¹⁴⁹⁶ Eindrapportage Verkennergroep: Versterking aanpak huwelijksdwang en achterlating, 7 June 2013, pp. 10–11.

¹⁴⁹⁷ Eindrapportage Verkennergroep: Versterking aanpak huwelijksdwang en achterlating, 7 June 2013, p. 9.

¹⁴⁹⁸ As stated by Lord Winston during a debate in the House of Lords on the FMCPA ‘There is a long-standing principle that the law in this country tries to prevent civil injustice’ (House of Lords Debate 30 June 2000, vol. 614, col. 1256).

¹⁴⁹⁹ S. Worthington, *Equity*, Oxford: OUP 2006, preface to the first edition.

contempt of court or a criminal offence, although it may result in an incremental non-compliance penalty (*dwangsom*).¹⁵⁰⁰

2.2. RESTRAINING AND PROTECTION ORDERS

Restraining or protection orders, used as an umbrella term for all sorts of non-molestation orders and contact and street bans, can be used both as a means of preventing forced marriages, but also as a form of protection against those involved in forcing someone to enter into a marriage. With regard to a (threatened) forced marriage, under English law, protection orders can be issued in the context of Part 4 of the Family Law Act 1996, which relates to domestic violence and occupation of the matrimonial home (non-molestation and occupations orders), the Protection from Harassment Act 1997 (non-harassment orders), the Crime and Security Act 2010 (Domestic Violence Protection Notices and Orders), the Criminal Justice Act 2003 (conditional release from custody on bail, and licence conditions for determinate or indeterminate sentence offenders), but most importantly, pursuant to the FMCPA in the form of FMPOs. The Anti-Social Behaviour, Crime and Policing Bill 2013 proposes to criminalise the breach of such orders as of 2014.

Under Dutch law, equivalents to these protection orders can be issued in the context of the Code of Civil Procedure (non-occupation orders, contact and street bans etc., via interlocutory proceedings), the Criminal Code and the Code of Criminal Procedure (as special conditions for release from pre-trial custody, a behavioural order issued by the Prosecutor, as special conditions attached to a (partly) suspended sentence, and as a separate measure imposed by a criminal court), and the Temporary House Ban Act (imposed by the mayor). In addition, Dutch criminal courts may impose restraining orders to prevent criminal offences or burdensome behaviour with respect to persons, which will be especially relevant in case of convictions for coercion, threatening behaviour, intimidation or stalking.¹⁵⁰¹

There is no equivalent to the FMCPA in the Netherlands, but there is a lot of overlap between the different measures Dutch and English courts can impose. Under Dutch law, interlocutory proceedings may be used to offer relief in the case of a (threatened) forced marriage. Interlocutory proceedings allow the court to make provisional arrangements or to issue a restraining order, for instance ordering the respondent not to contact the petitioner. A court could also order a person to hand over the passport of a child and could order someone to refrain from making any arrangements for a marriage. Provisional arrangements offer many

¹⁵⁰⁰ Dutch law is unfamiliar with the concept of contempt of court.

¹⁵⁰¹ Articles 284, 285, 285a and 285b Criminal Code respectively. See *Parliamentary Papers II (Lower House)* 2010/11, 32 551, no. 3 (Explanatory Memorandum), p. 7.

possibilities and in this sense can be seen as the Dutch equivalent to injunctions. But the procedure used for applying for provisional arrangements is subject to certain restrictions: only a lawyer is authorised to start the procedure¹⁵⁰² and a Dutch court cannot include a blanket provision in a provisional arrangement so as to prohibit, for example, anyone from assisting in any way with (the preparation of) a marriage. Further, a Dutch court cannot make orders or arrangements on its own initiative, whereas the FMCPA authorises English courts to make FMPOs on their own initiative. If, during civil proceedings (regardless of the legal topic of those proceedings), the court has reason to believe that one of the parties to those proceedings is in some way involved in a forced marriage case, the court can make an FMPO on its own initiative.

Why is it that English courts have a broader discretionary power when it comes to making orders and arrangements? This has to do with a reform of the system of English civil procedure in the form of the Civil Procedure Rules (CPR) which came into force in 1999. The CPR are the rules of procedure used by English courts in civil cases. They were drafted with the aim of consolidating the existing rules of procedure and making the previously rigid civil proceedings more streamlined and less complicated. The CPR were based in part on a comprehensive research carried out by Lord Woolf on the options to consolidate the rules of civil procedure.¹⁵⁰³ In his report, Lord Woolf concluded that the system of civil procedure suffered from many problems, one of them being the unrestrained adversarial culture of the English system – which left the responsibility for the proceedings entirely with the parties to the case and which had reduced the role of the judge to that of an umpire.¹⁵⁰⁴ Woolf believed that this culture did not promote access to justice and that ‘in this environment, questions of expense, delay, compromise and fairness may have only low priority.’¹⁵⁰⁵ In order to change the unrestrained adversarial culture and to enable courts to deal with cases justly (which is the so-called overriding objective of the CPR¹⁵⁰⁶), the CPR introduced judicial case management, giving courts rather than the litigants or their legal advisers responsibility for the control of litigation. The English system of civil proceedings remains adversarial, but judicial case management gives civil courts an interventionist role, allowing them to deal with matters such as controlling

¹⁵⁰² Note that Article 255(3) CCivP makes an exception for bailiffs: in some cases, a bailiff can commence interlocutory proceedings without a lawyer, i.e. in those cases where summons are not required to institute the proceedings, see Article 255(1) CCivP.

¹⁵⁰³ Loughlin & Gerlis 2004, pp. 1 and 9.

¹⁵⁰⁴ Loughlin & Gerlis 2004, p. 2. *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, July 1996, pp. 2 and 17.

¹⁵⁰⁵ Loughlin & Gerlis 2004, p. 3, quoting from Woolf’s Interim Report.

¹⁵⁰⁶ Section 1.1 CPR: ‘These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.’

the amount of expert evidence, identifying the issues in a case and summarily disposing of some of those issues.¹⁵⁰⁷

As part of the new role of the civil courts, section 3.3 of the CPR authorises civil courts to make orders on their own initiative, unless a rule or some other enactment restricts the court from doing so. The court can decide to notify the parties and hear representations before making an order, or it can decide to make an order without hearing the parties.¹⁵⁰⁸ This power is reflected in the FMCPA.

English civil litigation, in other words, has become less adversarial than Dutch civil litigation. The Dutch civil judge is more passive than his English colleague.¹⁵⁰⁹ Pursuant to Articles 24 and 25 Dutch Code of Civil Procedure (CCivP), the judge examines a case and takes a decision on the case based on the issues selected by the parties; if necessary, he will add legal grounds *ex officio*. It should be noted, however, that the role of Dutch civil judges has never been that of a mere umpire: judges do have certain case management tools. Article 20 Dutch Code of Civil Procedure for example stipulates that the judge must prevent unreasonable delay in the procedure and authorises the judge to take necessary measures *ex officio* in this regard. Indeed, it has been stated that during the trial, the judge plays a leading role.¹⁵¹⁰ Nevertheless, the Dutch civil judge does not have the authority to make provisional arrangements *sua sponte*; giving the courts this power would require a change in the legal system.

2.3. INTERRUPTION, DIVORCE AND ANNULMENT

2.3.1. Interruption

The Dutch Civil Code contains an instrument specifically aimed at preventing a marriage from taking place: interruption (*stuiting*). This measure can be used by a select circle of people, listed exhaustively in the law, who are aware of the fact that the spouses do not fulfil the legal requirements to enter into a marriage. Secondly, it can be used to prevent sham marriages from taking place. The law on interruption contains no specific grounds with regard to lack of consent, meaning that in the case of a forced marriage, interruption will be of little use, unless the

¹⁵⁰⁷ *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, July 1996, pp. 5 and 14. See also N. Andrews, 'A New Civil Procedural Code for England: Party-Control Going, Going, Gone', (19) *Civil Justice Quarterly* 2009, pp. 19–38.

¹⁵⁰⁸ Section 3.3(2) and (4) CPR. See also section 4.3 of the Family Procedure Rules 2010 which gives the court similar powers ('the court may exercise its powers on an application or of its own initiative').

¹⁵⁰⁹ For an example of a judge taking an active stance in interlocutory proceedings, see District Court Noord-Holland, 26 March 2013 ECLI:NL:RBNHO:2013:BZ5529.

¹⁵¹⁰ D.J. van Dijk, 'De lijdelijkheid van de civiele rechter; tussen praktijk en principe', speech made during SURFF Symposium 25 May 2004, Utrecht (available at <www.rechtspraak.nl/organisatie/publicaties-en-brochures/rapporten-en-artikelen/Documents/SURFFsymposiumdef.pdf> last accessed December 2013).

intended forced marriage would also be a sham marriage, in which case the PPS would have the power to interrupt the marriage. The Marital Coercion (civil law) Bill introduced into the Lower House in 2012 by the State Secretary of Security and Justice proposes to change this by amending the law and offering the possibility of interruption in the case of suspected coercion.¹⁵¹¹

The English Marriage Act 1949 gives members of the public who have objections to an intended marriage the possibility to enter a caveat with the Superintendent Registrar against the issue of a certificate. This possibility under English law is broader than the Dutch instrument of interruption: anyone may enter a caveat on any ground.¹⁵¹² Entering a caveat can therefore be a means to (at least temporarily) preventing a forced marriage from taking place.

2.3.2. Divorce

Although not specifically aimed at forced marriages, divorce is one of the options to dissolve a forced marriage. This option offers – at first sight – better possibilities in the Netherlands than in England. The ground for divorce, in both jurisdictions, is that a marriage has broken down irretrievably.

Under Dutch civil law, this criterion is very broad and is relatively easily fulfilled. The ground is objective, meaning that the focus is on the *existence* of an irretrievable breakdown; in principle, the causes that resulted in this breakdown, or which of the spouses caused it, are irrelevant.¹⁵¹³

In England, on the other hand, the divorce criterion is subjective and restricted to certain circumstances prescribed by law, and unlike the Netherlands, this jurisdiction does not recognise no-fault divorce. But the law in practice is more flexible than the law in the books: petitions for divorce are rarely defended and all undefended petitions are governed by a procedure that allows a decree for divorce to be granted on the basis of affidavit evidence only. In practice, this means that the court will not go into the question of whether the marriage has in fact irretrievably broken down, but will grant the divorce on the basis of the statements made in the undefended petition. Nevertheless, English law still has one disadvantage when compared to Dutch divorce law: under English law, there is an absolute bar to divorce within the first year of a marriage, meaning that one

¹⁵¹¹ See Chapter 7.

¹⁵¹² With the limitation that this ground must be reasonable; if the Registrar finds that a caveat was entered on grounds declared to be frivolous and to be such that they ought not to obstruct the issue of the certificate, the person who entered the caveat on such grounds is liable for the costs of the proceedings before the Registrar General and for damages recoverable by the person against whose marriage the caveat was entered (Article 29(4) Marriage Act 1949). A person who knowingly enters a false caveat can even be guilty of perjury (Article 3 Perjury Act 1911).

¹⁵¹³ Yet, when divorce is requested by one party, that party will have to motivate and prove the existence of the breakdown of the marriage. The court will, in most cases, reject a defence by the other spouse that the marriage has not broken down irretrievably, and grant the divorce in favour of the petitioning spouse (Asser/De Boer 2010, margin no. 603–606; and Wortmann & Duijvendijk-Brand 2012, p. 158).

year of married life has to lapse before spouses can petition for divorce. In the Netherlands, spouses can petition for divorce immediately after marrying.

Irrespective of this disadvantage, English divorce law also allows for an interesting possibility that can be especially relevant in cases of forced religious marriages: by withholding the final decree of divorce, an English court can effectuate the parties also having their marriage dissolved in accordance with the usages of their religion. This possibility was introduced in 2003 by the Divorce (Religious Marriage) Act 2002 and empowers courts to exercise a broad discretion to achieve justice in particular divorce cases. It was drafted chiefly to alleviate a social injustice that inflicts hardship on women in a small section of the Jewish community: according to Jewish religious law, only the husband can initiate the divorce proceedings.¹⁵¹⁴

At first glance, this seems to be a valuable measure: as was explained in Chapter 7, in some cultures and/or religions, spouses are still regarded as married if they have not divorced pursuant to the rules of their religion. In the Netherlands, divorce proceedings do not specifically provide for a comparable provisional arrangement. Article 827(1) CCivP authorises parties to request a divorce coupled with certain specified ancillary arrangements, such as maintenance payments and custody of children. An order to cooperate with a religious divorce is not specifically listed, but Article 827(1)(f) CCivP stipulates that the court can decide to make other arrangements than those specifically listed, provided that such arrangements are sufficiently related to the petition for divorce and that it is not expected that they will not lead to unnecessary delay in the proceedings. The Supreme Court has held that a petition for divorce and a request for cooperation with a religious divorce are closely related to each other and that the latter request can be filed in combination with a request for a divorce.¹⁵¹⁵ Therefore, it is possible for a party to request as an ancillary arrangement to a divorce that the other party cooperates in the proceedings that result in a divorce in accordance with the usages of the religion of the parties. In each case, it is up to the court to decide whether or not this would cause unnecessary delay in the divorce proceedings.¹⁵¹⁶ Further, on application of a petitioner in interlocutory proceedings, a Dutch court can order a person to cooperate with a religious divorce, if necessary subject to an incremental penalty payment.^{1517, 1518} The Dutch Supreme Court has held that,

¹⁵¹⁴ Lord Lester of Herne Hill, House of Lords Debate 30 June 2000, vol. 614, col. 1240–1244.

¹⁵¹⁵ Supreme Court 22 January 1982, *NJ* 1982, 489.

¹⁵¹⁶ *Parliamentary Papers II (Lower House)* 2011/12, 32 175, no. 31, p. 3.

¹⁵¹⁷ See *Parliamentary Papers II (Lower House)* 2011/12, 32 175, no. 31, where the Minister of Security and Justice refers to District Court Amsterdam 10 April 2012, ECLI:NL:RBAMS:2012:BW3800, Court of Appeal Amsterdam 31 August 1989, *NJ* 1990, 679, District Court Haarlem 17 February 1989, *KG* 1989, 134; District Court Middelburg 28 May 1986, *NIPR*, 413 (all cases concerning rabbinical divorces); and District Court Amsterdam 17 November 1983, *KG* 1983/359 (concerning a woman who was ordered to cooperate with a rabbinical divorce).

¹⁵¹⁸ Although sanctions that are imposed on a recalcitrant husband until he grants a religious divorce may be problematic in the case of Jewish divorces: a husband must *voluntarily* provide his wife with a so-called *get* and penalty payments and other sanctions have been interpreted

under some circumstances, not cooperating with a religious divorce procedure after having divorced according to Dutch civil law, can amount to a tortious act: refusal to cooperate can constitute a violation of a rule of unwritten law pertaining to proper social conduct between divorcees.¹⁵¹⁹

The reason why an English court, unlike a Dutch court, can withhold a decree of divorce until the parties promise to cooperate in the procedure that leads to divorce in accordance with the usages of their religion, goes back to the degree of secularity within the respective jurisdictions. The Netherlands is a secular state with a strict (although not absolute) separation of church and state. All religious groups have the right to live according to their own religious rules and principles, provided that they stay within the limits of Dutch law. With regard to marriage in particular, this means that individuals have the right to enter into a religious marriage, or have their marriage blessed by the minister of a religion, but religious marriages *an sich* have no legal effects. Dutch law only recognises civil marriages. Indeed, celebrating a religious marriage before a civil marriage is even a misdemeanour (Article 449 CriC). This marriage law dates back to the Napoleonic era: before the reign of Napoleon, religious marriages conducted by priests or other clergy were quite common. In order to harmonise the law on marriage and at the same time prevent undesirable clandestine marriages, for example marriages between close blood relatives, Napoleon reformed the law on marriage, giving the state monopoly on conducting marriage ceremonies and introducing the office of the Registrar.¹⁵²⁰ When, during the deliberation on the Marital Coercion (criminal law) Bill, an MP pointed out to the State Secretary of Security and Justice that English law offers judges the possibility to withhold a decree of divorce until both parties cooperate with the dissolution of their religious marriage, the State Secretary explicitly stated that the separation of church and state in the Netherlands was the reason for rejecting the possibility of making cooperation with a religious divorce a precondition for issuing a divorce decree. He reiterated that the state should not intervene in the practice of religious marriages, unless these marriages are contrary to public policy or unlawful.¹⁵²¹

by rabbinical authorities as circumstances that cause a religious divorce to be invalid, because the *get* was not granted voluntarily (see *inter alia* M. de Blois, 'Religious law versus secular law. The example of the *get* refusal in Dutch, English and Israeli law', *Utrecht Law Review* (6) 2010, p. 99; and Baroness Miller of Hendon's speech in the House of Lords (House of Lords Debate 30 June 2000, vol. 614, col. 1253)).

¹⁵¹⁹ Dutch Supreme Court 22 January 1982, *NJ* 1982, 489; and District Court Amsterdam 10 April 2012, ECLI:NL:RBAMS:2012:BW3800 (my translation) 'it can be contrary to the due care that should be observed by a person in relation to his divorced spouse according to generally accepted standards' ('kan in strijd zijn met de zorgvuldigheid die een echtgenoot in het maatschappelijk verkeer ten aanzien van de persoon van zijn gescheiden echtgenoot in acht behoort te nemen'). See also M. de Blois, 'Religious law versus secular law. The example of the *get* refusal in Dutch, English and Israeli law', *Utrecht Law Review* (6) 2010, p. 98.

¹⁵²⁰ Asser/De Boer 2010, margin no. 134.

¹⁵²¹ *Parliamentary Proceedings (Lower House)* 2012/2013, 11, p. 54. A marriage involving a minor or a marriage between a mother and her son are examples of unlawful marriages.

England, on the other hand, is less secular and has no such strict separation of church and state. For one, England has an Established Church – the Church of England. The sovereign is the head of this church and 26 bishops (‘Lords Spiritual’) of the Church of England serve in Parliament in the Upper House. Some ecclesiastical measures adopted by the General Synod, the legislative body of the Church of England, even form part of the law of England and, once given Royal Assent, have the same effect as Acts of Parliament.¹⁵²² Non-Anglican religious groups have the right to live according to their own rules, which may be enforced by religious courts such as the Jewish *Beth Din*, the Islamic *Shari’a* Councils and the Roman Catholic National Tribunal for Wales.¹⁵²³

Consequently, English law recognises religious as well as non-religious marriages: civil marriage, marriage according to the rites of the Church of England, Quaker and Jewish marriage, and other non-Anglican religious marriages. In order to reduce discrimination against non-Anglican religious groups,¹⁵²⁴ the Marriage Act 1949 allows all religious groups to marry in accordance with the usages of their religion, subject only to a few legal requirements, including the requirement that certificates are issued by a superintendent registrar.¹⁵²⁵ Divorce, however, is exclusively regulated by civil (i.e. non-religious) courts: English divorce law only revokes the civil marriage, leaving the religious marriage intact.¹⁵²⁶ Because of the very fact that the Marriage Act 1949 validates marriages contracted according to, amongst others, Jewish usages (provided, as stated, that certain legal requirements are met), so *religious* marriages, it was considered appropriate that Parliament also had some concern with the matter of religious divorce. For this reason, the government introduced the Divorce (Religious Marriages) Act 2002: a secular act that recognises religious law.¹⁵²⁷ The civil law on divorce now also offers a remedy in relation to possible impediments that may arise in case of religious divorce:¹⁵²⁸ i.e. making the issuance of the final divorce decree dependent on the spouses’ cooperation with religious divorce proceedings.

English law offers judges the possibility of withholding a decree of divorce until both parties cooperate with the dissolution of their religious marriage. Is there reason to incorporate a similar legal remedy in Dutch civil law? Looking at

¹⁵²² G. Douglas *et al.*, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, Cardiff University June 2011, p. 8.

¹⁵²³ G. Douglas *et al.*, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, Cardiff University June 2011, pp. 32–37.

¹⁵²⁴ Cretney’s *Principles of Family Law* 2008, margin no. 1–041.

¹⁵²⁵ In addition to abiding by the prescribed preliminaries, the person solemnising the marriages instead of the registrar must be authorised to this effect, the building where the marriage is celebrated must be registered premises, and the parties must, at some point during the ceremony, make the same statements that are prescribed for those marrying in a civil ceremony (Cretney’s *Principles of Family Law* 2008, p. 1–042). See also Chapter 7.

¹⁵²⁶ Lord Lester of Herne Hill, House of Lords Debate 30 June 2000, vol. 614, col. 1243.

¹⁵²⁷ Lord Lester of Herne Hill, House of Lords Debate 30 June 2000, vol. 614, col. 1248.

¹⁵²⁸ M. de Blois, ‘Religious law versus secular law. The example of the *get* refusal in Dutch, English and Israeli law’, *Utrecht Law Review* (6) 2010, pp. 100 and 107.

the possibilities that already exist to order a person to cooperate with a religious divorce (as an ancillary arrangement to a divorce, and as a request in interlocutory proceedings) and the fact that under certain circumstances, not cooperating with a religious divorce procedure after having divorced according to Dutch civil law can amount to a tortious act,¹⁵²⁹ the answer to this question is ‘no’. Furthermore, withholding a decree of divorce pending the dissolution of the religious marriage could have a negative effect on the spouse(s) who was (were) forced to enter into the marriage against their will: dissolving a religious marriage can take a lot of time and during that time, the spouses would still be married in the eyes of Dutch law. So seen from this perspective, the English instrument is an instrument of delay.¹⁵³⁰ Instead, a better alternative might be including in the Dutch Civil Code that it is tortuous to refuse to cooperate with a religious divorce after having obtained a decree of divorce pursuant to Dutch law.¹⁵³¹

2.3.3. *Annulment*

The second civil law measure that can offer relief in the case of a forced marriage is the law on nullity. There are four main differences between the law on annulment in England on the one hand and the Netherlands on the other hand.

First, the effects of a decree of annulment differ. In the Netherlands, annulment of a marriage has retroactive effect, working back to the moment the marriage was solemnised (*ex tunc*), which means that it never existed from a legal point of view. In England, on the other hand, annulment of a marriage takes effect from the date the court issued the decree of annulment (*ex nunc*). The explanation for this difference in the effects of a decree of annulment can be found in the categories of nullity: in the Netherlands, a marriage is never legally void: in the case of flaws in the establishment of the marriage, it must be annulled by court order. The possibility of absolute nullity in the context of a marriage is considered to be contrary to legal certainty.¹⁵³² In England, however, there are certain cases in which a marriage *is* legally void, meaning that it has never existed in the eyes of the law and it is null and void *ex tunc*.¹⁵³³ A marriage is void when there is an element of public policy against the marriage that causes such a fundamental flaw in the marriage that it cannot be recognised by the law.¹⁵³⁴

¹⁵²⁹ This is evidenced by case law referred to in footnote 1517 *et seq.* (*supra*).

¹⁵³⁰ *Parliamentary Proceedings (Lower House)* 2012/2013, 11, p. 54.

¹⁵³¹ *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 5 (Report), p. 5.

¹⁵³² Wortmann & Van Duijvendijk-Brand 2012, p. 49; and Asser/De Boer 2010, margin no. 162.

¹⁵³³ Note that pursuant to Article 58(5)(a) Family Law Act 1986 ‘No declaration may be made by any court (...) that a marriage was at its inception void,’ see *A local authority v. X and a child* (2013) EWHC 3274 (Fam). In this case, the local authority that cared for a 16-year-old girl, who had been forced to marry when she was 14, had requested the High Court to declare the marriage void at its inception. The High Court stated that Article 58(5)(a) FLA 1986 prevented it from doing so. Instead, the girl had to seek annulment herself by petitioning for a decree of nullity.

¹⁵³⁴ Herring 2011, p. 49.

Pursuant to Article 11 MCA, a marriage is void when the parties are within the prohibited degrees of relationship;¹⁵³⁵ when either party is under the age of 16;¹⁵³⁶ when the parties have intermarried in disregard of certain requirements as to the formation of marriage;¹⁵³⁷ when at the time of the marriage either party was already lawfully married or in a civil partnership; and finally, when, in the case of a polygamous marriage entered into outside England, either party was at the time of the marriage domiciled in England.

