

Reviewing the Prosecution of the Forced Marriage of Women and Girls in International Courts: Inhumane Act or Form of Sexual Slavery?

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BY: Sara J. Godfrey with David M. Crane.

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I. Introduction

Over the past two decades, international courts have grappled with how instances of forced marriage in mass atrocity situations should be approached under international criminal law. The crime's often complex intersection of sexual violence, human rights violations, and gendered elements has resulted in extensive jurisprudence fraught with debates over the proper characterization of the crime. In cases involving the prosecution of the forced marriage of women and girls by male perpetrators, such debates have centered around the validity of forced marriage as an offense equivalent to the crime against humanity of sexual slavery versus the crime against humanity of 'other inhumane acts.'¹ As this article will demonstrate with case studies from the Special Court for Sierra Leone ("SCSL") and the International Criminal Court ("ICC"),² a focus on gendered dimensions of forced marriage exposes key distinctions between the crimes of forced marriage and sexual slavery in terms of how the crime is perpetrated and the range of resulting harms. This article argues that these distinctions not only affirm the legitimacy of forced marriage as an inhumane act but allow for the necessary contextualization of forced marriage as a broader gender-based crime. By mapping the evolution of how the SCSL and ICC have prosecuted forced marriage, this article concludes that the ICC's recent final conviction of forced marriage and sexual slavery under separate crimes against humanity charges in the *Prosecutor v. Ongwen* suggests significant progress in the Court's understanding of forced marriage as a distinct crime encompassing a range of gendered offenses that are not confined to the sexual realm.³

The following article examines the prosecution of the forced marriage of women and girls in four conflict situations: Sierra Leone, the Democratic Republic of the Congo ("DRC"), Uganda, and Mali. In mass atrocity situations, forced marriage typically involves the imposition of a forcible

¹ *Note*, the crime against humanity of 'other inhumane acts' refers to the residual clause in the crimes against humanity article of international court statutes. This clause is used to capture crimes of similar gravity that are not already enumerated as a distinct offense in the court's statute. While sexual slavery is listed as a crime against humanity in most international court statutes, forced marriage is not explicitly enumerated as a crime against humanity in any international court statute. If the court determines that instances of forced marriage (1) contain elements not captured by other enumerated crimes, namely sexual slavery, and (2) of similar gravity to the other crimes against humanity in the court's statute, it may qualify as an inhumane act. These intricacies are further explained in the following section.

² *Note*, this article is concerned with how international courts have conceptualized instances of forced marriage that involve specifically women and girls as victims and the resulting debates over whether the crime should be prosecuted as either the crime against humanity of sexual slavery or a distinct offense amounting the crime against humanity of 'other inhumane acts.' In order to focus on cases stemming from these circumstances, this article examines cases involving the prosecution of the forced marriage of women and girls at only the SCSL and the ICC. Due to the differing circumstances, this article does not discuss how the Extraordinary Chambers in the Courts of Cambodia ("ECCC") prosecuted forced marriage policies present under the Khmer Rouge. This is not to disregard the prosecution of forced marriage at the ECCC or the existence of instances of forced marriage involving males as victims, but rather to examine the prosecution of forced marriage in cases stemming from similar circumstances.

³ I would like to thank Dr. Valerie Oosterveld for her support and reviews throughout this writing process. Both her scholarly work and Amicus Curiae Brief in *The Prosecutor v. Ongwen* on forced marriage are foundational to this paper and my arguments around the conceptualization of forced marriage as a broader gender-based crime. Further, I would like to thank Kristan McMahon for her numerous proofreads and edits. Finally, I would also like to thank Professor David Crane for his contributions and constant support throughout this process. Without his support, this paper would not have been possible.

conjugal association in which the perpetrator forces the victim to fulfill the gendered role of spouse according to the norms and expectations of such in the given society. As a result, victims are denied relational autonomy and subjected to a constellation of human rights violations.⁴ In the contexts of conflict situations in Sierra Leone, the DRC, Uganda, and Mali, women and girls were primarily forced by male perpetrators to fill the spousal role of ‘wife.’⁵ As ‘wives,’ victims were often forced to obey their ‘husband’s’ sexual demands while also completing various household and reproductive duties in line with the gendered expectations of a wife’s role in the given society. In each of these contexts, forced marriages were reliant on socially constructed ideas held by the perpetrator in relation to the victim’s gender and corresponding spousal role. This often included socially constructed ideas of women and girls as homemakers, child bearers, and providers of sexual services to men.⁶ As the crime’s perpetration relies on socially constructed ideas of what it means to be male/female and husband/wife in a given society, this article adopts the view that forced marriage is an inherently gendered crime.⁷ Therefore, to recognize the scope of the crime and resulting harms, it is critical for international courts to approach the crime using gender as the focal point of analysis.

