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An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of “Forced Marriage”

Amy Palmer*

I. INTRODUCTION

¶1 “I did not want to go; I was forced to go. They killed a lot of women who refused to go with them... When they capture young girls, you belong to the soldier who captured you. I was ‘married’ to him,” said Isatu, who was 15 years old at the time of her abduction.¹

¶2 Broadly, “forced marriage” involves a female being married, against her will, to a male.² This creates a union without mutual consent.³ Forced marriage is often used in combat situations and subjects the female population to wartime sexual violence and an undesired marital union. In 1991, the Republic of Sierra Leone was stricken with political and economic troubles, giving way to a state of civil war that lasted for eleven years.⁴ During the Sierra Leone conflict, rebels forcibly conscripted women and girls into the rebel forces and/or forcibly married them to members of their group. These women were then held captive by individual men in the rebel groups for prolonged periods of time. Previously, situations like these were treated as those of sexual slavery.

¶3 Sexual slavery is considered a crime against humanity and is prohibited by international law.⁵ However, there are critical differences between sexual slavery and forced marriage. The most significant of these differences is that sex is not the only incident of the forced relationship. Additionally, a forced conjugal association is sometimes not predominantly sexual, as victims of forced marriage need not necessarily be subject to non-consensual sex. Perpetrators of forced marriage are not being held responsible for the marital aspect of their offenses if they are prosecuted in the same

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¹ Augustine S.J. Park, ‘Other Inhumane Acts’: *Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone*, in SOCIAL & LEGAL STUDIES 315 (2006) (citing Amnesty International, *Sierra Leone: Rape and Other Forms of Sexual Violence Against Girls and Women*, AI Index: AFR 51/69/00).

² There is something to be said for the notion that male children, typically child soldiers, could be married against their will, however this is an issue beyond the scope of this case note.

³ The line between forced marriage and customary arranged marriage is blurred; however, in forced marriage there is no consent given on behalf of the female, even by her family. In situations involving arranged child marriage, the girl’s family consents for her.

⁴ The Sierra Leonean conflict will be discussed in more detail later in this note.

⁵ Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85, 89 (2005) [hereinafter Nowrojee, *Invisible War Crime*]. See Rome Statute of the International Criminal Court, art. 7(g), 2187 U.N.T.S. 90 (entered into force July 1, 2002), available at www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf [hereinafter Rome Statute].

manner as those perpetrating sexual slavery alone. Acknowledging forced marriage as a crime against humanity sends a profound message that the exploitation of a weaker gender group during wartime is a criminal act under international law.

¶4 The distinction between forced marriage and sexual slavery is prevalent in the conjugal duties the victim is forced to fulfill. Aside from the likely ongoing performance of sexual acts, the female is required to perform forced labor, such as cooking, washing, and portering (carrying ammunition and other looted items) for her rebel husband. Additionally, she is expected to bear his children.⁶ There are similarities between forced marriage and sexual slavery, because the conjugal status is imposed on the female through coercion or threats.⁷ However, there are differing mental and psychological elements of the effect the label of “wife” has on the female. There may be diminished capacity on behalf of the female to leave her “husband.” The female may also feel societal pressure beyond the concern that accompanies raising children from the marital-type union. She may be unable to reintegrate into her family and community because she bears the stigma of having been married to a rebel and having assisted in rebel activities. Even today, an unknown number of females still remain with their rebel husbands despite the fact the conflict is over.⁸

¶5 The international community and the Government of Sierra Leone called for both a Truth and Reconciliation Commission (TRC) and an independent court to address the atrocities committed during the eleven-year conflict in Sierra Leone.⁹ Through an act of parliament in February 2002, the TRC began investigating the war to create an impartial historical record of human rights abuses that occurred from 1991 to 1999. This act arose out of the 1999 Lomé Peace Agreement.¹⁰ Under the peace agreement, the TRC was to be established to “address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation.”¹¹

¶6 On August 14, 2000, the Government of Sierra Leone and the UN agreed to establish the Special Court for Sierra Leone (SCSL) in order to prosecute war crimes committed during the bloody ten-year civil war that left an estimated 75,000 dead.¹² The SCSL is a separate and independent court comprised of international and national judges, prosecutors and defense attorneys. It prosecutes persons for violations of international humanitarian law and Sierra Leonean law.¹³ The SCSL chose to investigate and pursue criminal charges against three organized, armed factions responsible for war crimes

⁶ HUM. RTS. WATCH, “WE’LL KILL YOU IF YOU CRY” SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT, Vol. 15, No.1 (A) (Jan. 2003), available at <http://www.hrw.org/en/reports/2003/01/15/well-kill-you-if-you-cry> [hereinafter WE’LL KILL YOU IF YOU CRY].

⁷ Nowrojee, *Invisible War Crime*, supra note 5, at 102.

⁸ WE’LL KILL YOU IF YOU CRY, supra note 6, at 3.

⁹ See S.C. Res. 1315, at 1, ¶¶ 1-9, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (creating the Special Court for Sierra Leone following breaches of the Lomé Agreement by the RUF and noting the Government’s pursuit of a Truth and Reconciliation Commission).

¹⁰ The Truth and Reconciliation Commission Act (2000) (Sierra Leone).

¹¹ Lomé Peace Agreement, Sierra Leone-Revolutionary United Front, art. 26(1), July 7, 1999, U.N. Doc. S/1999/777 [hereinafter Lomé Agreement].

¹² CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT 38 (Transnational Publishers 2005) [hereinafter BASSIOUNI, LEGISLATIVE HISTORY].

¹³ CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 569 (2d rev. ed. 1999).

throughout the conflict; the Revolutionary United Front (RUF), the Civil Defense Forces (CDF), and the Armed Forces Revolutionary Council (AFRC), and specifically singled out Charles Taylor for indictment.¹⁴

¶17 Throughout the armed conflict, thousands of women and girls of all ages were subjected to widespread and systematic sexual violence. This violence frequently manifested itself through forced marriage involving abduction by the rebels and subjection to sexual slavery and forced labor.¹⁵ These women and girls were forced to assume all the obligations of a traditional wife. They were also raped repeatedly, beaten and branded, made to care for their captor-husbands, and, if they became pregnant, forced to give birth to children.¹⁶ Human Rights Watch interviewed three hundred women and girls and prepared a report of their findings and recommendations to both the government of Sierra Leone and the international community in January 2002.

Abducted women were made to carry out forced labor during their captivity, including cooking, cleaning, washing clothes, and carrying heavy loads of ammunition and looted items. In many instances, women – intimidated by their captors and the situation they were in – felt powerless to escape their lives of sexual slavery, and were advised by other female captives to tolerate the abuses, “as it was war.” The rebels often deliberately marked abducted civilians with the letters “RUF” or “AFRC” carved mainly onto their chests. This made escape more difficult because, were they to be caught by government forces, they would likely be suspected of being rebels and killed.¹⁷

¶18 The Statute of the Special Court for Sierra Leone did not explicitly list the charge of forced marriage. However, upon a motion by the Prosecutor, Trial Chamber I of the SCSL decided in April 2004 that Trial Chamber II (Trial Chamber) of the SCSL could consider and hear evidence supporting a new crime against humanity; namely, forced marriage in the case of *Prosecutor v. Brima, Kamara, and Kanu* (AFRC Case). The three defendants in the case were officials and senior members of the AFRC.¹⁸

¶19 The three AFRC accused were found guilty during the trial phase of eleven different charges relating to acts of terror, collective punishment, unlawful killings, rape,

¹⁴ Charles Taylor was the head of the National Patriotic Front in Liberia (NPFL) and President of Liberia during the Sierra Leone Civil War and is purported to have overseen the campaign of terror and various criminal acts committed by the NPFL and encouraged similar acts committed by the AFRC and RUF against the population of Sierra Leone. See *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-PT, Prosecution’s Second Amended Indictment, ¶ 5 (May 29, 2007). See also Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone*, 57 DRAKE L. REV. 11, 13-14, 19 (2008) (noting Charles Taylor’s coordination of rebel training camps in Libya in the late 1980s and his effective control of the AFRC-RUF alliance).

¹⁵ WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 3.

¹⁶ Michael P. Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity*, in CASE RESEARCH PAPER SERIES IN LEGAL STUDIES 1, 2 (2005).

¹⁷ WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 43-44.

¹⁸ Statute of the Special Court for Sierra Leone arts. 2-5, available at <http://www.scs-sl.org/DOCUMENTS/ImportantCourtDocuments/tabid/200/Default.aspx> [hereinafter Statute of the Special Court].

physical violence (mutilation), outrages upon personal dignity (sexual slavery), recruitment and use of child soldiers, enslavement and pillage. However, the Trial Chamber majority found that forced marriage was not a crime under customary domestic law at the time of commission and merely amounted to proof of sexual slavery, rather than a separate crime against humanity.¹⁹ Justice Doherty wrote a dissenting opinion maintaining that forced marriage was a different crime than sexual slavery. She argued that the mental and moral suffering of the victim was different because of the conjugal status forced on these women, the forced labor and the social stigma attached to being a “bush wife.”²⁰ The Appeals Chamber, by a unanimous decision, disagreed with the Trial Chamber and concluded that forced marriage did amount to “other inhumane acts.”²¹

¶10 To date, no other international tribunal has heard evidence of forced marriage, placing this instance of prosecution in more of an exception category, not to be considered the rule. However, the AFRC Case is not the only case heard by the SCSL that has involved charges of forced marriage. On Nov. 2, 2004, the Trial Chamber in the CDF Case stated orally that evidence would not be heard regarding crimes of a sexual nature and/or forced marriage in spite of the fact that it existed, as it was inadmissible under the current counts.²² The Prosecution had requested for leave to amend the Indictment to add four new counts relating to sexual violence, however the Trial Chamber had denied the motion, stating it was in violation of an accused’s right to be informed promptly and in detail of the nature and cause of the charges against him.²³ In a more momentous decision, the indictment in the RUF Case was amended on Feb. 9, 2004 to include the charge of forced marriage as an other inhumane act against the accuseds and the three men were each found guilty of forced marriage by the Trial Chamber on Feb. 25, 2009.²⁴

¶11 Should forced marriage continue to be committed during conflicts, the AFRC Appeals Chamber Judgment and the RUF Trial Chamber Judgment have set persuasive precedent for other tribunals or the International Criminal Court (ICC) to prosecute forced marriage as a crime against humanity under international law.