The different categories of nullity in the two jurisdictions also explain the second difference between the annulment of marriages in England and the Netherlands, which relates to the category of persons who are authorised to petition for annulment. In England, only the spouses themselves can apply to have their voidable marriage annulled.¹⁵³⁸ In the Netherlands, the spouses themselves, but also their (grand-)parents, the PPS, and all other persons who have a direct legal interest can seek to have a marriage annulled by a court. As stated, pursuant to English law, flaws in a marriage can cause a marriage to be either voidable or void, unlike Dutch law, which only allows for voidable marriages. According to the English law of nullity, a marriage is void on those grounds where there is a public policy objection to the marriage (such as child marriages or marriages between a parent and child). Due to the nature of these grounds, any member of the public can seek a declaration of nullity. In contrast, the grounds on which a marriage may be *voidable* do not indicate that there is an element of public policy against the marriage; rather, there is such a significant problem in the marriage that only the *spouses* can have their marriage annulled if they wish so.¹⁵³⁹ In the Netherlands, the concept of void marriages does not exist; marriages can only be classified as ‘voidable’. The Dutch law of nullity is regarded as a matter of public policy, so all grounds for annulment are seen as public policy objections to a marriage. As a result, not only the spouses themselves, but the PPS as well as other third parties can petition for the annulment of a marriage.¹⁵⁴⁰ But because the legislator did not want third parties to meddle in an existing marriage, it was determined that third parties – with the exception of the PPS and the (grand-)

¹⁵³⁵ See Marriage (Prohibited Degrees of Relationship) Act 1986: parent-child (including adoptive child), grandparent-grandchild, brother-sister, uncle-niece, aunt-nephew. Cousins may marry under English law. Affinity restrictions pertain to step-parent-stepchild.

¹⁵³⁶ In tandem with criminal law policy that it is prohibited for a man to have sex with a girl younger than sixteen (Herring 2011, p. 52). Those between 16 and 18 will need parental consent; marriage contracted without this consent will still be valid, but possibly voidable (Article 3 Marriage Act 1949).

¹⁵³⁷ These formalities are complex and manifold and depend on the type of marriage, see Chapter 8 and Herring 2011, p. 52. A marriage is only void on the ground of breach of any of the formalities if the parties were aware of the breach and married wilfully in breach of the requirement, see Articles 25 and 49 Marriage Act 1949 for an overview of such formalities (Herring 2011, p. 53).

¹⁵³⁸ Herring 2011, p. 49.

¹⁵³⁹ Herring 2011, pp. 49–50.

¹⁵⁴⁰ Vlaardingerbroek, GS Personen- en Familierecht, commentaar op artikel 69 Boek 1 BW, margin no. 1.

parents of the spouses – are only authorised to petition for the annulment of a marriage *after* that marriage has been dissolved (e.g. by divorce or by the death of one of the spouses).¹⁵⁴¹

The third difference between the annulment of marriages in England and the Netherlands concerns the grounds on which a marriage can be annulled: these grounds are broader in England than in the Netherlands. The ground that is relevant in cases of forced marriages is the ground that pertains to circumstances that invalidate consent. Pursuant to Dutch law, there are two circumstances that invalidate consent: an unlawful serious threat and mistake. The Dutch law on mistake is virtually equal to the English law on mistake. The law on coercion/duress at the time of entering into a marriage, however, differs. The Dutch Civil Code only recognises one such ground: ‘unlawful serious threat’ – but note that the Marital Coercion (civil law) Bill proposes to replace the ground of ‘unlawful serious threat’ by the broader ground that the marriage came about as a result of coercion. The standards for the proof of the presence of an unlawful serious threat are high: only the more serious forms of coercion will qualify as such. Threatening someone with a weapon, threatening to commit suicide, and kidnapping someone, bringing them to another country, locking them in a house and physically assaulting them are examples of acts that would qualify as unlawful serious threats. The more subtle forms of pressure often used in cases of forced marriage, such as emotional blackmail and societal pressure, will not amount to unlawful serious threats and are therefore not covered by the annulment ground of Article 1:71(1) CivC. The alternative ground for annulment proposed by the Marital Coercion (civil law) Bill, ‘coercion’, is more inclusive and will catch these subtle forms of coercion/pressure.

The English equivalent of ‘unlawful serious threat’ (and in the future ‘coercion’) is duress, which focuses on the effect of the threat (the overborne will). Duress is defined in a broad and inclusive manner: the threat or pressure must have been such as to overbear the will of the individual. Duress therefore encompasses more subtle forms of social pressure, such as emotional blackmail, physical, emotional, sexual and financial pressure.¹⁵⁴² For example, the circumstances in the case described in Chapter 7 paragraph 2.1.2 concerning the young Pakistani woman whose relatives pressured her into signing a marriage contract by threatening that she would be taken to Pakistan to be married off, would probably have qualified as duress under the English law of annulment. Under the future Dutch regime (as proposed by the Marital Coercion (civil law) Bill), which is no longer limited

¹⁵⁴¹ The spouses and their (grand)parents can seek to have a marriage annulled independent of whether or not this marriage has (already) been dissolved; the PPS can only petition for annulment as long as the marriage has not yet been dissolved (after a marriage has been dissolved, the PPS no longer has an interest in meddling in a marriage that was contrary to public policy while it still existed). See Article 1:69(1) CivC and Vlaardingerbroek, GS Personen- en Familierecht, commentaar op artikel 69 Boek 1 BW, margin no. 2.

¹⁵⁴² Although marrying out of a sense of duty alone will not amount to duress.

to unlawful serious threats, these acts would amount to coercion and would consequently also constitute a ground for annulment.¹⁵⁴³

There is, however, an area where the Dutch law on annulment is broader than the English law: sham marriages. In England, a sham marriage cannot be nullified merely on the basis that it is not a genuine marriage (unless one of the spouses petitions for a decree of nullity on the basis that the marriage has not been consummated). Provided that both parties genuinely consented to the marriage, sham marriages are neither void nor voidable: they are valid.¹⁵⁴⁴ In the Netherlands, on the other hand, sham marriages are voidable, irrespective of the (absence) of consent of either of the parties to the marriage. These marriages can be annulled upon the request of the PPS.

The fourth difference between the jurisdictions relates to the period of approbation. Periods of approbation guarantee a modicum of legal certainty for the spouses and third parties and aim to protect the institution of marriage.¹⁵⁴⁵ In the Netherlands, the authority of a spouse to request annulment on the basis of an unlawful serious threat or mistake lapses three months after the spouses have lived together after the threat ceased or the mistake was discovered; in England, proceedings for annulment have to be instituted within three years after the date of the marriage. The Dutch Marital Coercion (civil law) Bill proposes to extend this period from six months to three years, as a result of which there would no longer be a difference between the period of approbation in the Netherlands and England.

At the time of writing of this book, English law offers more possibilities with regard to the annulment of forced marriages: it recognises forms of psychological pressure as forms of duress (which invalidates consent), whereas Dutch law requires an unlawful serious threat. The Dutch Marital Coercion (civil law) Bill will erase these differences. The English law on nullity does have one important disadvantage compared with the Dutch law, as was mentioned previously in this paragraph: in England, only the parties to a forced marriage can apply to have a voidable marriage annulled.¹⁵⁴⁶

¹⁵⁴³ In addition to mistake and duress, the English Matrimonial Causes Act lists unsoundness of mind as a circumstance that can invalidate consent. Unsoundness of mind is also a ground for annulment under Dutch law (see Article 1:69(1) in conjunction with 1:32 CivC).

¹⁵⁴⁴ Herring 2011, p. 64. The same goes for sham marriages that were contracted outside the UK: as long as both parties consented to the sham marriage, it is valid and will be recognised as such in England and Wales (C.M.V. Clarkson & J. Hill, *The conflict of laws*, Oxford: OUP 2006, p. 295). Such marriages are not recognised in the Netherlands.

¹⁵⁴⁵ Herring 2011, p. 65.

¹⁵⁴⁶ Herring 2011, p. 49.

2.4. CRIMINAL LAW

When it comes to the field of criminal law – the core of this book – there is less material for comparison than in the field of civil law. As explained in Chapter 7, there is no specific offence of forced marriage in Dutch criminal law. In English law there is: the ABCP Bill 2013 proposes to make it an offence to use violence, threats or any other form of coercion for the purpose of causing someone to enter into a marriage.¹⁵⁴⁷

The Dutch Criminal Code contains two offences that are particularly relevant to forced marriages: a general offence of coercion and a more specific offence of influencing another person's official statement. These two offences have much in common with the crime of forced marriage proposed by the ABCP Bill 2013: they cover the same forms of coercion. The English offence speaks in terms of 'violence, threats or any other form of coercion'. Article 284 CriC lists 'violence, another hostile act or threats of violence'. Article 285a CriC uses slightly different wording: it prohibits influencing someone's freedom to make an official, legal statement by using oral or written expressions, gestures or pictures. Arguably, the different terms are all broad and inclusive and cover the same kinds of coercive conduct. Obviously, the English offence has more specific elements than the Dutch offences exactly because this English offence was specifically tailored to deal with forced marriages. It requires direct intent on the side of the perpetrator, i.e. using coercion *for the purpose of* causing someone to enter into a marriage and it requires that the perpetrator believes or ought reasonably to believe that his coercive conduct will cause the victim to enter into a marriage without his or her free and full consent. This implies that a person will also be guilty of the offence of forced marriage if he believes his threats will cause the victim to marry, but the victim is not at all influenced by his behaviour. The same goes for the Dutch offence of influencing someone's freedom to make an official, legal statement (Article 285a CriC): this crime focuses on the intended effect of the perpetrator's acts – not on the actual effect they had on the victim.¹⁵⁴⁸ The offence of coercion (Article 284 CriC) on the other hand, focuses on the effect the pressure had on the victim: the coercive behaviour of the perpetrator must have inspired in the victim a genuine and reasonably held fear.¹⁵⁴⁹

The biggest difference between the three offences is the maximum penalty.¹⁵⁵⁰ The maximum penalty for the Dutch offences is two years (Article 284 CriC) and four years (Article 285a CriC) imprisonment; the maximum penalty for the

¹⁵⁴⁷ Luring someone abroad with a forced marriage in mind will also be an offence as of late 2014/early 2015.

¹⁵⁴⁸ Supreme Court 27 May 2008, ECLI:NL:HR:2008:BC7910.

¹⁵⁴⁹ *Parliamentary Papers II (Lower House)* 2012/2013, 33 488, no. 6, pp. 6 and 14. See also Machiels 2012, comments on Article 284, margin no. 4.

¹⁵⁵⁰ Note that conditional release schemes are not taken into consideration, but see Chapter 10, paragraph 2.6.3.

English offence of forced marriage is five years (for breaching an FMPO) and seven years on conviction on indictment for the separate offences of forced marriage.¹⁵⁵¹

3. LEVEL 2: COMPARING INTERNATIONAL AND NATIONAL LAW

Comparing the national and international legal frameworks for forced marriage with each other is challenging: the expression ‘apples and oranges’ comes to mind. The differences between the two fields of law have already been highlighted: international criminal law as codified in the Rome Statute (and in the statutes of other internationalise(d) courts and tribunals) consists of a limited number of offences: four core crimes (crimes against humanity, war crimes, genocide and aggression) which each have their own set of distinct offences. The scope of national criminal law is far greater: Dutch criminal law consists of thousands of criminal offences, English criminal law of tens of thousands.¹⁵⁵²

Yet there is a difference not only in quantitative terms, but also in qualitative terms: international criminal law deals only with the very worst of offences. Only the most serious acts are listed as crimes under international law and ascribe individual criminal liability. National criminal law, however, not only deals with crimes such as murder, rape and battery, it also deals with ‘petty offences’ such as writing blasphemous texts on places visible from the public road, public intoxication, and walking through a planted piece of land without authorisation.¹⁵⁵³ It is not surprising, therefore, that the national criminal laws of the Netherlands and England have a more diverse set of offences that can be charged in forced marriages cases. Offences that may be used are coercion, threats of violence, kidnapping, assault, battery, stalking, blackmail, cruelty to persons under 16, false imprisonment, harassment, abduction of a woman by force or for the sake of her property, influencing a person’s freedom to make an official, legal statement, and, in England (as of 2014), the specific offence of forced marriage.

The Rome Statute offers a more limited range of offences. Offences that have been charged in forced marriage cases are the crimes against humanity of (sexual) enslavement, and ‘other inhumane acts’ and the war crimes of sexual slavery

¹⁵⁵¹ All criminal cases are first heard at the magistrates’ court. During an administrative hearing, the magistrates will determine whether the forced marriage case is suitable to be heard by the magistrates’ court, or whether it should be sent to the Crown Court (Martin 2010, p. 154).

¹⁵⁵² The quantitative difference between England and the Netherlands has to do (*inter alia*) with the fact that the Netherlands has a system of administrative wrongs: many regulatory offences have been decriminalised and are enforced through administrative law. In England, on the other hand, regulatory or administrative violations fall within the realm of criminal law. Thus, traffic offences such as illegal parking are *criminal* offences. See Simester & Von Hirsch 2011, p. 7 and Ashworth & Horder 2013, pp. 2, 4 and 35: ‘Some European countries have instituted a separate system of administrative offences (...) English law does not have a general separate system dealing with minor “infringements” rather than with serious wrongs’ (at p. 4).

¹⁵⁵³ Articles 429*bis*, 453 and 460 CrIc respectively.

and committing outrages upon personal dignity. In those cases where a forced marriage on the national level comes about as a result of or results in human trafficking or enslavement, similar offences can be charged in the Netherlands and England.¹⁵⁵⁴ A category of ‘other inhumane acts’ or ‘outrages upon personal dignity’ cannot be found in Dutch and English general criminal law.¹⁵⁵⁵ But one can safely assume that those acts that are so serious that they qualify as ‘other inhumane acts’ or outrages upon personal dignity are also criminalised on the national level, be it under different nomenclature.

Finally, it should be noted that, unlike the national level, there are no civil law remedies for forced marriages (such as protection orders, annulment or divorce) on the level of international law.¹⁵⁵⁶ There is no international court or tribunal that could annul a marriage or make a protection order; victims of forced marriages need to turn to national courts and national law for these matters.

The differences between the systems of national and international criminal law described above have ramifications for the practice of criminalisation, more specifically, the criminalisation of forced marriage. This is addressed in Chapter 10.

4. CONCLUDING REMARKS

As mentioned in the introduction to this chapter, there are many similarities between the Dutch and English legal frameworks concerning forced marriage. Even though England has (civil and criminal) legislation that was created specifically with the aim of dealing with forced marriages, (potential) victims of a forced marriage can obtain similar protection from Dutch courts via provisional arrangements made in interlocutory proceedings.

There are two important differences. First, English courts have very far-reaching discretionary powers when it comes to making orders: they can make protection orders on their own initiative – so without having been asked to do so by any party – as long as any other family proceedings are before the court and a person who would be a respondent to proceedings for a forced marriage protection order is a party to those family proceedings. The person to be protected by the order need not be party to the family proceedings. Especially now that breaching a forced marriage protection order has become a criminal offence (in accordance with the ABCP Bill 2013) with a maximum penalty of five years on

¹⁵⁵⁴ See e.g. Article 273f CriC and see also the case of the Moroccan girl who was forced to marry a Dutch man who subsequently made her prostitute herself (Chapter 3).

¹⁵⁵⁵ They *are* codified in the Dutch International Crimes Act 2003, which was drafted in response to the Rome Statute.

¹⁵⁵⁶ Note that there are international human rights instruments that contain provisions on the right to enter into a marriage with free and full consent (see Chapters 1 and 10).

conviction on indictment, the court's *sua sponte* order-making possibilities can have significant consequences.

Secondly, pursuant to Dutch criminal law, litigants need a legal representative to commence interlocutory proceedings. The FMCPA, on the other hand, allows people to make an application for a protection order for themselves or on behalf of someone else; they do not need legal representation in the form of a solicitor. Local authorities can also apply for a protection order on someone else's behalf.

The comparison between the international and national legal frameworks is considerably less elaborate and more to the point than the comparison between the Netherlands and England. The two national landscapes, with their varied and wide range of criminal legislation contain the same (types) of crimes that may be used to prosecute forced marriages on the international level (such as enslavement), but not vice versa. The Rome Statute contains a limited number of criminal offences and does not include crimes such as coercion, stalking or influencing someone's freedom to make a legal statement. Although the Rome Statute does list a few umbrella clauses such as 'other inhumane acts' that catch crimes which are not specifically listed, offences such as using subtle psychological pressure on someone in order to influence their freedom of statement will not qualify as an 'other inhumane act'.

PART IV
ANALYSIS AND CONCLUSIONS

CHAPTER 10

THE CRIMINALISATION OF FORCED MARRIAGE UNDER DUTCH LAW AND IN THE ROME STATUTE

1. INTRODUCTION

(How) should forced marriage be criminalised on the levels of Dutch and international criminal law, more specifically the Rome Statute? This question formed the starting point of this research and will be answered in this chapter. The previous chapters served to pave the way by providing a definition, description and legal analysis of the phenomenon of forced marriage, by comparing the Dutch legal framework with the English framework, and by presenting frameworks that may be used as guidance in criminalisation debates. There are certain similarities between criminalisation on the two levels, yet the approaches that are taken in this chapter differ. In the first part of this chapter (paragraph 2), the criminalisation of forced marriage in the Netherlands will be addressed.¹⁵⁵⁷ The principles uncovered in Part II, especially in Chapter 4, will be used as guidelines to structure the arguments *contra* and *pro* (separate) criminalisation. The second part of this chapter (paragraph 3) goes into the criminalisation of forced marriage within the regime of the Rome Statute. The specific criminalisation requirements of crimes against humanity, war crimes and genocide will be taken into consideration. For a comparison between the two levels of criminalisation and the forced marriages that take place in times of peace and in times of conflict, see Chapter 3 (paragraph 7), Chapter 6 and Chapter 9.

¹⁵⁵⁷ England served as a means of comparison, as a source of inspiration to answer the question of whether and, if so, how the practice of forced marriage should be criminalised in the Netherlands. The question of whether or not forced marriage should be criminalised in England is not addressed in this book.

2. THE CRIMINALISATION OF FORCED MARRIAGE AND DUTCH LAW

2.1. INTRODUCTION

Forcing someone to enter into a marriage against that person's will is a criminal act pursuant to Dutch law. As was argued in Chapter 7, this act is caught by several offences, such as the crimes of coercion, influencing someone's freedom to make an official statement and stalking. Many other European countries have also criminalised the practice and a 2011 European Council Convention requires all states parties who have not yet done so to turn forced marriage into a criminal offence.¹⁵⁵⁸ Yet this does not address the question of *how* forced marriage is best criminalised. In the Netherlands, the act is caught by broad, general offences, yet the English legislator believed it necessary to create a specific offence of forcing someone to enter into a marriage, following the example of *inter alia* Germany, Belgium and Norway.¹⁵⁵⁹

In order to answer the question of how forced marriage should be criminalised, first, the particular harms and wrongs caused by forced marriages – which were extensively mapped out in Chapters 1 and 2 – will be called to mind. Subsequently, the other four criteria for criminalisation are applied.

This requires some additional explanation. The framework set out in Chapter 4 is based on theories of criminalisation that depart from the assumption that there is certain conduct (X), which currently does not fall within the ambit of the criminal law. The theories then address the question of whether X should be brought within the reach of the criminal law. This chapter has a different point of departure, namely: *how* should certain conduct (i.e. forced marriage), which already falls within the scope of existing non-specific criminal offences, be criminalised? More precisely, should forced marriage be *separately* criminalised or not?

This has certain implications for the application of the criminalisation criteria listed in Chapters 4 and 6. It will, for example, result in a different application of the principles of proportionality and subsidiarity. Traditionally, the proportionality principle – as a criminalisation criterion – requires that the use of state coercion in the form of criminal law is in proportion – as in: not out of proportion – with the gravity of the harms and wrongs caused by an act. Forced marriage is (already) considered to be a criminal offence, falling within

¹⁵⁵⁸ In December 2013, 32 European countries, including the Netherlands, had signed this convention, see <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG>>.

¹⁵⁵⁹ Article 237 *Strafgesetzbuch* (minimum penalty is six months – maximum penalty is five years imprisonment), Article 391*sexies* Belgian Criminal Code (minimum penalty is three months – maximum penalty is five years imprisonment); Article 222(2) Norwegian Criminal Code (maximum penalty is six years imprisonment).

the ambit of *inter alia* Article 284 CriC. This means that, theoretically, the proportionality principle has already been addressed and criminal law has been deemed a proportionate response to this practice. Nevertheless, a few lines need to be devoted to the proportionality of the criminalisation of forced marriage (paragraph 2.3). Next, the principle of subsidiarity will be addressed. It has been argued that this principle consists of two different components: an external test and an internal test. Below, the focus will be on the latter, but the former will also be briefly addressed (paragraph 2.4). After proportionality and subsidiarity, the criterion of effectiveness is discussed (paragraph 2.5). In paragraph 2.6, this study's research question is answered: (how) should forced marriage be criminalised under Dutch law?

2.2. THE HARMS AND WRONGS OF FORCED MARRIAGES

2.2.1. *The many harms of forced marriage*

Pinpointing the harms and wrongs caused by a forced marriage is a complex task. As was demonstrated in Chapters 1 and 2, the practice of forced marriage, which forms part of a bigger picture of violence, gender inequality and violence against women in particular, can have many different consequences and can cause a plethora of harms. Quek summarises the possible consequences:

'the harms of forced marriage can include: rape, forced pregnancy, lack of control of the number and spacing of children, interruption to or denial of education, physical violence and beatings, kidnapping or imprisonment (sometimes abroad), murder, lack of freedom of sexuality (especially if a victim is gay or lesbian), and psychological stress which can result in threatened suicide, mental breakdowns, eating disorders and self-harm. Should a victim manage to escape, they also face homelessness, social ostracism, and the likelihood of increased violence from strangers.'¹⁵⁶⁰

However, as stated, in this book, the act of forced marriage is defined restrictively: forcing someone to enter into a marital(-like) association against that person's will. Consequently, the gamut of criminal offences that could take place within a forced marriage are not considered as harms that are part of the specific act

¹⁵⁶⁰ K. Quek, 'A Civil Rather than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK', 15 *The British Journal of Politics & International Relations* 2013, pp. 626–646 (citations omitted). In addition, forced marriage involving young adults generally has a negative impact on health, personal development, education and economic status (Demos 2012, pp. 12 and 17–23).

of forced marriage. For example, not all forced marriages will result in rape.¹⁵⁶¹ Some marriages that were entered into under the influence of coercion or pressure may even become ‘voluntary’ over time, in the sense that the spouses decide to stay together of their own free will. Conversely, some marriages that were entered into voluntarily may become ‘forced’ over time, in the sense that one or both partners wish to exit the marriage but are not able to do so. Further, sexual or domestic violence or slavery-like situations certainly do not require a forced marriage. Consider the following case reported by the Dutch Rapporteur on Human Trafficking. Illegal immigrant J meets an older Dutch man who offers her a position as his housekeeper: he will pay her a small sum of money and offer board and lodging. After moving in with the man, J finds out that the man wants to have sex with her. J sees no possibility of refusing this and the man starts demanding more and more sexual favours of her and locks her in the house.¹⁵⁶² There was never any (forced) marriage.

The total gamut of possible *consequences* of a forced marriage, therefore, will not be considered as harms (that are necessarily) inherent in a forced marriage. Rather, the criminal results of a forced marriage can be separately charged for what they are, as concurrent offences. If A was forced to marry B and is (subsequently) raped by B, then B commits the distinct, independent offence of rape within the forced marriage; if A and B marry out of free will and B rapes A, then B commits the distinct, independent offence of rape; if A and B are not married and B rapes A, then B commits the distinct, independent offence or rape. The same goes for other offences generally linked to forced marriage, such as domestic violence, unlawful imprisonment and forced pregnancy.

2.2.2. *The specific harm of forced marriage*

Which specific harm, then, does the act of forcing someone to say ‘I do’ against that person’s will cause? Forcing someone to enter into a marriage is a violation of personal autonomy, of the right to choose whether, when and whom to marry. Decisions relating to these matters are very important life choices. The core of forcing someone to enter into a marriage against that person’s will is taking away, violating personal autonomy and thereby subjecting that person to the possibility that they will have to share their life with a person they did not choose themselves. An individual is effectively robbed of an important life decision and the course of their lives is forever altered, by being officially bound to someone against their will. A marital union is generally aimed at sharing a life and usually also starting a family. Couples will more often than not share a house and live

¹⁵⁶¹ The vast majority of marriages will result in sexual relations: marriage is (was) often used to legitimise sex. Forced marriages, therefore, will usually also lead to sexual intercourse, which, depending on the situation, may or may not amount to rape.