By focusing on the gendered dimensions of the forced marriage of women and girls in conflict situations, this article seeks to highlight the crime’s unique conduct, harms, and consequences that not only differentiate forced marriage from sexual slavery but allow for the rightful contextualization of forced marriage as a broader gender-based crime. This article argues that a focus on the gendered dimensions of forced marriage reveals that the perpetrator does not use ‘marriage’ for the purpose of ownership (as is the case during enslavement), but rather as a coercive mechanism to force their victim to fulfill the gendered role of ‘wife.’ As this article will demonstrate, this conduct and subsequent labeling of victims as ‘wives’ result in a range of unique domestic, social, and mental harms. These harms are gendered and beyond the scope of sexual violence alone, thus necessitating the prosecution of forced marriage as a broader gender-based crime as opposed to a predominately sexual crime equivalent to sexual slavery. Overall, this article concludes that the prosecution of forced marriage as an inhumane act offers an

⁴ The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 A A2, Amici Curiae Brief on Forced Marriage, (Dec. 22, 2021), [hereinafter Oosterveld et al. Amici Curiae Brief], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_11910.PDF.

⁵ Note, an ethnographic study by Myriam S. Denov and Mark A. Drumbl raises the question of male victimization under LRA forced marriages in Uganda, finding that some ‘bush husbands’ also felt they were victims of forced marriage. This challenges the female-victim/male-perpetrator binary. However, the OTP, Pre-Trial Chamber, Trial Chamber, and Appeals Chamber of the ICC all narrated the crime of forced marriage in the context of the LRA as one perpetrated against ‘wives’ and thus considered forced marriage as a crime committed against women and girls. For the purpose of this analysis, this article only examines the prosecution of the forced marriage of women and girls in the context of the LRA. Regardless, Myriam S. Denov’s and Mark A. Drumbl’s study is noteworthy and suggests the need for further studies on men’s experiences in forced marriage and how international courts should prosecute the offense. See Myriam S. Denov & Mark A. Drumbl, *The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda*, 18 *J. Int’l Crim. Just.* (2020), <https://doi.org/10.1093/jicj/mqaa007>.

⁶ Melanie O’Brien, *Gender Dimensions of Forced Marriage in International Criminal Law*, in *Gender and International Criminal Law*, (Indira Rosenthal, Valerie Oosterveld & Susana SáCouto eds., 2022), <https://doi.org/10.1093/oso/9780198871583.003.0009> [hereinafter O’Brien, *Gender Dimensions of Forced Marriage*].

⁷ Note, although this article focuses on the gendered dimensions of forced marriages involving women and girls as victims, this is not to theorize that forced marriages involving male victimization are not also gendered. Rather, this article argues that the gendered nature of forced marriage arises when anyone is forced to fulfill the gendered role of spouse.

opportunity for international courts to not only recognize the distinct conduct and harms present during acts of forced marriage but to rightfully contextualize such as a broader gender-based crime.

II. Background: Defining Gender, Sexual Violence, Gender-Based Crimes, and Inhumane Acts

Historically, atrocity crimes committed against women and girls have been prosecuted in international courts through charges related to sexual acts.⁸ Since the International Criminal Tribunals for Rwanda (“ICTR”) and the Former Yugoslavia (“ICTY”) in the 1990s, the international community has developed extensive jurisprudence on prosecuting various forms of sexual violence as crimes against humanity,⁹ war crimes,¹⁰ a means of torture,¹¹ and a tool of genocide.¹² As a result, the 1998 Rome Statute of the ICC enumerates a range of sexual acts as prosecutable offenses within the Court’s jurisdiction.¹³ This includes “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity per Articles 7(1)(g)¹⁴ and war crimes per Articles 8(2)(b)(xxii)¹⁵ and 8(2)(e)(vi).¹⁶ ¹⁷ Although the Rome Statute fails to offer

⁸ See Rosemary Grey, Chapter 3: Reoccurring Tendencies, in *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential*, pg. 87-88, (2019) [hereinafter Grey, Chapter 3: Reoccurring Tendencies] <https://www.cambridge.org/core/product/identifier/9781108652346/type/book>. Also see Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int’l L. (2003).

⁹ On September 2, 1998, the International Criminal Tribunal for Rwanda (ICTR) convicted Jean-Paul Akayesu of rape as a crime against humanity. This verdict constitutes the first time rape was internationally prosecuted as a crime against humanity and serves as a major legal precedent. See *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, (Sept. 2, 1998), [hereinafter Akayesu Judgment].

¹⁰ Per the Kunarac et al. Judgment issued on February 22, 2001, the ICTY convicted the accused of rape and enslavement as crimes against humanity for their conduct amounting to the sexual enslavement of victims detained in prison facilities. Additionally, the accused was charged with sexual violence as an “outrage upon personal dignity” (war crime) for acts of sexual violence committed against enslaved women and girls. See *The Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T*, Judgment (Feb. 22, 2001).

¹¹ On November 16, 1998, the ICTY convicted defendants of rape as a means of torture. See *The Prosecutor v. Delalic (Čelebići Camp Trial), IT-96-21-A*, Judgment, (Feb. 20, 2001).

¹² The September 1998 Judgement by the ICTR convicted Jean-Paul Akayesu of rape and other forms of sexual violence as instruments of genocide. See Akayesu Judgment, supra note 9.

¹³ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 at Art. 7(1)(g), Art. 8(2)(b)(xxii), Art. 8(2)(e)(vi).

¹⁴ Article 7(1) of the Rome Statute addresses the Court’s jurisdiction of crimes against humanity, stating: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Subsection (g) enumerates “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity within the Court’s jurisdiction.

¹⁵ Article 8(2)(b) of the Rome Statute addresses the court’s jurisdiction over war crimes defining such as “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. Subsection (xxii) enumerates “committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions” as war crimes within the Court’s jurisdiction.

