

2007

Distinguishing forced marriage as a separate crime against humanity specifically addressing the question as to whether jurisprudence exists to support the crime of forced marriage as separate from sexual slavery and if so, how the elements of the two crimes differ. In addition, whether forced marriage is unique from other enslavement crimes.

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: DISTINGUISHING FORCED MARRIAGE AS A SEPARATE CRIME AGAINST HUMANITY

SPECIFICALLY ADDRESSING THE QUESTION AS TO WHETHER JURISPRUDENCE EXISTS TO SUPPORT THE CRIME OF FORCED MARRIAGE AS SEPARATE FROM SEXUAL SLAVERY AND IF SO, HOW THE ELEMENTS OF THE TWO CRIMES DIFFER. IN ADDITION, WHETHER FORCED MARRIAGE IS UNIQUE FROM OTHER ENSLAVEMENT CRIMES.

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Fall Semester, 2007

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I. Introduction

In February 2005, the Special Court for Sierra Leone (the “Special Court”) established new precedent for an international war crimes tribunal when the Prosecution brought forth an indictment that included charges of a new crime against humanity, that of “forced marriage.”¹ However, the Special Court ruled in a subsequent decision that the Prosecution did not clearly establish forced marriage as a crime against humanity distinct from other crimes already pronounced within the Special Court’s Statute.² In particular, the Special Court determined that the recognized crime of sexual slavery actually subsumed the Prosecution’s elements of the crime of forced marriage.³ This paper produces jurisprudence supporting forced marriage as a unique crime against humanity, one that the Special Court must recognize as both valuable and necessary to its task of punishing those “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law.”⁴

II. International Treaties, Regional Treaties, Customary Law and Statutory Law Provide a Foundation for Prosecuting Forced Marriage.

According to Rule 72*bis* of the Rules of Procedure and Evidence, the Special Court may consider “where appropriate, applicable treaties and principles and rules of international law and customary law” as well as “general principles of law derived from national laws of legal systems around the world.”⁵ As such, because international communities, regional groups of states and individual states have all criminalized the core principles that lie within the crime of forced

¹ Prosecutor v. Brima, SCSL-04-16-PT, Indictment, 18 Feb. 2005 [reproduced in accompanying binders at Tab 1].

² Prosecutor v. Norman, SCSL-04-14-PT, Trial Chamber, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005 [reproduced in accompanying binders at Tab 5].

³ *Id.* at paragraph 19 (iii).

⁴ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

⁵ Prosecutor v. Brima, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 58 [reproduced in accompanying binders at Tab 3].

marriage, the Special Court may draw upon this precedent to justify the prosecution of forced marriage as a distinct crime against humanity. Further, the evolution of the recognition of other sex-based crimes as crimes against humanity presents substantial evidence that forced marriage can and should be the next logical step in the prosecution of these crimes.

A. International Treaties

International humanitarian law has evolved through a series of steps and sometimes, but not often, through leaps and bounds. However, in general, the process involves one nation or a group of nations stepping out from the shadows while the rest of the world hesitates, sputters and eventually comes to understand the value in taking such a step. Because forced marriage is appearing as a *new* “crime against humanity,” there is no historical evidence of such terminology, and there is no physical proof that society has outwardly recognized this atrocity as a legitimate and perceptible crime. However, a historical analysis of how international humanitarian law has come to shape and define the international community’s values provides the technical basis to establish forced marriage as a separate crime against humanity.⁶ In particular, the evolution of defining the various forms of sexual violence as distinct crimes against humanity is a powerful analogy as to how the Special Court can and should recognize forced marriage as a similarly unique crime.

First, Article 16(2) of the Universal Declaration of Human Rights,⁷ Article 23(2) of the International Covenant of Civil and Political Rights,⁸ and the Convention on the Elimination of

⁶ Attached as Exhibit 1 is a timeline, prepared by Margaux Day, that details the relevant laws and resolutions prohibiting forced marriage.

⁷ Universal Declaration on Human Rights, GA Res. 217 A (III) (10 Dec. 1948) [reproduced in accompanying binders at Tab 28].

⁸ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (19 Dec. 1966) [reproduced in accompanying binders at Tab 21].

all Forms of Discrimination against Women⁹ prohibit any marriage undertaken without the consent of one of the parties.¹⁰ At the heart of forced marriage is the wartime abduction of innocent female victims, thrust by their captors into martial situations against their will. In addition, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage states in Article 1 that a legitimate, legal marriage requires full and free consent of both parties.¹¹ As such, the international community, through its treaties and declarations, has recognized the importance of marriage as a primary element of human life, and forced marriage strikes down this posture by making a mockery of the institution of marriage.

However, although the international community has historically valued the right of consensual marriage, the accompanying recognition of sex-based crimes has been exceedingly slow. In fact, prior to the 20th century, a great deal of evidence indicates that the international community considered rape simply to be a “natural occurrence” in war.¹² The Lieber Code, a set of rules promulgated for the United States military, was one of the first instances where a nation recognized rape as an actual wartime *crime*. In proscribing accepted conduct for Union soldiers, President Lincoln delineated rape as one of the acts specifically prohibited.¹³

In comparison, The Hague Convention in 1907 provided the first hint that the *international* community was beginning to consider sexual violence as a crime against humanity.¹⁴ Although facially The Hague Convention IV and its annexed Regulations codified

⁹ Convention on the Elimination of all Forms of Discrimination against Women, GA Res. 34/180 (18 Dec. 1979), available at <http://www.un.org/womenwatch/daw/cedaw/> [reproduced in accompanying binders at Tab 16].

¹⁰ Prosecutor v. Brima, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 46 [reproduced in accompanying binders at Tab 3].

¹¹ *Id.* at 65.

¹² Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int'l L. 305, 306 (2002) [reproduced in accompanying binders at Tab 44].

¹³ *Id.* at 306.

¹⁴ Law and Customs of War on Land (Hague, IV), 36 Stat. 2277, T.S. No. 539 (18 Oct. 1907), reprinted in I C. Bevans, treaties and other international agreements of the United States of America 1776-1949 247 (1968) [reproduced in accompanying binders at Tab 23].

only the customary law prohibition on making slaves of prisoners of war, the Convention did emphasize the seriousness of rape and the necessity of respecting “family honor.”¹⁵ As such, the inclusion of rape within the crime of slavery exhibited an early recognition that control over one’s sexual autonomy is a distinct, criminal element. Further, by focusing upon respect for the familial nucleus, the Convention foreshadowed a connection between societal and cultural norms and crimes against humanity.

This budding recognition of sexual slavery as a crime against humanity grew both in the years before and after WWII, as evidenced in the Trafficking Conventions of 1904,¹⁶ 1910¹⁷ and 1933.¹⁸ Article II of the 1910 Convention, in particular, states that parties must punish anyone who has “by fraud or by the use of violence, threats, abuse of authority, or other means of constraint, hired, abducted or enticed” a girl or woman for “immoral purposes.”¹⁹ What is perhaps most revealing is the direct correlation between the Convention language and the abuses found in forced marriage, where captors use both violence and threats of violence to trap young women within the confines of the “legitimate” societal tradition of marriage, primarily for the immoral purposes of rape, forced labor and other forms of sexual violence.

The 1926 Slavery Convention later held that controlling another person’s sexuality was a form of slavery, and by 1937, the international community recognized this Convention as

¹⁵ Stefan A. Riesenfeld, ad litem Judge, ICTY, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 Berkeley J. Int’l L. 375, 380-81 (2003) [reproduced in accompanying binders at Tab 46], citing Law and Customs of War on Land (Hague, IV), 36 Stat. 2277, T.S. No. 539 (18 Oct. 1907), reprinted in 1 C. Bevans, treaties and other international agreements of the United States of America 1776-1949 247, 631 (1968) [reproduced in accompanying binders at Tab 23].

¹⁶ International Agreement for the Suppression of the White Slave Traffic, 11 L.N.T.S. 83 (18 Mar. 1904) [reproduced in accompanying binders at Tab 20].

¹⁷ Convention for the Suppression of the White Slave Traffic, 210 Consol. T.S. 45 (4 May 1910) [reproduced in accompanying binders at Tab 17].

¹⁸ Stefan A. Riesenfeld, ad litem Judge, ICTY, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 Berkeley J. Int’l L. 375, 382 (2003) [reproduced in accompanying binders at Tab 46], citing International Convention for the Suppression of the Traffic in Women of Full Age, 53 U.N.T.S. 49 (11 Oct. 1933) [reproduced in accompanying binders at Tab 22].