¹⁵⁶² Human trafficking, Seventh report of the National Rapporteur, The Hague: Bureau NRM October 2009, p. 538.

their lives together. In the eyes of the outside world, they are officially linked and bound to each other.

That is the harm of forced marriage: violating someone's personal autonomy by forcing the marital status on that person and thereby making that person spend a prolonged period of time (in some cases a lifetime) in an unwanted association.

It is reiterated that 'marriage' in this book is defined as any union between two or more people which, in a specific society, is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital or marital-like. This is what is unique about a forced *marriage*: the fact that people are bound to each other by the marriage and that law, custom and/or religion create certain rights and obligations between these people.

By being married, people are bound to each other intrinsically as well as extrinsically. Say that A's relatives force him to marry B. After the wedding ceremony, A and B sit together and it turns out that neither of them want this marriage, so they decide to separate and file for divorce. The harm done in this particular case seems to be relatively small. Yet this is an atypical example of a forced marriage. Forced marriages mostly take place in traditional, closed communities.¹⁵⁶³ These communities attach great value to (family) honour and living life according to certain religious and cultural norms: appearances are kept up and dirty laundry is not aired in public in order to prevent loss of face. In these communities, divorce is often stigmatised: once married, a couple is expected to stay together. It is to be expected that parents and other relatives who have gone to some length to bring about the forced marriage, will not easily be swayed by talk of divorce. If there has been external pressure to enter into the marriage, there will probably also be external (and internal as a result of internalised taboos on divorce) pressure to remain in the marriage – at least for a certain period of time.

Exactly because of the fact that forced marriages generally take place in more conservative circles, the ideas surrounding marriage will also be more conservative, so the reality of a forced marriage is that it binds someone for an indefinite period of time. Marriage is generally aimed at (a certain degree of) permanence. This is no different in the case of forced marriages.¹⁵⁶⁴ The forced, non-consensual entrance into a marriage will thus often also have consequences for the possibility to exit the marriage. Reasons for not being able to exit the marriage depend on the particular culture, but may vary from violence, coercion,

¹⁵⁶³ Note that this may be different in conflict situations.

¹⁵⁶⁴ There are exceptions, of course, e.g. forced marriages that are contracted with the aim of circumventing immigration rules. Yet even if the marriage was only meant to circumvent immigration rules, the marriage will have to last at least a few years. Dutch law, for example, requires foreigners who live in the Netherlands with a residence permit that is dependent on a marriage or relationship to stay in that relationship for at least five years before they are eligible to apply for an extended, independent permit. If the relationship ends within five years, they are, in principle, not eligible to apply for an independent residence permit (see the Aliens Decree in conjunction with the Aliens Act).

threats and structural emotional pressure applied by others, such as the other spouse or relatives, to broader contextual issues such as poverty and financial reasons, the fear of being rejected by the community, perpetuating gender inequalities, specific forms of socialisation (such as being brought up to believe that marriages must be successful) and the stigmatisation of divorce.¹⁵⁶⁵

Not being able to exit a (religious) marriage is referred to as marital captivity, which is a different phenomenon than forced marriage and does not form part of this study.¹⁵⁶⁶ Marital captivity generally refers to the inability to dissolve a religious marriage and causes different harms than being forced to enter into a (religious) marriage. For example: X and Y have divorced according to Dutch law and no longer live together, but Y refuses to allow X to divorce him according to the practices of their religion: X is captured, locked as it were in the religious marriage. As a result, she cannot enter into a new religious marriage with someone else and she may even be charged with adultery should she travel to certain countries with a new partner.¹⁵⁶⁷ In Chapters 7 and 9 this was illustrated using *inter alia* the example of the Jewish *get*: pursuant to Jewish marriage rites, divorce can only be obtained by a *get* given by the husband to the wife.¹⁵⁶⁸ Even though forced marriage is not the same as marital captivity, it is important to take into consideration that they are often linked to each other: the first will often result in the latter (see *infra* paragraphs 2.3 and 2.6.1).

A forced marriage with its inherent risks of psychological abuse, exploitation, sexual and/or domestic violence, constitutes a severe violation of personal autonomy, an attack on personal liberty. Even in the absence of sexual and/or domestic violence, a forced marriage causes severe harm in the sense that a person is coerced into an unwanted association. Those who are forced to enter into a marriage against their will are robbed of the possibility to influence their own lives. Being forced into a marriage can thus have a severe psychological impact on victims.

2.2.3. *The wrongs of forced marriage*

Marriage is a protected legal interest, a legal good (in German: *Rechtsgut*). It is an institution that is universally protected. So much is clear from the gamut of human rights instruments – analysed in Chapter 1 – that all contain a provision concerning the right to marry. Forcing someone to enter into a (religious) marriage constitutes a violation of this legal good (i.e. the right of free partner-choice and the right to enter into a marriage with free and genuine consent), because free and

¹⁵⁶⁵ Gangoli *et al.* 2011, pp. 27, 36, 39–40; and Gill & Anitha 2011, pp. 53–54.

¹⁵⁶⁶ The Dutch legislator does consider marital captivity to be part of the the practice of forced marriage (*Parliamentary Proceedings (Lower House)* 2012/2013, 11, p. 49).

¹⁵⁶⁷ See <www.femmesforfreedom.com/themas/huwelijkse-gevangenschap/> (see also General Introduction).

¹⁵⁶⁸ See Chapter 7, paragraph 4.5 and Chapter 9, paragraph 3.3.2.

full consent is an essential precondition to marriage.¹⁵⁶⁹ This is also recognised by a large number of universal and regional human rights instruments, ranging from the UDHR to the Universal Islamic Declaration of Human Rights and the Protocol to the African Charter on human and peoples' rights on the rights of women in Africa. A forced marriage can consequently be seen as a wrong. Consenting to a marriage, entering into it with genuine and full consent, is a human right. Taking that right away from someone and thereby restricting their personal autonomy (decision-making freedom) is wrongful. Forced marriages, i.e. marriages to which the consent of at least one of the parties was procured under duress, constitute a human rights violation.¹⁵⁷⁰ It is often said that consent is the ultimate expression of self-determination.¹⁵⁷¹ Robbing someone of the possibility to consent by forcing him or her into a marriage therefore violates that person's right to self-determination.

2.3. PROPORTIONALITY

Forcing someone to enter into a marriage, which falls within the ambit of Articles 284 and 285a CriC,¹⁵⁷² is harmful and wrongful. Depending on the culture or society, marriage (and divorce) can have life-long consequences: once married, divorce or separation may not be possible; once divorced, a person (usually a woman) may be stigmatised, ostracised and unable to remarry; once widowed, a person (again usually a woman) may be unable to remarry, or, conversely, may be required to marry someone in particular (such as her late husband's brother – see e.g. Genesis 38). Therefore, a marriage (so not just a forced marriage) can drastically and permanently change people's lives. A *forced* marriage has an even more disrupting result. As discussed in paragraph 2.2, forcing someone to marry results in severe harm. Indeed, a victim's psychological suffering as a result of a

¹⁵⁶⁹ Note that these human rights instruments do not distinguish between civil marriage and religious marriage: they refer to marriage in general without defining the term or specifying which type of marriage is meant. The ECHR is the exception, stating that 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

¹⁵⁷⁰ Forced marriage 'infringes the fundamental human rights of the individual' (Council of Europe, P.A., 29th Sitting, *Forced marriages and child marriages*, Texts Adopted, Res. 1468 (2005)). See also *Quila v. Secretary of State for the Home Department* (2011) UKSC 45, para. 9: 'The forcing of a person into marriage is a gross and abhorrent violation of her or his rights under, for example, article 16(2) of the Universal Declaration of Human Rights 1948, article 23(3) of the International Covenant on Civil and Political Rights 1966 and article 12 of the ECHR.'

¹⁵⁷¹ Boon 2001, p. 667, referring to R.W. Garnett, 'Why informed consent? Human experimentation and the ethics of autonomy', *Catholic Lawyer* (36) 1996, p. 457. See also Gill & Anitha 2011, p. 7; and Anderson 2010, p. 14.

¹⁵⁷² Note that Article 285a CriC only applies to forced civil marriages (see *infra* paragraph 2.6.3).

forced marriage may even be exacerbated by social and cultural conditions.¹⁵⁷³ Depending on the cultural environment in which a forced marriage takes place and in which its effects are felt, the specific harms and the intensity and duration of these harms suffered by victims can vary. For example, in societies or communities in which divorce is difficult (which is often the case in honour cultures), whether as a result of institutionalised gender inequality or as a result of social mores, a marriage (forced or not) can have more severe and more long-lasting consequences than in a society in which divorce is not stigmatised.

Because of the severe harms that are caused by coercively taking away an individual's possibility to decide whether, when and whom to marry, it does not appear to be disproportional to (also) use the criminal law to deal with forced marriages.

2.4. SUBSIDIARITY

2.4.1. *External subsidiarity*

Forcing someone to do something against that person's will is a crime pursuant to Article 284 CriC and forcing someone to marry falls within the scope of this offence. In this sense, the external component of the subsidiarity principle – i.e. that criminalisation should only be resorted to when it is an appropriate and effective method that is preferable to other (non-)legal mechanisms – has already been addressed, but a few lines must nevertheless be dedicated to this topic.

This book adheres to a minimalist approach to criminalisation. Criminal law should not be resorted to lightly, but it is not per definition the *ultimum remedium*. If other (non) legal measures can be used to tackle a problematic situation, then they may take precedence over criminal law, but some harms and wrongs (also) require the condemnatory response of the criminal law.

One of the most used arguments against the criminalisation of forced marriage and in favour of a civil law approach is that victims would not report the crime to the police, whereas the *de facto* civil law threshold might be lower and not discouraging for victims. The government consultation on the criminalisation of forced marriage in England (discussed in Chapter 7) plainly highlights that different victims have different expectations and preferences. Obviously, there could never be a unanimous outcome seeing as each victim and situation are unique, but the results emphasise the polarised debate: opponents of criminal law state that the English civil law framework offers sufficient protection from forced

¹⁵⁷³ *Čelebići* Trial Judgement, para. 495. In the context of the ECHR it has also been argued that an individual's culture can influence the psychological effects which particular treatment has on that person; see A. Reidy, *The prohibition of torture, A guide to the implementation of Article 3 of the European Convention on Human Rights* (Human rights handbooks, No. 6), Strasbourg: Council of Europe 2003.

marriages; proponents argue that this is not the case. Opponents of criminalisation state that it would make victims more vulnerable; proponents believe it would empower victims. Opponents argue that criminalisation would deter victims from reporting the crime; proponents believe it would encourage them. In the end, 37% of the respondents to this consultation stated that the practice of forced marriage is best kept outside the scope of the criminal law. A small majority (54%) argued that criminalisation would be a positive development.

The actual impact of criminalisation on victims' willingness to report forced marriages has not been researched, but it is possible to make a few general remarks. The negative effects of social relationships on the reporting of crimes by victims is well-documented: victims are usually less likely to report a crime committed against them if they know the offender in any way.¹⁵⁷⁴ Further, the prospect of going through the criminal justice system will make most victims anxious and negatively impact their readiness to report crimes.¹⁵⁷⁵ This is not, therefore, unique to forced marriage. Depending on the offence, whistleblowers and victims of crimes who step forward are often shunned by their communities and/or families. And although prosecutions without active victim participation are difficult to achieve,¹⁵⁷⁶ the reluctance of victims to report a certain crime is in itself not a valid argument to abstain from criminalisation.¹⁵⁷⁷ The risk of ostracism and alienation is further not restricted to invoking the *criminal law*. Seeking help in general can have severe consequences, especially in communities that attach high value to family honour.¹⁵⁷⁸ Research indicates that victims who decide to do something about their situation and seek external help – either from the police, an NGO, a teacher or another third party – are often alienated from their families, making reconciliation difficult.¹⁵⁷⁹

Dutch civil law, as was demonstrated in Chapters 7 and 9, offers many possibilities to tackle (threatened) forced marriages. Especially the concept of provisional arrangements (*voorlopige voorzieningen*) offers a wide range of options, many of which have not yet been used to their full potential. Provisional arrangements can be used to prevent family members or others from forcing

¹⁵⁷⁴ This is especially the case for domestic and sexual violence and goes for female as well as male victims, see e.g. R. Felson & P.P. Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, National Criminal Justice Reference Service, March 2005.

¹⁵⁷⁵ IKWRO 2012, p. 9.

¹⁵⁷⁶ Diversity Subcommittee of the Family Justice Council 2012, para. 34.

¹⁵⁷⁷ For example, victims of child abuse and their families in ultra-orthodox Jewish communities in New York City have been ostracised by community members, expelled from schools and synagogues and targeted for harassment intended to destroy their businesses, see S. Otterman & R. Rivera, 'Ultra-Orthodox Shun Their Own for Reporting Child Sexual Abuse', *New York Times* 9 May 2012 (available at <www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html> last accessed 21 October 2013). With regard to rape victims, see R. Bachman, 'Predicting the Reporting of Rape Victimization: Have Rape Reforms Made a Difference?', *Criminal Justice and Behavior* (20) 1993, pp. 254–270.

¹⁵⁷⁸ See Sanghera 2007.

¹⁵⁷⁹ Demos 2012, pp. 49–50.

someone to enter into a marriage, such as by ordering someone to hand over someone else's passport, or by prohibiting someone from making marriage arrangements. In this way, the civil law can function as a valuable framework to deal with forced marriages.

However, as explained in paragraph 2.2, the harms and wrongs caused by forced marriages are of such a nature that they require the condemnatory response of the criminal law. A forced marriage comprises a severe violation of personal autonomy – a type of harm that is not suitable for compensation.¹⁵⁸⁰ Obviously, not all forced marriage cases would be heard by a criminal court: the prosecutor's right to exercise prosecutorial discretion allows him to decide which cases to pursue and which to dismiss. A two-track system like in England will allow for the graver forced marriage cases to be dealt with through criminal law, and the other cases through civil law.

Civil law offers valuable measures to protect the victim from being forced into a forced marriage (e.g. provisional arrangements ordered during interlocutory proceedings) and to dissolve the forced marriage (e.g. by annulment). But the harms and wrongs caused by a forced marriage are of such a nature that they (also) require the condemnatory response of the criminal law.

2.4.2. *Internal subsidiarity and material distinctiveness*

In principle, the act of forced marriage is covered by the crime of coercion (Article 284 CriC), but in some cases, other offences, most notably threatening to commit a serious criminal offence (Article 285 CriC), influencing a person's freedom to make an official statement (Article 285a CriC) and stalking (Article 285b CriC) could also be relevant. Do these four offences specifically address the distinct harm caused by forced marriage, or is the act of forcing someone to enter into a marriage materially distinct? Obviously, this depends on the definition of the offence of forced marriage, i.e. on the elements of this crime. There is no single crime in the Dutch Criminal Code that specifically prohibits forcing someone to enter into a marriage. In this sense, it could be argued that none of the offences in the Dutch Criminal Code cover the *distinct* harm of a forced marriage. Indeed, by its nature, Article 284 CriC is non-specific so as to be applicable to a broad spectrum of coercive acts. The essence of this provision is to safeguard people's physical and psychological freedom in all situations.¹⁵⁸¹ And this is what is harmed when someone is forced to enter into a marriage

¹⁵⁸⁰ See in general: B.C.J. van Velthoven, 'Een onmogelijke opgave: Criteria voor strafbaarstelling vanuit economisch perspectief', in: C.P.M. Cleiren *et al.* (eds.), *Criteria voor strafbaarstelling in een nieuwe dynamiek. Symbolische legitimiteit versus maatschappelijke en sociaalwetenschappelijke realiteit*, The Hague: Boom Lemma 2012, p. 59; and Simester & Von Hirsch 2011, p. 17, footnote 35 and p. 198.

¹⁵⁸¹ *Parliamentary Papers II (Lower House)* 2009/10, 32 175, no. 2 (Letter from the Minister of Justice), p. 5.

against their will. Article 284 CriC prohibits using coercion to make someone do, tolerate or refrain from doing something against their will. The wording of Article 284 CriC covers a plethora of possibilities regarding (forced) marriage: forcing someone to marry a particular person, using coercion to force someone *not* to marry a particular person, and forcing someone to stay in a marriage.

Another provision that aims to protect personal freedom and more specifically the feelings of personal safety and peace (in German: *individuellen Rechtsfrieden*) is Article 285 CriC.¹⁵⁸² This provision stipulates that it is a criminal offence, punishable by a maximum prison sentence of two years, to threaten someone with certain serious offences, such as rape, sexual assault, a crime against a person's life, hostage taking and aggravated assault.¹⁵⁸³ This criminal offence does not require that these threats are uttered with a specific aim, such as to force someone to enter into a marriage. Uttering such serious threats alone constitutes an assault on personal freedom in and of itself.

The crux of Article 285a CriC is to prevent people from being influenced (by threats or other means) as a result of which they are no longer able to freely make a statement before a judge or public servant. The provision was drafted with the eye to protecting witnesses in criminal investigations and trials, but during the parliamentary readings it was already recognised that this article is meant to guarantee the freedom of statement of 'all civilians' in all official (legal) procedures.¹⁵⁸⁴ Therefore, it was argued in Chapter 7 that this provision is also applicable in those cases where someone is forced to enter into a civil¹⁵⁸⁵ marriage: the victim's freedom to make a truthful statement before the Registrar has been influenced by others as a result of which the victim is forced to say 'I do'.¹⁵⁸⁶

Article 285b CriC is aimed at protecting people's privacy. Stalking was separately criminalised in 2000 because certain acts of stalking and harassment, such as persistently following a person against their will, were not caught by any criminal offence and the legislator believed that these acts were criminal.¹⁵⁸⁷ As was demonstrated in Chapter 7, in many cases, the period leading up to the marriage ceremony (i.e. the period during which pressure is exerted on an individual with the aim of causing that person to marry) could qualify as stalking. Under certain

¹⁵⁸² Machielse 2012, comments on Article 285, margin no. 2.

¹⁵⁸³ In those cases where the threats are made in writing and coupled with a certain demand ('your money or your life'), the maximum sentence is four years imprisonment (Article 285(2) CriC).

¹⁵⁸⁴ *Parliamentary Papers II (Lower House)*, 1991/92, 22 483, no. 3, p. 39.

¹⁵⁸⁵ Note that this provision is not applicable to non-civil marriages, such as forced religious marriages (see also *infra* paragraph 2.6.3).

¹⁵⁸⁶ Looking at the wording of Article 285a CriC, this conclusion is valid. But a teleological interpretation brings to the fore a different conclusion. Three sentences after saying that Article 285a CriC is not limited to criminal proceedings and is aimed at 'protecting the freedom of all citizens to make a truthful statement to a judge or public servant', the Minister of Justice stated that the provision is intended to protect the legal interest of the 'freedom of statement of witnesses and experts' (*Parliamentary Papers II (Lower House)*, 1991/92, 22 483, no. 3, p. 39).

¹⁵⁸⁷ Machielse 2013, comments on Article 285b, margin no. 2.

circumstances, being forced to marry someone and being forced to live with that person will also amount to stalking.¹⁵⁸⁸ In this sense, the offence of stalking does capture some of the harms caused by a forced marriage, seeing as it aims to protect people's privacy and a forced marriage constitutes a violation of privacy. Yet, again, stalking does not specifically address the act of being forced to enter into a marriage. A forced marriage is more than living with a stalker or being harassed by relatives and community members: it is about not being able to make important life decisions, such as deciding with whom to share your life.

Is forced marriage materially distinct from existing criminal offences (internal subsidiarity)? It follows from the above that the discussion on the material distinctiveness of forced marriages from offences codified in the Dutch Criminal Code can go in two different directions. It could be argued that the distinct harms and wrongs of a forced marriage are not specifically covered by Article 284 CrC (or any other offence in the Dutch Criminal Code), which makes the act of forcing someone to enter into a marriage materially distinct from existing criminal offences: it contains an element (coercion with regard to entering into a *marriage*) that is not part of any other criminal offence. This means that, in principle, there would be a case for creating a separate crime of forced marriage. Yet it could also be argued that even though the act of forcing someone to marry is distinct in the sense that it is more specific (*lex specialis*) than general coercion, the *portée* is the same: forcing someone to enter into a marriage violates a person's psychological freedom – an interest safeguarded by the *lex generalis* of Article 284 CrC.

The outcome, therefore, remains inconclusive: Dutch criminal law contains several offences that can be used to prosecute forced marriages, meaning that there are alternatives (to separate criminalisation) within criminal law, but, in a strict sense, none of these offences *specifically* focus on the act of forcing someone to enter into a marriage.

2.5. EFFECTIVENESS

Forced marriage cases may prove to be difficult to prosecute.¹⁵⁸⁹ A forced marriage often takes place behind closed doors and may be the result of cumulative pressure exerted by a large circle of people: parents, uncles, aunts, siblings, grandparents, neighbours, religious leaders, and many others. This results in three problems – which have already been touched upon in previous chapters – with regard to the prosecution of forced marriages: the detection of forced marriages, the question of whom to prosecute and evidentiary issues.

¹⁵⁸⁸ The District Court Zutphen ruled that, under certain circumstances, domestic violence can (also) be seen as a breach of a person's privacy and thus as a form of stalking (District Court Zutphen 18 June 2003, NJ 2003, 451).

¹⁵⁸⁹ At the time of writing (December 2013), Dutch criminal courts had not (yet) dealt with charges concerning forced marriage.

2.5.1. *The detection of the hidden crime of forced marriage*

First, regarding the detection: not all forced marriages are reported to the police. Indeed, it has been argued in the context of the forced marriage criminalisation debates in England and the Netherlands that forced marriage is a hidden problem with a low reporting rate.¹⁵⁹⁰ This means that in many cases, the police are dependent on witness statements, e.g. friends or teachers of the victim, but also medical professionals and registrars. This is not very different from crimes such as child abuse and domestic violence and is not *eo ipso* a reason to refrain from (separate) criminalisation.¹⁵⁹¹ Would the creation of a separate criminal offence make victims more likely to step forward and report the crime? It is not possible to answer this question. On the one hand, it could be argued that a distinct crime of forced marriage would send out a clear signal that this practice is unacceptable and criminal, which could empower victims. On the other hand, it could also be argued that this would not change victims' hesitation to go to the police. As in all cases, each victim is different: some will feel empowered by a (separate) criminal prohibition; others will not feel more encouraged to report their plight to the authorities (see also *supra* paragraph 4.1).

It has been suggested, during debates on separate criminalisation of the practice of forced marriage, to turn forced marriage into a distinct offence that is only subject to prosecution on complaint by the victim (*klachtdelict*).¹⁵⁹² It is doubtful that this would increase victims' willingness to report the crime. Arguably, this would even increase the likelihood that more coercion is used: families might put a victim under further pressure, forcing her not to press charges or to drop them. By turning forced marriage into a prosecution-on-complaint offence, the authorities would become completely dependent on the will of the victim. If a third party were to report to the police that he believes his neighbour's daughter is being forced into a marriage, the police and prosecutor would not be able to proceed without the victim lodging a complaint.¹⁵⁹³

2.5.2. *Whom to prosecute?*

Secondly, relating to the prosecution of forced marriage (irrespective of whether or not it becomes a separate offence or remains a form of coercion): it is not unimaginable that in some cases it would be difficult to decide whom to prosecute. Many different people may have been involved in creating the coercion

¹⁵⁹⁰ See Chapters 2 and 7.

¹⁵⁹¹ On the willingness of victims to report domestic violence and on whether or not they want their abusers to be prosecuted see also A.R. Klein, *Practical implications of current domestic violence research: for law enforcement, prosecutors and judges*, Washington: U.S. Department of Justice June 2009.

¹⁵⁹² *Parliamentary Proceedings (Lower House)* 2012/2013, 32 840, no. 11, p. 50.

¹⁵⁹³ Unless of course there is reason to believe that other crimes (which are not subject to prosecution on complaint) have also been committed.

which caused a person to marry against their will. The marriage could have been the result of a ‘joint venture’ of family members using (subtle) pressure. It would appear that the standard rules of co-perpetration can be applied in these cases: in order to prove coercion, the conduct of all suspects combined must satisfy the elements of the offence. In this sense, the total complex of the suspects’ acts must amount to coercion.¹⁵⁹⁴ Each of the suspects will need to have had the required *mens rea*, i.e. they must have coerced the victim with the intention of causing them to enter into a marriage (*dolus eventualis* as a minimum). The elements ‘force/coerce’ (*dwingen*) and ‘unlawful’ (*wederrechtelijk*) in Article 284 CriC imply lack of consent on the victim’s side and awareness of this lack of consent on the perpetrator’s side.¹⁵⁹⁵ In the end, it is up to the prosecutor to decide whom to prosecute, a decision, which, to state the obvious, depends on the particular circumstances of the case. The key in these situations is the perpetrators’ shared *mens rea*, their common intent of causing the victim to marry against her will.