¶12 Specifically, Count 8 of the indictment in the AFRC Case alleged the offense of other inhumane acts.²⁵ This Case Note will demonstrate that the Trial Chamber holding that forced marriage was subsumed by the crime of sexual slavery was erroneously decided and will favor the Appeals Chamber’s finding that forced marriage is a separate other inhumane act falling under the prohibited umbrella of crimes against humanity.²⁶

¹⁹ Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-2004-16-PT, Judgment (June 20, 2007) [hereinafter AFRC Trial Chamber Judgment].

²⁰ *Id.*, dissenting opinion by Justice Doherty at 581-94.

²¹ Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-2004-16-A, Judgment (Feb. 22, 2008) [hereinafter AFRC Appeals Chamber Judgment]. See Statute of the Special Court, *supra* note 18, art. 2(i).

²² Prosecutor v. Moinina and Kondewa, Case No. SCSL-04-14-A, Appeals Chamber Judgment, ¶ 430 (May 28, 2008).

²³ *Id.*

²⁴ Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-T, Judgment, at 678-85 (Feb. 25, 2009).

²⁵ Further Amended Consolidated Indictment of Defendants Brima, Kamara, and Kanu, Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-2004-16-PT-147, available at <http://www.scs-sl.org/Documents/AFRC/SCSL-04-16-PT-147.pdf> [hereinafter AFRC Indictment].

²⁶ This Case Note will not go into detail about the finding of guilty on the charge of other inhumane acts (specifically through evidence of forced marriage) in the RUF Case as the evidence heard was similar in nature to the evidence heard in the AFRC Case, and because the RUF Judgment is still only a Trial

Part II of this Note details the evolution of gender-based war crimes in international law, establishing strong precedent for ad hoc tribunals to create new charges in international criminal law. Part III explains the historical backdrop for the conflict of Sierra Leone, the institution of marriage in Sierra Leone, and the creation of the SCSL. Part IV clarifies the AFRC Case holdings and rationale for the rejection, and subsequent approval, of forced marriage as a new crime against humanity. Part V illustrates the radical social and legislative changes that have taken place in Sierra Leone since the establishment of the SCSL, evidencing the consensus that forced marriage is illegal under Sierra Leonean law. Part V also calls for revisiting the charge of forced marriage as a separate crime against humanity in the prosecution of atrocities in the International Criminal Court.

II. HISTORY

A. Gender-Based War Crimes

¶13 Gender crimes have only recently been recognized by international law, but sexual violence has been a part of virtually every war the world has ever known.²⁷ For centuries, rape was seen as an inevitable consequence of war and a way to boost soldier morale.²⁸ The taking of brides by the victors was viewed similarly. Later, rape was seen as a crime against family honor. Only in the last half century has rape come to be seen as an offense against the woman's dignity rather than a property crime or a crime against her family's or husband's honor.²⁹ Codifications against rape during war tended not to be enforced.³⁰ The international community was reluctant to prosecute gender-based war crimes even when domestic law prohibited them. A number of countries have only within the past ten years reached a consensus to prosecute the perpetrators of gender-based war crimes.

B. International Criminal Tribunals

¶14 While many bilateral agreements existed in modern history, the Hague Convention was the only guidance for establishing rules regarding warfare. It focused on the treatment of other combatants, not civilians.³¹ Additionally, there were no enforcement mechanisms attached to the treaties. After the atrocities committed during World War II, the international community agreed, among other things, to hold people

Chamber Judgment, not an Appeals Chamber Judgment. The analysis conducted herein will not suffer for lack of inclusion of the RUF Trial Chamber Judgment.

²⁷ The Lieber Code was used by the Union Army during the American Civil War and included rape as a capitally punishable offense. See Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 220 (2000).

²⁸ Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. Pub. L. 317 (2002).

²⁹ See *id.*

³⁰ The Hague Convention of 1907 could have been interpreted to prohibit rape of civilians during wartime, but as the Convention only dealt with combatants, it did not explicitly extend protections to civilians and was not used as such by governments and courts. See Matthew Lippman, *Humanitarian Law: War on Women*, 9 MICH. ST. U. – DET. C. L. J. INT'L L. 33, 38 (2000).

³¹ See *id.*

responsible for the violence committed against civilians.³² The victors installed military tribunals specifically created to prosecute violators of the principles laid out in the Hague Convention as well as crimes enumerated in the tribunal charters.

¶15 Furthermore, the international community established the Geneva Conventions in response to the increasing vulnerability of civilians during wartime.³³ Moreover, the international community largely came to accept that individuals could be prosecuted and found liable for international criminal acts, particularly crimes against peace, war crimes, crimes against humanity, genocide, and terrorism.³⁴ However, while sexual violence has been considered a criminal act under domestic and international law, war-related sexual violence has seldom been prosecuted.³⁵ The development of international military and ad hoc tribunals has allowed the international community to prosecute war criminals responsible for crimes that occurred in specific regions of the world, but gender-based war crimes were largely ignored until the development of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

1. Nuremberg and Tokyo International Military Tribunals

¶16 The International Military Tribunal (IMT) in Nuremberg was the first modern international criminal tribunal.³⁶ At the time of the IMT's inception, waging aggressive war was considered the supreme crime, so the tribunal focused most of its attention on prosecuting crimes against the peace.³⁷ Even though the tribunal recorded evidence of a number of sex crimes committed by both armed forces, the sex crimes received little attention.³⁸ Additionally, the International Military Tribunal for the Far East investigated Japanese war crimes committed during World War II, including the systematic rape and sexual slavery by the Japanese imperial army of as many as 200,000 former "comfort women," but these crimes were wholly ignored by the Tokyo Tribunal.³⁹ Until the 1980's, there was almost no mention of the issue of comfort stations and gender-based

³² The Allies created the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East. Each military tribunal was governed by a Charter that governed what crimes were prosecuted. Rape was not specifically included in either Charter and was never prosecuted as an independent war crime, however rape could have been prosecuted as a crime against humanity or sexual violence and was prosecuted in conjunction with other crimes in the International Military Tribunal for the Far East. *See generally* KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 203 (1997).

³³ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, (entered into force Oct. 21, 1950).

³⁴ LINDA CARTER, CHRISTOPHER BLAKESLEY, & PETER HENNING, *Introduction to the Concept and Study of Global Issues*, in *GLOBAL ISSUES IN CRIMINAL LAW* 10 (2007).

³⁵ CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA* 1 (1996).

³⁶ The London Charter was in the form of a treaty that provided for individual and group criminal responsibility, removed the defenses of immunity, rejected the defense of following superior orders, and established the supremacy of international law over national law. It laid out the crimes/charges of crimes of aggression, crimes against peace, crimes against humanity, and war crimes. *See* BASSIOUNI, *LEGISLATIVE HISTORY*, *supra* note 12, at 26.

³⁷ Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Court and Tribunals: 1993 to 2003*, 11 No. 3 *HUM. RTS. BRIEF* 16 (2004).

³⁸ *See* ASKIN, *supra* note 32, at 138.

³⁹ Andrea R. Phelps, Comment, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 *WM. & MARY J. WOMEN & L.* 499, 512 (2006).

crimes that occurred during World War II even though both military tribunals were aware that such crimes had occurred.⁴⁰

2. International Criminal Tribunal for the former Yugoslavia

¶17

In 1945, following WWII, the Charter of the United Nations was drafted. This effectively created the UN and delegated the responsibility of maintaining international peace and security to the Security Council by giving it the power to handle “any threat to the peace, breach of the peace, or act of aggression.”⁴¹ On May 25, 1993, the Security Council, pursuant to Resolution 827, established the ICTY to prosecute the leaders responsible for the “ethnic cleansing” that occurred in the region.⁴² After WWII, the six republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia and Montenegro were united into the nation of Yugoslavia.⁴³ Ethnic tension resulted and eventually declarations of independence came from Croatia, Slovenia, Bosnia-Herzegovina and Bosnian Serbs declaring themselves the independent Serbian Republic of Bosnia and Herzegovina.⁴⁴ Violence escalated to the point where Bosnian Serbs were attacking the Croats and Muslims of Bosnia and non-Serbs were subject to internment, rape, torture, sexual violence and extermination.

¶18

The ICTY is the first ad hoc international criminal tribunal to be established by the Security Council and is still operating in The Hague. Its jurisdiction extends over genocide, crimes against humanity, and war crimes.⁴⁵ The ICTY also has the specific authority to try crimes of sexual violence as violations of international law.⁴⁶ The conflict

⁴⁰ *Id.* It should also be noted that, in December of 2000, the Women’s International War Crimes Tribunal 2000 convened in Tokyo, Japan to consider the rape and sexual slavery that occurred in the comfort facilities frequented by Japanese military forces during World War II. The tribunal assessed the criminal liability of the state of Japan as well as Emperor Hirohito as head of state. Both were convicted of gender-based war crimes perpetrated against 200,000 women during World War II. While the tribunal did not have the authority to sentence or punish, it did recommend reparations, and, even more notably, is the first war crimes tribunal to focus exclusively on gender-based war crimes. Christine M. Chinkin, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT’L L. 335, 335-39 (2001).