¹⁹ *Id.* at 382.

customary international law.²⁰ During this time, customary humanitarian law also prohibited forced prostitution.²¹ As such, these sequential events brought forth the idea that the international community should recognize sexual violence, in the forms of sexual slavery, forced prostitution and rape, as distinct crimes against humanity.

The International Criminal Court's (the "ICC") Elements of Crimes provides the most recent evidence of this demarcation because it lists sexual slavery as a separate crime against humanity.²² Although admittedly the ICC fails to define sexual slavery, it does list several other crimes directly relatable to the elements of forced marriage. The ICC lists the act of rape, enforced prostitution, forced pregnancy and sexual violence as crimes against humanity, and each of these crimes are often found sheathed beneath the visage of forced marriage.²³ Here, the ICC clearly recognizes sexual slavery as being more than enslavement and more than rape and therefore distinct from both categories.

Forced marriage, comparatively, "undermines marriage by using the institution to justify the egregious crimes of rape, torture, enslavement, sexual slavery, and forced pregnancy."²⁴ Undoubtedly, forced marriage is more than sexual slavery or forced labor. Accordingly, although forced marriage involves multiple crimes already enunciated in the language of the international community, its impact extends beyond merely its parts. As such, the Special Court should recognize that forced marriage deserves the distinction as a unique crime against humanity in and of itself.

²⁰ *Id.* at 380, citing The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021, 2 Bevans 932 (27 July 1929)[reproduced in accompanying binders at Tab 12].

²¹ *Id.* at 380.

²² Elements of Crimes, art. 7(1)(g)-2, 2002, U.N. Doc. PCNICC/2000/1/Add.2 [reproduced in accompanying binders at Tab 19].

²³ *Id.*

²⁴ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

B. Regional Treaties

Inherent in forced marriage is extreme discrimination against women; captors destroy their victims' bodies, spirit and dignity. They steal away their rights as daughters, mothers and wives. Even in areas of Africa where society often considers the traditional form of forced marriage as simply part of their culture, regional treaties have prohibited such discrimination against women. Both Article 18(3) of the African Charter on Human and Peoples' Rights²⁵ and Article 11(3) of the African Charter on the Rights of Women in Africa²⁶ show that the African community as a whole despises what lies at the heart of forced marriage: a clear cut hatred for the female position in society.²⁷ When captors perpetrate forced marriages, they not only destroy women but they destroy whole communities, as women represent the lifeblood of the community. These women stand behind their husbands as they go off into battle; these women bear and raise the future of the community. Without them, African culture perishes at the hands of conquering soldiers, leaving whole races of men without the ability to perpetuate their livelihood.

C. Statutory Law

Further, several countries have individually criminalized the abduction of any person, and more importantly, any female, for the purpose of marriage.²⁸ The list is long: Nigeria, Bulgaria, Papua New Guinea, India, Singapore, Indonesia, Venezuela and Brazil all have penal laws to punish perpetrators of crimes like forced marriage. For example, the Nigerian Penal Code awards a seven-year term of imprisonment for "any person who, with the intent to marry or

²⁵ African Charter on Human and Peoples' Rights, adopted June 27, 1981, *available at* <http://www.hrcr.org/docs/Banjul/afhr.html> [reproduced in accompanying binders at Tab 13].

²⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union (11 July 2003), *available at* http://www.achpr.org/english/_info/women_en.html [reproduced in accompanying binders at Tab 24].

²⁷ *Prosecutor v. Brima*, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 66 [reproduced in accompanying binders at Tab 3].

²⁸ *Id.* at 61,62.

carnally know a female of any age, or to cause her to be married, or carnally known by any other person, takes her away, or detains her, against her will.”²⁹ These laws respect choice: the choices of a woman or a man to, at the very least, have the approval of his or her family concerning his or her future spouse. These countries have statutorily prohibited two crucial elements within the crime of forced marriage: abduction and marriage. The liaison of the two is what makes forced marriage a potent form of destruction both during and after wartime conflicts. Forced marriage in the context of the Sierra Leonean civil war has distorted the concept of marriage beyond what the international community understands to be the traditional concept of forced marriage and thereby heightened the “degradation of an internationally valued social and spiritual institution.”³⁰ As such, because of the historical position of marriage, the international community should ensure that war crimes tribunals like the Special Court bring the perpetrators of such crimes to complete justice.

III. The Special Court Can Use Case Law to Expand the Scope of Sex-Based Crimes from Rape to Forced Marriage.

A. The Process of Establishing Other Sex-Based Crimes Provides a Blueprint for the Prosecution of Forced Marriage as a Distinct Crime Against Humanity.

In “The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law,” Doris Buss, an Associate Professor of Law at Carleton University, writes, “Sexual violence against women takes different forms and has multiple social, economic and political contexts in which the gendered nature of the harm intersects with, and is shaped by

²⁹ *Id.* at 61.

³⁰ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

other axes of oppression: ethnicity, race, class and so on.”³¹ However, the international community was exceedingly slow in even beginning to recognize the connection that exists between sexual violence and the perpetration of crimes against humanity, much less prosecute it inside a courtroom. As such, the practicality of prosecuting defendants today for forced marriage as a distinct crime against humanity is difficult largely because this language is absent from any case law. Even in those cases where the prosecution recognized the circumstances involved in forced marriage, prosecutors simply included these elements within charges of rape, sexual slavery or acts of outrage against personal dignity. However, because many of these charges had previously not existed in the criminal justice system, prosecutors historically have faced the same challenges that are currently plaguing the prosecution of forced marriage. As such, an analysis of the definitional procedure concerning these now-established crimes provides an insight into how prosecutors today may tackle the problems associated with charging forced marriage as a distinct crime against humanity.

In a 2001 lecture, the Honorable Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (the “ICTY”) and Rwanda (the “ICTR”), spoke about the development of international humanitarian law, and specifically, the prosecution of rape as a war crime.³² Judge Goldstone heralded the progress made in the past decade, stating, “the advances made in the recognition and prosecution of gender crimes committed during armed conflict are particularly noteworthy. This is all the more so because of the history of virtual effacement of these crimes from international humanitarian law.”³³ Judge

³¹ Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 Windsor Y.B. Access Just. 3, 22 (2007) [reproduced in accompanying binders at Tab 33].

³² The Honorable Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 Case W. Res. J. Int’l L. 277 (2002) [reproduced in accompanying binders at Tab 35]; See also Stefan A. Riesenfeld, ad litem Judge, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 Berkeley J. Int’l L. 375 (2003) [reproduced in accompanying binders at Tab 46].

³³ *Id.* at 278.

Goldstone describes how the international community has historically ignored rape as “being no more than an inevitable consequence of war,”³⁴ and as such, concerned members of the international community have had to fight long and hard to put the prosecution of gender crimes on the international judicial map.

B. Recognition of Sexual Slavery as a Crime in World War II

For example, the International Military Tribunal at Nuremburg and the International Military Tribunal for the Far East at Tokyo found both enslavement and forced labor to be international crimes, but their statutes contained no reference of rape despite the fact that prosecutors introduced rape as evidence of war crimes and crimes against humanity.³⁵ Although these courts held the comfort women system established by the Japanese during World War II was in fact slavery, it did not recognize or categorize the crimes perpetrated under the system as sexual in nature. Only at the insistence of comfort women survivors did the international community begin to view this system as a criminal perpetration of *sexual slavery*. In fact, the international community was generally ignorant of the horrifying conditions of the comfort women system until the early 1990s, when survivors finally began to break out of the shadows and reveal their stories. In 1991, three Korean comfort women sued the Japanese government in Tokyo District Court while forty-five Korean victims demanded \$5.6 million in damages from the Japanese government.³⁶ In 1993, eighteen Filipina plaintiffs demanded an admission of guilty by the Japanese government as well.³⁷ These cases represent the earliest recognition and

³⁴ *Id.* at 279.

³⁵ *Id.* at 279.

³⁶ Anne Barker, *Justice Delayed*, 8 Mich. St. J. Int'l L. 453, 459-60 (1999) [reproduced in accompanying binders at Tab 30].

³⁷ *Id.*

litigation of gender-based crimes, and they established the basis for demanding justice for sex-based violations.³⁸

Unfortunately, these litigious attempts met with little to no success. The Tokyo District Court dismissed the 1991 suit, and the Japanese went on to win all but one of the suits brought by survivors.³⁹ The Comfort Women's only success came in 1998 when, ignoring the plaintiffs' request for a public apology, the Yamaguchi Prefectural Court found the Japanese government guilty of negligence for violating a "constitutional obligation to enact legislation to compensate victims of its comfort women system."⁴⁰ In addition, the Japanese government did establish the "Asian Women's Fund" allegedly to compensate the victims of the Comfort Women system, although research shows that it was ineffective as a means of true reparations.⁴¹ Yet, although these victories were admittedly small in comparison to the atrocities committed by the Japanese government, they were still an integral step in the prosecution of wartime, sex-based crimes like forced marriage.