2.5.3. How to prove coercion was used?

Thirdly, it could also be challenging to prove that coercion was used. Different forms of coercion are used in forced marriage cases, ranging from emotional blackmail to physical violence. Victims may be threatened with abandonment, isolation, social ostracism, disownment, or even death. In extreme cases, victims are taken abroad or are abducted and imprisoned. Often, victims are pressured not by just one person, but by multiple family members, relatives and/or community members. The coercion may be subtle: the victim might find herself surrounded by people who incessantly talk and make insinuations about future marriages and try to persuade her to go along with the suggested marriage. As explained in Chapter 7, in many cases it will be difficult to determine whether the coercion that was used qualifies as criminal coercion in accordance with Article 284 CriC. In many cases, the eventual ‘I do’ of the victim will have come about as a result of a combination of protracted psychological pressure exerted by family and community members on the one hand and internalised ideals about marriage on the other hand.

How do courts deal with these issues? How could they prove that the perpetrator(s) coerced the victim to enter into a marriage? In some cases the very nature of the perpetrator’s behaviour will be decisive: if the perpetrator threatened the victim with violence, for example by putting a gun to her head and telling her

¹⁵⁹⁴ See *Proceedings II (Lower House)* 1998/99, no. 98, p. 5695 and Machielse 2013, comments on Article 285b, margin no. 5 (with regard to co-perpetration and stalking).

¹⁵⁹⁵ Lindenberg 2007, pp. 171 and 175. According to Lindenberg, the element of ‘coercion’ in Article 284 CriC implies that with his behaviour, the perpetrator intentionally caused the victim to do something, to refrain from doing something or to tolerate something against his will. Lindenberg states that the perpetrator’s intent must always cover the fact that the victim did not want the interference.

to choose between marriage and her life, it will be easier for the courts to conclude that the perpetrator coerced the victim to enter into a marriage. But what about more subtle forms of coercion? Here, one of the elements of Article 284 CriC, ‘hostile act’ (*feitelijkheid*), offers a solution. A hostile act is an act, other than an act of violence, by which the perpetrator intentionally caused the victim to do, to refrain from doing or to tolerate something that the victim would otherwise not have done, refrained from doing or tolerated. This element is incorporated in the definitions of several other coercion-based offences, such as rape and human trafficking, and has the same meaning in all these offences.¹⁵⁹⁶ The Supreme Court has held that a person coerces someone by a hostile act when he intentionally exerts such psychological pressure or intentionally brings the victim to such a situation of dependency that the victim, as a result of these actions, could not reasonably have been expected to act differently or to remove him or herself from the suspect’s (hostile) influence.¹⁵⁹⁷ An example could be, obviously depending on the circumstances, taking advantage of a victim’s devoutness.¹⁵⁹⁸ So, what is required is that the perpetrator used any of the means of coercion listed in Article 284 CriC (i.e (threats of) violence or other hostile acts) with the intention to coerce the victim. The victim must have responded by acting in a way in which she would not have acted, had she not been coerced, and this victim could not reasonably have been expected to resist the coercion.¹⁵⁹⁹

Turning forced marriage into a separate offence would not change any of these difficulties, nor would it necessarily act as a deterrent to (potential) perpetrators. As stated by Ashworth and Horder: ‘it cannot be assumed that creating a new crime or increasing the maximum punishment will lead – in a kind of hydraulic relationship – to a reduction in the incidence of that conduct.’¹⁶⁰⁰ Furthermore, separate criminalisation would not make the (enforcement of the) criminal law more efficient or effective. Since the promulgation of the Marital Coercion (criminal law) Act 2013, it has become possible to take suspects of criminal coercion (which includes forced marriages) into pre-trial detention. As a result, the law enforcement authorities are now able to use a broad spectrum of investigation methods and powers to investigate alleged instances of criminal coercion. The

¹⁵⁹⁶ See *inter alia* Machielse 2012, comments on Article 284, margin no. 4.

¹⁵⁹⁷ Dutch Supreme Court 27 August 2013, ECLI:NL:HR:2013:494 (a rape case).

¹⁵⁹⁸ In this particular case, the suspect had forced an underage girl – who was brought up in a very religious family – to have sexual intercourse with him *inter alia* by telling her that the Virgin Mary had brought them together. After having sexual intercourse with her, he told her that they were now married in the eyes of God. He then used this to keep forcing the girl to have sex with him (Dutch Supreme Court 27 August 2013, ECLI:NL:HR:2013:494).

¹⁵⁹⁹ See also Lindenberg 2007, pp. 132–190. Lindenberg lists several examples to illustrate the broad scope of Article 284 CriC: forcing someone to sign a document, forcing someone to stop working, forcing someone to send a picture, forcing someone (via a webcam) to write the word ‘slut’ on her chest and to hit herself repeatedly in the face, and forcing someone to make a phone call. For more examples of acts that have been qualified as coercion, see Lindenberg 2007, pp. 244–245.

¹⁶⁰⁰ Ashworth & Horder 2013, p. 16.

police and prosecutor can, for example, demand that telecommunication data (such as telephone records and text messages) are handed over.¹⁶⁰¹ Creating a distinct crime of forced marriage would not increase or widen the authorities' investigative powers.

2.6. CONCLUSION: A SEPARATE OFFENCE OF FORCED MARRIAGE...

2.6.1. ...is not required in Dutch criminal law

In the previous paragraphs, it was demonstrated that forcing someone to enter into a marriage against that person's will causes harms and wrongs. These harms and wrongs are of such a severity and nature that a criminal law response would not be disproportional, indeed, they (also) call for the condemnatory response of the criminal law, irrespective of the valuable protective remedies offered by the civil law. But should the act of forcing someone to marry be turned into a separate criminal offence? In this paragraph it will be argued that this is not necessary: the current situation – where this act is caught by Article 284 CriC, and, depending on the circumstances, several other criminal offences – does not call for the creation of a distinct offence of forced marriage.

Forced marriage, depending on how it is defined, covers several harms. In this book, it is defined as a marriage (i.e. a marital or marital-like association), which at least one of the partners entered into against their will as a result of some form of coercion exerted by another party. But it has been argued by some that a forced marriage is broader than the mere conferral of marital status against someone's will, and that it also refers to being forced to remain in a (religious) marriage, a phenomenon which has been referred to as 'marital captivity'. As stated above, in many cases, a forced marriage as defined in this book will also result in marital captivity. Yet marital captivity is not always the result of a marriage that was entered into under duress: a voluntary marriage (as opposed to a forced marriage) can also result in marital captivity. It is here that the coercion offence of Article 284 CriC proves its worth: it covers both situations.

Because marriage in general is aimed at (some level of) permanence and brings about a change in someone's (legal and societal) status, and with all (legal/religious) consequences that entail, it is difficult to separate the event of forcing someone to say 'I do', from what follows afterwards: being married. Yet forcing someone to remain married (in the sense of marital captivity), is something other than forcing someone to enter into a marriage in the first place. Forcing someone to say 'I do' (forcing someone to do something, an element of Article 284) is an instantaneous offence (*aflopend delict*), but as a result, that person will, generally,

¹⁶⁰¹ See Article 126n(1) CCriP.

also have to remain married, which amounts to coercing someone to refrain from doing something (e.g. filing for divorce) and/or to tolerate something (i.e. being married) – two other elements of Article 284.^{1602, 1603} The latter could be qualified as a continuing offence (*délit continu* or, in Dutch, *voortdurend delict*). Article 284 covers all of these situations.¹⁶⁰⁴

The offence of forcing someone to enter into a marriage – as an instantaneous offence – is completed once the victim has been forced to take part in the wedding ceremony (or in any ceremony that brings about the marriage). As a result, the *dies a quo* of the statutory prescription period of six years (see Article 70(1) sub 2) will be the day after the wedding day.¹⁶⁰⁵ If this victim is also forced to remain married (marital captivity), then the statute of limitations will depend on the way in which the prosecutor decides to charge the offence. If the prosecutor charges the defendant with forcing the victim to enter into the marriage and subsequently forcing the victim to remain in this marriage, then this total complex of acts would qualify as a continuing offence. The acts could then be seen as a so-called continuous act (*voorgezette handeling*) as described in Article 56 CriC: i.e. acts that each individually amount to a criminal offence or misdemeanour but that are so closely connected that they must be regarded as one continuous act. In such cases, the statute of limitations starts to run on the day after the marital captivity has come to an end, e.g. as a result of divorce or death of a spouse.

Article 284 CriC catches all different types of forced marriage: forced civil marriage (the only type of marriage that is recognised by Dutch civil law), forced religious marriage and forced customary marriage.¹⁶⁰⁶ Even cases of forced registered partnership and forced cohabitation – the latter was separately criminalised in Belgium in October 2013¹⁶⁰⁷ – could fall within the scope of Article 284 CriC, as long as the perpetrator used (threats of) force or other hostile acts to coerce the victim to do, refrain from doing or tolerate something that the victim would otherwise not have done, refrained from doing or tolerated. If a

¹⁶⁰² See with regard to the offence of coercion and the elements ‘to do, refrain from doing or tolerate’ Lindenberg 2007, pp. 64–65. Compare in this regard: depriving a person unlawfully of his freedom versus keeping someone deprived of his freedom (both codified in Article 282 CriC): the former is an instantaneous, the latter a continuing offence (Remmelink 1996, p. 120).

¹⁶⁰³ It is possible that there are different perpetrators involved at different stages, e.g. the victim’s parents forced her to enter into the marriage, but the victim’s husband is the one who forces her to remain in the marriage and prevents her from filing for divorce.

¹⁶⁰⁴ This was also mentioned by the State Secretary of Security and Justice (*Parliamentary Proceedings (Lower House) 2012/2013*, 11, p. 49).

¹⁶⁰⁵ Unless the victim is a minor; in that case the *dies a quo* of the statutory prescription period of six years will be the day after the victim’s 18th birthday (see Marital Coercion (criminal law) Act, amending Article 70(2) sub 2 CriC). See also Chapter 7, paragraph 3.1.

¹⁶⁰⁶ Forcing someone to enter into a civil marriage and also forcing them to enter into a religious marriage could be charged as two concurrent violations of Article 284 CriC.

¹⁶⁰⁷ Article 391septies Belgian Criminal Code. This provision concerns ‘legal cohabitation’ (*wettelijke samenwoning*).

new criminal offence were created, this offence would need to be defined in broad terms, so that it would not be limited to forced civil marriages.

As argued above, creating a separate offence *would* send a clear message that forced marriage is wrong, unacceptable and will not be tolerated. This message can also be sent by other means, such as media (awareness) campaigns, programmes to train professionals (such as teachers and registrars) who are likely to encounter instances of forced marriage, and prosecutorial guidelines stating the ways in which forced marriage will be charged. All of these measures are contained in the Dutch government's action plan concerning the prevention of forced marriages.¹⁶⁰⁸ Further, it is often argued that separate criminalisation would act as a strong deterrent for potential perpetrators on the one hand and act as a means to empower the victims on the other hand. As explained above in paragraphs 2.4.1 and 2.5, it is not possible to substantiate these claims.

2.6.2. *The principle of legality*

The law should be clear. Legal certainty in the form of the legality principle demands that citizens are able to understand what kind of behaviour will lead to criminal liability. As was argued in Chapter 4, when it comes to criminalisation, considerations regarding the legality principle generally come to the fore after the criminalisation decision has been made. Had the conclusion of this research been that forced marriage should be separately criminalised, then the legality principle – more specifically the sub-norm of *lex certa* – would have been used as a guideline in defining this new distinct offence in the sense that the elements of that crime must be as clear and accurate as possible. Yet the conclusion of this research is that it is not necessary to create a new crime. This means that the *lex certa* principle is not extensively addressed in the context of forced marriages. Article 284 CriC, the provision of choice for prosecuting acts relating to forced marriage, is a broad and general offence. Its elements are non-specific so that the offence encompasses a large number of criminal acts that can be qualified as 'coercive'. The provision could be used to prosecute people who force someone to convert to a certain religion, or who pressurise someone into joining or staying in a sect. In theory, it could even be used to prosecute someone who forces a woman to have children, or who uses coercive means to prevent someone from having children. And what about forcing someone to leave the country and never come back? These are all very harmful acts, which have not been separately criminalised. The elements of Article 284 CriC may be broad and inclusive, but they are not vague. All elements have been defined and interpreted by criminal courts. Therefore, if, for whatever reason, the decision were to be made to create a

¹⁶⁰⁸ *Parliamentary Papers II (Lower House) 2011/12*, 32 175, no. 35 (Prevention of Forced Marriages 2012–2014); and see Letter of the State Secretary of Health Welfare and Sport to the President of the Lower House, 15 July 2013.

separate criminal offence of forced marriage, it would be highly recommendable to use Article 284 CriC as a blueprint for the definition of this (new) crime.

2.6.3. *Dealing with a legal anomaly: Article 284 versus Article 285a CriC*

One of the conclusions of this research is that it is not necessary to create a distinct offence of forced marriage. This leaves us with one anomaly that has not yet been dealt with: the divergence between Article 284 CriC and 285a CriC. In the majority of forced marriage cases, the offence of coercion (Article 284 CriC) will be applicable. It has been argued in Chapter 7 and above that Article 285a CriC may also apply in some cases. Article 284 CriC, with a maximum penalty of two years imprisonment, covers *all* forms of forced marriage (civil as well as religious); whereas Article 285a CriC, with a maximum penalty of four years imprisonment, only covers those cases where force was used to cause someone to enter into a *civil* marriage. This means that a forced civil marriage (if the prosecutor decides to charge Article 285a CriC) is threatened with a higher maximum penalty than a forced religious marriage, even though a forced religious marriage can cause similar harms as a forced civil marriage. Indeed, in certain communities a religious marriage binds the victim in similar, if not in more extreme ways than a civil marriage: in some communities, the religious marriage is seen as the ‘actual’ marriage.¹⁶⁰⁹

There are two solutions to this problem: amending Article 285a CriC so that it is no longer applicable to any form of forced marriage (i.e. exclude the Registrar as a public official within the meaning of Article 285a CriC), or equating the maximum penalties on Article 284 and 285a CriC. There is something to be said for both options. But amending Article 285a CriC so that it no longer covers the freedom to make a truthful statement in the presence of a Registrar could send the wrong message: it could be seen as ‘devaluing’ the act of forcing someone to enter into a civil marriage from a four-year offence to a two-year offence.¹⁶¹⁰

The latter option (i.e. equating the maximum penalties) begs the question of whether the maximum penalty of Article 285a CriC should be made equal to the

¹⁶⁰⁹ See e.g. Van der Leun & Leupen 2009, p. 28. In many cases, a (forced) religious marriage will (also) be linked with a (forced) civil marriage (it is reiterated that conducting a religious marriage between two people who have not yet entered into a civil marriage is a misdemeanour pursuant to Article 449 CriC), but it cannot be ruled out that a person is only forced to enter into a religious marriage (i.e. without also being forced to enter into a civil marriage). See Van der Leun & Leupen 2009.

¹⁶¹⁰ It is also interesting to note the following, without adding any value judgement to this observation: as explained in Chapter 7, the Marital Coercion (civil measures) Bill aims to amend the Civil Code in such a way that cousins who wish to marry each other must first make an official declaration of free consent in the presence of the Registrar. Currently, if parents were to force their child to make an untruthful statement, their behaviour could fall within the ambit of Article 285a CriC. If Article 285a CriC were to be amended so that it no longer covers the freedom to make a truthful statement in the presence of a Registrar, the parents’ behaviour would no longer be caught by this provision. Instead, it would be caught by Article 284 CriC.

maximum penalty of Article 284 CriC or vice versa. In other words: should the maximum penalty be lowered or raised? The scales seem to tip in favour of the latter: bringing the maximum penalty of Article 284 CriC on a par with that of Article 285a CriC. Increasing the maximum penalty on coercion from two to four years would not be disproportional. It goes without saying that there are many forms of coercion that are not worthy of a four-year prison sentence, but some might warrant more than the current maximum of two years imprisonment. Increasing the maximum penalty from two to four years gives the court a broader sentencing bandwidth: a court would be able to impose a prison sentence anywhere between one day and four years. An advantage of increasing the maximum penalty for Article 284 CriC would be that pursuant to Article 70(1) sub 3 CriC, the statute of limitations increases from six to twelve years, allowing an extra six years for cases of forced marriage (and marital captivity) to come to light.¹⁶¹¹

In this context, it is illustrative¹⁶¹² to note the length of the maximum penalties in other European countries – without using these examples as a decisive reason to increase the maximum penalty on coercion in the Netherlands. In England, the maximum penalty for forced marriage is seven years, in Norway it is six years, in Belgium it is five years (with a minimum of three months) and in Germany¹⁶¹³ it is also five years (with a minimum of six months).¹⁶¹⁴

3. THE CRIMINALISATION OF FORCED MARRIAGE AND THE ROME STATUTE

3.1. INTRODUCTION

This paragraph answers the question of whether and, if so, how forced marriage should be criminalised in the Rome Statute. The paragraph starts off by briefly recalling what forced marriages in conflict situations entail and which harms

¹⁶¹¹ Note that the Marital Coercion (criminal law) Act 2013 added Article 284 CriC to Article 67 CCriP as an offence which allows for pre-trial detention and several extra investigative powers (see Chapter 7, paragraph 3.1).

¹⁶¹² Most jurisdictions work with possibilities of early release. These schemes have not been taken into consideration. In England, for example, most prisoners serving a fixed-term sentence are eligible for release on a conditional licence after serving half of their sentence, which would mean that a maximum sentence of seven years for forced marriage would result in 3.5 years spent in prison (see section 237 *ff* Criminal Justice Act 2003). In the Netherlands, prisoners sentenced to more than two years imprisonment are eligible for conditional early release after serving two-thirds of their sentence (Article 15(2) CriC). A prisoner convicted of four years would therefore serve two years and eight months.

¹⁶¹³ In addition to the crime of forced marriage, the German Criminal Code also contains a crime of coercion comparable to the Dutch offence of coercion. In Germany, the maximum penalty for this offence is three years and in very severe cases five years (with a minimum of six months).

¹⁶¹⁴ Section 108(7)(b) ABCP Bill 2013; Article 222(2) Norwegian Criminal Code; Article 391 *sexies* Belgian Criminal Code and Article 237 Strafgesetzbuch, respectively.

they cause (paragraph 3.2). Subsequently, the criteria for criminalisation set out in Chapter 5 will be applied to the three core crimes (paragraphs 3.3–3.5).

It is important to reiterate that the Rome Statute, being a treaty, can be amended independently of the criminalisation criteria that are used below: any amendment can be adopted as long as it is supported by a two-thirds majority of states parties. The criteria distilled from the intra article criminalisation structure of the core crimes and the negotiation history of the Rome Statute represent the ideal situation: i.e. that new crimes against humanity, war crimes or forms of genocide are added to the Rome Statute only if they satisfy the criminalisation criteria applied below. In this sense, it is proffered that these criteria should be used as guidelines whenever amendments to the core crimes are suggested. It is also important to keep in mind that the Rome Statute, although influenced by ICTR and ICTY case law, is an independent system of criminal law in itself.¹⁶¹⁵ As a result, there are several differences with regard to the (interpretation of) elements of certain crimes by the *ad hoc* and internationalised courts on the one hand, and the ICC on the other hand. Where relevant, this will be addressed. Finally, special consideration must be given to the meaning of the legality principle in the Rome Statute, in particular the *lex stricta* norm: in accordance with Article 22(2) Rome Statute, the definitions of crimes discussed below will be strictly construed and will not be extended by analogy.

3.2. THE HARMS OF FORCED MARRIAGE IN CONFLICT SITUATIONS

3.2.1. Introduction

The act of forced marriage and its consequences are usually described as multiple wrongdoings. It can comprise a multitude of criminal acts, such as rape, enforced pregnancy and (sexual) slavery. Often, forced marriage is even conflated with these crimes. The SCSL, for example, struggled to distinguish between forced marriages on the one hand and sexual slavery on the other hand, and often confused the different harms caused by these two acts.¹⁶¹⁶ And the ICC Pre-Trial Chamber, in the decision on the confirmation of the charges in the case against Katanga, has held that forced marriage is a form of sexual slavery.¹⁶¹⁷ But in this research, the act of forced marriage is defined restrictively as the act of forcing

¹⁶¹⁵ G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', *Journal of International Criminal Justice* 2007–5, pp. 961–962.

¹⁶¹⁶ See Chapter 8, paragraphs 2.2.5 and 2.3.3. The AFRC Appeals Chamber, for example, held that the act of forcibly conferring the marital status upon another person is in itself grave enough to amount to a distinct other inhumane act. But the Chamber substantiated this claim by referring to bush wives becoming victims of rape, sexual violence, forced labour and deprivation of liberty (AFRC Appeal Judgement, para. 199). See also Toy-Cronin 2010, p. 583.

¹⁶¹⁷ *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 431.

someone to enter into a conjugal association. The focus is therefore on the harm caused by the forcible imposition of the marital status itself, which does not include any (subsequent) physical suffering as a result of, for example, rape or other forms of physical abuse.¹⁶¹⁸

As stated in paragraph 2 *supra*, forcing someone to enter into a marriage, taking away from that person the possibility to make the important life decision of whether, when and whom to marry, causes severe harm. In the context of a conflict, this harm manifests itself in different ways.

3.2.2. *Sierra Leone (as a blueprint for many other African conflicts)*¹⁶¹⁹

In her Dissenting Opinion to the AFRC Trial Judgement, Justice Doherty listed a set of harms that are often associated with or were caused by the forced marriages that took place within the specific context of the civil war in Sierra Leone.¹⁶²⁰ In many cases, she submits, the victims were very young and therefore vulnerable. Because they were abducted, taken away from their families, and placed in a violent, hostile environment, their vulnerability increased and they became completely dependent on their abductors.¹⁶²¹ After the trauma they suffered as a result of being abducted and having witnessed their relatives being slaughtered or maimed, the girls were forced to become bush wives to individual rebels. These women were forced to marry the enemy, the very men who participated in the attack on the civilian population of which the women themselves were members. Having to live with, be associated with, maintain an intimate relationship with, and be dependent on men they feared, sometimes even the very men who murdered their family or previously raped them, caused severe psychological suffering.¹⁶²² Yet in the bush, these marriages also saved women from further abuse and violence: girls who did not ‘belong’ to individual rebels as wives were at everyone’s (sexual) disposal, had to do more hard labour, had to find food for themselves, and were at greater risk of being sent to the front.¹⁶²³

As a result of being labelled ‘wife’, some women felt, for various reasons, that they were not able to exit the bush marriage and leave their rebel husband. Some were afraid to leave the marriage, still living in fear of their bush husbands, who

¹⁶¹⁸ The physical suffering is already covered by crimes such as rape and (sexual) enslavement.

¹⁶¹⁹ As has already been pointed out in Chapter 3, paragraph 6, the forced marriages that took (and still take) place in many of the conflicts that are under investigation or already on trial before the ICC, bear great resemblance to the Sierra Leonean bush marriages.

¹⁶²⁰ These harms were reiterated by the Prosecutor in his Appeal Brief in the AFRC case, see AFRC Prosecution Appeal Brief, paras. 625–626.

¹⁶²¹ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 47.

¹⁶²² AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 48; and AFRC Prosecution Appeal Brief, para. 620.

¹⁶²³ *Prosecutor vs. Brima, Kamara and Kanu (AFRC)*, Case No. SCSL-04–16-T, Prosecution Final Trial Brief, 6 December 2006, para. 1879; AFRC Expert report Bangura, p. 16; and Carlson & Mazurana 2008, p. 41.

kept them in captivity after the civil war for sexual and domestic purposes.¹⁶²⁴ Habituation was another reason for staying in the bush marriage; after spending years in the bush, from an early age onwards, many women did not know any better, they had grown accustomed to their lives in the bush, to their lives with their rebel husbands. Other women had nowhere else to go or stayed because of the children they had given birth to.¹⁶²⁵ And in some cases, women chose to stay with their bush husbands because they had been treated correctly by them during the war, or because they had grown to love them. Some even sought to formalise the bush marriage after the war.¹⁶²⁶

3.2.3. Cambodia

The Khmer Rouge marriages resulted in relatively less (sexual) violence than the Sierra Leonean bush marriages: often, both spouses were the victim of the forced marriage, although there were also cases where one of the spouses was abused by the other. The greatest harm caused by the marriages arranged by the Khmer Rouge is the fact that the label ‘marriage’ caused many people to feel compelled to remain in the association, thereby drastically and permanently disrupting people’s lives. As a result of their culture, for many, divorce or separation was not an option. So with their social engineering experiment, the Khmer Rouge took control of people’s lives.