⁴¹ Charter of the United Nations art. 39, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945). See generally *id.* arts. 39-51.

⁴² BASSIOUNI, LEGISLATIVE HISTORY, *supra* note 12, at 35 (citing 25 May 1993, S.C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159). The Security Council based this decision off of recommendations by the Commission of Experts pursuant to Resolution 780 to investigate violations of international humanitarian law in the former Yugoslavia that the SC established in 1992. *Id.* at 34.

⁴³ VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 18 (1995).

⁴⁴ *Id.* at 20.

⁴⁵ The Tribunal was created after the UN Security Council, “express[ed] once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of ‘ethnic cleansing,’ including for the acquisition and the holding of territory.” S.C. Res. 827, ¶ 3, U.N. Doc. S/RES/827 (1993). See also Statute of the International Criminal Tribunal for the Former Yugoslavia preamble and arts. 2-5, U.N. Doc. S/25704 (1993) (allowing prosecution of grave breaches of the Geneva Conventions, violations of laws and customs of war, charges of genocide, and crimes against humanity).

⁴⁶ BASSIOUNI & MCCORMICK, *supra* note 35, at 8-9 (noting the Commission published its first report, drawing attention to “ethnic cleansing” and systematic rape that was occurring in the region however once the ICTY was established, it was not the first tribunal to try crimes of sexual violence, even though it had the legal authority to do so).

in the former Yugoslavia took sexual violence to a new, systematic, level with its policy of ethnic cleansing: employing sexual violence in concentrations camps, torture and cruel, inhuman and degrading treatment in the areas targeted by the Serbian and Bosnian Serb armies to become “Greater Serbia.”⁴⁷

3. International Criminal Tribunal for Rwanda

¶19 At the end of 1994, the UN Security Council established the ICTR in order to address the genocide that raged in Rwanda by the Hutu majority against the Tutsi minority. The ICTR’s inception came in the wake of the brutal killing of between 500,000 and one million Rwandan men, women and children in less than three months in 1994.⁴⁸ It is still in operation in Arusha, Tanzania.⁴⁹

¶20 The ICTR was established less than a year after the ICTY was established.⁵⁰ The ICTR differed from the ICTY, as the ICTR was established in response to a conflict solely of an intra-state nature. However, the UN Security Council used the precedent created by the ICTY to allow for an international criminal tribunal in Rwanda.⁵¹ Moreover the ICTR, like the ICTY, has the legal authority to prosecute genocide, crimes against humanity, and war crimes.⁵²

4. Other Ad hoc Tribunals

¶21 Beyond the three military and criminal tribunals listed above, additional venues have been established in a number of countries once involved in internal and external conflicts. Aside from the Special Court for Sierra Leone as a hybrid fusion of international and domestic jurisdiction, there is the Iraqi High Tribunal⁵³ and the Extraordinary Chambers in the Court of Cambodia,⁵⁴ created to address the aftermath of conflicts in those two countries.

⁴⁷ *Id.* at 5. Notably, the ICTY is the first tribunal has been established to try violators on all sides in an ongoing conflict. *Id.* at 2.

⁴⁸ BINAIFER NOWROJEE, HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 12 (1996), *available at* <http://www.hrw.org/legacy/reports/1996/Rwanda.htm> [hereinafter NOWROJEE, SHATTERED LIVES].

⁴⁹ BASSIOUNI, LEGISLATIVE HISTORY, *supra* note 12, at 35 (citing 8 Nov. 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598).

⁵⁰ See Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) [hereinafter Rwanda Statute].

⁵¹ Richard J. Goldstone, *The Role of the United Nations in the Prosecution of International War Criminals*, 5 WASH. U. J.L. & POL’Y 119, 121 (2001).

⁵² See Rwanda Statute, *supra* note 50.

⁵³ The Iraqi Criminal Tribunal was created to hold Iraqi national or residents accountable for genocide, crimes against humanity and war crimes committed after 1986 and before May 1, 2003, the date of the invasion that brought about an end to the rule of Saddam Hussein. See Iraqi High Criminal Court Law, No. 4006 Ramadan 14, 1426 Hijri 47th year, 18 October, 2005, *available at* http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf.

⁵⁴ The Extraordinary Chambers in the Courts of Cambodia was created upon request by Cambodia for international assistance in prosecuting serious crimes committed during the Khmer Rouge regime from 1975 to 1979. It is estimated that up to three million people perished during this period. See 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, *available at* http://www.eccc.gov.kh/english/agreement_image.aspx.

¶22 Additionally, the International Criminal Court (ICC) is an independent, permanent court that has the power to try persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.⁵⁵ The International Criminal Court is currently investigating conflict situations in the Darfur region of Sudan, the Democratic Republic of the Congo, Uganda, and the Central African Republic. There is continuing support not only for specialized tribunals but also for permanent tribunals to aid in the enforcement of international criminal law and prosecute perpetrators for both domestic and international crimes.

C. *Development of International Crimes of Gender-Based Violence*

¶23 As mentioned earlier, military and criminal tribunals have existed for over fifty years, yet crimes of gender-based violence committed during wartime have largely been ignored. Despite production of overwhelming evidence of sexually violent crimes in every international ad hoc tribunal, only in the past ten years have these international criminal tribunals begun to acknowledge and prosecute gender-based crimes.⁵⁶ Notably, though, these prosecutions have led to the vast development within only a short period of time of a body of international criminal jurisprudence that not only creates prohibitions but also enforces those prohibitions against gender-based violence perpetrators within armed conflicts.⁵⁷

1. Akayesu Case

¶24 The first step forward for gender-based war crime prosecution came out of the ICTR, when the tribunal found Jean-Paul Akayesu, the former mayor of the Taba commune,⁵⁸ guilty of rape as an act of genocide, among other crimes.⁵⁹ Akayesu took part in and helped facilitate collective rapes on or near the commune premises. This decision recognized that rape and sexual violence are independent crimes constituting crimes against humanity and articulated broad definitions of rape and sexual violence.

2. Celebici Camp Case

¶25 At first, the ICTY was reluctant in prosecuting crimes of sexual violence. However, in the Celebici Camp Case, the ICTY prosecuted brutal sexual abuse of prisoners in the Celebici prison camp.⁶⁰ The ICTY found the defendant guilty of rape as

⁵⁵ See Rome Statute, *supra* note 5.

⁵⁶ Prosecution of gender-based war crimes began with the International Criminal Tribunal for Rwanda and continued in the International Criminal Tribunal for the former Yugoslavia. See Phelps, *supra* note 39.

⁵⁷ *Id.*

⁵⁸ Prior to 2002, Rwanda was divided into 154 communes. Akayesu was mayor of the Taba commune. Mass atrocities were committed against the Tutsis who were forced to live in his commune during the Rwandan genocide. See Kelly Dawn Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 106 (1999).

⁵⁹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

⁶⁰ Čelebići prison camp was a prison camp run by Croat and Bosniak defense forces located in Čelebići, a village in the central Bosnian municipality of Konjic, during the Bosnian War. Prosecutor v. Delalic, Case No. IT-96-21-T, P 496, Judgment (Nov. 16, 1998).

a crime of torture and thereby made rape more than just a minor circumstance incident to other more heinous crimes.⁶¹

3. Furundz Ija Case

¶26 In this case, the ICTY advanced the prosecution of sexual violence by expanding the definition of rape to include oral and anal penetration. The ICTY additionally acknowledged that, though rape is covered under the ICTY Statute, other less grave forms of serious sexual assault are implicitly covered under the term other inhumane acts.⁶²

4. Kunarac Case

¶27 This decision involved the first indictment issued purely for sexual violence. The ICTY convicted the defendant of enslavement as a crime against humanity. The crimes in this case took place in the town of Foca, where the Serbs created rape camps where women were brutalized with multiple rapes, including gang rapes, and made to serve as sexual slaves to their Serb captors.⁶³ Although the term was not used explicitly, the conviction was based primarily on sexual enslavement.⁶⁴ This case also marked the first time that rape was charged as a crime against humanity in the ICTY.

5. Kvočka Case

¶28 This ICTY case involved prosecution relating to the Omarska Camp used to imprison, torture, kill, rape, humiliate, and otherwise abuse persons suspected of resisting Serbian authority. The Judgment convicted all five indictees of crimes against humanity for sex crimes they committed, as they knowingly and substantially participated in the enterprise.⁶⁵

6. Relationship to AFRC Case (Brima, Kamara, Kanu)

¶29 The aforementioned international tribunal judgments, while not directly binding on other ad hoc tribunals, provide persuasive authority and guidance to courts dealing with similar issues of wartime gender-based violence. The development of the definition of crimes against humanity to include many sexually violent crimes has highlighted the need for explicit recognition and distinction between wartime rapes and other inhumane acts that may also involve sexual violence. Additionally, the aforementioned cases all involve high ranking officials or key players in these various conflicts. While there were many people involved in facilitating and committing these widespread atrocities, the international tribunals are equipped only to deal with the highest level of officials,

⁶¹ *Id.*

⁶² Prosecutor v. Furundzija, Case No. IT-95-17, PP 174, 185, Judgment (Dec. 10, 1998).

⁶³ Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23-PT & IT-96-23/1-PT, Judgment (Feb. 22, 2001).