C. Recognition of Sex-Based Crimes as Crimes Against Humanity in Rwanda

The next step in the prosecution of sex-based crimes occurred in the very same year as the comfort women's only success. Heard before the International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu* held that rape could be, and that the defendant in question had used it as, an instrument of genocide.⁴² Following *Akayesu*, *Prosecutor v. Kunarac* "focused exclusively on the rape, torture and mistreatment of women during the conflict in Bosnia

³⁸ Anne Barker, *Justice Delayed*, 8 Mich. St. J. Int'l L. 453, 459-60 (1999) [reproduced in accompanying binders at Tab 30].

³⁹ Kristl K. Ishikane, *COMMENT: Korean Sex Slaves' Unfinished Journey for Justice: Reparations from the Japanese Government for the Institutionalized Enslavement and Mass Military Rapes of Korean Women During World War II*, 29 Hawaii L. Rev. 123, 134 (Winter, 2006) [reproduced in accompanying binders at Tab 39].

⁴⁰ *Id.* at 134-5.

⁴¹ *Id.* at 134, 137.

⁴² Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 Windsor Y.B. Access Just. 3, 11 (2007) [reproduced in accompanying binders at Tab 33]; citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment of 2 Sept. 1998 [reproduced in accompanying binders at Tab 9].

Herzegovina.”⁴³ Holding that a preconceived plan must exist to prove defendants committed sexual violence in a criminal manner, the ICTR recognized rape and sexual violence as criminal acts and found that the Hutu tribe had used sexual violence as a tool to destroy the Tutsi population.

The ICTR further defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or physical conduct.”⁴⁴ The ICTR went on to hold that “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.”⁴⁵

The ICTR’s declarations concerning rape and sexual violence within the context of genocide and crimes against humanity represent significant steps in the recognition for and expansion of the prosecution of sex-based crimes. The ICTR not only recognized mass rape as genocide but it defined sexual violence against women as a crime falling under multiple sections of the Tribunal statutes.⁴⁶ During this time, the international community garnered an appreciation for moving away from preconceived notions of what constitutes a crime against humanity. As such, the Special Court should not hesitate to continue this progression by establishing forced marriage as a distinct crime against humanity.

⁴³ *Id.*, citing Prosecutor v. Kunarac, IT-96-23-T/IT-96-23/1-T, Judgment of 22 Feb. 2001, available at <http://69.94.11.53/default.htm> [reproduced in accompanying binders at Tab 6].

⁴⁴ Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR*, 3 J. Int’l Crim. Just. 1007, 5 (2005) [reproduced in accompanying binders at Tab 38], citing Prosecutor v. Akayesu, ICTR-96-4-T, Judgment of 2 Sept. 1998 at paragraph 688 [reproduced in accompanying binders at Tab 9].

⁴⁵ Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR*, 3 J. Int’l Crim. Just. 1007, 5 (2005) [reproduced in accompanying binders at Tab 38], citing Prosecutor v. Akayesu, ICTR-96-4-T, Judgment of 2 Sept. 1998 at paragraph 731 [reproduced in accompanying binders at Tab 9].

⁴⁶ Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 Windsor Y.B. Access Just. 3, 12 (2007) [reproduced in accompanying binders at Tab 33].

The *Akayesu* decision also provides further clarification concerning the elements of a crime against humanity, particularly in its definitions of “widespread” and “systematic.” *Akayesu* defines widespread as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” “Systematic” means, “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”⁴⁷ *Prosecutor v. Gacumbitsi* held that for a successful assertion of rape as a crime against humanity, the Prosecution would need to have evidence not merely of the rape but that the rape had been part of an “attack” against a certain community.⁴⁸ This memorandum will establish that forced marriage as a crime against humanity fulfills these requirements, thereby further escalating the need for the international community to recognize it separately from the already-enumerated crimes.

Finally, in *Prosecutor v. Musema* the ICTR found Alfred Musema, director of the Gisovu Tea Factory in Kibuye prefecture, guilty of crimes of genocide, including sexual violence as a separate crime of genocide. Here, the ICTR established a new definition of genocide, holding “Article 2(2)(b)’s proscription of “serious bodily or mental harm” included, but is not limited to, “acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence and persecution.”⁴⁹ Again, the international community continued to expand its recognition of the many distortions that pervade the commission of genocide and crimes against humanity, and as such, the Special Court should not hesitate to further this expansion with the inclusion of forced marriage as a separate crime against humanity.

⁴⁷ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment of 2 Sept. 1998 [reproduced in accompanying binders at Tab 9].

⁴⁸ Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 Windsor Y.B. Access Just. 3, 14 (2007) [reproduced in accompanying binders at Tab 33].

⁴⁹ Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. Davis J. Int’l L. & Pol’y 197, 208 (2001) [reproduced in accompanying binders at Tab 43].

D. Recognition of Sex-Based Crimes as Crimes Against Humanity in the Former Yugoslavia

In 1993, the same year the Filipina plaintiffs demanded justice for sex-based crimes, the United Nations Security Council set forth its resolution promulgated to establish the ICTY; within this declaration, the Security Council for the first time openly condemned rape in war.⁵⁰ Article 5(g) of the ICTY's statute enumerates rape as a crime against humanity, demonstrating the international community's newfound concern for the sexual violence perpetrated during wartime conflicts.⁵¹ This concern sprouted from the discovery that Serb soldiers had committed mass rape of Bosnian Muslim and Croat women during the conflict in Bosnia. Buss describes the events as "a nationalism-inspired violence where one group attacked another through the bodies of women."⁵² In a society where virginity and marriage are core values of the community, the persecution of women struck deep. As such, the ICTY followed in the footsteps of the ICTR and recognized the use of rape as a weapon of war.⁵³

A former prosecutor at the International Criminal Tribunal for the Former Yugoslavia, Peggy Kuo describes her and her colleagues' battles in framing sex-based crimes before the ICTY. The question of whether to handle crimes against women as separate and distinct cases versus including them with other indictments was one of the many issues that challenged the prosecution.⁵⁴ Further, although the top leaders within the ICTY fully supported the prosecution's efforts concerning these new war crimes, the prosecution quickly discovered that time and money constraints would make it difficult to extend the jurisdiction of the ICTY. In

⁵⁰ The Honorable Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 Case W. Res. J. Int'l L. 277, 278 (2002) [reproduced in accompanying binders at Tab 35].

⁵¹ *Id.*

⁵² Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 Windsor Y.B. Access Just. 3, 10 (2007) [reproduced in accompanying binders at Tab 33].

⁵³ *Id.*

⁵⁴ Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int'l L. 305, 310 (2002) [reproduced in accompanying binders at Tab 44].

fact, the prosecution met actual resistance from several of its *own investigators* who felt that in such tight times the ICTY would do better to focus on prosecuting the large-scale killings and torture that occurred during the genocide. One investigator argued, “I’ve got ten bodies, how do I have time for rape? That’s not as important.”⁵⁵

Further, Kuo acknowledges that another one of the primary and most difficult tasks was choosing how to define the various crimes, including rape, rape as torture and enslavement. However, decisions and opinions handed down by The Hague and the ICTR “set the stage” for what the ICTY was attempting,⁵⁶ and in March of 2000, Commander Dragoljub Kunarac became the first person ever accused of rape in an indictment. Still, Kuo admits the prosecution thereafter did not often directly charge rape as a war crime; instead, the Prosecution categorized it as an “act of outrage against personal dignity,” which was an already-established war crime.⁵⁷ However, by highlighting specific acts of sexual violence, the ICTR in the *Kayishema and Ruzindana* Judgment proved that Judges could include gender crimes within their judgments regardless of whether they were included within the actual indictment itself.⁵⁸

In *Prosecutor v. Kunarac*, the prosecution faced the task of defining enslavement. Although the end determination merely read “ownership,” the process surrounding the prosecution’s struggle to define slavery illustrates that the tribunals have had to work hard in the past to ensure their proceedings followed the evolution of international humanitarian law. In addition, part of the prosecution’s evidence of slavery included forced marriage, although the ICTY did not use this terminology at the time. Kuo describes how commanders locked enemy

⁵⁵ Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305, 310-11(2002) [reproduced in accompanying binders at Tab 44].

⁵⁶ Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305, 313 (2002) [reproduced in accompanying binders at Tab 44].