In addition, the Khmer Rouge marriages caused specific cultural harm. For Cambodians, at least for the older generations, rituals form an important, indispensable part of life. The abolition and prohibition of traditional wedding rituals was a great source of distress for people wed under the Khmer Rouge. Not being able to make appeasement offerings to their ancestors and being wed to a person that was not carefully selected by their parents or a matchmaker could cause anxiety and (fear of) bad karma. Rituals such as fortune-telling are used to maximise luck and thereby invest in family harmony, which is considered one of the greatest goods to pursue in marriage.¹⁶²⁷ The absence of rituals caused stress with regard to the possible lack of harmony in the (forcibly) arranged marriages. Another source of anxiety was formed by the fact that *Angkar* often arranged marriages between complete strangers. In traditional Cambodian marriages it is, or at least was, not uncommon for bride and groom to meet for the first time on the wedding day: the partner was selected by the parents who often made sure that spouses had an equal social and educational status.¹⁶²⁸ *Angkar* had made no such careful selections. Even though at first, the CPK seemed intent to pair people with the same social standing – new people with new people, base people with

¹⁶²⁴ Save the Children 2007, p. 44.

¹⁶²⁵ AFRC Trial Judgement, Dissenting Opinion Justice Doherty, para. 45.

¹⁶²⁶ Coulter 2009, pp. 1–2; and McKay & Mazurana 2004, p. 56.

¹⁶²⁷ LeVine 2010, p. 32.

¹⁶²⁸ LeVine 2010, p. 84; Heuveline & Poch 2006, p. 101.

base people, soldiers with soldiers – this policy was soon abandoned and mixed marriages became the norm.¹⁶²⁹ Under the reign of the Khmer Rouge, keeping a low profile and lying about one's past increased chances of survival. Those who had been doctors or (family members of) employees of the overthrown Sihanouk government, had best conceal their past. This became more difficult when *Angkar* arranged for them to marry. Under *Angkar*, betrayal ran rampant, spies were everywhere and people were actively encouraged to report those who acted in a counterrevolutionary way. It is not surprising, therefore, that some people had a difficult time determining whether or not they could trust their spouse. Some were unable to do so and lived in fear of being betrayed: there are even reports of men and women who reported their spouse to *Angkar* as 'enemies'.¹⁶³⁰ This was often the case in mixed marriages between base and new persons. Especially people who had lied about their past had to be very careful, for fear of being exposed and having to suffer the consequences. Others, like the majority of LeVine's respondents, did not experience such trust and betrayal issues, but found in their spouse an ally, a companion and confidant.

3.2.4. *The specific harms of forced marriage in conflict situations*

In the previous two sub-paragraphs, (the harms of) forced marriages in two specific conflicts were described. This outline results in the following description of forced marriage in conflict situations in general. This description is consistent with the working definition of forced marriage that was formulated in Chapter 1. A forced marriage during a conflict consists of a perpetrator forcing someone to enter into a relationship, either with himself or with another person. This relationship is qualified as 'marriage', either by the perpetrator, the victim, the subculture of war and/or by the society at large. In many cases, perpetrators of forced marriages also cause the victims to stay in the association for a certain period of time. The forced conferral of the marital status has consequences for the relationship between the parties: the forced marriage creates certain exclusive obligations and/or rights between the spouses that do not exist between people who are not (forcibly) married. These rights and/or obligations often pertain to *inter alia* sexual exclusivity, either reciprocal or unilateral. The victim is bound to this forced association, by the very nature of the association: 'the term "marriage" serves (...) to bind the women/girls to their captors/"husbands" through the use of a label that has important social and cultural connotations'.¹⁶³¹ Marriage thus binds people (to each other) through social and cultural mores.¹⁶³² As a result, the

¹⁶²⁹ LeVine 2010, p. 84.

¹⁶³⁰ Ngor 1989, p. 293.

¹⁶³¹ K. Stout, 'What's in a name? The feasibility and desirability of naming forced marriage as a separate crime under international humanitarian law', *Dalhousie Journal of Legal Studies* (19) 2010, pp. 8–9.

¹⁶³² Scharf & Mattler 2004, p. 9.

label ‘marriage’ may cause people to feel compelled to remain in the association, long after the conflict has come to an end.¹⁶³³

As was considered by the ICTY Trial Chamber in the Čelebići case with regard to rape, a victim’s psychological suffering as a result of this crime may be exacerbated by social and cultural conditions.¹⁶³⁴ The same holds true for (other forms of gender-based violence, such as) forced marriage. This was also argued above in the context of national law: depending on the cultural environment in which a forced marriage takes place and in which its effects are felt, the specific harms and the intensity and duration of these harms suffered by victims can vary.¹⁶³⁵ In societies in which divorce is stigmatised, forced marriage may lead to extra stigma and harm to the victim. The same goes for (often patriarchal) societies that put great emphasis on and attach great value to the chastity and virginity of women.¹⁶³⁶ These societies/cultures often define women by their roles as wives and mothers.¹⁶³⁷ It is highly likely that there are differences in victims’ experiences of forced marriage in different conflicts and countries. These differences can be caused by ethnicity, religion, kinship and the ‘moral economy of sex and violence’. Wartime experiences, as Coulter argues, are tied to social and cultural contexts as well as to history.¹⁶³⁸ From this it follows that forced marriages (and the specific harms they cause) should be assessed in the context of the culture in which they occur.¹⁶³⁹

3.3. FORCED MARRIAGE AS A (DISTINCT) CRIME AGAINST HUMANITY

3.3.1. Introduction

The list of crimes against humanity in Article 7(1) Rome Statute is not exhaustive. Any inhumane act that causes great suffering, or serious injury to body or to mental or physical health, and is of a similar character to any other act referred to

¹⁶³³ Note that this description also reflects the forced marriages that take place outside of a conflict, such as the forced marriages that take place in the Netherlands.

¹⁶³⁴ Čelebići Trial Judgement, para. 495.

¹⁶³⁵ See also *Akayesu* Trial Judgement, para. 507, where the ICTR Trial Chamber regarded acts of sexual violence in the specific context of Rwanda, taking into account ‘the reasons for and the implications of these acts on the direct victims themselves and on the group with which they were associated’, see De Londras 2010, pp. 290–304.

¹⁶³⁶ Human Rights Watch, *The scars of death. Children Abducted by the Lord’s Resistance Army in Uganda*, September 1997, p. 50. For Sierra Leone, see Coulter 2009, p. 93.

¹⁶³⁷ Coulter 2009, pp. 73–74: In Sierra Leone, ‘(t)he hegemonic model of femininity (...) was one of being a wife and a mother.’

¹⁶³⁸ Coulter 2009, p. 16.

¹⁶³⁹ See also De Londras 2010, pp. 290–304.

in Article 7(1) Rome Statute can amount to a new crime against humanity.¹⁶⁴⁰ In order to answer the question of whether forced marriage amounts to a (distinct) crime against humanity, the following questions – as set out in Chapter 5 – must be addressed:

- 1a. Is the act of forcing someone to enter into a marriage subsumed under listed crimes against humanity? or
- 2a. Does this act cause great suffering or serious injury to body or to mental or physical health? and
- 2b. Is this act similar in nature and gravity to listed crimes against humanity?

3.3.2. *Internal subsidiarity: is forced marriage caught by listed crimes against humanity?*

3.3.2.1. Introduction

The first step that must be taken in order to answer the question of whether and, if so, how forced marriage should be criminalised within the scheme of the Rome Statute's crimes against humanity provision is to verify whether or not the act of forcing someone to enter into a marital(-like) association is already subsumed under listed crimes against humanity. This step voices the internal subsidiarity criterion.

Forced marriages can go hand in hand with a number of criminal offences, such as rape, sexual slavery, forced pregnancy, enforced prostitution, other forms of sexual violence, torture and deprivation of liberty. This is evidenced by the forced marriages that took place *inter alia* in Sierra Leone, Uganda, the DRC and Cambodia. The question that needs to be answered is whether (any of) the inhumane acts listed as crimes against humanity in the Rome Statute cover the specific act of forcing another person to enter into a conjugal association. Article 7 Rome Statute lists 18 (categories of) inhumane acts that amount to crimes against humanity when they are committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of this attack.¹⁶⁴¹ None of these crimes contain an element that is related to the conferral of marital status, but, as will be explained below, two crimes deserve specific attention: the inhumane acts of persecution and (sexual) enslavement.

¹⁶⁴⁰ Provided, of course that the other elements listed in the EoC are also met. This means that the perpetrator must have been aware of the factual circumstances that established the character of the act and that he must have acted with the required intent. In addition, the chapeau elements of crimes against humanity must be satisfied.

¹⁶⁴¹ Murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity, persecution, enforced disappearance, apartheid, other inhumane acts.

3.3.2.2. Forced marriage as a form of persecution

The offence of persecution requires that the perpetrator severely infringed upon the victim's basic rights and did so with a discriminatory intent, 'by reason of the identity of the group or collectivity'.¹⁶⁴² In addition to the chapeau requirements of crimes against humanity, the ICC EoC list the following elements of persecution:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.¹⁶⁴³

Persecution must result in a severe deprivation of fundamental rights. The right to enter into a marriage with full and genuine consent is enshrined in all important human rights instruments – most notably the UDHR, ICCPR, ICESCR, the Universal Islamic Declaration of Human Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa – and therefore qualifies as a fundamental right.¹⁶⁴⁴ Pursuant to the EoC and the definition in Article 7(2)(g) Rome Statute, persecution requires a link between persecutory acts and any crime within the jurisdiction of the Court. In other words, persecution must be committed in connection with another listed international crime.¹⁶⁴⁵ This means that forced marriage – even if it could not be classified as any of the listed inhumane acts or as an 'other inhumane act' – could be prosecuted as persecution, as long as the forced marriages were committed with the necessary discriminatory intent and in connection with any other international crime listed in Articles 6–8 Rome Statute. In cases of forced marriages, the perpetrator could have targeted the victims on any of the grounds listed in the third element of persecution. It is not unthinkable, for instance,

¹⁶⁴² Hall 2008, pp. 220 and 257; and Article 7(2)(g) Rome Statute.

¹⁶⁴³ Article 7(1)(h) EoC.

¹⁶⁴⁴ Other examples of acts which may amount to a severe deprivation of fundamental rights and thus to the crime against humanity of persecution are pogroms, exclusion from professions, restrictions on family life, obliging members of a certain group to wear a distinctive sign, seizure of assets and confiscation or destruction of private dwellings (Hall 2008, pp. 259–261).

¹⁶⁴⁵ Hall 2008, p. 221; and Von Hebel & Robinson 1999, pp. 100–101.

that forced marriages could amount to a form of gender-based persecution.¹⁶⁴⁶ For example: forced marriage committed with a discriminatory intent and in connection with enslavement could qualify as persecution. But forced marriage in itself does not amount to persecution.

3.3.2.3. Forced marriage as a form of enslavement¹⁶⁴⁷

Pursuant to Article 7(2)(c) Rome Statute, the quintessence of enslavement is ‘the exercise of any or all of the powers attaching to the right of ownership over a person.’ In this sub-paragraph it is argued that forced marriage in itself – so defined as the forcible conferral of marital status upon a person against that person’s will – does not amount to enslavement. It will be argued that a forced marriage may result in enslavement and may be used as a means to enslave, but forcing someone to enter into a conjugal relationship *sec* does not constitute (an exercise of) a power attaching to the right of ownership over that person.

The act of making someone enter into a conjugal association is not an exercise of a power attached to the right of ownership. From the drafting history of the EoC¹⁶⁴⁸ and the case law of the ICTY (most notably the *Kunarac et al.* case),¹⁶⁴⁹ the following powers attaching to the right of ownership can be distilled. First, acts which are linked with transfer and procurement of an individual: purchase, exchange, trade, sale, loan and barter. And secondly, acts which are linked to the ability to exploit an individual: exacting forced labour (without commensurate compensation) and/or forced sexual activity, as a result of the absolute control someone has over another. When any of these powers are exercised, the crime of (sexual) enslavement comes to the fore. The act of forcing someone to enter into a conjugal relationship is not part of this list. Powers attaching to the right of ownership refer to powers that would, when exercised over a thing, be considered as evidence of ownership. For example, possession – which is a power attached to the right of ownership – of a pencil amounts to ownership of that pencil; possession of a human being would also amount to a right of ownership,

¹⁶⁴⁶ Several countries, including the US, the UK and Canada, recognise forced marriage as a particular form of gender-based persecution, which can constitute a ground for asylum claims (Gill & Anitha 2011, p. 11).

¹⁶⁴⁷ For a detailed analysis of the parameters of enslavement and a discussion of the differences between forced marriage and enslavement, including the ways in which a forced marriage can result in enslavement, see Haenen 2013(II). This paragraph is based on that publication.

¹⁶⁴⁸ See *inter alia* V. Oosterveld, ‘Sexual slavery and the International Criminal Court: advancing international law’, 25 *Michigan Journal of International Law* (2004), p. 631; and *Discussion paper proposed by the Coordinator*, Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/1999/WGEC/RT.6 (10 August 1999), p. 2.

¹⁶⁴⁹ *Kunarac et al.* Trial Judgement, para. 543, listing the following factors that should be taken into consideration in determining whether enslavement was committed: ‘the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The (...) ability to buy, sell, trade or inherit a person or his or her labours or services (...) could be a relevant factor.’

but for the fact that ownership of a human being is illegal under modern day law.¹⁶⁵⁰ So in the case of enslavement, the relevant powers are those of the kind that attach to the right of ownership, were the legal status of slavery possible. The power to marry someone (against their will) is not such a power. Although forcing someone to marry can be seen as exercising control over an individual's autonomy, as a form of denying someone freedom of choice, that particular act *an sich* would not be serious enough to amount to slavery. Enslavement refers to the dominion over a human being. The crime of enslavement would be rendered meaningless if interpreted in such a broad manner as to encompass all exploitative social injustices or human rights violations.¹⁶⁵¹ The sole act of forcing someone to enter into a conjugal association is a serious violation of human rights and, depending on the circumstances, can have severe consequences for the victim, but the conferral of marital status *in itself* is not (an exercise of) a power attaching to the right of ownership and therefore does not constitute enslavement.¹⁶⁵²

A forced marriage can, however, *result* in enslavement.¹⁶⁵³ As is clearly demonstrated by the forced marriages that took place during the conflicts in *inter alia* Sierra Leone, DRC and Uganda, a forced marriage can very well lead to the exercise of powers attaching to the right of ownership. Forced marriages may, for example, result in sexual exploitation and/or domestic servitude.¹⁶⁵⁴ As the SCSL Trial Chamber stated: 'the use of the term "wife" by the rebels was deliberate and strategic, with the aim of *enslaving* and psychologically manipulating the women and with the purpose of treating them like *possessions*.'¹⁶⁵⁵ When a marriage results in the treatment of a person as chattel, this situation can be qualified as enslavement.¹⁶⁵⁶ In the words of Parrot and Cummings, when one or both of the

¹⁶⁵⁰ J. Allain, 'The Parameters of "Enslavement" in International Criminal Law', Paper presented at the International Symposium of the Research Centre for International Criminal Law and International Humanitarian Law of the China University of Political Science and Law (25–26 April 2009), p. 3.

¹⁶⁵¹ S. Miers, *Slavery in the twentieth century: the evolution of a global pattern* (Walnut Creek (CA): AltaMira Press 2003), at xiii and 453; and UNHCHR, *Abolishing slavery and its contemporary forms*, report prepared by D. Weissbrodt and Anti-Slavery International, New York 2002, p. 4.

¹⁶⁵² Article 1(c) of the 1956 Supplementary Slavery Convention on the Abolition of Slavery establishes a link between slavery and certain practices of forced marriage by regarding certain institutions and practices (such as wife inheritance) as similar to slavery. The situations listed in this provision refer to acts of sale, transfer and inheritance, three acts which constitute powers attaching to the right of ownership. In those cases in which a forced marriage is accompanied by the exercise of such powers, the act can be qualified as enslavement. The conferral of marital status itself is, as stated, not (an exercise of) a power attaching to the right of ownership.

¹⁶⁵³ In this regard, it is recognised that both a marriage that was entered into under duress, as well as a marriage that was contracted with the free and full consent of both spouses can (eventually) lead to the enslavement of one (or both) of the spouses. Although it may be presumed that a marriage that was entered into voluntarily but that resulted in the enslavement of one of the spouses, can no longer be said to be truly voluntary.

¹⁶⁵⁴ *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian*, UN Doc. A/HRC/15/20, 28 June 2010, para. 43.

¹⁶⁵⁵ RUF Trial Judgement, para. 1466 (emphasis added).

¹⁶⁵⁶ *Amnesty International, Preliminary comments concerning the elements of war crimes other than grave breaches of the Geneva Conventions provided for the second prepcom (26 July to 13 August*

spouses ‘has no agency, cannot leave, cannot refuse, and is often obligated to have sex on demand, it (the marriage; IH) is a form of sexual slavery.’¹⁶⁵⁷

The fact that a (forced) marriage can result in slavery is corroborated by remarks made by a group of Arab states during the negotiations on the Elements of Crimes. This group of states submitted a proposal in which they sought to limit the crime of enslavement (and sexual slavery) by adding a third element so that the offence would not extend to certain cultural practices: ‘Powers attaching to the right of ownership do not include rights, duties and obligations incident to marriage between a man and a woman.’¹⁶⁵⁸ These states thought that the law on crimes against humanity was too ambiguous and feared that it might be used ‘by activist judges not simply to deal with atrocities but as a tool of “social engineering.”’¹⁶⁵⁹ Some Arab states, whose laws make divorce more difficult for women than for men or whose laws reduce married women’s legal authority to act, feared that without a cultural exemption, these practices could amount to (sexual) slavery. The proposal was not widely supported, especially because most delegates found it inappropriate to include culturally specific exemptions in a document that was to reflect a basic law for all humanity. Moreover, many delegates believed this exemption could set an undesirable precedent that could also negatively impact human rights law.¹⁶⁶⁰ The exemption was therefore not included.

These examples illustrate that someone can exercise powers attaching to the right of ownership *by virtue of* a conjugal association. This is the case when a husband-wife relationship becomes a master-slave relationship. The marriage, in the broad sense (i.e. not the mere conferral of marital status), then qualifies as enslavement.

The fact that a marriage can result in slavery and that powers attaching to the right of ownership can be exercised by virtue of a conjugal association implies that forced marriage can also be used as a means to enslave.¹⁶⁶¹ During the negotiations on the ICC EoC, the delegates decided against including ‘recruitment’ and ‘abduction’ in the list of examples of powers attaching to the

1999), Preparatory Commission for the International Criminal Court, p. 11, available at <www.iccnw.org/documents/AIPreliminaryCommentsJuly99.pdf> (last accessed December 2013); and UN Commission on Human Rights: Contemporary forms of slavery 1998, paras. 8 and 30.

¹⁶⁵⁷ Parrot and Cummings 2008, pp. 57–58; and Judgement of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, 4 December 2001, para. 644: ‘Once the women were not free to leave, free to dictate the nature and terms of their services, or free to refuse services, they were enslaved.’

¹⁶⁵⁸ Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and the United Arab Emirates concerning the elements of crimes against humanity (UN Doc. PCNICC/1999/WGEC/DP. 39). Robinson 2001, p. 65.

¹⁶⁵⁹ Oosterveld 2007, pp. 636–637; and Robinson 2001, pp. 65.

¹⁶⁶¹ Voluntary marriage can also be used as a means to enslave. This can be the case in so-called lover boy practices: men seduce vulnerable girls and women, sometimes marrying them, and then force them into prostitution.

right of ownership as these acts do not describe directly an exercise of ownership over a person, but rather define the means of obtaining that person.¹⁶⁶² In a similar way, forced marriage can also be a means of obtaining control over a person. In Sierra Leone, for example, bush marriages were used as a way to establish a system of individualised enslavement. By calling a woman ‘wife’, a rebel would gain exclusive access to her sexuality and labour. The term ‘wife’ was used by rebels to enslave the women, to openly stake their claim of possession. Important in this regard is that customary law in some countries recognises the practice of wife ownership, which means a husband has complete control over his wife.¹⁶⁶³ If marriage results in wife ownership, a marriage is the necessary act to *enslave* someone. The ‘ownership’ over a woman or girl is transferred from her father to her husband by the act of marriage.¹⁶⁶⁴ In these cases, marriage, forced or not, is used as a means to enslave someone.

Summarising: (forced) marriages may very well *result* in (sexual) enslavement or slavery-like practices and they may be used as a means to enslave, but the act of forcing someone to enter into a marriage does not *in itself* amount to an exercise of a power attached to the right of ownership and therefore does not constitute enslavement.

Now that it has been established that the act of forcing someone to enter into a marital(-like) association is not completely caught by any of the inhumane acts enumerated in the Rome Statute, the question may be asked as to whether forced marriage could (and/or should) qualify as a new, separate crime against humanity.

3.3.3. Conclusion: forced marriage as a new, distinct crime against humanity?

3.3.3.1. Great suffering, or serious injury to body or to mental or physical health

International criminal law has a higher harm threshold than national criminal law. This difference was extensively discussed in Chapter 6. And indeed, the Elements of Crimes require an (other) inhumane act to have caused the victim *great* suffering, or *serious* injury to body or to mental or physical health. The internationalised courts and tribunals have held that the seriousness and gravity

¹⁶⁶² La Haye 2001, p. 191. Purchasing a person, for example, is a means of obtaining a person, but it also constitutes an exercise attaching to the right of ownership, as opposed to abduction and recruitment, which are means of obtaining only.

¹⁶⁶³ Amnesty International, *Uganda: ‘Breaking God’s commands’: the destruction of childhood by the Lord’s Resistance Army*, AFR 59/001/1997, 16 September 1997, p. 19; and T. Barton and G. Wamai, *Equity and vulnerability: A situation analysis of women, adolescents, and children in Uganda, 1994* (Kampala: Uganda National Council for Children 1994), p. 140.

¹⁶⁶⁴ Compare to the ancient Roman tradition of *cum manu* marriages: women ceased to be under the authority of their fathers (*patria potestas*) when they married. Upon marriage, a woman came under the autocratic power of her husband. In a *sine manu* marriage, the woman remained under the legal control of her father, even after marriage (Stone 2000, p. 208).

of a particular act must be examined on a case-by-case basis. Consideration must be given to all circumstances of the case, such as the context in which the act was committed, the nature of the act, the duration and/or any repetition of the act, the individual circumstances of the victim including age, gender and health as well as the physical, mental and moral effects the conduct had on the victim.¹⁶⁶⁵ These effects must have been seriously damaging, going beyond temporary unhappiness, but they need not necessarily be permanent.¹⁶⁶⁶

The harms caused by forcing someone to enter into a marriage, as described in paragraph 3.2 *supra* meet the thresholds of *great* suffering as well as *serious* injury to body or to mental or physical health. Forced marriages disrupt people's lives during the actual conflict, as well as (long) after the conflict has ended. Being forced to enter into a marriage or marital-like association can cause severe mental and moral anxiety. In Cambodia, where *Angkar* forced complete strangers to marry each other, the Khmer Rouge marriages greatly impacted (the rest of) the victims' lives as these associations caused many people to stay together up until this very day. As a result, the victims have been deprived of the chance to enter into a marriage of their own choosing. In this particular conflict, the 'enemy', in the form of the top CPK echelons, concocted the marriage policy and orchestrated forced marriages between civilians and in many cases both spouses could be considered to be victims; but in other conflicts, such as in Sierra Leone, Uganda and the DRC, victims are forced to marry the enemy. As the SCSL Prosecutor stated in his AFRC Appeal Brief:

‘the gravity of forced marriage is immeasurably enhanced where it is perpetrated as part of a widespread or systematic attack against a civilian population, against a member of the civilian population under attack. In this situation, the victim is held captive as the “wife” of one of the perpetrators of the attack against the civilian population of which she is a member.’¹⁶⁶⁷

This, in itself causes the victim great suffering. The ‘suffering’ element of ‘other inhumane acts’ can be informed by the interpretation of the war crime of wilfully causing great suffering or serious injury to body or health under Article 8(2)(a)(iii) of the Rome Statute.¹⁶⁶⁸ The ICTY has held that serious harm ‘results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’¹⁶⁶⁹ This is exactly what forced marriages cause. The act of forcing someone

¹⁶⁶⁵ See *inter alia* AFRC Trial Judgement, para. 699; RUF Trial Chamber, para. 169; *Kayishema* Trial Judgement, para. 151; and *Vasiljević* Appeal Judgement, para. 165. This was confirmed by the ICC Pre-Trial Chamber in *Katanga and Ngudjolo Chui* Decision on the confirmation of charges, para. 449.