¹⁶ Article 8(2)(e)(vi) of the Rome Statute defines the following as a war crime within the Court’s jurisdiction: “(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts... (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.”

¹⁷ Note, the SCSL similarly defines “Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” as a crime against humanity per article 2(g) and “Outrages upon personal dignity, in

guidance on the categorization and definition of gender-based crimes, the 1998 document does offer a definition of gender, stating that “the term ‘gender’ refers to the two sexes, male and female, within the context of society.”¹⁸ While not explicitly recognize gender as a social construct that assigns specific societal roles, expectations, and behaviors to women/girls and men/boys, situating the definition of gender in relation to “the context of society” recognizes that ideas of gender are contingent on time and place and vary between societies.

In 2014, the ICC released further guidance on the categorization of sexual and gender-based crimes under its 2014 *Policy Paper on Sexual and Gender-Based Crimes*.¹⁹ Per the 2014 Policy crimes enumerated in Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) were broadly categorized as “sexual crimes.”²⁰ Each offense was further defined under the criteria set out by the ICC’s 2013 *Elements of Crimes* (commonly referred to as the “Elements”).²¹ In relation to the crimes against humanity and war crimes of rape, enforced prostitution, and sexual violence, the Elements require “the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act.”²² Similarly, the Elements also require the crime against humanity and war crime of sexual slavery to involve the perpetrator to have caused “such person or persons to engage in one or more acts of a sexual nature.”²³ Therefore, per the ICC’s 2013 *Elements of Crimes* and 2014 *Policy Paper on Sexual and Gender-Based Crimes*, “sexual crimes” were those defined under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute, covering crimes involving one or more acts of a “sexual nature,” form of sexual violence, or a sexual element.

Building on the Rome Statute’s definition of gender, the 2014 Policy Paper stated:

“‘Gender’, in accordance with article 7(3) of the Rome Statute (‘Statute’) of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”²⁴

In correspondence to this definition, the 2014 Policy Paper defined gender-based crimes as ones “committed against persons, whether male or female, because of their sex and socially constructed gender roles. *Gender-based crimes are not always manifested as a form of sexual violence. They may include nonsexual attacks on women and girls, and men and boys, because of their gender.*”²⁵ Therefore, while gender-based crimes may contain sexual acts, the presence of

particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” as a war crime per article 3(e). See Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138 at Art. 3(e).

¹⁸ Rome Statute, *supra* note 13, at Article 7(3).

¹⁹ The Office of the Prosecutor, Int’l Crim. Ct., *Policy Paper on Sexual and Gender-Based Crimes*, (June 2014) [hereinafter 2014 ICC Policy Paper] <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

²⁰ *Id.* at pg. 3.

²¹ See International Criminal Court, *Elements of Crimes*, ICC-PIOS-LT-03-002/15_Eng, (2013) [hereinafter ICC Elements] <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

²² 2014 ICC Policy Paper, *supra* note 19, at pg. 3.

²³ *Note*, the full definition of sexual slavery and its required elements are discussed in the following two sections.

²⁴ 2014 ICC Policy Paper, *supra* note 19, at 3.

²⁵ 2014 ICC Policy Paper, *supra* note 19, at pg. 3 (emphasis added).

sexual acts is not the defining factor of gender-based crimes. Instead, gender-based crimes are those perpetrated *because* of socially constructed ideas related to gender that influence who the perpetrator targets and what kind(s) of violence they use.^{26 27} This means that although sexual offenses are often present in gender-based crimes, gender-based crimes are not limited to acts of sexual violence and, therefore, may not be captured by charges defined by predominately sexual acts.²⁸ Similarly, while sexual crimes, especially those committed against women and girls, may be a form of gender-based violence (as they are often perpetrated on the basis of socially constructed ideas of gender), sexual crimes and gender-based crimes are not mutually exclusive categories or synonymous terms.²⁹

The distinction between gender-based crimes and sexual violence has recently been emphasized in the updated 2023 *Policy on Gender-Based Crimes*.³⁰ This document further refined the ICC’s definitions of crimes involving sexual and gender-based violence, explicitly defining crimes of sexual violence under the “umbrella” of gender-based crimes.³¹ First, adding to the 2014 Policy Paper’s definition of gender, the 2023 Policy Paper clarifies that,

“As a social construct, gender varies from society to society and even within a single society. It can change over time, or due to events that can disrupt gender roles such as displacement, natural disaster and armed conflict... ‘Gender’ and ‘sex’ are closely related concepts that are tethered together. Where “gender” refers to social constructs and criteria about roles, expressions and behaviours used to define maleness and femaleness in a given context, ‘sex’ refers to an individual’s biological or physiological characteristics.”³²

The 2023 Paper defines gender-based violence (“GBV”) as “an umbrella term for any harmful act that is perpetrated based on socially ascribed differences based on gender, usually because of a person’s actual or perceived gender, sex, or sexual orientation.”³³ As summarized below, the updated policy paper states the following:

1. GBV violates a person’s human rights.³⁴

²⁶ Rosemary Grey, Chapter 2: Gender-Based Crimes, in *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential*, pg. 50-51, (2019) [hereinafter Grey, Chapter 2: Gender-Based Crimes] <https://www.cambridge.org/core/product/identifier/9781108652346/type/book>.