⁵⁷ *Id.*

⁵⁸ Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR*, 3 J. Int’l Crim. Just. 1007, 7 (2005) [reproduced in accompanying binders at Tab 38] citing *Prosecutor v. Kayishema*, ICTR-95-1-T, Trial Chamber II, Judgment of 21 May 1999 [reproduced in accompanying binders at Tab 10].

women up, raped them repeatedly, abused them, and forced them to do household chores.⁵⁹ The prosecution presented this evidence to show exactly what it meant by “ownership” and how this slavery inflicted extreme humiliation, as women had to serve the very people who were abusing them.⁶⁰ Later cases would move on to define rape as “penetration under force, threat of force or coercive circumstances” and “sexual violation.”⁶¹

In the Foca trial, the ICTY finally declared rape to be a distinct war crime. Interestingly, the ICTY’s language that describes the crimes committed in the former Yugoslavia is particularly helpful for establishing forced marriage as a distinct war crime in and of itself. The ICTY describes how “girls were enslaved, forced to perform sexual acts and keep house.”⁶² Further, *Prosecutor v. Kvočka* defined sexual violence, holding that it

would also include such crimes as sexual mutilation, forced marriage and forced abortion as well as gender related crimes explicitly listed as war crimes and crimes against humanity in Articles 7(1)(g), (8)(2)(b)(xxii) and (8)(2)(e)(vi) of the Rome Statute of 17 July 1988 establishing the International Criminal Court.⁶³

As such, the ICTY not only already recognized that the events occurring during the conflict extended beyond mere enslavement but included forced marriage as a distinct crime. What the international community now terms “forced marriage” is not simply enslavement or sexual slavery; it is a collection of these and other abuses that together cause distinctly cruel suffering. The Special Court would do its citizens a great injustice if it refuses once again to recognize the crime of forced marriage and the extremities found within its perpetration.

⁵⁹ Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305, 315 (2002) [reproduced in accompanying binders at Tab 44].

⁶⁰ *Id.* at 313.

⁶¹ *Id.*

⁶² Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305, 315 (2002) [reproduced in accompanying binders at Tab 44].

⁶³ *Prosecutor v. Kvočka*, IT-98-30-T, Judgment of 2 Nov. 2001 at paragraph 180 [reproduced in accompanying binders at Tab 8].

IV. Forced Marriage is Distinct from Sexual Slavery and Forced Labor.

The common dialogue within the international community concerning forced marriage actually focuses upon a societal tradition different from the wartime events occurring in Sierra Leone. In many African and Middle Eastern countries, including Sierra Leone, forced marriage in its traditional sense involves parents that coerce their sons and daughters to enter into marriage without their consent.⁶⁴ In “Mobilization of Professionals – A Strategy for Combating Forced Marriages,” the authors define forced marriage as

a type of orchestrated violence within a family. Forced marriage is arranged by the family which shows no consideration whatsoever towards consent and even less towards their child’s resistance. Once consummated, a forced marriage creates the basis for sexual relations that lack consent. This means it is *practically rape* (emphasis added).⁶⁵

The forced marriages occurring in the Sierra Leone civil war, however, were not *practically rape*; they were rape. The United Nations describes the traditional practice of forced marriage as a “contemporary form of slavery.”⁶⁶ However, the forced marriage that occurred during the civil war in Sierra Leone is not merely a “contemporary form of slavery,” but a distinct and separate crime that extends beyond slavery. Forced marriages in Sierra Leone involved enemy soldiers who captured young women and forced them to perform sexual acts *as well as* domestic acts, all under the guise of a “marriage” between the soldiers and the women.

In addition to sexual slavery, the captors extracted marital obligations, humiliating them by forcing them to perform domestic duties traditionally reserved for spouses, while subsequently forcing these women to endure constant violence, both of a physical and mental

⁶⁴ See Farwha Nielsen, *Protecting Youth and Controlling Immigration*, Fempower, 2/2005 no. 11, available at http://noticeboard.ucy.ac.cy/gen_announcements/Fempower11.pdf [reproduced in accompanying binders at Tab 49].

⁶⁵ See Latta Drit and Francoise Imbert, *Mobilization of Professionals – A Strategy for Combating Forced Marriages*, Fempower, 2/2005 no. 11, available at http://noticeboard.ucy.ac.cy/gen_announcements/Fempower11.pdf [reproduced in accompanying binders at Tab 50].

⁶⁶ See Editorial, Fempower, WAVE network & European Information Centre Against Violence, 2/2005 no. 11, available at http://noticeboard.ucy.ac.cy/gen_announcements/Fempower11.pdf [reproduced in accompanying binders at Tab 48].

nature.⁶⁷ As such, the prosecution in *Brima* appropriately submitted forced marriages under the category of “Other Inhumane Acts,” declaring this crime

consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.⁶⁸

In its brief to the Special Court, the prosecution put forth the following elements as pertaining to forced marriage: sexual slavery in a martial type union, the imposition of conjugal status by coercion or threat and forced labour. Further, forced marriage includes “reduction to a servile status, the practical impossibility of seeking familial assistance or attempting escape and the widespread discrimination against bush wives which fuels prejudice against them in the community.”⁶⁹ As such, because forced marriage is a conglomeration of criminal actions, its ramifications extend beyond each of these crimes singularly. Forced marriage includes, but is not limited to inescapable rape, sexual slavery, torture, forced pregnancy and enslavement.⁷⁰

A. Forced Marriage is Distinct from Traditional Notions of Forced Marriage.

Justice Doherty, in his dissent to *Brima*, writes, “I am of the view that the abduction of girls and their coercion into marital unions...is not the same nor comparable to arranged or traditional marriages.”⁷¹ Forced marriage in the wartime setting of Sierra Leone was very different from the traditional idea of forced or “arranged marriages”; whereas traditionally a woman’s parents gave consent to the marriage, during the wartime conflict in Sierra Leone there

⁶⁷ See Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

⁶⁸ Prosecutor v. Brima, SCSL-04-16-T, Judgment of 20 June 2007 [reproduced in accompanying binders at Tab 2].

⁶⁹ Prosecutor v. Brima, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 16 [reproduced in accompanying binders at Tab 3].

⁷⁰ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

⁷¹ *Id.* at 583.

was no consent given whatsoever. When the RUF forces invaded Sierra Leone from Liberia in 1991, they physically abducted women and girls to be their “wives”; they repeatedly raped and subjected them to other forms of sexual violence. Although sometimes soldiers made a mockery of traditional marriage by holding faux marriage ceremonies, in truth there was no religious or social ceremony to legitimize these forced marriages. Instead, there was the imposition of violence, coercion and abuse.

B. Forced Marriage is Distinct from Sexual Slavery.

The 1926 Slavery Convention and the 1953 Protocol amending the Convention defined sexual slavery as, “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.”⁷² The 2002 Foca case defined rape as

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) [of] the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.⁷³

Because Sierra Leonean society does not recognize marital rape, these captors could repeatedly rape their “wives” and never fear persecution.⁷⁴ Further, enemy combatants repeatedly raped their victims in often brutal, tortuous manners involving crude objects and other sources of humiliation.

Perpetrators of sexual slavery and enslavement in general attach the right of ownership to their victims to assert control over the individual’s freedom. By contrast, perpetrators of forced

⁷² See Louise Taylor, “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict*, 15 Human Rights Watch (Africa Division) 1(A) (Jan. 2003), available at <http://www.hrw.org/reports/2003/sierraleone/> [reproduced in accompanying binders at Tab 40].

⁷³ *Id.*

⁷⁴ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42], citing Note by Secretary-General Report of the United Nations High Commissioner for Human Rights on assistance to Sierra Leone in the field of human rights, U.N. Doc A/59/340 at para. 30, 9 Sept. 2004 [reproduced in accompanying binders at Tab 52].

marriage attach *the obligations of a spouse* to the victim rather than the direct right of ownership.⁷⁵ Further, investigators believe soldiers from the AFRC and RUF probably used their abductees as “human shields,” hoping that enemy forces either would spare them because of their captured innocent victims or kill the innocent victims first.⁷⁶ As such, the exercise of control over these women often resulted in greater abuse and torture in comparison to circumstances of sexual slavery.

In his speech, Stefan Reisenfeld, ad litem Judge for the International Criminal Tribunal for the former Yugoslavia, noted that the establishment of sexual slavery as a unique crime “recognizes the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves.”⁷⁷ As such, the Special Court’s prosecution of forced marriage as a distinct crime would perform this very same function. Because the crime of forced marriage includes forced labor, forced pregnancy and other crimes, the crimes of enslavement and sexual slavery lack the specificity necessary for the successful prosecution of this distinct crime.⁷⁸

C. Forced Marriage is Distinct from Forced Labor.

Louise Taylor, a consultant to Human Rights Watch, writes, “During captivity, these women and girls were also made to carry out forced labor, including carrying heavy loads, cooking, cleaning, etc. Many women and girls have given birth to children fathered by rebels.”⁷⁹ As such, the victimization that occurred in forced marriages did include forced labor. However,

⁷⁵ *Id.*

⁷⁶ See Chen Reis, *War-Related Sexual Violence in Sierra Leone* (2002) (Physicians for Human Rights), available at <http://www.phrusa.org/research/sierraleone/report.html> [reproduced in accompanying binders at Tab 31].