¹⁶⁶⁶ *Krstić* Trial Judgement, para. 513.

¹⁶⁶⁷ AFRC Prosecution Appeal Brief, para. 620.

¹⁶⁶⁸ Cryer *et al.* 2010, p. 291. See also *infra* paragraph 3.4.2.2 on the war crime of wilfully causing great suffering.

¹⁶⁶⁹ *Krstić* Trial Judgement, para. 513.

to enter into a marriage or marital-like association against that person's will may thus cause great suffering and serious injury to mental health.

3.3.3.2. Similar in nature and gravity to other inhumane acts

It is important to emphasise, from the outset, that the ICC interprets the category of other inhumane acts in a different way than the internationalised courts and criminal tribunals. First, where the ICTY, ICTR and ECCC have held that a serious attack on human dignity may also qualify as an 'other inhumane act',¹⁶⁷⁰ the definition of 'other inhumane' acts enshrined in the Rome Statute and EoC does not include a serious attack on human dignity. Secondly, and most importantly, where the ICTY, ICTR, SCSL and ECCC only require an act to be of a gravity comparable to listed crimes against humanity,¹⁶⁷¹ the ICC (in accordance with the Rome Statute and EoC) also requires an act to be similar in *nature* to listed crimes against humanity. This has been formulated thus by the ICC Pre-Trial Chamber:

"The Chamber notes, however, that the Statute has given to "other inhumane acts" a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived "other inhumane acts" as a "catch all provision" leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action."¹⁶⁷²

A new crime against humanity must amount to an inhumane act that is of a character (i.e. of a gravity and nature) similar to any other act listed as a crime against humanity in the Rome Statute. As a result of this stricter test, it would appear that acts such as forced nudity, which the ICTR qualified as an 'other inhumane act', will not amount to an 'other inhumane act' in the context of the Rome Statute.¹⁶⁷³ According to the ICC Pre-Trial Chamber, causing severe physical injuries and killing and mutilating people in front of relatives are examples of acts that could amount to 'other inhumane acts'.¹⁶⁷⁴

¹⁶⁷⁰ See *inter alia* Jelisić Trial Judgement, para. 52; Kayishema Trial Judgement, para. 151; Duch Trial Judgement, para. 371; and Case 002 Closing Order, paras. 1442–1445.

¹⁶⁷¹ See e.g. Stanišić & Župljanin Trial Judgement, para. 82; Kayishema Trial Judgement, para. 151; Taylor Trial Judgement, para. 436; RUF Appeal Judgement, para. 735; Duch Trial Judgement, para. 367; and Case 002 Closing Order, paras. 1442–1445.

¹⁶⁷² Katanga and Ngudjolo Chui Decision on the confirmation of charges, para. 450.

¹⁶⁷³ It is also questionable whether forced nudity would qualify as an 'other form of sexual violence' pursuant to Article 7(1)(g) Rome Statute, seeing as this provision requires sexual violence to be of comparable gravity to rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation.

¹⁶⁷⁴ Muthaura, Kenyatta and Ali Decision on the Confirmation of Charges, para. 277.

When determining whether or not the act of forcing someone to enter into a marriage is of similar gravity and nature to crimes against humanity listed in Article 7 Rome Statute, it is important to take into consideration the legality principle as enshrined in Article 22 Rome Statute:

‘the (Pre-Trial; IH) Chamber opines that the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.’¹⁶⁷⁵

So is the act of forcing someone to enter into a marriage in itself of a similar nature and gravity as the acts listed in Article 7 Rome Statute? As was argued in Chapter 5, the ICC uses human rights law as a source for determining the scope of the clause ‘other inhumane acts’, but not every human rights violation constitutes an inhumane act. The acts listed as crimes against humanity in the Rome Statute concern violations of the right to life, bodily integrity and physical liberty. Is forcing someone to enter into a marriage, taking away the right to enter into a marriage with full consent, comparable to violations of these three legal goods? In itself, so without other offences being committed, this does not seem to be the case: a forced marriage in the strict sense is not comparable in nature to acts such as murder, rape, enslavement, torture and enforced sterilisation.

As will be explained in the next sub-paragraph, this will not result in any difficulties with the situations that are currently before the ICC.

3.3.3.3. Forced marriages taking place in conflicts currently before the ICC

The forced marriages that took (and take) place during the situations that are currently before the ICC, such as in Uganda, the DRC, Côte d’Ivoire, the Central African Republic and Uganda, bear many similarities with the Sierra Leonean bush marriages. In these situations, the offence of forced marriage is completely overshadowed by the crime of (sexual) enslavement. The Sierra Leonean rebels used the bush marriages as a means to enslave women and girls, forcing them to perform and be subject to acts that are traditionally associated with ‘wives’, most notably sexual intercourse. By virtue of these bush marriages, the rebels created their very own (sex) slaves. Within the bush, the label ‘bush wife’ provided women in some camps with a modicum of protection. In the majority of cases, the end of the civil war also meant the end of the bush marriages, as Sierra Leonean society did not regard these associations as valid marriages: they had not been negotiated or sanctioned by the family or the community and no dowry had been paid to the

¹⁶⁷⁵ *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, para. 269.

girl's family.¹⁶⁷⁶ The prefix 'bush' emphasises that the marriages that took place in the bush were regarded as illegitimate and not socially sanctioned.¹⁶⁷⁷ Many victims use conjugal terminology when they described what happened to them – they were 'taken as wives', they 'had to live with him as his wife' – while at the same time stating that these were 'not real marriages'.¹⁶⁷⁸

In this context, a comparison with the *Kunarac et al.* case mentioned above in paragraph 3.3.2.3 is illustrative. Kunarac and Kovač, commanders of the military police of the Bosnian Serb Army, took women from prison camps, locked them in houses, made them cook, wash and clean and raped them on a regular basis. In at least one instance, a girl was exclusively reserved for one of the perpetrators who forbade other soldiers to touch her.¹⁶⁷⁹ Although the enslavement of the women did not last several years (as did some of the bush marriages), but several months, up to half a year, the facts are very similar to the facts of the bush marriages. The only difference is that the Serb soldiers did not call their victims 'wives'. If they had done so, would this have changed the facts?

What was said above with regard to Sierra Leone also seems apply to Uganda, Côte d'Ivoire and other conflicts currently before the ICC.¹⁶⁸⁰ In the LRA camps, for example, unions between abductees and fighters were seen as a form of marriage, but Ugandan law and custom do not recognise them as legitimate marriages. Indeed, Amnesty International found that the LRA marriages are a twisted and extended form of customary patriarchal social settings in Uganda, which feature wife ownership (including the husband's exclusive sexual rights over his wife, meaning that marital rape is not recognised) and polygamy.¹⁶⁸¹

In this regard, it is interesting to note that in the DRC, in some cases, the word 'bush wife' is also used to refer to men who have suffered sexual abuse at the hands of other men: 'those men in the bush made you their wife'.¹⁶⁸² The word 'wife' is also used to refer to female rape victims. A farmer interviewed by Amnesty International in Darfur described how a young girl was abducted by the *Janjaweed* and then raped: 'More than six people used her as a wife'.¹⁶⁸³ Female rape victims also use this term to describe what happened to them. For example,

¹⁶⁷⁶ Coulter 2009, p. 220; and Scharf 2005, p. 81.

¹⁶⁷⁷ Coulter 2009, pp. 100–101 and Coulter 2008, pp. 55–56, footnote 2.

¹⁶⁷⁸ Van Gog 2008, pp. 64–65.

¹⁶⁷⁹ See *Kunarac* Trial Judgement, paras. 740 *et seqq.* and Chapter 3, paragraph 2.2. The Trial Chamber noted that: 'the girls were treated as personal property of the accused Kunarac and DP 6, they had to do household chores and they had to obey all demands' (*Kunarac et al.* Trial Judgement, para. 728).

¹⁶⁸⁰ Note that little is known about the forced marriages that have taken place in Kenya.

¹⁶⁸¹ Amnesty International 1997, p. 19.

¹⁶⁸² R. Dassié, 'Men on men rape cases in DR Congo: the ordeal of "bush wives"', *Afrik News* 13 August 2009 (available at <www.afrik-news.com/article16039.html> last accessed January 2014); and J. Gettleman, 'Symbol of Unhealed Congo: Male Rape Victims', *The New York Times* 4 August 2009 (available at <www.nytimes.com/2009/08/05/world/africa/05congo.html?em&_r=0> last accessed January 2014).

¹⁶⁸³ Amnesty International, *Sudan: Darfur: rape as a weapon of war: sexual violence and its consequences*, 18 July 2004, p. 12.

a Sierra Leonean girl interviewed by Denov and Maclure states that before she became the wife of an officer, she was raped daily: 'I was every man's wife.'¹⁶⁸⁴

Summarising: in those situations where forced marriages bear resemblance to the Sierra Leonean bush marriages, the ICC should follow the SCSL Trial Chamber in the Taylor case and classify these associations as instances of (sexual) enslavement. The accused in the different cases could be charged with enslavement, rape, and, where relevant, forced pregnancy. Depending on the particular circumstances of the case, forcible transfer, torture, persecution and deprivation of liberty could also be charged.

3.3.3.4. Forced marriages comparable to Khmer Rouge marriages

Even though forced marriages occur in many conflicts, the factual situation, the reality of the act, may differ from one situation to another. This was demonstrated by the comparison between the Sierra Leonean bush marriages and the Khmer Rouge marriages. The forced marriages that took place during the situations that are currently before the ICC are comparable to the former. But what if the ICC is ever faced with forced marriages that are similar to the ones that took place in Cambodia?

Before turning to the ICC, let us first look at the ECCC. There is reason to believe that the forced marriages organised by the Khmer Rouge could qualify as other inhumane acts within the regime of the ECCC. The ECCC does not require an 'other inhumane act' to be similar in nature to listed crimes against humanity; the only requirement is that such acts are comparable in gravity.¹⁶⁸⁵ In addition, the ECCC has held that violations of personal dignity may also qualify as 'other inhumane acts'. In Cambodia, tens of thousands of people were forced to enter into marriages arranged by *Angkar*. Most of these marriages did not result in a master-slave relationship between the husband and the wife, yet they did profoundly affect people's lives and they caused grave mental and moral harm to the victims. This form of social engineering conducted by the Khmer Rouge violated people's psychological liberty and altered the course of their lives. As the Co-Investigating Judges stated in the Closing Order of Case 002, by being forced to enter into a conjugal relationship, the 'victims endured mental suffering of a degree of gravity comparable to that of other crimes against humanity.'¹⁶⁸⁶

What if a similar situation came before the ICC? It seems that these particular instances of forced marriage, using the criteria applied above, would not qualify as 'other inhumane acts' either. Forcing someone to enter into a marriage is not similar in nature to the listed crimes against humanity. As stated by the ICC Pre-Trial Chamber and cited above, the category of 'other inhumane acts' has

¹⁶⁸⁴ Denov & Maclure 2006, p. 77.

¹⁶⁸⁵ The ECCC Law lists eight specific inhumane acts: murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecution (Article 5 ECCC Law).

¹⁶⁸⁶ Case 002 Closing Order, paras. 1442–1443.

been given a different, more restrictive scope in the context of the Rome Statute than, for example, in the Statutes of the ICTR and the ECCC. The ICC Pre-Trial Chamber has pointed out that the clause ‘must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.’¹⁶⁸⁷ The extra requirement that acts are comparable in nature to listed inhumane acts prevents such uncritical expansion. This is in line with the ICC’s stricter application of the legality principle.¹⁶⁸⁸ Applying the elements of ‘other inhumane acts’ as enshrined in the Rome Statute and EoC in accordance with the way in which they are interpreted by the Pre-Trial Chamber results in the outcome that a forced marriage in itself is not similar in nature to other inhumane acts.

It was explained above that in the majority of cases, forced marriages that take place during conflict situations will result in some form of enslavement.¹⁶⁸⁹ The forced marriages that took place in Cambodia in the 1970s do not appear to be an exception to this rule. The main difference between the Sierra Leone ‘type’ forced marriages and the Khmer Rouge marriages is that the former are used as a means of individual enslavement, whereas the latter were part of a scheme of collective enslavement. In Cambodia, the government – not individual rebels – enslaved people. The CPK evacuated cities and villages and relocated civilians to communities where they were forced to perform hard labour in work units. People’s entire lives were controlled by *Angkar* and collective labour, collective dining and in some cases even collective motherhood were used to demonstrate that the work unit had replaced the family as the basic social unit. *Angkar* had taken the role of mother and father and Pol Pot had become everyone’s eldest brother (‘Brother Number One’). Calling to mind once again the indicia of enslavement delineated by the ICTY Trial Chamber and confirmed by the Appeal Chamber in the *Kunarac et al.* case, it is clear that the entire complex of acts committed by *Angkar* amounted to enslavement:

‘the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.’¹⁶⁹⁰

Angkar used the marriage policy to gain even more control over the citizens. Forced arranged marriages were strategically used to deliberately undermine the traditional family and to replace the traditional family and kinship bonds with loyalty to *Angkar*. Through the marriages, the Khmer Rouge gained control over

¹⁶⁸⁷ *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, para. 269.

¹⁶⁸⁸ Stricter in comparison with the other international(ised) criminal courts and tribunals (see also Chapter 5, paragraph 3.3.2 and Chapter 6, paragraph 6).

¹⁶⁸⁹ As was demonstrated in Chapter 2, paragraph 2.5, forced marriages that take place in times of peace can also result in enslavement.

¹⁶⁹⁰ *Kunarac et al.* Trial Judgement, para. 543.

people's sexuality and reproductive functions and asserted their loyalty, seeing as they had to pledge allegiance to *Angkar* during the wedding ceremony. The Khmer Rouge marriages resulted in a serious violation of psychological liberty and a severe negation of personal autonomy, which demonstrated *Angkar*'s ability to exercise powers attaching to the right of ownership.

3.4. FORCED MARRIAGE AS A (DISTINCT) WAR CRIME

3.4.1. Introduction

War crimes are breaches of the international law of armed conflict that are regarded as so serious that they entail individual criminal responsibility.¹⁶⁹¹ In order to determine whether or not the act of forcing someone to enter into a marriage could amount to a war crime in the context of the Rome Statute, the following issues will be addressed in this paragraph:

1. Is the act of forcing someone to enter into a marriage subsumed under serious violations of customary international law that are listed in the Rome Statute? or
2. Does the conduct amount to a war crime which is not codified in the Rome Statute:
 - a. Is the conduct considered to be a breach of a rule of customary international humanitarian law; and
 - b. Can the violation be qualified as 'serious'; and
 - c. Does the breach give rise to individual criminal responsibility under customary international law?¹⁶⁹²

3.4.2. Internal subsidiarity: is forced marriage caught by listed war crimes?

3.4.2.1. Introduction

Article 8 Rome Statute contains an extensive catalogue of war crimes. Cassese divided them into six categories. First, acts which are committed against persons taking no active part, or no longer taking active part, in the hostilities. This category protects civilians and members of armed forces who have laid down their arms or are sick or wounded (i.e. those placed *hors de combat*). Secondly and thirdly, acts committed against enemy combatants or civilians involving the use of prohibited methods or prohibited means (i.e. weapons) of warfare. The fourth class of war crimes pertains to acts committed against specially protected persons

¹⁶⁹¹ Boas, Bischoff & Reid 2009, p. 215.

¹⁶⁹² See Chapter 5, paragraph 5 for a detailed description of the war crimes framework.

and objects (such as medical personnel and their transport). Crimes which involve the improper use of signs and emblems comprise the fifth category and finally, the use of child soldiers forms the sixth category of war crimes.¹⁶⁹³ With regard to the act of forcing someone to enter into a marriage, the first category of acts is of particular relevance.

As has already been stated several times, forced marriages can be accompanied by and result in a host of criminal offences enumerated as war crimes, such as sexual slavery, torture and child soldiering.^{1694, 1695} Five war crimes listed in Article 8 Rome Statute are of particular importance with regard to the act of forcing someone to enter into a marital(-like) association: 1) inhuman treatment and 2) wilfully causing great suffering (two grave breaches of the Geneva Conventions); 3) committing outrages upon personal dignity (both as a serious violation of the laws and 4) customs applicable in international armed conflict and as a serious violation of Article 3 common to the Geneva Conventions); and 5) cruel treatment as a form of violence to life and person (a serious violation of Article 3 common to the Geneva Conventions).

3.4.2.2. The war crimes of inhuman treatment, cruel treatment and wilfully causing great suffering

The war crimes of inhuman treatment (Article 8(2)(a)(ii) Rome Statute) and cruel treatment (Article 8(2)(c)(i) Rome Statute) 'function as subcategories or residual provisions covering a range of potentially criminal conduct'.¹⁶⁹⁶ Within the system of the Rome Statute, they require similar type of conduct, namely that 'the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons'.¹⁶⁹⁷ The same could be said for the war crime of wilfully causing great suffering (Article 8(2)(a)(iii) Rome Statute), requiring that 'the perpetrator caused

¹⁶⁹³ Cassese 2008, pp. 88–92.

¹⁶⁹⁴ See Chapter 3, paragraphs 3.5 and 6.3.1 on the similarities between forced marriage and child soldiering.

¹⁶⁹⁵ Note that the SCSL has held that forced marriages were committed with the specific intent to terrorise the Sierra Leonean civilian population and break family and social bonds, and therefore amounted to an act of terror (see Chapter 8, paragraph 2.3.1; and RUF Trial Judgement, paras. 1349, 1352 and 1365). The Rome Statute, unlike the SCSL Statute, does not contain a war crime relating to acts of terror(ism).

¹⁶⁹⁶ Boas, Bischoff & Reid 2009, p. 272. The ICTY and SCSL have also held that the notions of 'cruel' in the context of the war crime of 'cruel treatment' and 'inhumane' in the context of crimes against humanity have the same legal meaning. See e.g. AFRC Appeal Brief of the Prosecution, para. 610; *Jelisić* Trial Judgement, para. 52; *Vasiljević* Trial Judgement, para. 234; and *Gotovina* Trial Judgement, para. 1791. See also I. Erdei, 'Cumulative convictions in international criminal law: reconsiderations of a seemingly settled issue', *Suffolk Transnational Law Review* (34) 2011, p. 332.

¹⁶⁹⁷ Article 8(2)(a)(ii) Rome Statute and Article 8 (2)(c)(i)-3 EoC. The only difference between these two war crimes is that inhuman treatment (a grave breach of the Geneva Conventions) requires that the victims were protected under one or more of the Geneva Conventions of 1949 (international conflict); whereas cruel treatment (a serious violation of Article 3 common to the Geneva Conventions) requires that the victims were either *hors de combat*, or were

great physical or mental pain or suffering to one or more persons'.¹⁶⁹⁸ The only difference between the three war crimes with regard to the *actus reus* element is the adjective used to qualify the pain and suffering: the first two war crimes (inhuman treatment and cruel treatment) use the adjective 'severe', the third uses the adjective 'great' (which is the same adjective used by the elements of 'other inhumane acts', see *supra* paragraph 3.3.3.1). What distinguishes the crimes against humanity category of 'other inhumane acts' from these three war crimes – apart from the differences in the chapeau elements – is that 'other inhumane acts' incorporate an *eiusdem generis* standard of interpretation, requiring acts to be similar in gravity and (most notably) nature to listed crimes against humanity. The three war crimes lack this requirement.¹⁶⁹⁹

As was established above (paragraph 3.2), forcing people to enter into marriages can cause mental suffering that can be qualified as grave. This means that in those cases where a forced marriage does result in severe c.q. great mental suffering it may qualify as inhuman or cruel treatment or be an instance of wilfully causing great suffering, and thus amount to a war crime. Obviously, the other elements of the respective war crimes will also have to be satisfied, such as the requirement that the victims belonged to a certain protected group of people (e.g. that they were *hors de combat* or civilians). The forced marriages must also have taken place in the context of and must have been associated with an armed conflict. See for example the RUF Trial Judgement, where the SCSL held that the RUF used forced marriages as both a tactic of war and a means of obtaining unpaid logistical support for troops.¹⁷⁰⁰

3.4.2.3. The war crime of committing outrages upon personal dignity

The war crime of committing outrages upon personal dignity (Article 8(2)(b)(xxi) and (c)(ii) Rome Statute) requires that the perpetrator humiliated, degraded or otherwise violated the dignity of the victim(s). The severity of the humiliation, degradation or other violation must have been of such a degree as to be generally recognised as an outrage upon personal dignity.¹⁷⁰¹ In a footnote, the Elements of Crimes add that in the assessment of the severity of this humiliation, relevant aspects of the cultural background of the victims are to be taken into account.¹⁷⁰²

civilians, medical personnel, or religious personnel taking no active part in the hostilities (non-international armed conflict).

¹⁶⁹⁸ Article 8(2)(a)(iii) EoC. In addition, the victims must have been protected under one or more of the Geneva Conventions of 1949 and the perpetrator must have been aware of the factual circumstances that established that protected status.

¹⁶⁹⁹ It appears that the ICTY does, on occasion, use the requirement that 'the occurrence of an act or omission (is; IH) of similar seriousness to the other enumerated acts under (the ICTY war crimes provision; IH)' (see *Vasiljević* Trial Judgement, para. 234).

¹⁷⁰⁰ RUF Trial Judgement, para. 2107.

¹⁷⁰¹ Article 8(2)(b)(xxi) EoC.

¹⁷⁰² EoC footnote 49.

Examples of acts that have been qualified as outrages upon personal dignity by the *ad hoc* tribunals are using detainees as human shields, forced incest, burying corpses in latrine pits and leaving infants without care after killing their guardians.¹⁷⁰³

Forcing people to enter into marriages, often with a complete stranger – whether one spouse is the victim and the other the perpetrator or whether both spouses can be considered to be victims – and often also causing that person to remain in that conjugal association, may amount to an outrage upon personal dignity, especially when taking into consideration relevant aspects of the cultural background of the victims. For example, the SCSL has held that the bush marriages that took place during the civil war in Sierra Leone constituted ‘a severe humiliation, degradation and violation of the dignity of the victims’ and thus constituted the war crime of outrages upon personal dignity.¹⁷⁰⁴ In this respect, the Trial Chamber considered that:

‘Due to the social stigma attached to them by virtue of their former status as “bush wives” and the effects of the prolonged forced conjugal relationships to which they were subjected, these women and girls were too ashamed or too afraid to return to their communities after the conflict. Accordingly, many victims were displaced from their home towns and support networks.’¹⁷⁰⁵

The previous two sub-paragraphs demonstrate in which ways forced marriages can fall within the ambit of four general classes of war crimes, but the act itself, i.e forcing someone to enter into a marital(-like) association, is not listed as a war crime. In other words: forced marriage is materially distinct from the listed war crimes. Therefore, the question may be asked as to whether forced marriage could be added to the Rome Statute as a distinct war crime. This question is answered in the following sub-paragraph.

3.4.3. *Conclusion: forced marriage as a new, distinct war crime?*

For forced marriage to be recognised as a separate war crime, it must first be established that this particular practice is considered to be a violation of a rule of customary international humanitarian law (IHL).¹⁷⁰⁶ The question of which rules are part of customary law can prove to be challenging. However, with regard to IHL, the following can be said with relative certainty: the 1907 Hague Regulations Respecting the Laws and Customs of War on Land (annex to Hague Convention IV) and the four 1949 Geneva Conventions and many of the provisions of

¹⁷⁰³ For an overview of the relevant case law, see Boas, Bischoff & Reid 2009, p. 278.

¹⁷⁰⁴ RUF Trial Judgement, paras. 1298 and 1301.

¹⁷⁰⁵ RUF Trial Judgement, para. 1474 and *Taylor* Trial Judgement, para. 432.

¹⁷⁰⁶ For a discussion on the relevance of the status of a crime under customary international law in the context of the Rome Statute, see Chapter 5, paragraph 5.2.