²⁷ Note scholar Rosemary Grey theorizes that the term gender-based crimes applies to three scenarios:

1. When victims are targeted because of their gender identity.
2. When the perpetrator uses violence to affirm their own gender identity.
3. When the crime is committed to punish the victim for violating gender norms.

In summary, Grey defines gender-based crimes as “crimes that are committed because of the victim and/or perpetrator’s gender identity, as well as crimes that are committed to punish deviation from gender norms.” *Id.*, at pg. 60.

²⁸ For example, the idea of gender as grounds for persecution demonstrates why gender-based violence is not always confined to sexual acts. See *Prosecutor v. al Hassan*.

²⁹ See Grey, Chapter 2: Gender-Based Crimes, *supra* note 26, at pg. 61-66 for a further discussion on the relationship between gender-based crimes and sexual violence.

³⁰ The Office of the Prosecutor, Int’l Crim. Ct., *Policy on Gender-Based Crimes*, (Dec. 2023) [hereinafter 2023 ICC Policy on Gender-Based Crimes] <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>

³¹ *Id.* at ¶ 27-29.

³² *Id.* at ¶ 17-19.

³³ *Id.* at ¶ 27.

³⁴ *Id.* at ¶ 28.

2. GBV includes acts that inflict physical, sexual or mental harm or suffering, threats of such actions, coercion, and other deprivations of liberty.³⁵
3. GBV is a form of violence rooted in structural gender inequalities and power imbalances, it is both a symptom of gender inequity and a tool to reinforce it.³⁶
4. GBV is a broader category than sexual violence, as GBV may include sexual violence and reproductive violence.³⁷
5. Multiple crimes under articles 6, 7, or 8 of the Rome Statute involve acts of GBV and may be categorized as gender-based crimes (“GBC”). These crimes may be explicitly gendered in form, or they may be facially neutral crimes that are nonetheless motivated or targeted by gender or that are enacted in gender-disparate ways.³⁸
6. GBC may entail physical or non-physical harm.³⁹
7. GBC can affect any individual.⁴⁰
8. GBCs are sometimes specifically motivated by a person’s actual or perceived sexual orientation, gender identity, and expression, or sex characteristics.⁴¹

Under the “umbrella” of gender-based violence, the 2023 Policy Paper also offers an updated definition of sexual violence, stating that “sexual violence is a form of gender-based violence that involves the commission or attempted commission of sexual acts.”⁴² As this article will show, although gender-based crimes committed against women and girls often involve sexual violence, gender-based crime crimes are not limited to sexual acts. Recognizing this distinction is critical, especially when dealing with gender-based crimes against women and girls involving nonsexual (but still gendered) offenses such as those present in acts of forced marriage.

Gender-based crimes that are not fully captured by the crimes enumerated in Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute may be prosecuted as an inhumane act as a crime against humanity.⁴³ The ‘other inhumane acts’ clause (present in the statutes of the ICTY, ICTR, SCSL, ECCC, and ICC)⁴⁴ functions as a residual category to capture crimes of a similar gravity that are not explicitly enumerated as crimes against humanity within the court’s statute. According to the ICC’s Elements, an inhumane act as a crime against humanity per Article 7(k) is defined by the following criteria:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at ¶ 29. *Note*, the 2023 ICC Policy Paper on Gender-Based Crimes defines sexual violence as “a form of gender-based violence that involves the commission or attempted commission of sexual acts” and reproductive violence as a gender-based crime that “violates reproductive autonomy and/or it is directed at people on account of their actual or potential reproductive capacity, or perceptions thereof.”

³⁸ *Id.* at ¶ 30.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at ¶ 31.

⁴³ *See* Oosterveld et al. Amici Curiae Brief, *supra* note 4, at ¶ 4.

⁴⁴ *See* ICTY Statute Article 5(i); ICTR Statute Article 3(i); SCSL Statute Article 2(i); ECCC Statute Article 5; Rome Statute Article 7(k).

2. The act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴⁵

Given the residual nature of the clause, to qualify as an inhumane act as a crime against humanity, the crime must not meet the criteria of any other enumerated offenses within the court's statute. In the case of forced marriage as an inhumane act, this means that the crime must not be fully captured by any of the crimes listed in Article 7 of the Rome Statutes, namely "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."⁴⁶ Therefore, for forced marriage to be prosecuted as an inhumane act as a crime against humanity, the Prosecutor must prove that the crime contains elements distinct from the sexual crimes already codified in the court's statute, namely sexual slavery.⁴⁷

In accordance with these definitions, this article adopts the view that forced marriage is best characterized as a gender-based crime as the crime's perpetration is reliant on socially constructed ideas related to the victim's gender and corresponding spousal role.⁴⁸ In the case of the forced marriage of women and girls by male perpetrators, the crime is defined by the denial of relational autonomy and a range of human rights violations,⁴⁹ many of which are gendered in nature and beyond the scope of sexual acts alone. Therefore, it is essential to use a gendered lens when addressing instances of forced marriage, as failure to do so masks the true extent of the crime and risks conflating crimes committed against women to strictly sexual acts. This highlights the importance of disseminating the distinctions and intricacies between sexual violence and gender-based crimes. As this article will demonstrate, in the past, failure to recognize the gendered dimensions of forced marriage has yielded the mischaracterization of forced marriage as a predominately sexual offense equivalent to sexual slavery. This is problematic given the crime's gender elements and unique conduct and harms that are foundational to the crime and yield distinct consequences for victims. As this article will show, only recently has the ICC solidified its view of forced marriage as a gendered crime distinct from sexual enslavement, marking a major step in the Court's recognition of gender-based crimes beyond the scope of sexual violence.⁵⁰

⁴⁵ ICC Elements, *supra* note 21, at Article 7(1)(k).