⁷⁷ Stefan A. Reisenfeld, ad litem Judge, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 *Berkeley J. Int’l L.* 375, 386 (2003) [reproduced in accompanying binders at Tab 46].

⁷⁸ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

⁷⁹ See Louise Taylor, “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict*, 15 Human Rights Watch (Africa Division) 1(A) (Jan. 2003), available at <http://www.hrw.org/reports/2003/sierraleone/> [reproduced in accompanying binders at Tab 40].

in forced marriages captors forced their wives to perform laborious tasks *typically associated with marriage*, such as domestic duties and childcare responsibilities, rather than the familiar notions of work performed in forced labor. Further, the sexual slavery inherent in forced marriages distinguishes this victimization from forced labor. Because forced sex constitutes “an exercise of ownership over a person,” which customary international law expressly forbids, forced marriage is different from compulsory labor, which may be permissible under a narrow set of circumstances.⁸⁰

D. Forced Marriage Includes Control Over Reproductive Rights.

In addition, the forced marriages in Sierra Leone often involved forced abortion or forced impregnation. If an enemy combatant took as his wife a woman already pregnant with a rival’s child, the soldier often forced the woman to abort the pregnancy. Further, the enemy soldier might forcibly impregnate his new bush wife and ensure, through coercion, that she carried the child to term. As such, forced marriage not only involved the destruction of freedom and right to sexuality but it included the destruction of the woman’s right to reproduce.⁸¹ These men deprived their wives of their right “to form relationships of one’s choice and to decide whether to have a family.”⁸²

E. Forced Marriage Has a Lasting Impact.

Taylor includes in her article that, “an unknown number of abducted girls and women still remain under the control of their rebel “husbands” who did not want or feel able to relinquish the “families” they had founded in the bush; in many cases the abductees’ own

⁸⁰ Stefan A. Riesenfeld, ad litem Judge, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 Berkeley J. Int’l L. 375, 381-82 (2003) [reproduced in accompanying binders at Tab 46].

⁸¹ Stefan A. Riesenfeld, ad litem Judge, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 Berkeley J. Int’l L. 375, 379 (2003) [reproduced in accompanying binders at Tab 46].

⁸² *Id.*

families would not have welcomed them back.”⁸³ The civil war in Sierra Leone provided for a hostile environment, one in which anyone who had any ties to the “enemy” was considered an enemy themselves. As such, Sierra Leonean society rejected these women as property of the enemy; sometimes their own families and villages viewed these women as having submitted to the enemy to save themselves from death, and as such, they were traitors to their own people.

In addition, the patriarchal disposition of society often rejected these women’s offspring as now constituting members and kin of the enemy tribes. Because Sierra Leonean society determines the bloodline of a child through its father, the bush wives’ children became the direct children of their soldier fathers. As such, these women simply had no place to go other than to remain with their bush “family.” Further, due to a mother’s bond with her children and her motherly position in the familial home, it would have been extremely difficult for these women to leave behind their children or extract their children from their biological fathers. The perpetrators of forced marriage bound their victims “both intrinsically and extrinsically by the bonds placed upon a married couple by religion, society and the State.”⁸⁴

One 45-year old woman from the town of Koidu relates her nightmare. “The rebels caught us in the bush after my family and I had fled one Saturday in February. They killed my brother immediately, and they took my two children. One of them raped me. He used me as his wife, and another one beat me with a gun. They made me and others carry their loads.”⁸⁵ The torture these women endured affected every single facet of their lives, from their villages to their

⁸³ See Louise Taylor, “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict*, 15 Human Rights Watch (Africa Division) 1(A) (Jan. 2003), available at <http://www.hrw.org/reports/2003/sierraleone/> [reproduced in accompanying binders at Tab 40].

⁸⁴ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

⁸⁵ See Scott Campbell and Jane Lowicki, *Sowing Terror: Atrocities Against Civilians in Sierra Leone*, 10 Human Rights Watch (Africa Division) 3(A) (July 1998), available at <http://www.hrw.org/reports98/sierra/index.htm> [reproduced in accompanying binders at Tab 45].

homes and their families. As such, the international community cannot atone for the cruelties endured by victims of forced marriage simply by prosecuting criminals for only rape and/or only forced labor.

F. The Conflicts in Rwanda and the former Yugoslavia Provide Useful Comparisons for Prosecution.

In *Forced Marriage: Rwanda's Secret Revealed*, Monika Satya Kalra, Associate Legal Officer to the ICTY, argues that the situation in Rwanda provides the evidence necessary to pave the way for the future prosecution of forced marriage as a distinct crime against humanity.⁸⁶ Her article clearly sets forth the conditions prevalent within a forced marriage, and because these circumstances are exactly those that occurred in Sierra Leone, the Special Court can recognize those same distinctions drawn between forced marriage and the other crimes against humanity.

Kalra writes,

historically, enemy fighters targeted and sexually attacked women during wartime. Combatants used acts of sexual violence as weapons of war, including sexual slavery, forced impregnation and sexual violence. In Rwanda, Hutu men crossed an additional boundary: they often forced Tutsi women to marry them.⁸⁷

In Rwanda, Hutu men abducted Tutsi women from their homes and communities just as the soldiers did during the civil war in Sierra Leone.

Admittedly, the Hutu captors sometimes performed a “ceremony,” but never a ceremony that Rwandan society would have officially recognized. When made a “bush wife” or a “rebel wife,” their captors forced the Tutsi women to submit to all their sexual desires. Within this setting, captors intimidated and forced their captives to be “intimate” with them, just as a husband and wife would be in a traditional marital relationship. They repeatedly violated and

⁸⁶ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 201 (2001) [reproduced in accompanying binders at Tab 43].

⁸⁷ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 201 (2001) [reproduced in accompanying binders at Tab 43].

humiliated their wives sexually; the Hutu captors made their “wives” their sex slaves and as such, there is indeed a connection between forced marriage and sexual slavery. However, although the Hutus subjected their bush wives to sexual abuse within a confined area, a Hutu husband typically kept his wife to himself.⁸⁸ Whereas captors often passed around or shared between them women that were being kept as sex slaves, such as the Comfort Women during World War II, bush wives primarily remained with their “husband” in his home.⁸⁹ In addition, sexual slavery has not historically consisted of forced domestic labor, denial of reproductive autonomy and the other duties typically performed in conjunction with the institution of marriage.⁹⁰

Further, Kalra notes that forced marriages present greater complexity than other forms of sexual violence because Hutu captors presented the Tutsi women with an impossible situation: these Hutu men had saved their lives but conversely, ended them by destroying them with lifelong sexual violence.⁹¹ It is the essential catch-22 within the world of genocide; the vicious world somehow thrusts the victim into the position of the saved. In addition, Kalra cites that even if these Tutsi women managed to free themselves from their bondage, returning to their past lives often proved difficult if not impossible. Rwandan society often viewed these wives as traitors, believing they had ensured their safety by allying with the enemy. Kalra notes that this placed an impossible aura of consent to the marriages, which further destroyed these women’s

⁸⁸ Prosecutor v. Brima, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 29 [reproduced in accompanying binders at Tab 3].

⁸⁹ *Id.*

⁹⁰ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

⁹¹ Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. Davis J. Int’l L. & Pol’y 197, 202 (2001) [reproduced in accompanying binders at Tab 43].

potential to return to their normal, previous lives.⁹² Unfortunately, the captors often also transmitted sexual diseases to their wives, further stigmatizing them in the eyes of society.⁹³ Traitorous and damaged, victims of forced marriage suffered a dual fate both during and after their victimization; they suffered torture at the hands of their “saviors,” and their status within their own families became despised, degraded, and downgraded.