⁶⁴ *Id.*

⁶⁵ Prosecution v. Kvočka, et al., Case No. IT-98-30/1, Judgment (Nov. 2, 2001).

considered by the international community to be the most culpable individuals.⁶⁶ The domestic and local courts, moreover, are employed to prosecute lower level violators.⁶⁷

¶30 The international community has recognized that gender-violence, whether committed as an act of genocide, rape, or a more systematic way of humiliating and degrading a group of people, is prohibited during armed conflict. Comparably, in the AFRC Case, the three accused were all high level officials in the AFRC group and were all indicted for crimes against humanity based on the sexual violence charges of rape, sexual slavery, other inhumane acts, and outrages upon personal dignity.⁶⁸

¶31 This continual development of armed conflict-related sexual violence prohibition illustrates how important it is to recognize new charges based on distinguishing elements of a crime. This is exactly what the Prosecutor sought to do in the AFRC case in the Special Court for Sierra Leone.

III. SIERRA LEONE AND THE SPECIAL COURT

A. *History of the Conflict*

¶32 Sierra Leone gained its independence from the United Kingdom in 1961 and began as a multiparty political state modeled after the British system. However, in the late 1960s, this multiparty system gave way to thirty years of single party governance by the All People's Congress (APC). The APC was known for its corruption, nepotism and fiscal mismanagement despite the country's large deposits of diamonds, gold, rutile, and bauxite.⁶⁹ By 1991, the country's economic and political crisis paved the way for the emergence of the Revolutionary United Front (RUF), whose invasion of Sierra Leone from Liberia triggered the civil war.⁷⁰ The RUF was composed of students, alienated youths, and Liberian fighters from Charles Taylor's National Patriotic Front of Liberia (NPFL).⁷¹ Throughout the 1990s, multiple forces and factions battled for control of Sierra Leone. The organized and armed factions were: the RUF rebels; the National Provisional Ruling Council (NPRC), who had overthrown the APC in 1992; the Sierra Leone Army (SLA), from which a number of soldiers defected and joined the RUF and the AFRC; the West Side boys, a splinter AFRC group; the Civil Defense Forces (CDF),

⁶⁶ Many of these tribunals and offices for the prosecution have mandates that allow them to indict only the highest level perpetrators, however they have the ability to work with national courts to prosecute lower-level offenders. See, e.g., Rome Statute, *supra* note 5, art. 1; and Rwanda Statute, *supra* note 50, art. 8.

⁶⁷ *Id.*

⁶⁸ AFRC Indictment, *supra* note 25.

⁶⁹ CHERIF BASSIOUNI, POST-CONFLICT JUSTICE IN SIERRA LEONE, 565 (2002) (citing JOHN L. HIRSH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY, 22-23 (2001)) [hereinafter BASSIOUNI, POST-CONFLICT JUSTICE]; see generally, J.A.D. ALIE, A NEW HISTORY OF SIERRA LEONE (1990).

⁷⁰ Lynn L. Amowitz et al., *Letter from Sierra Leone: Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone*, 287 J. AM. MED. ASS'N 513 (2002). Prior to 1991, the RUF forces were not well known, however by April, communication from the guerillas announced the name of the RUF and its leader, Foday Sankoh. The RUF message was that "the country was immensely rich in mineral wealth controlled by a few Lebanese and business men with political connections that the time for reasoned debate had passed, and that lasting solutions to the country's chronic economic and political problems could be found only through an explosion of destructive violence." BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 69, at 567 (citing Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone: A Revolt of the Lumpenproletariat*, in AFRICAN GUERRILLAS 179 (Christopher Clapham, ed., 1998)).

⁷¹ WE'LL KILL YOU IF YOU CRY, *supra* note 6, at 10.

a pro-government militia supported by the NPRC; the Kabbah government, who had previously and silently supported the RUF in the early 1990s; and the AFRC, consisting of a number of ex-SLA soldiers. The AFRC overthrew the Kabbah government and then joined forces with the RUF in 1997.⁷²

¶33 On October 23, 1997, the RUF/AFRC group signed an agreement providing for the return to power of President Kabbah through negotiations by the Economic Community of West African States (ECOWAS). However, the RUF forces began stockpiling weapons and attacking the monitoring forces stationed in Sierra Leone, so they were driven from Freetown, the capital of Sierra Leone.⁷³ Once expelled, the RUF/AFRC forces began to strategically consolidate their positions and, by late 1998, were in control of over half the country. Then, the RUF/AFRC rebels embarked on a violent campaign on January 6, 1999, invading Freetown, committing egregious human rights abuses and killing thousands before they were again driven back.⁷⁴

¶34 The international community stepped in to negotiate the Lomé Peace Agreement between President Kabbah and Foday Sankoh, the RUF leader, on July 7, 1999. The goal was to legitimize the RUF as a political party with political power, access to diamonds and mineral resources and amnesty for its human rights abuses.⁷⁵ However, the RUF refused to disarm and, in May 2000, captured five hundred UN peacekeepers. RUF forces continued the fighting and unrest for another three years despite a second cease-fire agreement in November 2000.⁷⁶ The civil war in Sierra Leone did not officially end until January 18, 2002.⁷⁷

B. *Sexual Violence Against Women and Girls during the Conflict*

¶35 When the world began to learn of the atrocities occurring in Sierra Leone's civil war, this knowledge was limited to widely reported amputations accompanied by images of hands and limbs being hacked off in relation to the diamond mining process. This violence was performed through the conscription of child soldiers.⁷⁸ Such soldiers were depicted carrying automatic weapons and high on drugs. Though sexual violence was committed on a much larger scale than amputations, very little was reported to the international community.⁷⁹ The UN Special Rapporteur on the Elimination of Violence Against Women estimated that 72 percent of Sierra Leonean women and girls experienced human rights abuses and that over 50 percent were victims of sexual violence.⁸⁰ Additionally, a survey conducted by Physicians for Human Rights in 2002

⁷² *Id.* at 9-11; *see also* AFRC Indictment, *supra* note 25, at 3-4.

⁷³ WE'LL KILL YOU IF YOU CRY, *supra* note 6, at 11.

⁷⁴ Scharf & Mattler, *supra* note 16, at 3.

⁷⁵ US Department of State, Bureau of African Affairs, Background Note: Sierra Leone (Nov. 2003), at <http://www.state.gov/r/pa/ei/bgn/5475pf.htm> [hereinafter Background Note]; *see* Lomé Agreement, *supra* note 11.

⁷⁶ BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 69, at 572; Abuja Ceasefire Agreement between the Government of Sierra Leone and the Revolutionary United Front (Nov. 10, 2002).

⁷⁷ Background Note: Sierra Leone, *supra* note 75.

⁷⁸ *See e.g.*, Andres Perez, *Sierra Leone's diamond wars*, LE MONDE DIPLOMATIQUE, June 2000. *See also*, BLOOD DIAMOND (Warner Bros. Dec. 8, 2006).

⁷⁹ WE'LL KILL YOU IF YOU CRY, *supra* note 6.

⁸⁰ Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, Comm'n on Hum. Rts., 58th Sess., Provisional Agenda Item 12(a), at 15, U.N. Doc. E/CN.4/2002/83/Add.2 (2002).

calculated that as many as 215,000 to 257,000 Sierra Leonean women and girls may have been subjected to sexual violence during the conflict.⁸¹ Human Rights Watch documented personal accounts of the violence that occurred.

H.K., a sixteen-year-old student, was abducted from Freetown during the January 1999 invasion. She was taken to Makeni where she was “virginated” and forced to be the wife of Colonel “Jaja,” a twenty-two-year-old half-Liberian who threatened to kill her entire family if she escaped. H.K. was brutally tortured after Colonel “Jaja” accused her of stealing his money, [which she did not do. She was forced to endure punishment for stealing, however she was not killed, nor was she thrown out. After being punished] for several days, maybe up to a week or so, [she went back to being Jaja’s wife].⁸²

¶36 Amidst the rampant sexual violence, thousands of women and girls were abducted and forced to become the sexual partners of their captors. These women and girls were frequently raped by their partners and their partners’ associates and remained with their abductors for years.⁸³ They were considered wives of their captors and endured force or threat of violence administered by their husbands to coerce them into assuming the duties normally expected of a wife such as cooking, cleaning and bearing and raising children.⁸⁴ Many such bush wives currently remain with their spouses even though the conflict has ended.⁸⁵

C. Creation of the Special Court for Sierra Leone

¶37 The Special Court for Sierra Leone was established after the breaches of the Lomé Agreement by the RUF in order to prosecute persons for violations of both international and Sierra Leonean law.⁸⁶ All parties to the conflict, and even the peacekeeping forces, have reportedly committed human rights abuses. However, RUF/AFRC forces seem to have been the most frequent offenders. These forces committed acts including murder, rape, and mutilation of civilians.⁸⁷

¶38 The amnesty provision in the Lomé Agreement, so important to the negotiating parties at the time, allowed protection of perpetrators for abuses and crimes committed during the conflict and, therefore, would have interfered with the Court’s ability to prosecute individuals responsible for the atrocities. However, the international community refused to uphold it. The Report of the Secretary-General on the

⁸¹ PHYSICIANS FOR HUMAN RIGHTS, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE: A POPULATION-BASED ASSESSMENT 3-4 (Boston: Physicians for Human Rights, 2002).

⁸² WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 33, Human Rights Watch interview, Freetown, Oct. 12, 1999.

⁸³ *Id.*

⁸⁴ Jennifer Swallow, *Brutalized Legacy; Jennifer Swallow reports from Sierra Leone on the continuing civil war*, MORNING STAR, July 10, 2004, at 9.

⁸⁵ Fourth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/455 (May 19, 2000).

⁸⁶ Lomé Agreement, *supra* note 11.

⁸⁷ Amowitz, *supra* note 70, at 514. Human Rights Watch even documented human rights abuses by peacekeeping forces in Sierra Leone. See WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 28.