⁴⁶ Note, to qualify as an inhumane act, acts of forced marriage must also be different from the other crimes against humanity included in the Rome Statute, such as enslavement or torture.

⁴⁷ See Oosterveld et al. Amici Curiae Brief, *supra* note 4, at ¶ 2-9 for a detailed discussion of forced marriage and gender-based crimes as inhumane acts.

⁴⁸ See O'Brien, Gender Dimensions of Forced Marriage, *supra* note 7, at 3.

⁴⁹ See Oosterveld et al. Amici Curiae Brief, *supra* note 4, at ¶ 4.

⁵⁰ ICC 2023 Policy on Gender-Based Crime, *supra* note 30, at ¶ 63.

III. Prosecuting Forced Marriage at the Special Court for Sierra Leone

A) Introduction

The following section explores how the SCSL conceptualized and prosecuted the forced marriage of women and girls in the context of conflict in Sierra Leone. As the first international court to attempt to prosecute the offense, the Prosecution faced challenges in its characterization of the crime, specifically regarding its attempt to prosecute forced marriage as an inhumane act as a crime against humanity, distinct from the previously enumerated crime against humanity of sexual slavery. This section will outline those challenges, seeking to contextualize such as the beginning of a history of legal debates surrounding the validity of forced marriage as a crime distinct from sexual enslavement. First, this section elaborates on forced marriage in the context of the Sierra Leone Civil War. This discussion relies heavily on the work of Zainab Hawa Bangura, an expert on women's rights in Sierra Leone who was commissioned by the Office of The Prosecutor ("OTP") to author the Expert Report on the phenomenon of 'forced marriage' in the context of the conflict in Sierra Leone. Bangura's report provides the context in which forced marriages occurred and highlights the crime's unique consequences by focusing on the gendered dimensions of the crime. After this discussion, this section examines in detail two cases involving the prosecution of forced marriage: *The Prosecutor v. Brima, Kamara, Kanu* (referred to as the AFRC Case) and *The Prosecutor v. Sesay, Kallon, Gbao* (referred to as the RUF Case).⁵¹ By analyzing how the Court prosecuted forced marriage in each of these cases, this section explores how the OTP conceptualized forced marriage as a crime that differed from sexual slavery and, subsequently, how the Trial Chamber understood the offense. Through this analysis, this section finds that although the OTP initially struggled to express how forced marriage differed from sexual slavery, the Court ultimately produced jurisprudence that has been foundational for the prosecution of forced marriage as an inhumane act as a crime against humanity and further, the contextualization of such as a broader gender-based crime.

B) Background: Forced Marriage in Sierra Leone

The Sierra Leone Civil War (1991-2002) involved the use of widespread gender-based violence against women and girls by multiple rebel forces.⁵² In addition to various acts of sexual violence, the conflict witnessed the forced marriage of thousands of civilian women and girls to rebel fighters.⁵³ Under forcible marriages, women and girls were forced to serve as 'bush wives,' subjecting them to an exclusive conjugal relationship (i.e., 'marriage') with their perpetrators

⁵¹ *Prosecutor v. Brima, Kamara, Kanu* (the AFRC Case), SCSL-2004-16-T, Expert Report on the phenomenon of 'forced marriage' in the context of the conflict in Sierra Leone and, more specifically, in the context of the trials against the RUF and AFRC Accused only (May 2005) [hereinafter Expert Report on Forced Marriage].

⁵² Valerie Oosterveld, *Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts*, 17 Am. U. J. Gender Soc. Pol'y & L. 407 (2009) <https://heinonline.org/HOL/P?h=hein.journals/ajgsp17&i=415>.

⁵³ *Note*, that while the exact number of bush wives is unknown, experts estimate that 'thousands of Sierra Leonean women were forcibly married to rebel fighters during the conflict. See Expert Report on Forced Marriage, *supra* note 51, at section 1.2.

(‘husbands.’)⁵⁴ Under forcible marriages, ‘bush wives’ were made to fulfill a range of sexual, domestic, and reproductive activities in line with the gendered expectations of a wife’s role in rebel society. As a result, ‘bush wives’ were forced to submit to their ‘husbands’ sexual demands and complete a range of domestic and reproductive obligations, including cooking, cleaning, farming, child-rearing, and child-raising.⁵⁵

In 2002, the SCSL was mandated to prosecute “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30th, 1996.”⁵⁶ Given the presence of forced marriage, a novel offense at the time, the Prosecution requested leave to investigate the phenomenon of the forced marriage in connection to both the AFRC and RUF cases.^{57 58} As a result, Zainab Hawa Bangura, an expert on women’s rights in Sierra Leone, was commissioned by the OTP to author the “Expert Report on the phenomenon of ‘forced marriage’ in the context of the conflict in Sierra Leone and, more specifically, in the context of the trials against the RUF and AFRC Accused only.”