Additional Protocol II are regarded as part of customary law.¹⁷⁰⁷ In determining which other rules of IHL are currently part of customary law, international courts and tribunals have used two studies undertaken by the ICRC in 2005 and 2011.^{1708, 1709}

The act of forcing someone to enter into a marriage does not feature in any of these documents.¹⁷¹⁰ Forced marriage unquestionably constitutes a serious violation of fundamental human rights. But even though the Vienna Declaration and Programme of Action states that ‘violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law’,¹⁷¹¹ stating that forced marriage, at this point in time, is considered to be a violation of *customary* IHL, or, what is more, a violation of customary IHL that entails individual criminal responsibility, would be a bridge too far. This would mean that, according to the three-pronged test, which was set out in the *Tadić* case and was used by the drafters of the Rome Statute, forced marriage could not qualify as a separate war crime.

It may very well be that the final chapter on the recognition of forced marriage as a distinct war crime has not yet been written. In this respect, it is interesting to draw parallels with the offence of forced pregnancy. Like forced marriage, forced pregnancy is not explicitly mentioned in the IHL documents mentioned above, but it was nevertheless included in the Rome Statute as a war crime and crime against humanity. As a result of the forced pregnancies that took place during the wars in the former Yugoslavia, several UN documents – most notably the Vienna Declaration and Programme of Action and the Beijing Platform for Action – articulated the need for an effective response to this practice.¹⁷¹² The UN Commission on Human Rights had also, on several occasions, stated that forced pregnancy is among the gravest violations of humanitarian and human rights law.¹⁷¹³ Because the offence had received certain international recognition,

¹⁷⁰⁷ Cryer *et al.* 2010, pp. 267 and 269; Boas, Bischoff & Reid 2009, p. 261; Shaw 2008, pp. 1168 and 1170; and Von Hebel & Robinson 1999, p. 104.

¹⁷⁰⁸ J.M. Heckaerts & L. Doswald-Beck, *Customary International Humanitarian Law. Volume I and II*, Cambridge: CUP 2005; and F. Kalshoven & L. Zegveld, *Constraints on the waging of war: an introduction to international humanitarian law*, Cambridge: CUP 2011.

¹⁷⁰⁹ Meron 2005, p. 833. E.g. *Hadžihasanović* Appeal of Decision on Acquittal, 11 March 2005, paras. 29–30; and RUF Trial Judgement, para. 216.

¹⁷¹⁰ I.e. Hague Conventions, Geneva Conventions, Additional Protocols I and II, and the 2005 and 2011 ICRC reports.

¹⁷¹¹ Vienna Declaration and Programme of Action, para. 38.

¹⁷¹² The Vienna Declaration is an important human rights declaration adopted at the World Conference on Human Rights in 1993 (this declaration also created the post of UN High Commissioner for Human Rights); the Beijing Platform for Action was adopted during the Fourth World Conference on Women in 1995 organised by the UN.

¹⁷¹³ For an overview of relevant documents and resolutions, see J.M. Heckaerts & L. Doswald-Beck, *Customary International Humanitarian Law. Volume I*, Cambridge: CUP 2005, p. 2208.

the drafters of the Rome Statute felt that incorporating forced pregnancy as a war crime in the Rome Statute was justified.¹⁷¹⁴

During the past decade, similar developments have taken place with regard to the way in which conflict-related forced marriage is regarded. Since at least 1996, forced marriage has been documented as a form of violence often committed in conflict situations,¹⁷¹⁵ but the practice has really started to gain international attention ever since it was charged as a crime against humanity and war crime before the SCSL. Yet it is very important to emphasise that in these NGO and UN documents, the practice of forced marriage is often conflated with sexual enslavement.¹⁷¹⁶ In this context, forced marriage (as a form of sexual slavery) has also been referred to as a tactic of war and a tool that is used to win and maintain authority over civilians in occupied territories.¹⁷¹⁷ In a similar manner, the SCSL, when recognising forced marriage as an outrage upon personal dignity, conflated the practices of sexual slavery and forced marriage.¹⁷¹⁸ The focus, therefore, is mostly on sexual slavery or enslavement that is the result of forced marriages during conflicts and not on forced marriages as such (as a violation of a rule of (customary) IHL).

The conclusion is therefore as follows: at this point, it cannot be said that forcing someone to enter into a marital(-like) association as such constitutes a violation of customary IHL that entails individual criminal responsibility. The general clauses in the war crimes provision can be used to prosecute forced marriages, so creating a *specific* war crime of forcing someone to enter into a marriage is not necessary in the sense that there is no lacuna in the law.

Why does a forced marriage, in principle, not amount to a crime against humanity (an ‘other inhumane act’) but why may it, under certain circumstances, amount to a war crime (e.g. ‘wilfully causing great suffering’)? This divergence is

¹⁷¹⁴ La Haye 2001, p. 185.

¹⁷¹⁵ See specifically Human Rights Watch 1996 on the forced marriages that took place during the Rwandan genocide. Human Rights Watch qualifies these forced marriages as instances of individual sexual slavery.

¹⁷¹⁶ In a thematic report on servile marriages, for example, the Special Rapporteur on contemporary forms of slavery noted that forced marriages (especially resulting in servitude) increase during times of conflict (see *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian. Thematic report on servile marriage*, 10 July 2012, UN Doc. A/HRC/21/41, p. 11). See also *inter alia* UN Commission on Human Rights: Report of the Special Rapporteur on violence against women its causes and consequences 1998, paras. 17 and 36; and UN Commission on Human Rights: Contemporary forms of slavery 1998, para. 30: ‘Sexual slavery also encompasses situations where women and girls are forced into “marriage”.’ And: *Sexual violence in conflict. Report of the Secretary-General*, 14 March 2013, UN Doc. S/2013/149, pp. 2–5, 12–15, 19–20 and 30.

¹⁷¹⁷ RUF Trial Judgement, paras. 1298 and 1301 K.K. Paterson, Mali conflict is latest to employ forced marriage as tool of war, 4 June 2013 available at <www.womenunder siegeproject.org/blog/entry/mali-conflict-is-latest-to-employ-forced-marriage-as-tool-of-war> (last accessed December 2013); and <<http://unu.edu/publications/articles/sexual-violence-in-the-democratic-republic-of-the-congo.html>> (last accessed December 2013).

¹⁷¹⁸ AFRC Trial Judgement, paras. 1105, 1114, 1126, 1130, 1141, 1159, 1165, 1169, 1183 and 1185. See also Chapter 8, paragraph 2.2.1.

in line with the differences between war crimes and crimes against humanity: crimes against humanity only deal with those acts that can be qualified as *inhuman*, whereas war crimes were drafted as a result of the desire to ensure that in conflict situations at least some elementary principles and values are respected (see Chapter 5, paragraph 3.4). War crimes, therefore, also deal with offences that are less serious in comparison with crimes against humanity, such as intentionally directing attacks against installations or material involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations (Article 8(2)(b)(iii) Rome Statute) and seizing the property of an adversary unless such seizure is imperatively demanded by the necessities of the conflict (Article 8(2)(e)(xii) Rome Statute).

3.5. FORCED MARRIAGE AS A (DISTINCT) GENOCIDAL ACT

3.5.1. Introduction

In Chapter 5 it was argued that any new genocidal act should be added to the definition of genocide in the Rome Statute on the basis of an *eiusdem generis* standard: only those acts that are comparable in gravity and in nature to enumerated genocidal acts are eligible for inclusion in the definition of genocide. Coupled with the criterion of internal subsidiarity, this results in the following steps:

- 1a. Is this act subsumed under listed genocidal acts? or
- 2a. Is the act of such a nature that it may (ultimately) result in the destruction of (part of) a group of people? and
- 2b. Is the gravity of this act comparable to the listed genocidal acts (*eiusdem generis*)?

3.5.2. Internal subsidiarity: is forced marriage caught by listed genocidal acts?

Genocide, ultimately, is about the intention to destroy (a part of) a group of people. To this end, the definition of genocide lists broad, inclusive categories of genocidal acts, which may encompass a plurality of acts. If particular conduct falls within the scope of any of the listed genocidal acts and was committed with the required intent, it qualifies as an act of genocide. With regard to forced marriage, two of the five genocidal acts listed in Article 6 Rome Statute are of particular

relevance.¹⁷¹⁹ Depending on the particular circumstances of the case, (a policy of) forced marriages could come within the parameters of these two categories.

First, forced marriages can cause serious mental harm to members of a group.¹⁷²⁰ This is clearly evidenced by the examples of the bush marriages and especially the Khmer Rouge marriages (see *supra* paragraph 3.2). It is important to emphasise that the perpetrators must have had the intention to inflict this serious mental harm ‘in pursuit of the specific intention to destroy a group in whole or in part.’¹⁷²¹ In other words: the people orchestrating the forced marriages must have forced people from a certain group to enter into marriages – thereby causing them serious mental harm – with the specific aim of ultimately destroying this particular group. This was not the case in the situations studied in this book, but it could happen in a different context. It is difficult to imagine that the mental harm specifically caused by the practice of forced marriage is intended, by the perpetrators, to (ultimately) destroy a particular group, yet it cannot be ruled out that this mental harm eventually may contribute to the destruction of the group, for example because people lose desire to live.

Secondly, and most importantly, the category of ‘measures intended to prevent births within a group’ must be mentioned. This category of acts refers to instances of biological genocide. The ICTR has held that imposing measures to prevent births within a group includes acts such as enforced sterilisation, sexual mutilation, forced birth control, forced separation of the sexes, and (notably) prohibition of marriages.¹⁷²² In the situations that were studied in this book, the forced marriage policies were not used in this sense. Indeed, in Cambodia, the Khmer Rouge used forced marriages as a means to try to *stimulate* births within the entire group of the Cambodian population. In Sierra Leone, there was no indication that rebels forced women and girls into marriages with the intention of preventing births within a particular group. Yet forced marriages could very well be used as a means to prevent births within a group, particularly in conflicts where

¹⁷¹⁹ See also C. O’Sullivan, ‘Dying for the bonds of marriage’, *Hastings Women’s Law Journal* (22) 2011, p. 290. But note that O’Sullivan mainly focuses on the underlying offences that are committed in forced marriages and the consequences of these offences, such as enforced pregnancy and transmission of HIV through rape. She does not look in depth at the forced conjugal association in itself. She reaches the conclusion that forced marriage could potentially satisfy all five listed genocidal acts.

¹⁷²⁰ Severe beatings, sexual violence, torture and forcible displacement have been listed in the case law of the ICTY and ICTR as examples of the genocidal act of causing serious bodily or mental harm to members of the group. See Boas, Bischoff & Reid 2009, p. 182 and *inter alia Akayesu Trial Judgement*, para. 507.

¹⁷²¹ *Kayishema Trial Judgement*, para. 112 (emphasis added).

¹⁷²² *Akayesu Trial Judgement*, para. 507; and *Musema Trial Judgement*, para. 158. For example, during the genocide in Rwanda (which is a patriarchal society, where membership of a group is determined by the identity of the father), Tutsi women who had been raped by Hutu men gave birth to Hutu children and were thus prevented from giving birth to children of their own ethnicity (*Akayesu Trial Judgement*, para. 507). Forced abortions are also caught by this category, see The Secretary-General, *Draft Convention on the Crime of Genocide*, 25, delivered to the Economic and Social Council, UN Doc. E/447 (June 26, 1947).

different national, ethnical, racial or religious groups fight each other. Especially in a patriarchal society, where the group membership of a child is determined by the identity of the father, one group (A) could force women of the other group (B) to marry their men. Any children born in these marriages would belong to group A and not B. By forcing women into marriages, they would be prevented from having children with men from their own group. In this sense, forced marriage can amount to a measure which is intended to prevent births within a group and thus a genocidal act. As held by the ICTR, making women culturally unable to procreate, which may be achieved by forcing them into marriages, can amount to a measure that is intended to prevent births within a group.¹⁷²³

The act of forcing someone to enter into a marriage may therefore – depending on the circumstances – amount to an implicit form of genocide via the two genocidal acts described above.¹⁷²⁴

3.5.3. *Conclusion: forced marriage as a new, distinct genocidal act?*

The definition of genocide as enshrined in the Rome Statute is part of customary international law. Theoretically, this definition could be amended in the Rome Statute, but the question may be asked whether new, very specific offences (such as forced marriage) should be added to the definition. In the author's opinion this should not be done: forced marriage should not be included in the Rome Statute as a distinct genocidal act. The most important reason is that there is no need to do so: the act of forced marriage is already caught by listed genocidal acts (internal subsidiarity). A (policy of) forced marriage can result in the destruction of (part of) a group in the two ways described in the previous paragraph, most notably as a measure which is intended to prevent births within that group. Consequently, there is no lacuna in the law that necessitates the creation of a new genocidal act of forced marriage. Also, it appears that a forced marriage in itself would never be an act that can result in the destruction of a group of people. A forced marriage could be means to commit a genocidal act; it is not a genocidal act in itself. For example, perpetrators would use forced marriage as a measure to prevent births within a group. Preventing births is what can ultimately result in the destruction of a group; forcing people into marriages cannot. In addition, creating such a new, specific act would be contrary to the system and methodology of Article 6 Rome Statute. Because the (ultimate) destruction of groups of people can be achieved in innumerable ways, the definition of genocide uses broad, generic categories of genocidal acts, instead of listing specific acts (such as crimes against

¹⁷²³ *Akayesu* Trial Judgement, para. 507.

¹⁷²⁴ Compare with regard to forced pregnancy: Soh Sie Eng Jessie, 'Forced pregnancy: codification in the Rome Statute and its prospect as implicit genocide' *New Zealand Journal of Public and International Law* (4) 2006, pp. 311–337.

humanity).¹⁷²⁵ This means that it does not stand to reason to add a specific act like forced marriage to this list. Imprisoning someone in a concentration camp, for example, is not specifically mentioned either, but falls within the category of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

3.6. CONCLUDING REMARKS: A SEPARATE CRIME OF FORCED MARRIAGE IS NOT REQUIRED

Forced marriages are serious violations of human rights. They rob people of the opportunity to make important life decisions and can have very severe and long-lasting consequences. Yet the act of forcing someone to enter into a marital(-like) association *sec* does not qualify as a separate crime against humanity, war crime or genocidal act. The Rome Statute and the ICC are unambiguous about the importance of the legality principle. Article 22 Rome Statute clearly states that definitions of crimes must be strictly construed and must not be extended by analogy. In accordance with this interpretation of the legality principle, forcing someone to enter into a marriage does not constitute an inhumane act that is similar in nature to the inhumane acts that are listed in the Rome Statute. Neither does it amount to a serious violation of a rule of customary IHL that entails individual criminal responsibility. Nor does it qualify as a specific act that can be used for the purpose of the destruction of a group of people.

As has been stated on several occasions, this does not mean that states parties cannot decide to amend the Rome Statute and add forced marriage as a new, separate crime to the crimes against humanity, war crimes and/or genocide provisions: they are free to do so. Yet it has been demonstrated in the previous sub-paragraphs that there is no need for separate criminalisation. Existing crimes can be used to adequately prosecute the practice. The conflict-related forced marriages that have been described in this book are committed with a particular motive and that motive is related to dominion or control: in the vast majority of cases, forced marriages will result in (sexual) enslavement. In Cambodia, the Khmer Rouge sought to gain absolute control over the Cambodian population – the marriage policy was a means to extend that control to sexuality and reproduction. In conflicts taking place in countries such as Uganda, the DRC, Rwanda, Sierra Leone and the Central African Republic, it is not the fact that (mostly) women and girls are forced to marry the perpetrators, it is the fact that they are treated as slaves, reduced to chattel, that makes these associations atrocious. As bush wives, women and girls have no right to self-determination; they are under complete control of their husbands. Abducted girls and women

¹⁷²⁵ Perhaps with the exception of Article 6(e) Rome Statute (forcibly transferring children of the group to another group); this does refer to a specific act.

who are not given to individual rebels as ‘wives’ are treated in the same manner: as slaves. Therefore, it is the *result* of the bush marriages, i.e. (sexual) enslavement that the ICC should focus on, and not the label ‘wife’ or ‘marriage’.¹⁷²⁶

¹⁷²⁶ The ICC’s stance on cumulative charging and cumulative convictions is not yet entirely clear, but pursuant to the *Bemba Gombo* Decision on the confirmation of the charges, the prosecution can only bring multiple charges for the same conduct if each of these crimes requires at least one additional material element which is not required by the other. This could have implications for the practice of forced marriage, seeing as sexual slavery is the *specialis* of enslavement – meaning that it would not be possible to charge both offences for the same conduct. The practice of forced marriage would be best addressed by charging enslavement cumulatively with rape and any other crimes committed within the forced marriage, such as any other acts of sexual violence.

SUMMARY

RESEARCH QUESTION

Specific legislation criminalising the act of forcing someone to enter into a marriage is on the rise. During the past decade, many European countries, including Belgium, Norway, Denmark, Germany, Austria and England (as of 2014), have introduced a specific offence of forced marriage in their criminal laws. On the international level, the Sierra Leonean bush wife phenomenon sparked the question of whether forced marriage ought to be classified as a ‘new’ crime against humanity (i.e. as an ‘other inhumane act’), or whether it is caught by existing crimes against humanity such as (sexual) enslavement. This research focused on the question of whether, and, if so, how the practice of forced marriage should be criminalised under Dutch law and international law (with a particular focus on the Rome Statute of the International Criminal Court). In order to answer this question, the phenomenon of forced marriage was first described, after which frameworks – consisting of criminalisation criteria – were created for the levels of national and international law. After analysing current Dutch, English and international criminal law in relation to forced marriage, these criteria were applied to the practice of forced marriage.

THE PRACTICE OF FORCED MARRIAGE

Forced marriages take place all over the world, in times of conflict as well as in times of peace. Universal and regional human rights instruments, such as the UDHR, the ICCPR and the ICESCR, discern the right to marry and the right not to marry without full and free consent. This means that a forced marriage, i.e. a marriage at least one of the partners entered into against their will as a result of some form of coercion that was exerted by another party, constitutes a human rights violation. In many cases, a marriage arranged by parties other than the spouses themselves will be at the basis of a forced marriage. That is to say, an arranged marriage may turn into a forced marriage in those cases where the wishes of the arrangers are not in line with the wishes of the one(s) for whom the arrangements are made, and the former nevertheless force the latter to enter into the marriage. Concepts of shame and honour (protecting family honour) are the underlying cause of the majority of forced (arranged) marriages. Because of the subtle forms of coercion and pressure that can be applied (e.g. in the form

of socio-cultural expectations, that, to a certain extent, are internalised) it is not always easy to establish the degree to which consent to an arranged marriage was actually free and full, and thereby distinguish between arranged and forced marriages. This may change if (threats of) physical violence has been used as a means of coercion.

THE PRACTICE OF FORCED MARRIAGE IN THE NETHERLANDS AND ENGLAND

The practice of forced marriage is not something that is generally associated with Western Europe. Often, it is assumed that this only happens in 'other' countries. Yet research shows that forced marriages are a daily reality in Europe. The practice mainly takes place in traditional and closed communities that attach great value to family honour and keeping up appearances. In England and the Netherlands, forced marriages are especially prevalent among communities with origins in India, Bangladesh, Pakistan, Morocco, Turkey and Surinam, but also in orthodox Protestant circles and strict Roman Catholic (Irish traveller) communities.

Forced marriage is a hidden practice that often takes places within the privacy of the family. It is mainly used as a means to control (female) children and uphold traditional values, both with the aim of protecting family honour. It is possible that only the future spouse exerts pressure on the victim, but in most cases, parents and relatives are the ones forcing the victim(s) to enter into a marriage. The force used is very diverse and ranges from (threats of) physical violence to psychological pressure (such as emotional blackmail) exerted by a large variety of people over a long period of time. Threats of disownment and social exclusion/ostracism are especially effective in closed and traditional communities because these mechanisms (i.e. disownment and exclusion) are used to display public disapproval if a community member transgresses what is deemed to be acceptable. These types of forced marriages ought to be distinguished from the forced marriages that occur outside the context of the family. The latter type of forced marriage are often linked with human trafficking, generally involve more physical violence and are often (also) brought about by others than the victim's relatives – although forced marriages taking place within family circles may also amount to trafficking.

THE PRACTICE OF FORCED MARRIAGE DURING CONFLICT

In conflict situations, the taking of brides by the victor is a common occurrence. Through the years, many conflicts around the world have been marked by the abduction of women and girls who were forced into what is generally referred

to as ‘marriages’ with their captors. There are reports of forced marriages taking place during many conflicts, but in this book, the forced marriages that took place during two conflicts in particular were highlighted: the bush marriages that took place during the civil war in Sierra Leone (‘rebel marriages’) and the forced arranged marriages that were contracted by order of the Khmer Rouge government (‘government-planned marriages’). In addition, the eight situations (i.e. Côte d’Ivoire, Kenya, the Central African Republic, Mali, Uganda, the Democratic Republic of Congo, Darfur and Libya) that are currently before the ICC were studied with regard to the practice of forced marriage.

In Sierra Leone, rebels abducted thousands of women and girls and forced them into associations that are known as bush marriages: situations of individual slavery that were referred to as marriage in the bush, but that were not recognised as legitimate marriages by the Sierra Leonean community. In these bush marriages, many girls were raped, abused and used as slaves. And although many former bush wives were (eventually) welcomed back by their family, they nevertheless suffered from secondary victimisation through stigmatisation, discrimination and socio-economic marginalisation, just like the majority of rape victims and child soldiers.

The practice of forced marriage was also dominant in the 1970s under the rule of Pol Pot. During the Khmer Rouge regime, the Cambodian government arranged marriages between civilians as part of policies aimed at population growth and breaking all family ties to facilitate complete loyalty to *Angkar*. The systematic arrangement of marriages demonstrated that the Khmer Rouge had taken over the traditional role of parents of all Cambodians. Most people had little or no say in this matter: they were informed by Khmer Rouge officials that it had been decided that they would marry a certain person on a settled date and time. From interviews with survivors of the Khmer Rouge era, it follows that in some collectives, married couples were ordered to have sex with each other whereas in other collectives, sexual intercourse was not prescribed. As evidenced by the same survivor narratives, couples were not expected to build an emotional bond: many couples were separated a few days after their wedding and those who were not separated hardly saw each other since they worked long days in the labour groups which were classified on the basis of sex and age. Many couples remained married after the fall of the Khmer Rouge.

It appears that forced marriage can be seen as a policy-based crime: in conflict situations, forced marriages are often used for particular reasons. The main goal pertains to dominion: gaining control over people and regulating their sexual conduct. In Cambodia and within the Ugandan Lord’s Resistance Army, life was governed by a puritanical code and sex was only allowed within sanctioned wedlock. Seen from this perspective, the marriages were also used as a way to legitimise sex. As a consequence, adultery was prohibited: unilateral if not bilateral. In Cambodia and Uganda, married couples were not allowed to have sex with others; in Sierra Leone, a bush wife was forbidden to have sexual

relations with someone other than her captor husband. In Cambodia and Uganda, moreover, procreation seems to have been an additional goal of the forced associations, whereas the Sierra Leonean rebels mainly used bush marriages as a means to establish a system of individual slavery.

THE DIFFERENCES BETWEEN THE PRACTICE OF FORCED MARRIAGE IN TIMES OF PEACE AND CONFLICT

As stated, forced marriages happen on a daily basis, in times of conflict, as well as in times of peace. In England and the Netherlands, forced marriages are often the result of people close to the victim, usually parents and direct kin, interfering in the victim's life. Parents use pressure to force their children to enter into a marriage to protect family honour, to fulfil a promise made to the parents of the other spouse, to facilitate entrance to a country, and/or because they believe they act in their child's best interests. There are also examples where forced marriages take place in a different context, such as in the course of human trafficking. Other examples of forced marriages that usually, but not necessarily exclusively, take place outside the family context are cases of bride kidnapping. Apart from these exceptions, the majority of forced marriages in the Netherlands and England take place within the context of the family and are usually coupled with psychological or more subtle forms of coercion. The period over which the coercion is exercised is in most cases protracted. In conflict situations, this is very different. As demonstrated *inter alia* by the conflicts in Sierra Leone, Uganda, Cambodia and the DRC, in times of conflict, family members often have no involvement whatsoever in the forced conjugal associations that take place and (family) honour is generally not a cause or contributing factor of forced marriages. In Cambodia, the Khmer Rouge took over parents' traditional role in arranging the marriage of their children; in several conflicts in African countries, rebel groups abducted women and girls and divided them amongst themselves as wives. The run-up to these marriage is considerably shorter and the means of coercion more aggressive and violent; the marriages are usually brought about with (threats of) physical violence. In addition, it appears that, in times of peace (that is to say at least in the Netherlands and England), relatively more men become victims of forced marriages than in times of conflict (with the exception of Cambodia). In the latter situations, the vast majority of victims are women.