Establishment of a Special Court for Sierra Leone stated that the “United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”⁸⁸ The SCSL derived its power from, and was completely dependent upon, the international community’s view that the amnesty provision was invalid—specifically in relation to the SCSL’s ability to prosecute perpetrators of both domestic criminal law and international criminal law.

1. Court Authority/Jurisdiction

¶39 The SCSL is a treaty-based tribunal of mixed jurisdiction and composition combining the efforts of the UN and Sierra Leone itself.⁸⁹ It is a new kind of ad hoc criminal tribunal in that the rule of law is not being imposed upon an unwilling state. Instead, it is being established at the request of the Government of Sierra Leone.⁹⁰ According to the statute, the court “shall have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”⁹¹

2. Statute for Special Court for Sierra Leone and National Law

¶40 Made up of both international and national law, the Statute for the Special Court for Sierra Leone includes international crimes committed in non-international armed conflicts, specifically crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.⁹²

¶41 Additionally, Article 5 of the Statute incorporated under Sierra Leonean law crimes including offences relating to the abuse of girls under the Prevention of Cruelty to Children Act and offenses under the Malicious Damage Act.⁹³ Unfortunately, the application of Sierra Leonean law did not provide much protection to women and children. Women were not legally equal to men in Sierra Leone, and the laws were discriminatory against women.⁹⁴ Although sexual violence constituted a crime in Sierra Leone, rape of a virgin was perceived as the only serious crime. Rape of a married woman or non-virgin may not even have been a crime, and there seemed to be a general assumption that the woman consented.⁹⁵ Rape continuously went unpunished,⁹⁶ and, in

⁸⁸ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915 (2000), ¶ 22 [hereinafter Report on Establishment]. The UN and the government of Sierra Leone essentially voided the amnesty provision, opining that such a grant of amnesty was impermissible under customary international law. See BASSIUNI, POST-CONFLICT JUSTICE, *supra* note 69, at 581.

⁸⁹ BASSIUNI, POST-CONFLICT JUSTICE, *supra* note 69, at 583 (citing Report on Establishment, *supra* note 88, ¶ 9).

⁹⁰ Celina Schocken, Notes & Comments, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436, 437-38 (2002).

⁹¹ Statute of the Special Court, *supra* note 18, art. 1, § 1.

⁹² *Id.* arts. 2-4.

⁹³ *Id.* art. 5. Article 5 seems to perpetuate gender stereotypes under Sierra Leonean law as it only applies to girls under 13 and is less protective than international standards

⁹⁴ Report of the Sierra Leone Truth and Reconciliation Commission, Vol. 3b, 8 (Oct. 5, 2004) [hereinafter TRC Report].

⁹⁵ WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 19-21, 24. Marital rape is not recognized by general law

the event some remedy was actually sought, certain community figures came together to form a dispute resolution group rather than focusing on prosecution and punishment of the perpetrator.⁹⁷ Moreover, domestic violence under customary law in Sierra Leone permitted a husband to “reasonably chastise his wife by physical force,”⁹⁸ and women had very few property rights under general (statutory) and customary law.⁹⁹

¶42 As an indication of societal attitudes regarding domestic violence, Physicians for Human Rights noted a few years after the conflict ended that, while 80 percent of women surveyed expressed that there should be legal protections for the rights of women, more than 60 percent of the women surveyed believed that a husband had the right to beat his wife.¹⁰⁰

¶43 Women’s lack of economic power contributed to their vulnerability throughout the conflict because they were more dependent upon men and more likely to stay in dire and dangerous relationships.¹⁰¹ Due to this virtually lesser legal status of women and children in Sierra Leone, the Office of the Prosecutor for the SCSL was forced to rely more heavily upon international law violations than on domestic law violations.

IV. AFRC CASE – CHARGE OF FORCED MARRIAGE

¶44 As illustrated by the tribunal development of case law allowing for the prosecution of gender-based violence noted above, forced marriage had never been included as its own charge in any of the ad hoc tribunals. However, on May 6, 2004, Trial Chamber I for the SCSL issued a decision allowing for the prosecution of forced marriage as a crime against humanity. The amendment entered a new count of “Crimes Against Humanity – Other Inhumane Acts” (forced marriage). This followed the trend in international justice of focusing on gender-based crimes.¹⁰² However, on June 20, 2007, the Trial Chamber ruled that forced marriage was not its own separate crime against humanity or a violation of domestic customary law. Instead, the Chamber ruled that forced marriage fell under the umbrella of sexual violence, covered by sexual slavery, and therefore was accounted for under Count 9, Outrages upon Personal Dignity.¹⁰³

¶45 The Prosecution appealed a number of issues, including the forced marriage ruling, in the judgment of the Trial Chamber and oral hearings took place November 12-14, 2007.¹⁰⁴ The Appeals Chamber upheld the Prosecution’s appeal regarding forced

or customary law in Sierra Leone.

⁹⁶ TRC Report, *supra* note 94, at 9.

⁹⁷ *Id.* at 12.

⁹⁸ WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 22, n.63.

⁹⁹ SIERRA LEONE CONST, art. XXVII, § 4, *available at* <http://www.sierra-leone.org>.

¹⁰⁰ Amowitz, *supra* note 70, at 519.

¹⁰¹ TRC Report, *supra* note 94, at 9.

¹⁰² Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-2004-16-PT, 2004:12 [38], Decision (May 6, 2004).

¹⁰³ AFRC Trial Chamber Judgment, *supra* note 19, at 220, ¶ 713.

¹⁰⁴ Transcript of Appeals Chamber Judgment, Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-2004-16-A (Feb. 22, 2008), *available at* http://www.scs-sl.org/Documents/AFRC/AFRC_22FEB08_APEALS%20JUDGMENT.PDF [hereinafter Appeal Judgment Transcript].

marriage, recognizing it as one of the other inhumane acts.¹⁰⁵ However, the Appeals Chamber declined to enter an additional conviction for forced marriage.

A. Facts of Prosecutor v. Brima, Kamara, Kanu

¶46 Brima, Kamara, and Kanu are alleged to have been former high ranking officials of the AFRC rebel group. As noted above, the AFRC was made up of many ex-Sierra Leone Army rebels and, when in power, invited the RUF to join its government in June 1997. Alex Tamba Brima began serving in the SLA in 1991 and rose to the rank of Staff Sergeant.¹⁰⁶ He then joined the AFRC and was a member of the group which staged the coup and ousted President Kabbah. Alex Tamba Brima was in direct command of AFRC forces which conducted attacks on civilians in a number of instances.¹⁰⁷ Brima Bazy Kamara began serving in the SLA in 1991 and also rose to the rank of Staff Sergeant. He too joined the AFRC forces, helped remove President Kabbah from power, and commanded AFRC forces, which conducted attacks on civilians throughout the north, eastern, and central areas of Sierra Leone.¹⁰⁸ Santigie Borbor Kanu joined the SLA in 1990 and rose to the rank of Sergeant. He also joined the AFRC forces, aided in the removal of President Kabbah, and was a senior commander of AFRC forces conducting armed operations throughout the north, eastern, and central areas of Sierra Leone.¹⁰⁹ All three accused were allegedly members of the Junta governing body and the AFRC Supreme Council. Through their association with the RUF, all three also allegedly acted in concert with Charles Taylor.¹¹⁰ Taylor is currently standing trial in front of the SCSL at The Hague.¹¹¹

B. Applicable Law to Charge of Forced Marriage – Applied by Trial Chamber

¶47 The Trial Chamber considered four counts relating to sexual violence. The Prosecution charged the three accused with crimes relating to rape, sexual slavery and any other form of sexual violence, other inhumane acts, and outrages upon personal dignity. These constituted Counts 6, 7, 8, and 9, respectively.¹¹²

1. Count 6: Rape

¶48 Rape is punishable as a crime against humanity under Article 2(g) of the Statute and, according to the court, is “firmly enshrined in customary international law.”¹¹³ The Trial Chamber acknowledged that consent must be voluntarily given in order for sexual intercourse not to constitute rape and that force or threat of force provides a clear

¹⁰⁵ *Id.* at 25.

¹⁰⁶ AFRC Indictment, *supra* note 25, at 2, ¶¶ 1-2, providing the armed history for each accused.

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.* at 2, 5-6.

¹⁰⁹ *Id.* at 2, 6.

¹¹⁰ *Id.*

¹¹¹ *See generally* Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, Second Amended Indictment (May 29, 2007), available at <http://www.sc-sl.org/Documents/SCSL-03-01-PT-263.pdf>.

¹¹² AFRC Trial Chamber Judgment, *supra* note 19, ¶¶ 691-722, providing an analysis of each sexual crime.

¹¹³ *Id.* at 213 (identifying rape as a crime against humanity in the statutes of the ICTY, ICTR, and the ICC and noting the definition of rape provided by the jurisprudence of the ICTY and the ICTR).

evidence of non-consent. Additionally, the court relied on its discretion under Art. 5(a) in holding that children below the age of 14 cannot give valid consent.¹¹⁴

2. Count 7: Sexual Slavery and Any Other Form of Sexual Violence

¶49 The Trial Chamber found Count 7, “sexual slavery and any other form of sexual violence,” punishable under Art. 2(g) of the Statute, to be duplicitous. The Trial Chamber held that Count 7 of the Indictment charged the Defendants with two distinct crimes against humanity in one count, namely sexual slavery and any other form of sexual violence.¹¹⁵ The court therefore struck down Count 7.¹¹⁶ Procedural issues aside, however, the Parties had presented significant amounts of evidence of sexual slavery. Therefore, the Trial Chamber decided it was in the interest of justice to consider this evidence under Count 9, outrages upon personal dignity.¹¹⁷ Moreover, the majority ruled that the evidence regarding bush wives was proof of sexual slavery and, therefore, considered it under Count 9, as well.¹¹⁸

3. Count 8: Other Inhumane Acts

¶50 The Trial Chamber adopted the following elements required to establish the crime of other inhumane acts pursuant to Art. 2(i) of the Statute: the perpetrator inflicted greater suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; the act was of a gravity similar to the acts referred to in Art. 2(a)-(h) of the Statute, and; the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.¹¹⁹

¶51 The Prosecution submitted the crime of forced marriage to qualify as the crime of other inhumane acts, as well. The Prosecution argued that 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.¹²⁰

¶52 Using this argument, the Prosecution submitted that sexual slavery does not amount to forced marriage. Rather, even if forced marriage involves sex, it has its own distinctive features qualifying it as a distinct, inhumane act.