The report highlighted the foundational role of ‘marriage’ as a means to assert power over the victim. Bangura emphasized that the “[u]se of the word wife was deliberate and strategic” and used by rebels to assert an exclusive claim over their victims.⁵⁹ The labeling of victims as ‘wives’ was not only used by rebels to assert a relationship of sexual exclusivity with their victims but to demand conjugal loyalty as well. Under the guise of ‘marriage,’ each victim ‘belonged’ to a particular rebel and was expected to demonstrate ‘loyalty’ to their ‘husband’ by acting as his exclusive ‘wife.’⁶⁰ Bangura’s report found that the expectations of a bush wife extended far beyond the sexual realm as “[b]ush wives’ were expected to carry out all the functions of a wife and more.”⁶¹ This included the following:

⁵⁴ Note, that in the context of the Sierra Leone conflict, ‘bush wives’ were also referred to as ‘rebel wives’ and ‘jungle wives.’

⁵⁵ See O’Brien, Gender Dimensions of Forced Marriage, *supra* note 7

⁵⁶ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Apr. 12, 2002, *U.N.T.S* 2178 Treaty No. 38342
<https://treaties.un.org/doc/Publication/UNTS/Volume%202178/v2178.pdf>

⁵⁷ Note, during this leave, the OTP created an internal informal working group, gathering victims to discuss the charging of forced marriage as either the already enumerated crime of sexual slavery (given the better chance of conviction) or forced marriage as an inhumane act (a novel charge). Victims unanimously requested that the OTP press charges of forced marriage as an inhumane act, feeling that this term best captured their lived experiences. See, Valerie Oosterveld, *The Special Court for Sierra Leone: Initial Structural and Procedural Decisions on Sexual and Gender-Based Violence*, 46 *Cambrian Law Review* (2015-16).

⁵⁸ Note until the AFRC and RUF cases at the SCSL, instances of forced marriage in conflict situations had never been directly addressed or prosecuted by an international court. This is not to say that practices of forced marriage did not exist in other conflict situations before then. For example, the forced marriage of Tutsi women and girls to Hutu men during the conflict in Rwanda is well documented. See Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 *U.C. Davis J. Int'l L. & Pol'y* 197 (2001),
<https://heinonline.org/HOL/P?h=hein.journals/ucdl7&i=201> & Melanie O'Brien, ‘Don't Kill Them, Let's Choose Them as Wives’: *The Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law*, 20 *Int'l J. Hum. Rts.* 386 (2016),
<http://www.tandfonline.com/doi/full/10.1080/13642987.2015.1091562>.

⁵⁹ Expert Report on Forced Marriage, *supra* note 51, at section 2.1(i)

⁶⁰ *Id.*

⁶¹ *Id. supra* note 51, at section 2.1(ii)

- A ‘bush wife’ carried her ‘husband’s’ possessions on her head and trekked across the countryside with him.
- She was expected to gratify her ‘husband’s’ sexual wishes whenever he so desired without question.
- A ‘bush wife’ cooked for her ‘husband’ when food was available, did his laundry and generally protected his possessions in his absence.
- A ‘bush wife’ was expected to show undying loyalty to her ‘husband’ for his protection and reward him with ‘love’ and affection. She was not expected to attempt to escape as this was deemed disloyal. Punishment for disloyalty was always severe and, so women were led to believe, in most cases would be met by death.⁶²

The Expert Report continued by distinguishing between the roles and consequences faced by ‘bush wives’ and ‘non bush wives’ in rebel society.⁶³ ‘Non bush wives’ included women and girls held captive by rebel groups and regularly sexually abused by multiple rebels. In contrast to ‘bush wives,’ ‘non bush wives’ were not forcibly married to a specific rebel. Given the lack of ‘marriage,’ ‘non bush wives’ were not subject to an exclusive marital relationship with a particular rebel or expected to fulfill the gendered role of a rebel’s ‘wife.’ For example, rather than caring specifically for their ‘husbands’ by cooking for them, protecting and carrying their possessions during moves, and laundering their clothes, ‘non bush wives’ performed general camp maintenance activities. This included carrying heavy camp loads during moves, doing the general camp laundry, and serving as additional fighters when needed. Critically, since ‘non bush wives’ were not ‘married’ to a particular rebel, they were subject to regular sexual abuse and gang rapes by multiple rebels.⁶⁴ In contrast, ‘bush wives’ were ‘protected’ from gang rapes by their ‘husbands’ as a reward for their exclusive relationship (sexual and conjugal) asserted via their ‘marriage.’ However, if a ‘wife’ were deemed disloyal to her ‘husband’ or raped by other rebels, punishment would occur, often in the form of beatings or death.⁶⁵

By contrasting the experiences of ‘bush wives’ and ‘non bush wives,’ the Expert Report highlighted the unique harms associated with forced marriages that were not present in the case of ‘non bush wives,’ particularly that related to the lasting consequences of being labeled a rebel’s ‘wife.’ Labeling victims as ‘wives’ effectively isolated them, subjecting them to

⁶² *Id.*

⁶³ *Note*, the Expert Report on Forced Marriage states that ‘non bush wives’:

- carried the camp’s heavy loads and food supplies as the group moved across the countryside,
- were regularly sexually abused by any rebel in the camp because they did not ‘belong’ to a particular rebel,
- they were at the disposal of any man who felt like having sex and dared not refuse,
- at night these women would go to bed scared and not knowing who would demand sex from them,
- were not provided with food, instead they were expected to find food for others as well as for themselves,
- were expected to do most of the hard work in the camps. They also did the general laundry and worked for the ‘bush wives,’
- were expected and could be sent to the war front to fight if the unit needed additional fighters.
- were sometimes sent as spies on reconnaissance missions to the enemy camp to gather information about troop movements. They were threatened with death in they failed to carry out their assignments or did not return.