A FRAMEWORK FOR CRIMINALISATION ON THE NATIONAL LEVEL

The central question of this research revolves around criminalisation of forced marriage: should this practice be criminalised, and, if so, how? Should it be prohibited as a distinct, separate offence, or under the heading of (generic) existing crimes? In order to answer these questions, a non-exhaustive set of criminalisation criteria was distilled from the writings of *inter alia* Mill, Feinberg, Simester, Von Hirsch, Husak, Ashworth, Horder, Duff, Hulsman, Van Bemmelen, De Roos, Corstens, Haveman and De Hullu. A total of six general criteria emerged. First, two threshold criteria must be fulfilled: criminal law is reserved for *wrongful* conduct that causes some (risk of) *harm*. The harm principle, which provides for a balancing of interests, facilitates informed decision making regarding the harmfulness and criminality of conduct. Reaching an informed decision necessitates a clear understanding of why certain behaviour takes place (etiology) and this requires mapping the background of the behaviour. The conduct, its prevalence and its consequences must be identified and defined, and any available (extra) legal remedies must be critically assessed. If at all possible, the harmfulness should be demonstrated by empirical evidence. Along with its harmfulness, the wrongfulness of conduct ought to be determined. Wrongfulness is a concept with strong moral connotations and is associated with a high level of intuitivism – especially in relation to traditional core crimes such murder, rape and theft.

Once the dual test of harm and wrongfulness has been satisfied, a set of three secondary criteria should be taken into consideration. First, the principle of proportionality can be used to assess the severity of the harm and wrong, and balance this against the benefits and disadvantages of the criminal law. Are the harm and wrong so severe that they warrant the use of the criminal law? Secondly, the legislator should examine the necessity of penalisation by applying the principle of subsidiarity. He should verify whether there are alternatives to criminalisation (external subsidiarity), and, if this is not the case, whether the criminal law already contains offences that address the conduct (internal subsidiarity). Thirdly, the legislator should include the more practical principles of effectiveness and efficiency in his deliberation. A new provision that separately criminalises specific behaviour should not result in investigative or prosecutorial problems. When contemplating the criminalisation of conduct, a legislator should take into consideration De Roos' argument that a criminal provision must offer a sufficient foundation for professionals involved in the investigation, prosecution and trial stages, and must not cause insurmountable evidentiary problems. If the crime turns out to be unprosecutable, this would be injurious to the deterrent effect of the offence. These pragmatic considerations, however, are only supplementary arguments, that is to say the other, principled criteria (such as subsidiarity) carry more weight. This means that the pragmatic arguments should not be decisive, they should not tip the scales, but they should be included

in the decision-making process nonetheless. Proportionality, subsidiarity and effectiveness function as mediating considerations: they may provide reasons not to criminalise, even when the threshold criteria of harm and wrongfulness are satisfied. Finally, once the legislator has decided to criminalise conduct, it goes without saying that the (definition of the) new offence must be in line with the legality principle, which can be seen as a tertiary criterion.

These six criteria form a theory of criminalisation that can assist the legislator in making a decision with regard to criminalisation. These principles offer no panacea, but they do facilitate a (partly) principled framework in which a balanced and informed decision regarding criminalisation can be made. In this sense, as benchmarks, they offer protection from criminalisation being used as an arbitrary tool or a procrustean solution. In the end, however, criminalisation decisions are based on lists of pro and contra arguments. Therefore, as De Hullu states, the best approach to criminalisation is a more pragmatic, casuistic approach, which comes down to balancing the arguments in favour of and against criminalisation in each case. The principles described above can be used to uncover and systemise these arguments.

A FRAMEWORK FOR CRIMINALISATION ON THE INTERNATIONAL LEVEL

The history of international criminal law is, like that of the egregious acts and conflicts that necessitated its creation, a turbulent one. Created and amended in reaction to atrocities committed during various conflicts and continuously put to the test by man's ingenuity when it comes to inflicting harm upon others, the special part of international criminal law has traditionally not been founded on elaborate, crystallised theories. Several authors (such as Bassiouni, Cassese and May) have tried to retroactively derive criteria from this history marked by lack of systematisation in order to uncover a doctrinal basis for international criminalisation that can be applied in the future. In addition to these theories, the legislative history of the Rome Statute offers insights in dynamics of criminalisation under international law. The decisions to include certain specific acts in the provisions of crimes against humanity and war crimes in the Rome Statute were the result of negotiations between delegations of more than 160 countries and were in the end based on consensus, rather than a set of strict criteria pertaining to criminalisation. Often, it seems, practical rather than principled arguments were decisive. These practical considerations, such as the requirement that a new crime is not completely subsumed under existing crimes, in the sense that it is distinct from these crimes, are reflected in the road maps constructed in this book.

The ICC only has jurisdiction over those crimes codified in the Rome Statute. Therefore, the question of how particular conduct could be criminalised in the

Rome Statute in fact demands an answer to the question if and how this conduct can be included in the Statute. In order to address this issue, a distinction must be made between the core crimes: does particular conduct constitute a crime against humanity, a war crime and/or an act of genocide?

To answer these questions, two steps need to be taken. The first step is to verify whether the conduct in question is perhaps included in offences that are already listed in the Rome Statute. The requirement that crimes are legally distinct from each other is especially important with regard to crimes against humanity, as is evidenced by the aspiration of the majority of the drafters of the Rome Statute to include in the provision of crimes against humanity as few duplicitous acts as possible. Although less stringent, the argument against duplicity also applies to war crimes. Even though the drafters of the Rome Statute set out to include as many war crimes under customary international law as possible – as a consequence of which many of the serious violations listed in Article 8 Rome Statute overlap – it would hardly be desirable to incorporate new war crimes in the Rome Statute when they are already completely covered by existing war crimes. It would appear that the same logic applies to the crime of genocide. Limiting the number of duplicitous and thus possibly superfluous crimes contributes to the overall coherence and applicability of the Rome Statute and prevents this statute from turning into an unoperationalisable and impenetrable morass of offences. If the conduct in question is included in any of the listed crimes, the conclusion will therefore be that the act is criminal and falls within the jurisdiction of the ICC under the nomenclature of existing offences.

If it has been established that the conduct under consideration does *not* fall within the scope of any of the specific crimes listed in the Rome Statute, *or* if this conduct is caught by an umbrella clause, the second step raises the question of whether this conduct could be included as a distinct crime against humanity, war crime or genocidal act in the Rome Statute. Crimes against humanity require an act to constitute an inhumane act, war crimes require a serious violation of international humanitarian law, and genocide requires an act that could potentially result in the destruction of (part of) a group of people. Schematically, this results in the following overview.

Crimes against humanity

4. Is the act subsumed under or materially distinct from listed crimes against humanity (is it an *other* inhumane act)?
5. Does this act cause great suffering? and
6. Is the act similar in nature and gravity to listed crimes against humanity (*eiusdem generis*)?

War crimes

3. Is the conduct subsumed under serious violations of customary international law that are listed in the Rome Statute? or
4. Does the conduct amount to a war crime which is not codified in the Rome Statute:
 - a. Is the conduct considered to be a breach of a rule of customary international humanitarian law; and
 - b. Can the violation be qualified as 'serious'; and
 - c. Does the breach give rise to individual criminal responsibility under customary international law?

Genocide

- 3a. Is this act subsumed under listed genocidal acts? or
- 4a. Is the act of such a nature that it may (ultimately) result in the destruction of (part of) a group of people? and
- 3b. Is the gravity of this act comparable to the listed genocidal acts (*eiusdem generis*)?

If the questions listed above are answered positively, there exist valid reasons to include the act in question as a 'new' crime against humanity (e.g. as an 'other inhumane act'), war crime or act of genocide in the Rome Statute. Especially when this particular act has certain prevalence in conflict situations and is likely to reoccur, it stands to reason to consider including it in the Rome Statute.

NATIONAL AND INTERNATIONAL CRIMINALISATION COMPARED

After comparing the different frameworks for national and international criminalisation with each other, it appears that the criteria in the national framework are not so 'national' after all. There are many similarities. The core crimes in the Rome Statute have their own requirements for criminalisation, their own criminalisation frameworks, but all 'national' criteria are also, to some extent, present on the international level. Harm, wrong, internal subsidiarity and legality are indispensable criteria on both levels and the principles of proportionality and external subsidiarity are subsumed under the higher harm and wrong thresholds that are inherent in international criminal law.

The approach to criminalisation taken in this book is one of minimalism. The concept of minimalism has two implications. First, there ought to be very persuasive reasons for using the criminal law to prohibit certain conduct, because in many cases, criminal law must be regarded as the *ultimum remedium*. There

exists, in the author's opinion, a presumption against criminalisation. Secondly (and linked to the first observation), the volume of criminal law, i.e. the number of criminal provisions, should preferably not snowball and get out of control. Many acts that cause serious harm have already been criminalised. Before the decision is made to create a new criminal offence, the legislator ought to give heed to the internal subsidiarity principle by assessing the tools that are already available: is the conduct in question caught by existing criminal offences or are the harms and wrongs caused by the conduct so specific, so unique that they are not covered and might require a criminal prohibition of their own? If the act is subsumed under existing criminal offences, then care must be taken that new criminal offences are not created just for the sake of it. There must be compelling reasons to criminalise conduct that is already completely caught by existing offences. Sending out a message that the conduct in question is unacceptable (symbolic function of criminalisation) could be a reason, but this should be assessed on a case-by-case basis.

FORCED MARRIAGE AND DUTCH LAW

Forced marriages have been on the Dutch political agenda since 2005 and the wish to tackle this issue has resulted in several legal amendments. In 2009, the Dutch government drafted a broad set of measures for the purpose of combating the problems associated with protracted integration and emancipation of family migrants. These measures include changes in the civil and criminal law pertaining to polygamy, forced marriage, marriages between cousins and raising the minimum age for marriage in private international law.

Dutch law recognises only one type of marriage: civil marriage celebrated in accordance with the requirements set out in Book 1 of the Civil Code. There are several civil law remedies that can be used in the case of a threatened forced marriage or if a forced marriage has already taken place. Annulment currently has a high bar, requiring an 'unlawful serious threat', which means that a marriage that was the result of more subtle forms of coercion, such as psychological pressure, does not qualify for annulment. After promulgation of the Marital Coercion (civil law) Bill, marriages that were entered into as a result of *any* form of coercion will be eligible for annulment. This will offer victims of forced marriage better possibilities to dissolve the unwanted union. As argued above, in some cases, an annulment may be a better response than a divorce, because the consequence of an annulment is that the marriage never existed. A divorce decree does not have this *ex tunc* effect. Yet in other cases, a divorce will be a more obvious choice as it offers relief more quickly and does not require the party (parties) to prove that the marriage came about as a result of coercion. Judicial separation, the third option to dissolve a marriage, results in a separation between the spouses, but has limited added value in the context of forced marriages. When it comes to preventing

forced marriages, it appears that the Registrar is a key figure. The Registrar is the person who actually weds a couple and if he suspects that coercion is involved, he is compelled by law to report this to the PPS (Article 162(1)(c) CriC).

The Dutch Criminal Code contains a number of offences that may be applicable to forced marriages. Especially relevant in this regard are the offence of coercion (Article 284 CriC) and the offence of influencing someone's statement (Article 285a CriC). In government documents, the offence of coercion is generally heralded as most applicable to forced marriages, but the offence of influencing someone's statement appears to be a blueprint for the act of forcing someone to enter into a marriage against that person's will.

FORCED MARRIAGE AND ENGLISH LAW

English courts have quite a long history when it comes to dealing with cases of forced marriage, but the phenomenon entered the political limelight only relatively recently. In the late 1990s, several high profile cases attracted media attention and outraged the British public, causing two Members of Parliament to place the issue of forced marriage on the political agenda. In 2005, the government consulted on the possibility of separately criminalising the practice of forced marriage, but, considering that the arguments against the creation of a specific offence outweighed the arguments in favour, the government decided not to criminalise the practice. Instead, a civil law approach was favoured and in 2007 legislative action was taken with the creation of the Forced Marriage (Civil Protection) Act. But the debate on criminalisation of forced marriage kept resurfacing. After a consultation late 2011, the government decided to create a specific criminal offence of forced marriage, arguing that this would send a strong message that the practice is unacceptable and will not be tolerated. In May 2013, the Anti-social Behaviour, Crime and Policing Bill (ABCP Bill) was introduced in the House of Commons. This Bill proposes to create two offences concerning forced marriage and proposes to criminalise the breach of a so-called Forced Marriage Protection Order, which is a civil measure.

English law also offers a varied number of tools that can be used to tackle forced marriages. A forced marriage that has already taken place can be annulled within three years from the date of the marriage ceremony on the ground that a party to the marriage did not validly consent to it, as a consequence of duress. Pursuant to the case law, there is no valid consent when a person's will has been overborne, that is to say, the relevant question in these cases is 'whether the threats or pressure were such as to overbear the will of the individual and destroy the reality of consent' (*Hirani v. Hirani*). It has been recognised that duress in the context of consent to marriage can include physical and psychological coercion, but also financial, sexual and emotional pressure. Divorce can also be used to end a forced marriage, but is not preferable to annulment as a petition for divorce

may be presented to the court only after the expiration of one year from the date of the marriage and the law strictly limits the grounds for divorce. A decree of divorce is granted only under certain specific circumstances; the fact that one or both of the spouses were forced to enter into the marriage against their will is not one of them. Pursuant to the Matrimonial Causes Act, the petitioner would have to demonstrate that the marriage has broken down irretrievably by satisfying the court that his/her spouse has behaved in such a way that the petitioner cannot reasonably be expected to live with him/her. Someone who faces the risk of being forced into a marriage or who has already been forced to marry can also, depending on the circumstances, apply to the court for non-molestation orders and occupation orders under the FLA 1996, restraining orders under the Protection from Harassment Act 1997, or Domestic Violence Protection Notices and Orders under the Crime and Security Act 2010.

The most notable legal tools at the government's disposal are the FMCPA 2007 and the criminal offences of forced marriage proposed by the ABCP Bill 2013. The FMCPA was implemented in 2008 and enables courts to make injunctions to protect people who are faced with a forced marriage or who have already been forced to enter into a marriage against their will. The content of these protection orders is entirely up to the discretion of the court: a protection order may for example prohibit the great uncle of the woman who has applied for the order to make arrangements for her wedding. Breach of an order is considered civil contempt of court. In 2011, the government announced that a breach of an FMPO would be made into a criminal offence, punishable with up to five years imprisonment. After an extensive consultation in 2012, the government concluded that the two-step prohibition (i.e. the criminalisation of a breach of a civil order) was not sufficient and that the practice of forced marriage requires the creation of a specific criminal offence. The ABCP Bill 2013 makes it a criminal offence to use violence, threats or other forms of coercion for the purpose of causing another person to enter into a marriage without that person's free and full consent. Practising any form of deception with the intention of causing someone to leave the UK and intending that person to be subjected to a forced marriage abroad is also a criminal offence.

FORCED MARRIAGE AND INTERNATIONAL CRIMINAL LAW

None of the statutes of any of the international(ised) courts or tribunals specifically list the act of forced marriage as a crime against humanity, a war crime or an act of genocide. The legal framework of forced marriage in international criminal law is based on the case law of the SCSL and – to a lesser extent – the ECCC. This case law demonstrates that the legal framework for forced marriage under international criminal law is formed by several (categories of) crimes: the war

crimes and crimes against humanity of enslavement and sexual slavery, the crime against humanity of other inhumane acts, and the war crime of outrages upon personal dignity.

The SCSL was the first court that was faced with the daunting task of deciding whether the act of forced marriage should be subsumed under existing crimes against humanity or whether it constitutes a separate crime against humanity. Since no other international or international(ised) criminal court or tribunal had ever addressed this issue, the SCSL entered uncharted legal area. Understandably, the Court faced several challenges, the main problem being the definition of the act of forced marriage, i.e. its *actus reus* and (to a lesser degree) *mens rea*. The legacy of the Court is unprecedented and constitutes without question an enrichment of international criminal law, but nonetheless presents several difficulties and ambiguities: no clear definition of forced marriage is given, as a concomitant circumstance of which no clear and convincing distinction is made between sexual slavery and forced marriage: the SCSL often conflated the two offences. The overlap between the Khmer Rouge marriages and the crimes of enslavement and sexual slavery is less evident, but this practice did result in a complete deprivation of people's autonomy and right to self-determination. At the time of writing (March 2014), the ECCC Trial Chamber had not yet addressed this issue.

DUTCH, ENGLISH AND INTERNATIONAL CRIMINAL LAW COMPARED

In England as well as in the Netherlands, the fight against forced marriages is high on the political agenda: MPs and NGOs have examined existing and new measures that could be taken to tackle this phenomenon and discussions on involving the criminal law have resulted in new legislation in both jurisdictions. Specific legislation comparable to the FMCPA does not exist in the Netherlands. Nevertheless, there are several comparable measures in Dutch law. Two landscapes that at first glance seem very different, appear, upon closer inspection, to have many similarities. Even though England has (civil and criminal) legislation that was created specifically with the aim of dealing with forced marriages, (potential) victims of a forced marriage can obtain similar protection from Dutch courts via provisional arrangements made in interlocutory proceedings.

But there are two important differences. First, English courts have very far-reaching discretionary powers when it comes to making orders: they can make protection orders on their own initiative – so without having been asked to do so by any party – as long as any other family proceedings are before the court and a person who would be a respondent to proceedings for a forced marriage protection order is a party to those family proceedings. The person to be protected by the order need not be party to the family proceedings. Especially now that

breaching a forced marriage protection order has become a criminal offence (in accordance with the ABCP Bill 2013) with a maximum penalty of five years on conviction on indictment, the court's *sua sponte* order-making possibilities can have significant consequences.

Secondly, pursuant to Dutch criminal law, litigants need a legal representative to commence interlocutory proceedings. The FMCPA, on the other hand, allows people to make an application for a protection order for themselves or on behalf of someone else; they do not need legal representation in the form of a solicitor. Local authorities can also apply for a protection order on someone else's behalf. Aside from these two differences, the similarities between the measures available to victims of forced marriages under English and Dutch law are vast.

As regards the comparison between the international and national legal frameworks, the following can be remarked. The two national landscapes, with their varied and wide range of criminal legislation contain the same (types) of crimes that may be used to prosecute forced marriages on the international level (such as enslavement), but not vice versa. The Rome Statute contains a limited number of criminal offences and does not include crimes such as coercion, stalking or influencing someone's freedom to make a legal statement. Although the Rome Statute does list a few umbrella clauses such as 'other inhumane acts' that catch crimes which are not specifically listed, offences such as using subtle psychological pressure on someone in order to influence their freedom of statement will not qualify as an 'other inhumane act'.

CONCLUSION: A SEPARATE OFFENCE OF FORCED MARRIAGE IS NOT REQUIRED IN DUTCH CRIMINAL LAW

As stated above, six criteria have emerged in this book as relevant to criminalisation issues under national law: harm, wrong, proportionality, subsidiarity, effectiveness and legality. After applying these criminalisation criteria to the practice of forced marriage it has become clear that there is no need for specific criminal legislation concerning forced marriage.

Forcing someone to enter into a marriage against that person's will causes harm and wrongs of such a severity and nature that a criminal law response would not be disproportional. Currently, the act of forcing someone to enter into a marriage is captured by the criminal offence of coercion (Article 284 CriC), and, depending on the circumstances, several other criminal offences, including the crime of influencing someone's official statement (Article 285 CriC). There exists no specific criminal offence of forced marriage. One of the conclusions of this research is that it is not necessary to create such a distinct offence.

Forced marriage, depending on how it is defined, covers several harms. In this book, it is defined as a marriage (i.e. a marital or marital-like association),

which at least one of the partners entered into against their will as a result of some form of coercion exerted by another party. But it has been argued by some that a forced marriage is broader than the mere conferral of marital status against someone's will, and that it also refers to being forced to remain in a (religious) marriage, a phenomenon which has been referred to as 'marital captivity'. As stated above, in many cases, a forced marriage as defined in this book will also result in marital captivity. Yet marital captivity is not always the result of a marriage that was entered into under duress: a voluntary marriage (as opposed to a forced marriage) can also result in marital captivity. It is here that the coercion offence of Article 284 CriC – which criminalises the act of using (threats of) force or other hostile acts to coerce someone to do, refrain from doing or tolerate something – proves its worth: it covers both situations.

Unlike Article 285 CriC, which only covers forced *civil* marriages, Article 284 CriC catches all different types of forced marriage: forced civil marriage (it is reiterated that Dutch law only recognises civil marriages), forced religious marriage and forced customary marriage. Even cases of forced registered partnership and forced cohabitation could fall within the scope of Article 284 CriC, as long as the perpetrator used (threats of) force or other hostile acts to coerce the victim to do, refrain from doing or tolerate something that the victim would otherwise not have done, refrained from doing or tolerated. If a new criminal offence were created, this offence would need to be defined in broad terms, so that it would not be limited to forced civil marriages.

As argued above, creating a separate offence *would* send a clear message that forced marriage is wrong, unacceptable and will not be tolerated. But this message can also be sent by other means, such as media (awareness) campaigns, programmes to train professionals (including teachers and registrars) who are likely to encounter instances of forced marriage, and prosecutorial guidelines stating the ways in which forced marriage will be charged. All of these measures are contained in the Dutch government's action plan concerning the prevention of forced marriages.

CONCLUSION: NO NEED FOR A NEW, DISTINCT OFFENCE OF FORCED MARRIAGE IN THE ROME STATUTE

A forced marriage during a conflict consists of a perpetrator forcing someone to enter into a relationship, either with himself or with another person. This relationship is qualified as 'marriage', either by the perpetrator, the victim, the subculture of war and/or by the society at large. In many cases, perpetrators of forced marriages also cause the victims to stay in the association for a certain period of time. The forced conferral of the marital status has consequences for the relationship between the parties: the forced marriage creates certain exclusive

obligations and/or rights between the spouses that do not exist between people who are not (forcibly) married. These rights and/or obligations often pertain to *inter alia* sexual exclusivity, either reciprocal or unilateral. The victim is bound to this forced association, by the very nature of the association. Marriage thus binds people (to each other) through social and cultural mores. As a result, the label 'marriage' may cause people to feel compelled to remain in the association, long after the conflict has come to an end.

Forced marriages are serious violations of human rights. They rob people of the opportunity to make important life decisions and can have very severe and long-lasting consequences. Yet the act of forcing someone to enter into a marital(-like) association *sec* does not qualify as a separate crime against humanity, war crime or genocidal act. The Rome Statute and the ICC are unambiguous about the importance of the legality principle. Article 22 Rome Statute clearly states that definitions of crimes must be strictly construed and must not be extended by analogy. In accordance with this interpretation of the legality principle, forcing someone to enter into a marriage does not constitute an inhumane act that is similar in nature and gravity to the inhumane acts that are listed in the Rome Statute. Neither does it amount to a serious violation of a rule of customary IHL that entails individual criminal responsibility. Nor does it qualify as a specific act that can be used for the purpose of the destruction of a group of people.

As has been stated on several occasions, this does not mean that states parties cannot decide to amend the Rome Statute and add forced marriage as a new, separate crime to the crimes against humanity, war crimes and/or genocide provisions: they are free to do so. Yet it has been demonstrated in this book that there is no need for separate criminalisation. In line with the internal subsidiarity principle, existing crimes can be used to adequately prosecute the practice. The conflict-related forced marriages that have been described in this book are committed with a particular motive and that motive is related to dominion or control: in the vast majority of cases, forced marriages will result in (sexual) enslavement. In Cambodia, the Khmer Rouge sought to gain absolute control over the Cambodian population – the marriage policy was a means to extend that control to sexuality and reproduction. In conflicts taking place in countries such as Uganda, the DRC, Rwanda, Sierra Leone and the Central African Republic, it is not the fact that (mostly) women and girls are forced to marry the perpetrators, it is the fact that they are treated as slaves, reduced to chattel, that makes these associations atrocious. As bush wives, women and girls have no right to self-determination; they are under complete control of their husbands. Abducted girls and women who are not given to individual rebels as 'wives' are treated in the same manner: as slaves. Therefore, it is the *result* of the bush marriages, i.e. (sexual) enslavement that the ICC should focus on, and not the label 'wife' or 'marriage'.

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CURRICULUM VITAE

Iris Haenen (1986) received her LLM and MPhil degrees from Tilburg University in 2009 and 2010 respectively. From November 2010 to March 2014, she conducted her PhD research at the Department of Criminal Law at Tilburg University, including a short stay at King's College London conduct comparative legal research.

Iris' publications include:

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