¶53 The Trial Chamber I decision on May 6, 2004, allowed the court to consider the new crime against humanity of forced marriage. However, the Trial Chamber dismissed

¹¹⁴ *Id.*; Statute of the Special Court, *supra* note 18, art. 5(a).

¹¹⁵ AFRC Trial Chamber Judgment, *supra* note 19, ¶ 94.

¹¹⁶ *Id.* at 214.

¹¹⁷ *Id.* at 46-48. *See also*, Prosecutor v. Brima, Kamara, and Kanu, Case Summary, Case No. SCSL-2004-16-PT, available at <http://www.sc-sl.org/documents/SCSL-04-16-T-613s.pdf> [hereinafter Case Summary].

¹¹⁸ *Id.*

¹¹⁹ AFRC Trial Chamber Judgment, *supra* note 19, at 215.

¹²⁰ *Id.* at 216 (citing Prosecution Final Brief, ¶¶ 1009-1012).

Count 8, holding that forced marriage was not a separate crime. Justice Doherty dissented, and her opinion will be considered below.¹²¹

¶54 The Trial Chamber found that, because Art. 2(g) encompassed rape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*, Art. 2(i) must be restrictively interpreted to exclude crimes of a sexual nature.¹²² And, after examining the evidence of the case in its entirety, the Trial Chamber, by a majority, “[wa]s not satisfied that the evidence adduced by the Prosecution is capable of establishing the elements of a non-sexual crime of ‘forced marriage’ independent of the crime of sexual slavery under article 2(g) of the Statute.”¹²³

¶55 The court based its interpretation of the evidence on the fact that in every instance a female was in a marriage that amounted to sexual slavery. “Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental.”¹²⁴ The court further reasoned that the term wife was indicative of the intent of the perpetrator to exercise ownership over the victim, not intent to assume a marital or quasi-marital status with the victim.¹²⁵ “None of the witnesses gave evidence that they considered themselves to be in fact ‘married.’”¹²⁶

¶56 Therefore, the Trial Chamber decided that Count 8 was redundant insofar as sexual slavery would be included in Count 9. Other crimes of a non-sexual nature were dealt with in Count 11.¹²⁷

4. Count 9: Outrages Upon Personal Dignity

¶57 Under Count 9, the Trial Chamber considered Art. 3(e) of the Statute, prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” The Court’s analysis was based on violations of Article 3 common to the Geneva Conventions.¹²⁸ The Trial Chamber adopted the following elements of the crime of outrages upon personal dignity:

the perpetrator committed an outrage upon the personal dignity of the victim; the humiliation and degradation was so serious as to be generally considered as an outrage upon personal dignity; the perpetrator intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or

¹²¹ Case Summary, *supra* note 117, at 2.

¹²² AFRC Trial Chamber Judgment, *supra* note 19, ¶ 697 (emphasis added).

¹²³ *Id.* at 217.

¹²⁴ *Id.* at 219.

¹²⁵ *Id.* This brings to mind an account in Human Rights Watch involving a forced abortion by one of the West Side Boys, the splinter group of the AFRC, where a woman was taken as the wife of a rebel and he forced her to have an abortion so he could keep her as his wife. See WE’LL KILL YOU IF YOU CRY, *supra* note 6, at 41. Not only do the men involved consider these women to be their wives, there are also a number of accounts where the women consider themselves to be wives. *Id.* at 3 (noting that there are women who stayed with their “husbands” after the war ended and are still with them today).

¹²⁶ AFRC Trial Chamber Judgment, *supra* note 19, at 219.

¹²⁷ *Id.*

¹²⁸ Statute of Special Court, *supra* note 18, art. 2(e).

otherwise be a serious attack on human dignity; and the perpetrator knew that the act or omission could have such an effect.¹²⁹

¶58 The Trial Chamber found that rape and sexual slavery satisfied the charge of outrages upon personal dignity as acts of humiliation, degradation and discrimination.¹³⁰ However, the Indictment was not pleaded with sufficient specificity to identify any other forms of sexual violence that might have fallen under the outrages upon personal dignity heading.¹³¹

C. Judgment/Sentence

¶59 The Trial Chamber found the three AFRC officials criminally responsible for acts of terror, collective punishments, unlawful killings, rape, physical violence (mutilation), outrages upon personal dignity (sexual slavery), recruitment and use of child soldiers, enslavement and pillage on June 20, 2007.¹³² Brima, Kamara, and Kanu were sentenced on July 19, 2007 to fifty, forty-five, and fifty years in prison, respectively.¹³³

D. Separate Concurring Opinion of Hon. Justice Julia Sebutinde

¶60 Presiding Trial Chamber Justice Julia Sebutinde wrote a concurring opinion dealing only with the issue of forced marriage in Sierra Leone. When Trial Chamber I, to which the Prosecution appealed to amend the indictment to include forced marriage, made its decision, Justice Sebutinde wrote her own concurring opinion observing that the acts of forced marriage are a form of sexual violence and could qualify as a form of sexual slavery. She wrote that “the sexual element inherent in these acts tends to dominate the other elements therein such as forced labour and other forced conjugal duties.”¹³⁴

¶61 While this was her opinion during the initial decision to consider forced marriage as a new crime, her views did not change even in light of all the evidence and expert opinions provided in the case. Justice Sebutinde agreed with both experts that,

a clear distinction should be drawn between traditional or religious marital unions involving minors (early or arranged marriages), during times of peace; and the forceful abduction and holding in captivity of women and girls (bush wives) against their will, for purposes of sexual gratification of their ‘bush husbands’ and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties).¹³⁵

¹²⁹ AFRC Trial Chamber Judgment, *supra* note 19, at 221.

¹³⁰ *Id.* (citing ICTR Trial Chamber decision in *Akayesu* considering rape used for purposes of intimidation, punishment, etc. as a violation of personal dignity, and the ICTY Trial Chamber decision in *Kvočka* noting that sexual violence is broader than rape).

¹³¹ *Id.*

¹³² *Id.* at 568-72.

¹³³ Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-2004-16-T, Sentencing Judgment (July 19, 2007), available at <http://www.sc-sl.org/documents/SCSL-04-16-T-624.pdf> [hereinafter AFRC Sentencing].

¹³⁴ AFRC Trial Chamber Judgment, *supra* note 19, at 575, concurring opinion by Justice Sebutinde.

¹³⁵ *Id.* at 577.

¶62 Despite evidence provided in expert opinions relating to the emotional, mental, and social impacts these marriages have on the women, Justice Sebutinde found that forced marriage possessed all the hallmarks or characteristics of the crime against humanity of sexual slavery.¹³⁶ Women in forced marriages were forced to render gender-specific forms of labour, as they were owned by their bush husbands. Such women were also regularly subjected to sexual intercourse without consent and forcibly kept in captivity and sexual servitude with the intention of holding them indefinitely in that state or with the reasonable knowledge that was likely to occur.¹³⁷ Accordingly, Justice Sebutinde concluded that there was no need for a separate crime of forced marriage, as it was completely subsumed in the crime against humanity of sexual slavery.¹³⁸

E. Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriage)

¶63 Trial Chamber Justice Doherty wrote a partly dissenting opinion relating to the charge of forced marriage. She believed it to be an other inhumane act consisting 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.¹³⁹

¶64 Justice Doherty reviewed the Prosecution Expert Report, as the Defense Expert declined to research the concept of forced marriage in the West African region. Justice Doherty noted that most bush wives experienced long-term stigmatization, were rejected by their families and/or communities and were unable to return to schools or communities for fear of reprisals.¹⁴⁰ Justice Doherty, even after taking into account the reasons why some victims remain in forced marriages after the war, found that the decision to remain does not retroactively negate the original criminality of the act.¹⁴¹ Additionally, Justice Doherty was satisfied that the use of the term wife “is indicative of forced marital status which had lasting and serious impacts on the victims.” The label of wife caused mental trauma, created stigmatization and negatively impacted the victims’ ability to reintegrate into their communities.¹⁴²

¶65 In her opinion, Justice Doherty stated that “[t]he crucial element of forced marriage is the imposition, by threat or physical force arising from the perpetrator’s words or other conduct, of a forced conjugal association by the perpetrator over the

¹³⁶ *Id.*

¹³⁷ *Id.* at 579.

¹³⁸ *Id.*

¹³⁹ AFRC Trial Chamber Judgment, *supra* note 19, at 584 (citing Prosecution Final Brief, ¶¶ 1009-1012).

¹⁴⁰ *Id.* at 587 (citing Exhibit P-53, HRW Report, CMS, at 14492).

¹⁴¹ *Id.* at 589.

¹⁴² *Id.* at 590.

victim.”¹⁴³ While there may be elements of physical violence such as abduction, enslavement or rape, they go to prove the lack of consent of the victim. The primary concern of the crime is the mental and moral suffering of the victim.