In comparison, Kuo describes the sexual slavery that occurred in the Eastern Bosnia municipality of Foca, where Serb forces overran the Muslim soldiers.⁹⁴ “They were called brothels, but they really were not brothels per se; they were houses where the girls were simply enslaved and the soldiers could come and go as they wanted so that they could rape them.”⁹⁵ However, Kuo additionally notes that there were some girls who were kept by a single soldier rather than exchanged, and these girls were kept in abandoned apartments which the soldiers had taken as their own. “There, the girls were enslaved, forced to perform sexual acts and keep house.”⁹⁶ As such, Kuo clarifies a distinct difference between those girls kept as sex slaves for the pleasure of many soldiers and those girls taken as wives for a single soldier. Some women even admitted to attaching themselves to a sole soldier for protection.⁹⁷ Bush wives were thus “spared” from gang rapes, although still persecuted by their captors.⁹⁸ Whereas forced marriage involved all the normal duties typically attached to the institution of marriage, mere sexual

⁹² See Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. Davis J. Int’l L. & Pol’y at 197 (2001) [reproduced in accompanying binders at Tab 43].

⁹³ *Id.*

⁹⁴ Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305, 314 (2002) [reproduced in accompanying binders at Tab 44].

⁹⁵ *Id.* at 315.

⁹⁶ *Id.* at 315.

⁹⁷ See Corinne Dufka, *Sierra Leone: Getting Away with Murder, Mutilation and Rape*, 11 Human Rights Watch (Africa Division) 3(A) (June 1999), available at <http://www.hrw.org/reports/1999/sierra/> [reproduced in accompanying binders at Tab 32].

⁹⁸ *Prosecutor v. Brima*, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 29 [reproduced in accompanying binders at Tab 3].

violence and/or slavery would have led these men to confine their acts to sexual abuse alone and then discard the women afterwards.

For example, once a husband-captor had consummated his marriage, he would then force his wife to perform domestic, household chores typically relegated to spouses. Bush wives cooked, cleaned, washed clothes, and carried their husbands' possessions on long journeys, along with submitting sexually against their will.⁹⁹ As such, the civil wars had turned these societies into ones of slavery, both sexual in nature and laborious. However, whereas enslavement attaches the right of ownership to the person with the control, the enslavement found in forced marriage attaches not only the same right of ownership but also the right to a spouse's marital obligations.¹⁰⁰ The wives in forced marriages are not "owned" as sexual slaves because soldiers hide behind the guise of "marriage," but they are "inextricably bound to their captors by the ties of matrimony and obligations flowing from it."¹⁰¹ Although slavery may encompass both sexual and non-sexual criminal activities, it often does not cover forced labor or forced pregnancy.¹⁰² As such, these elements further distinguish forced marriage from slavery and sexual slavery.

Monika Kalra perhaps best brings to light the severity of the plight of forced marriage victims within the international community, stating, "In the future, forced marriage may provide a loophole for combatants, who may claim women as wives, rape them, and submit them to various forms of physical and psychological violence with impunity."¹⁰³ The need is great; the future is precarious. By denouncing the crime of forced marriage as merely a sub-category of

⁹⁹ Prosecutor v. Brima, SCSL-04-16-T, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde, 20 June 2007, at paragraph 12 [reproduced in accompanying binders at Tab 4].

¹⁰⁰ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

¹⁰¹ *Id.* at 19.

¹⁰² *Id.* at 17.

¹⁰³ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 204 (2001) [reproduced in accompanying binders at Tab 43].

sexual slavery or one that other crimes of humanity already sufficient protect, the international community continues to ignore a troublesome evolution in the persecution of crimes against humanity. However, perhaps more ominous is that not only will the international community fail past victims by refusing to fully bring their captors to justice but they may permit future perpetrators to hide behind and thereby continue the destruction of the sacred tradition of marriage.

V. The Special Court Can Prosecute Forced Marriage within the Current International Law Framework.

To prevent Kalra's predictions from coming true, the international community and the Special Court should recognize forced marriage as a distinct crime against humanity. As such, the Prosecution may use and the Special Court may thereby accept several methods to establish forced marriage within the framework of current international law. In fact, the Statute of the Special Court for Sierra Leone provides at least three possibilities for prosecuting the crime of forced marriage.

A. The Special Court Can Prosecute Forced Marriage under Article 2.

Article 2 of the Statute of the Special Court for Sierra Leone sets forth a list of crimes against humanity, along with the caveat that the perpetrators must have committed these crimes specifically as part of a "widespread or systematic attack against any civilian population."¹⁰⁴ These crimes consist of murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual slavery, persecutions on political, racial and religious grounds and other inhumane acts.¹⁰⁵ While

¹⁰⁴ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

¹⁰⁵ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

the list is rather extensive, the caveat is perhaps the most difficult requirement to prove regarding forced marriage because of the general lack of knowledge of the actual crime itself.

However, forced marriage does fulfill the two prongs of a crime against humanity: (i) a widespread or systematic attack and (ii) against a civilian population. First, the ICTR held in *Akayesu* that the Prosecution must prove the perpetrators possessed the requisite intent or actus reus, which is the purpose to commit a widespread or systematic attack. *Akayesu* clarified that the actus reus must be based upon one or more discriminatory grounds as well, meaning the attack was targeted towards a certain group within the population. Kalra writes that because it is highly unlikely the prosecution will draw out a confession from a captor who claims he directly perpetrated the attack with the requisite intentions, investigators must therefore draw from other inferences to prove to the Court that these crimes meet the Article's requirements.¹⁰⁶

Akayesu held the Court might look at several factors, including “the scale of the atrocities committed and the deliberate and systematic targeting of victims, on account of their membership in a particular group, to the exclusion of members of other groups.”¹⁰⁷ It is hard to determine how many conquerors forced Sierra Leonean women into marital situations because of the secrecy inherent to forced marriage: hiding behind the guise of marriage, outsiders often viewed these women not as abductees or victims but as co-perpetrators. They had collaborated with their captors, become traitors to their people, all in the name of survival. In addition, the fact that these women often remained with their captors after the conflict had ended only furthered this stigmatization and the inability to determine actual numbers of forced marriage victims. Yet, research has projected that conquering soldiers in Sierra Leone abducted at least

¹⁰⁶ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 206 (2001) [reproduced in accompanying binders at Tab 43].

¹⁰⁷ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 206 (2001) [reproduced in accompanying binders at Tab 43], citing Prosecutor v. Akayesu, ICTR-96-4-T, Judgment of 2 Sept. 1998, at paragraph 731 [reproduced in accompanying binders at Tab 9].

thousands of women and forced them to become their wives.¹⁰⁸ Further, when describing the sexual violence committed against Sierra Leonean women and girls, Louise Taylor uses the exact language required for Article 2, stating, “Throughout the ten-year civil war, thousands of Sierra Leonean women and girls were subjected to widespread and systematic sexual violence, including rape and sexual slavery.”¹⁰⁹

Further, forced marriage clearly involves “deliberate and systematic targeting of victims, on account of their membership in a particular group.” Corinne Dufka, a Sierra Leone researcher for Human Rights Watch, writes that, “the organized way in which victims frequently described being rounded up and taken, and the number of rebels participating in these abductions, suggests an element of premeditation and planning on the part of the RUF command.”¹¹⁰ Soldiers specifically captured *women*, took them as their wives, forced them to do household chores, and forced them to have their babies. These conquering men were tribal men themselves and obviously aware of societal values; they understood that to destroy the dignity of conquered women would not only destroy the women themselves but the entire community as a whole. Sierra Leone, like other African nations, maintains a patriarchal society, one in which the race of a baby is determined by its father. As such, when conquered soldiers forcibly impregnated their bush wives, they consequently ended that child’s tribal status within the surrounding community. In forced marriages, the community therefore loses its reproductive capabilities and faces

¹⁰⁸ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42], citing Human Rights Watch, Human Rights Watch Report 2001: Sexual Violence Within the Sierra Leone Conflict (26 February 2001), available at <http://www.hrw.org/backgrounder/africa/sl-bck0226.htm> [reproduced in accompanying binders at Tab 51].

¹⁰⁹ See Louise Taylor, “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict*, 15 Human Rights Watch (Africa Division) 1(A) (Jan. 2003), available at <http://www.hrw.org/reports/2003/sierraleone/> [reproduced in accompanying binders at Tab 40].

¹¹⁰ See Corinne Dufka, *Sierra Leone: Getting Away with Murder, Mutilation and Rape*, 11 Human Rights Watch (Africa Division) 3(A) (June 1999), available at <http://www.hrw.org/reports/1999/sierra/> [reproduced in accompanying binders at Tab 32].

potential extinction at the hands of its vanquishers. The situation in the former Yugoslavia presents a valuable comparison: “because both Muslims and Serbs trace their racial background paternally, if a Serb impregnated a Muslim woman, he would destroy the Muslim’s paternal line.”¹¹¹ As such, the Special Court must recognize that the inferences it may draw from these factors provide the requisite intent to fulfill the caveat of a “widespread or systematic attack against any civilian population.”