⁶⁴ *Id.*

⁶⁵ *Id.* at section 2.1(i)

extensive mental and social harms beyond the conflict. Mentally, victims suffered extensive psychological trauma. Specifically, the alleged ‘protection’ from sexual abuse by other rebel men provided by their ‘husbands’ due to their ‘marriage’ left many victims feeling tied to their ‘husbands’ after the war, especially if they had born and raised his children.⁶⁶ Socially, the labeling of victims as combatants’ ‘wives’ effectively broke down family ties and social support structures, creating shame and social stigmatization beyond the conflict. In some instances of forced marriage, ‘bush wives’ ended up living with their ‘husbands’ for up to ten years post-conflict due to social isolation and extensive psychological trauma. As a result, ‘bush wives’ came to be viewed as primarily an extension of their rebel ‘husbands,’ making community reintegration after the war extremely difficult.⁶⁷

The report concluded that the consequences of forced marriages resulted in additional social stigma and long-term psychological harm that differed significantly from ‘non bush wives.’ Further, in contrast to victims of predominantly sexual crimes, ‘bush wives’ received little sympathy from the local populations after the conflict, with some communities believing that ‘wives’ benefited economically from rebel lootings. Additionally, many communities refused to raise ‘rebel children,’ making it impossible for some victims to return to their original homes and families. Given the shame and stigma of being a rebel’s ‘wife,’ victims of forced marriage suffered lasting psychological harm and social isolation after the conflict.⁶⁸ Arguably, these consequences can be broadly classified as gender-based harms, as they result from a crime perpetrated because of socially constructed ideas related to the victim’s gender and corresponding spousal role in society.

C) The AFRC Case: Prosecutor v. Brima, Kamara and Kanu

In 2003, the SCSL indicted three military leaders associated with the Armed Forces Revolutionary Council (AFRC), a rebel group active in the Sierra Leone conflict. The amended indictment contained 18 counts alleging that the defendants had committed various crimes against humanity and war crimes.⁶⁹ The prosecution indicted the defendants with four charges under the label “sexual violence.”⁷⁰ Per the AFRC Amended Indictment, these charges were to address the widespread rape and abduction of an unknown number of women and girls that were “used as sex slaves and/or forced into ‘marriages’ and/or subject to other forms of sexual violence.”⁷¹ These offenses were charged under the following counts:

⁶⁶ *Id.* at section 2.2(ii)

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ The Prosecutor v. Brima, Kamara, Kanu (AFRC Case), SCSL-2004-16-PT, Amended Consolidated Indictment, (May 13, 2004) [hereinafter AFRC Amended Indictment]

<http://www.rscsl.org/Documents/Decisions/AFRC/070/SCSL-04-16-PT-078.pdf>.

⁷⁰ *Note*, the AFRC Appeals Chamber later found that the Prosecution’s placement of forced marriage under the label “sexual violence” was incorrect and misleading. This is discussed in the following section.

⁷¹ *See* AFRC Amended Indictment, *supra* note 69, at ¶¶ 51-57.

Count 6: Rape as a crime against humanity per Article 2(g)⁷²

Count 7: Sexual slavery and any other form of sexual violence as a crime against humanity per Article 2(g)⁷³

Count 8: Forced marriage as an inhumane act constituting a crime against humanity per Article 2(i)⁷⁴

Count 9: Outrages upon personal dignity as a war crime per Article 3(e)⁷⁵

Following the Rome Statute's definition of sexual slavery, the SCSL defined the elements of sexual slavery as:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.⁷⁶

The defense argued that count 7 offended the defendant's fundamental rights as it charged the defendants with two separate offenses under the same count (sexual slavery *and* any other form of sexual violence).⁷⁷ In response, the Trial Chamber ruled that the language of "any other form of sexual violence" failed to identify the specific offense related to sexual violence and, therefore, violated the defendant's right to know "of the nature and cause of the charge against him."⁷⁸ Charge 7 was dismissed in its entirety as a result.⁷⁹ Subsequently, the Trial Chamber ruled that sexual slavery best qualified as an act of humiliation and degradation that amounted to a war crime.⁸⁰ Therefore, sexual enslavement was to be prosecuted under count 9 as an outrage upon personal dignity per Article 3(e) of the court's statute.⁸¹

Count 8 of the indictment charged defendants with forced marriage as an inhumane act as a crime against humanity, marking the first time forced marriage was charged in an international

⁷² Note, Article 2 of the SCSL Statute asserts that the following crimes are within the court's jurisdiction and may be charged as crimes against humanity: "a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic, or religious grounds; i. Other inhumane acts." See Statute of the Special Court for Sierra Leone, *supra* note 56, at Article 2.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Note, per subsection (e) "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" constitute a Violation of common article 3 to the Geneva Conventions and of Additional Protocol II. See Statute of the Special Court for Sierra Leone, *supra* note 56, at Article 3.