¶166 Justice Doherty’s conclusion was that the victim of forced marriage is subject to physical, mental and moral suffering. This suffering transgresses the internationally accepted conventions that both parties must consent to a marriage. Accordingly, Justice Doherty held that forced marriage constitutes a crime against humanity under Count 8, other inhumane acts.¹⁴⁴

F. AFRC Appeal

¶167 The Prosecution and Accused appealed the Trial Chamber Judgment on many counts. For purposes of this Case Note, the analysis is limited to the Appeals Chamber’s reconsideration of the Trial Chamber holdings for Counts 7 and 8.¹⁴⁵

¶168 Count 7 charged sexual slavery and any other form of sexual violence. The Appeals Chamber found that charging two separate offenses in a single count renders the count defective and held that Count 7 violated the rule against duplicity.¹⁴⁶ However, the Appeals Chamber considered the remedies available to the Trial Chamber and held that it should have chosen to proceed on the basis that the offence of sexual slavery had been properly charged in Count 7, return an appropriate verdict on that Count in respect of the crime of sexual slavery and strike out the charge of any other form of sexual violence.¹⁴⁷ Despite this finding, the Appeals Chamber did not believe a miscarriage of justice had resulted, because the evidence of sexual slavery was applied to enter convictions for Count 9 which charged the offence of outrages upon personal dignity.¹⁴⁸

¶169 Count 8 charged other inhumane acts. The Prosecution argued that the crime of forced marriage constituted an other inhumane act. But the Trial Chamber disagreed and found that forced marriage was subsumed by the umbrella of sexual slavery, for which the evidence was considered under Count 9, outrages upon personal dignity. The Appeals Chamber found the Trial Chamber erred in its analysis of forced marriage. First, the Appeals Chamber held that Art. 2(i), other inhumane acts, should not exclude sexual crimes.¹⁴⁹ The Appeals Chamber noted the wide range of criminal acts, including sexual crimes, that have been recognized as other inhumane acts.¹⁵⁰

¶170 The Appeals Chamber then considered the nature of forced marriage and its distinction from sexual slavery. The Appeals Chamber found the trial record replete with situations where the perpetrators of forced marriages intended to impose a forced

¹⁴³ *Id.* at 592.

¹⁴⁴ AFRC Trial Chamber Judgment, *supra* note 19, at 594.

¹⁴⁵ AFRC Appeals Chamber Judgment, *supra* note 21.

¹⁴⁶ *Id.* at 35-38.

¹⁴⁷ *Id.* at 38.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 186.

¹⁵⁰ AFRC Appeals Chamber Judgment, *supra* note 21, ¶ 184 (listing forcible transfer, sexual and physical violence perpetrated upon dead human bodies, other serious physical and mental injury, forced undressing of women and marching them in public, forcing women to perform exercises naked, and forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions as ‘other inhumane acts’ according to other international criminal tribunal judgments).

conjugal association upon the victims rather than exercise an ownership interest.¹⁵¹ These situations constituted instances where forced marriage was not predominantly a sexual crime.¹⁵² The court found that “no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery.”¹⁵³ The Appeals Chamber agreed with Justice Doherty that this was due to the compulsion into a forced conjugal association resulting in great physical or mental suffering and the relationship of exclusivity between the husband and wife.

¶71 The Appeals Chamber conducted an analysis of forced marriage to determine if the crime satisfied the elements of other inhumane acts. Art. 2(i) of the Statute of the Special Court describes these elements as follows:

(i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.¹⁵⁴

¶72 The Appeals Chamber concluded that all three requirements were met by the evidence presented at trial.¹⁵⁵ The Appeals Chamber considered entering the distinct conviction of forced marriage as an other inhumane acts, noting it would reflect the full culpability of the Accused. However, the Appeals Chamber decided against entering cumulative convictions, because the Trial Chamber relied upon the evidence of sexual slavery and forced marriage to enter convictions for outrages upon personal dignity.¹⁵⁶

¶73 In the end, on February 22, 2008, the Appeals Chamber found that the Trial Chamber was justified in imposing prison sentences of 50, 45 and 50 years on Alex Tamba Brima, Bazzy Kamara and Santigie Borbor Kanu, respectively.¹⁵⁷

V. PRESSURE FOR CHANGE

¶74 In the AFRC Case, the Trial Chamber for the SCSL held that forced marriage was not an independent charge under international criminal law. Nevertheless, the Appeals Chamber for the SCSL held that forced marriage was an independent charge of crimes against humanity, as an other inhumane act prohibited by Art. 2(i) of the Statute of the Special Court; but the Appeals Chamber declined to enter fresh convictions. Moreover, the SCSL continued on this trajectory by acknowledging that forced marriage was a crime against humanity in the RUF Case Judgment on February 25, 2009.¹⁵⁸

¶75 A number of factors should be identified that may convince future courts, and the international community, to reconsider the issue and prosecute the gender-based crime of

¹⁵¹ *Id.* ¶ 190.

¹⁵² *Id.*

¹⁵³ *Id.* ¶ 195.

¹⁵⁴ AFRC Trial Chamber Judgment, *supra* note 19, ¶ 698.

¹⁵⁵ AFRC Appeals Chamber Judgment, *supra* note 21, ¶¶ 199-201.

¹⁵⁶ *Id.* ¶ 202.

¹⁵⁷ Appeal Judgment Transcript, *supra* note 104, at 40-41.

¹⁵⁸ RUF Trial Chamber Judgment, *supra* note 24.

forced marriage as such. There is currently strong public movement, both in Sierra Leone and other African countries, to strengthen domestic legal protection of women and children.¹⁵⁹ The Appeals Chamber for the SCSL was the first international criminal tribunal to acknowledge forced marriage. This decision leaves the door open for future courts, even the ICC, to do the same. And, on a more theoretical level, the international community seems to be recognizing the importance of acknowledging certain gender-based wartime violations and charging them as independent criminal acts. Women's rights are presently a high-profile issue, and public discourse relating to sexually-based crimes is at an all-time high with the establishment of a number of truth and reconciliation commissions around the world.¹⁶⁰

A. *New Women's Rights Legislation*

¶176

While the AFRC case was drawing to a close, there was mounting public pressure on the parliament of Sierra Leone to improve the legal status of women and children.¹⁶¹ Sierra Leone had been a state party to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) since 1979,¹⁶² but the convention was little more than puffery and good intentions.¹⁶³ However, conditions for women and children have finally begun to improve since the end of Sierra Leone's civil war.¹⁶⁴ The presence of the Special Court for Sierra Leone, the Truth and Reconciliation Commission, women's groups, and international civil rights organizations has worked to increase awareness of gender-based issues.¹⁶⁵ This has informed civil society and empowered it to call for legislative action. On June 14, 2007, three laws, known collectively as Gender Bills were passed unanimously by Sierra Leone's parliament.¹⁶⁶ These laws included the Domestic Violence Act, the Registration of Customary Marriages and Divorce Act, and the Devolution of Estates Act.¹⁶⁷

¹⁵⁹ See generally, Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. See also, Human Rights Watch, Women's Rights, <http://www.hrw.org/en/category/topic/women%E2%80%99s-rights> (last visited Nov. 22, 2008).

¹⁶⁰ "It seemed as though women were everywhere that day in May 2003. Morning traffic came to a halt as women marched en masse on the road from Victoria Park in the center of Freetown, Sierra Leone to the YMCA Hall where the TRC was about to commence three days of dedicated hearings on violence against women. . . . By the time the hearings began, women packed the large auditorium, demonstrating solidarity with the rape victims and others who would speak about the atrocities committed against women and girls during the decade-long civil war in Sierra Leone." Nowrojee, *Invisible War Crime*, supra note 5, at 86 (quoting from the author, who was present at the hearings in Freetown, Sierra Leone on May 22, 2003).

¹⁶¹ UN Office for the Coordination of Humanitarian Affairs, *Sierra Leone: New laws give women unprecedented rights, protection*, July 4, 2007, <http://www.irinnews.org/Report.aspx?ReportId=73072> [hereinafter Coordination of Humanitarian Affairs].

¹⁶² CEDAW, supra note 159.

¹⁶³ Sierra Leone has failed to submit an initial report, second periodic report, third periodic report, and fourth periodic report since it ratified the treaty. UN Doc CEDAW/C/2002/II/2, <http://www.un.org/womenwatch/daw/cedaw/cedaw27/status.pdf>.

¹⁶⁴ Coordination of Humanitarian Affairs, supra note 161.

¹⁶⁵ Nowrojee, *Invisible War Crime*, supra note 5.

¹⁶⁶ Adelia Saunders, *Bold Women's Rights legislation in Sierra Leone puts women's votes in the spotlight*, July 6, 2007, <http://mediaglobal.org/index.php/2007/07/06/bold-women%E2%80%99s-rights-legislation-in-sierra-leone-puts-women%E2%80%99s-votes-in-the-spotlight/>.