As for the main element of Article 2, forced marriage does involve several of the crimes enumerated, and as such, the Special Court may recognize it as a crime against humanity deserving judicial prosecution within the Special Court’s Statute. Although murder is typically not the result of forced marriage, the threat of death constantly pervades the household, and if perhaps, the captor decides to “marry” another wife, the previous wife’s life could be in danger. Second, one of the most significant elements of the crime of forced marriage is that of extermination, executed through forced pregnancy and the resulting end of the patriarchal familial line within society. Forced marriage is thus a powerful tool of extermination and thereby has played a major part of the perpetration of genocide that occurred in Sierra Leone.

Third, the women victimized by forced marriage often undergo various forms of torture. In his dissent, Justice Doherty commented that the crime of forced marriage “is concerned primarily with the mental and moral suffering of the victim.”¹¹² For example, in Foca captors did not regularly feed their “wives” and would not hesitate to beat them into submission at any sign of resistance.¹¹³ In “Forced Marriage: Exploring the Viability of The Special Court for

¹¹¹ Grant H. Carlton, *Equalized Tragedy: Prosecuting Rape in the Bosnian Conflict Under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, 6 D.C.L. J. Int’l L. & Prac. 93 (1997) [reproduced in accompanying binders at Tab 34].

¹¹² Prosecutor v. Brima, SCSL-04-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 and Count 8, 20 June 2007, at paragraph 52 [reproduced in accompanying binders at Tab 3].

¹¹³ Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305, 315 (2002) [reproduced in accompanying binders at Tab 44].

Sierra Leone’s New Crime Against Humanity,” the authors include as one of the key elements of forced marriage: “attaching the right of marriage to one or more persons without consent *by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power*” (emphasis added).¹¹⁴ During the conflicts in both Rwanda and Sierra Leone, soldiers would take women and girls, sometimes as young as twelve or thirteen years old, and rape them repeatedly. They would burn their “wives” with cigarettes, cut them, beat them and even at times give them narcotics to keep them compliant.¹¹⁵

Further, captors carved the letters “RUF” onto their wives’ chests, effectively branding them and stigmatizing them as property of the enemy combatants. These symbols were more than representations of the enemy’s control; they acted as powerful deterrents to the wives returning to their homes and their villages after the conflict had ended. Their families would see them as worthless because according to societal values, they were no longer marriageable. As such, their former husbands and families would disown them. Further, these traditional societies often believed that once an enemy combatant, or even merely another man who is not the woman’s husband, has raped a woman, she is permanently tainted and unable to return with any dignity to her previous home. As such, not only did their captors torture them physically and mentally but the treatment and potential rejection by their spouses and families must have been additional torture for these women as well.

Forced marriage entirely encompasses Article 2(g); it is rape; it is sexual slavery; it is forced pregnancy. However, forced marriage takes sexual slavery and sex-based crimes in general to a higher level. Because it involves so many of these elements, the Special Court

¹¹⁴ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone’s New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

¹¹⁵ *Id.*

should recognize that by prosecuting soldiers who commit forced marriage merely for crimes of rape or slavery, they are not doing justice to those who are victims of forced marriage. These victims' suffering is simply more than that caused by a sex-based crime; it is the result of a terrorization of their spirit and a destruction of their homes, families, communities and the dearly held societal value of the institution of marriage. Further, although forced marriage falls more completely under the category of a sex-based crime, it clearly involves persecution on at least a racial level. In Rwanda, conquering Hutu men took Tutsi women as their wives to destroy the Tutsi population, the enemy tribe and the enemy race.

However, because forced marriage does include so many of the enumerated crimes under Article 2's Crimes Against Humanity, successful prosecution of forced marriage may result from presenting it as an "other inhumane act" under Article 2(i). The crimes enumerated in Article 2 recognize the principle of *nullum crimen sine lege*. Michael Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law, writes that the "other inhumane acts category enjoys a particularly strong assurance of compliance with *nullum crimen sine lege*, as it has been a crime against humanity since its incorporation into the Nuremberg charter."¹¹⁶

The ICTR has previously explained that "other inhumane acts" means "an act or omission whose nature and character is similar in nature, character, gravity and seriousness to the other acts, as enumerated in sub-articles (a) to (h) of Article 3 of the ICTR's statute (comparable

¹¹⁶ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42], citing Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284, 288, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> [reproduced in accompanying binders at Tab 14].

to Article 2 of the Special Court's Statute)."¹¹⁷ Forced marriage potentially involves sub-articles (a), (b), (c), (f), (g) and (h), and as such, it is undoubtedly similar, if not exactly alike, the character, gravity and seriousness of the stated acts. Further, because this category exists as a "catch-all" category to prosecute crimes the international community has heretofore not recognized or envisioned,¹¹⁸ the Special Court can use it in the successful prosecution of the new crime of forced marriage.

In addition, because it encompasses six of the eight enumerated crimes, forced marriage is an even more serious and grave crime against humanity. Further, because enslavement, torture and possibly even rape meet the requirements of a jus cogen norm violation, and forced marriage is composed of each of these constituent acts, the international community may accurately identify forced marriage as a violation of a jus cogen norm as well.¹¹⁹ The Special Court's recognition of forced marriage as a jus cogen norm violation would solidify the crime as an egregious and unacceptable breach of international humanitarian law because "rights protected by jus cogens norms are nonderogable, binding on all States at all times, cannot be preempted by treaty, and can be prosecuted against anyone at any time."¹²⁰ As such, this classification would effectively permit the Special Court to prosecute individuals for the crime of forced marriage under Article 2 of the Special Court's Statute.

¹¹⁷ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 213 (2001) [reproduced in accompanying binders at Tab 43] citing Prosecutor v. Musema, ICTR-96-13-T, Judgment, at paragraph 232, 26 Jan. 2000 [reproduced in accompanying binders at Tab 11].

¹¹⁸ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42], citing Prosecutor v. Kupreskic, IT-95-16-T, Judgment, at paragraph 563, 14 Jan. 2000 [reproduced in accompanying binders at Tab 7].

¹¹⁹ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

¹²⁰ *Id.*

B. The Special Court Can Prosecute Forced Marriage under Article 3.

The Special Court may also recognize forced marriage under Article 3 of the Special Court's Statute, which involves violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Because forced marriage is applicable to several sections within Article 3, the Special Court may consider it sufficiently capable of prosecution as a distinct war crime. First, Section (a) seems a logical fit for forced marriage as it entails a combination of the inherent elements of violence within forced marriage. Section (a) involves, "Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment."¹²¹

Forced marriage fits this description through its constituent elements that involve both torture and mutilation. The ICTR clarified the idea of both torture and mutilation in *Musema*, defining torture as "intentionally inflicting severe pain or suffering," or "intimidating or coercing him for any reason based on discrimination of any kind."¹²² According to the ICTR, mutilation consists of "causing severe physical injury or damage to victims."¹²³ Because victims of forced marriage fall prey to beatings, rape, and other cruel forms of serious physical abuse simply because of their status as enemy women and wives, this war crime includes both torture and mutilation. As such, the prosecution could successfully put forth forced marriage as a distinct war crime under Section (a) of Article 3.

In addition, Section (e) of Article 3 involves, "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of

¹²¹ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

¹²² Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 218 (2001) [reproduced in accompanying binders at Tab 43] citing Prosecutor v. Musema, ICTR-96-13-T, Judgment, at paragraph 285, 26 Jan. 2000 [reproduced in accompanying binders at Tab 11].

¹²³ *Id.*

indecent assault.”¹²⁴ Forced marriage often involves a situation where the captor humiliates and degrades his “wife” by forcing her to perform domestic chores as well as sexual favors against her will. As such, rebel forces forced Sierra Leonean women to serve the very men that abused them.¹²⁵ Their captors treated them like slaves and mocked the institution of marriage by calling them their “wives.” As such, their “husbands” stole these women’s freedom in every sense of the word. They had no right to their own sexuality and reproduction, no right to form relationships of their own choosing, no right to decide whether to have a family and no sense of personal dignity.¹²⁶

Further, although rape is clearly a component of forced marriage, the Special Court could also consider the abuse present within forced marriage to be an adaptation of enforced prostitution. Wives within forced marriages found themselves at the sexual mercy of their husbands; although a husband typically kept his wife to himself, it was also possible for the husband to allow other soldiers to sexually use and abuse his wife. Kalra notes, however, that this could be a controversial comparison because prostitution typically involves a woman selling her body in return for compensation.¹²⁷ Forced marriage does not include any compensation, as society commonly perceives it, such as money or expensive possessions.

However, the Special Court might view forced marriage as involving coercion to perform sexual acts in return for the compensation of survival. Here, both crimes involve a woman receiving something for her body, something for her sexuality or control of her sexuality.