¹⁶⁷ *Id.*

¶77 Sierra Leone's new domestic violence law has a broad definition of domestic violence.¹⁶⁸ It therefore gives both the police and the individual the tools to mediate disputes and allow criminal and civil action when there is a violation.¹⁶⁹ Registering customary marriages introduces a minimum age of eighteen years of age and requires consent of both parties for such marriages to be valid.¹⁷⁰ The registration process seeks to put an end to child brides and forced marriages while simultaneously providing proof to wives who previously had minimal rights under the law if their husbands wished to invalidate the marriage or refused to provide for his children.¹⁷¹ The inheritance law ensures that, if a man dies without a will, his wife is entitled to his property.¹⁷² Prior to this law, it had been customary for such property to pass to the man's parents and brothers.¹⁷³ Additionally, the law bans wife inheritance, the practice in which a widow is "inherited" as property and forced into marriage with her brother-in-law.¹⁷⁴

B. *Ramifications on the International Criminal Court*

¶78 The Office of the Prosecutor appealed the acquittals of Brima, Kamara, and Kanu on the charge of forced marriage and succeeded. While the three military leaders' sentences for the other crimes committed during the conflict in Sierra Leone did not change, finding that the charge of forced marriage is not subsumed under the umbrella of sexual slavery and is an independent other inhumane act could help bring about convictions on similar charges at the International Criminal Court relating to the insurgency in Uganda, the conflict in the Darfur region of Sudan, the failed military coup in the Central African Republic and the inter-ethnic fighting in the Democratic Republic of the Congo.¹⁷⁵ The Appeals Chamber was convinced that:

society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack

¹⁶⁸ Domestic violence now means any of the following acts or threat of any such act: physical or sexual abuse; economic abuse; emotional, verbal or psychological abuse, including any conduct that makes another person feel constantly unhappy, humiliated, ridiculed, afraid or depressed or to feel inadequate or worthless; harassment, including sexual harassment and intimidation; or conduct that in any way harms or may harm another person. See Domestic Violence Act, 2007, No. 20, <http://www.sierra-leone.org/Laws/2007-20p.pdf> (being an Act to suppress domestic violence, to provide protection for the victims of domestic violence and to provide for other related matters).

¹⁶⁹ *Id.*

¹⁷⁰ Child Right Act, 2007, No. 7 (34), <http://www.sierra-leone.org/Laws/2007-7p.pdf> (stating minimum age of marriage and right to refuse betrothal or marriage). Amnesty International Press Release, *Sierra Leone: Gender laws mean greater rights and protection for women*, June 19, 2007, <http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR510022007> (noting a third law called the Registration of Customary Marriages and Divorce Act, however was unable to find the law on the Sierra Leone website).

¹⁷¹ Saunders, *supra* note 166.

¹⁷² Devolution of Estates Act, 2007, No. 21, <http://www.sierra-leone.org/Laws/2007-21p.pdf> (marking the creation of an act to provide for surviving spouses, children, parents, relatives and other dependants of testate and intestate persons and to provide for other related matters, amending the Christian Marriage Act, the Muslim Marriage Act (Cap. 96), and the Administration of Estates Act).

¹⁷³ *Id.*

¹⁷⁴ Saunders, *supra* note 166.

¹⁷⁵ See generally Katy Glassborow, Institute for War & Peace Reporting (London), *Forced Marriage appeal may influence the ICC*, ALLAFRICA.COM, July 27, 2007, <http://allafrica.com/stories/200707301152.html>.

against civilian population, is adequately reflected by recognizing that such conduct is criminal and that it constitutes an ‘other inhumane act’ capable of incurring individual criminal responsibility in international law.¹⁷⁶

Recognition by the Appeals Chamber of the SCSL provides important precedent for future prosecution of gender-based crimes in both ad hoc tribunals and the permanent ICC.

¶79 Rape and sexual slavery feature in all of the situations in which the ICC is currently investigating, specifically in reports of forcing girls into marriages with combatants.¹⁷⁷ It is alleged that forced marriages have been carried out by the Union Congolese Patriots under Thomas Lubanga’s direction, by the Lord’s Resistance Army in Uganda, and that similar practices are reported in the Central African Republic and in Darfur.¹⁷⁸

¶80 The Rome Statute already establishes the ICC’s jurisdiction to prosecute crimes of forced marriage, the charge just needs to be recognized by the ICC. Art. 7(1)(g) provides for prosecution of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity. Further, Art. 7(1)(k) provides for prosecution of other inhumane acts of a similar character intentionally causing great suffering or serious mental or physical injury.¹⁷⁹ Should the Prosecution and ICC choose to, they could conduct a similar analysis of Count 8, other inhumane acts, in the AFRC and RUF Indictments that the Judgments from the SCSL have followed.

¶81 Despite the acknowledgment by the Trial and Appeals Chambers for the Special Court for Sierra Leone of forced marriage as an independent other inhumane act, further action is needed. Without some further indication that the international community recognizes forced marriage as a separate, independent crime against humanity, the ICC will only be able to prosecute forced marriage under the umbrella of sexual slavery. A Review Conference of the Rome Statute is scheduled to be held in 2009, convened by the UN Secretary-General of the United Nations.¹⁸⁰ The Review Conference will consider proposed amendments to the Rome Statute, and this Case Note urges the Conference participants to consider the introduction of forced marriage as a crime against humanity in order to punish those responsible for grave crimes of gender-based violence.

C. Analysis of Forced Marriage in Light of Evident Changes in Domestic Policies and the Current Focus of International Organizations and Truth and Reconciliation Commissions on Gender-Based Crimes

¶82 Aside from the evidence the Prosecution pointed to in the AFRC case, there are still vulnerabilities of women and girls in time of conflict that should be highlighted.

¹⁷⁶ AFRC Appeals Chamber Judgment, *supra* note 21, ¶ 202.

¹⁷⁷ See Micaela Frulli, *Advancing International Criminal Law*, 6 J. INT’L CRIM. JUST. 1033, 1041-42 (2008).

¹⁷⁸ See *id.* nn. 33-35.

¹⁷⁹ See Rome Statute, *supra* note 5, art. 7.

¹⁸⁰ See Frulli, *supra* note 177, at 1042.

These vulnerabilities bolster the need for creation of a new crime against humanity of forced marriage. Unlike the conflicts in the former Yugoslavia and Rwanda, the conflict in Sierra Leone involved sexual violence perpetrated against female members in the military population *within* a given fighting force.¹⁸¹ There appeared to be no motive of genocide or ethnic cleansing. Instead, this appears to have been an instance of rebels taking advantage of a weaker group among the Sierra Leonean population. The forced marriage in this situation was not one of only sexual slavery, as there were both bush husbands and bush wives who considered, and still today consider, these marriages to be official. A number of countries and international organizations are beginning to notice the vulnerabilities of women and girls in time of conflict and work toward changing domestic policies to allow for more protection of this specific group of individuals.

¶183 The utilization of truth and reconciliation commissions has helped pave the way for the public acknowledgment of these stark problems in domestic law. There have been at least 23 TRCs throughout the world, many of which have been in African and Latin American countries.¹⁸² TRCs allow for open, public discourse about terrible tragedies and force society to recognize, analyze and remedy the causes of the tragedies. Cultures of silence have historically militated against the victim making the violation known publicly. Such cultures involve fear of shame, ostracization and stigma.¹⁸³ Through the work of TRCs, these cultures of silence have begun to break down in many countries. Specifically, the TRC in Sierra Leone helped to strengthen the public resolve that changes needed to be made to domestic law in order to protect this class of civilians.¹⁸⁴ It has been known for some time that fragile, mainly civilian, populations are the victims of terrible crimes during war, but the discussion of causation has illuminated a very strong facilitator: lack of domestic criminal law.

¶184 Additionally, the prosecution of forced marriage has symbolic value in condemning the violation of the rights of girls and women in this manner.¹⁸⁵ Recognizing forced marriage as an international crime when committed during conflict situations will open the door for public debate regarding issues like child marriage and arranged marriage in countries all over the world without trampling fundamental, longstanding domestic law and religious beliefs about the institution of marriage and its function during peace time.¹⁸⁶

¹⁸¹ Many of the women in Rwanda as well as the women in Sierra Leone were held in forced marriages. In the ICTR, as in the SCSL, these crimes were prosecuted as sexual slavery. However, the conflict in Rwanda was carried out against the backdrop of genocide against the Tutsis, and the conflict in the former Yugoslavia involved gender-based crimes being systematically carried out to wipe out another race. See Park, *supra* note 1, at 327; see also NOWROJEE, SHATTERED LIVES, *supra* note 48.

¹⁸² According to the United States Institute of Peace, there have been truth commissions in Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay, and Zimbabwe. See Truth Commission Digital Collection: U.S. Institute of Peace, <http://www.usip.org/library/truth.html#tc> (last visited Nov. 22, 2008).

¹⁸³ TRC Report, *supra* note 94, at 13.

¹⁸⁴ See Nowrojee, *Invisible War Crime*, *supra* note 5.

¹⁸⁵ While the international community is not willing to force states to ban child marriage (despite provisions in the Convention on the Elimination of all Forms of Discrimination against Women), prosecution of crimes involving non-consenting marriages of women and girls raises awareness that these practices may violate their human rights. Note the new legislation in Sierra Leone, raising the age of marriage to 18 and requiring the consent of both parties, rather than just the parents. See Saunders, *supra* note 166.

¹⁸⁶ Forced marriages and arranged marriages violate international human rights norms, but only forced

VI. CONCLUSION

¶85 The Special Court for Sierra Leone illustrates to the world that domestic and international law can be reconciled in a very effective way, as the first hybrid court of its nature. The SCSL has provided a compelling example to the international community in terms of how to deal with internal and external conflicts involving the commission of mass atrocities and forced marriage in particular. The Truth and Reconciliation Commission for Sierra Leone has shown the world how successful open communication regarding widespread victimization can be. Forced marriage is more than the sum of its constituent acts. The Special Court for Sierra Leone is the first international criminal tribunal to express society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against civilian population. Accordingly, it should be prosecuted as a separate crime under international law in order to appropriately recognize its gravity, prevent future tragedies, properly recognize the suffering of the victims, and facilitate an examination of the traditional marital union within differing cultures across the world.

marriage is currently considered by the international community to be clearly criminal in nature.