However, enforced prostitution does carry with it a certain stigma regarding the victim herself;

¹²⁴ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

¹²⁵ See Peggy Kuo, Esq., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int’l L. 305 (2002) [reproduced in accompanying binders at Tab 44].

¹²⁶ Stefan A. Riesenfeld, ad litem Judge, Symposium Speech 2002, Sexual Slavery and the “Comfort Women” of World War II, 21 Berkeley J. Int’l L. 375, 386 (2003) [reproduced in accompanying binders at Tab 46].

¹²⁷ Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. Davis J. Int’l L. & Pol’y 197, 219 (2001) [reproduced in accompanying binders at Tab 43].

the mere use of the term “prostitute” connotes a highly negative image of the female in question. As such, whereas equating forced marriage with enforced prostitution is possible, there exists potential downfalls in its execution, and the prosecution might do better to avoid the negative comparison that could potentially downgrade the victimization of these women.

Finally, the Special Court may recognize forced marriage under Article 3(h), which involves “Threats to commit any of the foregoing acts.”¹²⁸ Captors, although they may not always have used actual physical violence, may have resorted to direct threats to coerce their wives to submit to their desires. They threatened to commit both mental and physical torture, rape and abandonment, meaning they would leave their wives to die alone in a society that no longer accepted them. In addition, even if the captors did not use actual threats, there was always the threat of violence present in the household. In addition, captors often threatened to harm the victims’ family members or spouses as a means of making their wives obey. Unable to escape, these women lived in constant fear of their captors. Fearful for their own lives and the lives of their families, these women capitulated and submitted themselves to a life of torture, abuse and degradation.

C. The Special Court Can Prosecute Forced Marriage under Article 4.

Finally, the Statute gives the Special Court jurisdiction to prosecute persons for several broad, general categories of war crimes. For example, Article 4 of the Statute involves “Other Serious Violations of International Humanitarian Law.”¹²⁹ Here, Section (a) includes the crime of “intentionally directing attacks against the civilian population as such or against individual

¹²⁸ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

¹²⁹ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

civilians not taking direct part in hostilities.”¹³⁰ Conquering soldiers specifically targeted innocent women and girls to be their wives, stripping them from society and effectively preventing their return to that society well after the conflict had ended. Not only did these soldiers kill the men and boys from the villages but also they extended their pillage to the female population. By forcibly impregnating these women, they focused upon not only the destruction of the current generation but of future generations to come. The children born within forced marriages no longer belonged to their communities; the patriarchal society surrounding them would reject them as misfits of the conquering enemy. They would become members of their father’s community, forever alienating them from their mother’s side of the family.

Further, these marriages often extended for longer than the conflict itself for several reasons, because either the soldiers refused to release their captive wives or the wives found themselves unable to leave. The rejection of their families and their previous husbands left these women with no homes and no place to go. Because women in Sierra Leone are unable to inherit land, once a woman finds herself without a husband, society strips her of all material possessions. As such, many of these women remained with their captors and even remain there today, not out of respect or love but out of simple desperation. In these situations, innocent women remain the victims of a conflict long past as hostilities have ceased but the torture of these women continues into an indeterminable future.

VI. Several Reasons Exist for Prosecuting Forced Marriage as a Distinct Crime Against Humanity.

The evolution of the international community’s recognition of sex-based crimes and sexual violence provides the requisite backdrop for the prosecution of forced marriage as a distinct crime against humanity. Beyond having the foundation for its prosecution, however, the

¹³⁰ *Id.*

Special Court must recognize the reasons behind punishing perpetrators for this crime. The Prosecutor to the Special Court for Sierra Leone, David Crane, stated that he decided to pursue forced marriage as a distinct crime against humanity because of its' widespread practice during the civil war.¹³¹ Crane argues that, "because these women were held so long under threat of harm or death, the crimes differ from rape or other war crimes prosecuted at other courts."¹³²

Forced marriage is not merely a conglomeration of crimes; it is an extension of these crimes to the institution of marriage. It is an abomination of that institution, which leaves the battlefield behind and thereby furthers the conflict beyond the cessation of hostilities. Long after the end of the civil war, the victims of forced marriage continue to suffer at the hands of their "husbands." As such, because the crimes of sexual slavery, enslavement and forced labor "fall short of capturing the totality of the perpetrator's conduct or the victim's experiences,"¹³³ the Special Court must distinguish forced marriage from these already-established crimes against humanity. Because of the prevalence of forced marriage, the Special Court must today establish precedent for the future.

VII. Conclusion

In conclusion, jurisprudence exists that supports the establishment of forced marriage as a separate crime from that of sexual slavery or forced labor. This jurisprudence defines the crime of forced marriage as the situation where:

(1) a perpetrator attaches the right of marriage to one or more persons without consent by threat of force or coercion, such as that caused by fear of violence, duress, detention,

¹³¹ See Angela Stephens, *Forced Marriage Pursued As Crime in Sierra Leone Tribunal Cases*, UN Wire, 16 April 2004, National Journal Group (2004), available at <http://www.globalpolicy.org/intljustice/tribunals/sierra/2004/0416marriage.htm> [reproduced in accompanying binders at Tab 29].

¹³² *Id.*

¹³³ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent;

(2) a perpetrator causes a victim to engage in one or more acts of a sexual nature, and/or forced domestic labor, child bearing or child rearing;

(3) a perpetrator makes it so that the individual is unable to dissolve the marriage;

(4) the conduct that is committed is part of a widespread or systematic attack directed against a civilian population; and

(5) a perpetrator knew his conduct was part of or intended to be part of widespread and systematic attack directed against a civilian population.¹³⁴

As such, because the elements of forced marriage are distinguishable from those of other crimes against humanity, none of the current enumerated crimes gives a clear account of the atrocities involved in the perpetration of forced marriage.

Finally, forced marriage as a distinct crime against humanity does fall within the Special Court's jurisdiction. Several sections within the Special Court's Statute provide a requisite backdrop for the prosecution of forced marriage. First, the prosecution may argue forced marriage falls within Article 2 and particularly under Section (i), "Other Inhumane Acts."¹³⁵ However, forced marriage as a separate crime against humanity fits under both Articles 3 and 4 of the Special Court's Statute as well.¹³⁶ As such, the Special Court cannot continue to ignore the crime of forced marriage. In doing so, the Special Court reduces the abuses committed

¹³⁴ Michael P. Scharf and Suzanne Matler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crime Against Humanity*, African Perspectives on International Criminal Justice (2005) [reproduced in accompanying binders at Tab 42].

¹³⁵ Statute of the Special Court for Sierra Leone, art. 1, adopted by the Security Council on 14 August 2000, U.N. Doc. S/RES/1315 (2000) [reproduced in accompanying binders at Tab 27].

¹³⁶ *Id.*

against these innocent women and girls and thereby relegates Sierra Leone's own citizens to a position of neglect and rejection.

EXHIBIT 1

TIMELINE – FORCED MARRIAGE

- 1948 – Universal Declaration of Human Rights adopted
- 1962 – Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted
- 16 December 1966 – International Covenant on Economic, Social and Cultural Rights adopted
- 19 December 1966 - International Covenant on Social and Political Rights adopted
- 1968 – Bulgaria outlaws forced marriages
- 23 March 1976 – International Covenant on Civil and Political Rights adopted
- 1979 – Convention on the Elimination of all Forms of Discrimination Against Women adopted
- 1990 – African Charter on the Rights and Welfare of the Child adopted
- 1991 – Penal Code of the Socialist Republic of Bosnia and Herzegovina passed
- 1992 – Application of Prosecutor v. Kunarac, Kovac and Vukovic in ICTY
- 1992 – Application of Prosecutor v. Kvočka et al. judgment in ICTY
- 1992 – Application of Prosecutor v. Tadic judgment in ICTY
- 20 December 1993 – Declaration on the Elimination of Violence against Women
- April 7, 1994 – application of judgment in *Prosecutor v. Akayesu*
- 1998 – Elements of Crimes for ICC adopted
- 2 September 1998 - Prosecutor v. Akayesu Judgment in ICTR
- 11 October 2000 – GA Res. A/C.3/55/L.13 adopted
- 2 November 2001 – Prosecutor v. Kvočka et al. judgment in ICTY
- 2003 - Kyrgyz Republic Law on Gender Equality passed
- 11 July 2003 – Protocol of the African Charter on Human Rights and Peoples’ Rights on the Rights of Women in Africa adopted
- 20 July 2006 – Democratic Republic of the Congo outlawed forced marriage

[There are other laws that criminalize forced marriage included in the memo, but the author could not locate the dates of these laws.]