⁷⁶ The Prosecutor v. Brima, Kamara, Kanu (AFRC Case), SCSL-2004-16-T, Trial Judgment, ¶ 708, (June 20, 2007) [hereinafter AFRC Trial Judgment] <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf>.

⁷⁷ *Id.* at ¶ 721.

⁷⁸ See Statute of the Special Court for Sierra Leone, *supra* note 56, at Article 17(4)(a).

⁷⁹ Note, Justice Doherty dissented. See AFRC Trial Judgment, *supra* note 76, at pg. 582- 596 (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages').

⁸⁰ ARFC Trial Judgment, *supra* note 76, at ¶ 719.

⁸¹ *Id.* at ¶ 713-715.

criminal court. Because forced marriage was not enumerated as a prosecutable offense within the Court's statute, the prosecution argued that forced marriage constituted the crime against humanity of 'other inhumane acts.'⁸² Given the residual nature of the 'other inhumane acts' clause, this suggests that the prosecution understood forced marriage as a crime distinct from the sexual crimes enumerated under Article 2(g) of the Court's statute, particularly sexual enslavement.⁸³ As a result, the prosecution articulated forced marriage as a crime involving:

“...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. These acts are distinct from sexual acts in that they represent forcing a person into the appearance, the veneer of the conduct (i.e., marriage), by threat, physical assault of coercion.”⁸⁴

The Prosecution emphasized that although acts of forced marriage often included sexual offenses, the crime also contained distinctive elements, particularly regarding the conferral of “the status of marriage.” In distinguishing forced marriage from sexual enslavement, the Prosecution explicitly stated its view that “[s]exual slavery does not necessarily amount to forced marriage,” highlighting the fact that neither a sexual slave nor victim of sexual violence alone is “obliged to perform all the tasks attached to a marriage... [or] obliged to pretend that she is the wife of the perpetrator.”⁸⁵ The Prosecution concluded that forced marriage as an inhumane act as a crime against humanity may include elements of sexual slavery or sexual violence; however, the crime contained distinctive elements as well and was of sufficient gravity to constitute an inhumane act.⁸⁶ From the view of the Prosecution, these distinctions were two-fold. First, forced marriage involves the forced conferral of the status of ‘wife’ on the victim.⁸⁷ As explained by the *Expert Report*, the forced status of a rebel’s ‘wife’ resulted in lasting psychological harm and societal stigmatization. Second, victims of forced marriage were subject to harms arising from the forced duties present during the crime. This includes that resulting from the forced completion of domestic and reproductive labor assigned to the victim due to socially constructed ideas related to their gender and corresponding spousal role.⁸⁸ Therefore, although the Prosecution had indicted forced marriage as an inhumane act under the heading “sexual violence,” this suggests that the OTP conceptualized forced marriage as a crime containing distinctive features that were not captured by charges related to sexual violence alone or the crime of sexual slavery.

⁸² See AFRC Amended Indictment, *supra* note 69

⁸³ The Prosecutor v. Brima, Kamara, Kanu (AFRC Case), SCSL-04-16-T, Prosecution Final Trial Brief, ¶1000-1012, (Dec. 6, 2006) [hereinafter AFRC Prosecution Final Trial Brief] <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-601.pdf>.

⁸⁴ *Id.* at ¶ 1009.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Valerie Oosterveld, *Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties*, 2 *Int'l Humanitarian Legal Stud.* 127-58, 135 (2011).

⁸⁸ *Id.*

Ultimately, the Trial Chamber rejected the validity of forced marriage as an inhumane act as a crime against humanity. Justice Sebutinde’s concurring opinion expressed that the Trial Chamber viewed forced marriage as “a form of sexual violence pursuant to Article 2.g. of the Statute and [therefore] could equally qualify as a form of sexual slavery.”⁸⁹ This was because, in the view of the Trial Chamber majority, the sexual aspect of forced marriage dominated the nonsexual aspects of the crime. Given the Trial Chamber’s conceptualization of forced marriage as an act that was “clearly sexual in nature,” the Trial Chamber ruled that forced marriage did not constitute an inhumane act, as sexual crimes were already enumerated under Article 2(g) of the Court’s Statute.⁹⁰ In summary, Justice Sebutinde expressed that forced marriage was equivalent to the crime of sexual slavery based on the following:

- (1) The captor asserted power over the victim via ownership. The forced conjugal duties resulted from the captor’s ownership and enslavement of the victim.
- (2) The captor regularly sexually abused the victim.
- (3) The captor held the victim in captivity, condemning her to sexual servitude.⁹¹

Therefore, by majority decision, the Trial Chamber concluded that the evidence presented by the prosecution in support of forced marriage (count 8) was “completely subsumed by the crime of sexual slavery.”⁹² Since count 7 (Sexual slavery *and* any other form of sexual violence as a crime against humanity) was already dismissed due to duplicity, the Trial Chamber ruled to consider evidence of forced marriage (or sexual slavery, as understood by the Trial Chamber) under count 9, which charged the defendants with the war crime of “outrages upon personal dignity.”⁹³

In dissent, Justice Doherty argued that forced marriage constituted an offense distinct from sexual slavery as the labeling of victims as combatants’ ‘wives’ resulted in unique traumas and stigma for victims.⁹⁴ Justice Doherty reiterated that “[the crime of forced marriage] is concerned with the mental and physical trauma of being forced unwillingly into a marital arrangement, the stigma associated with being labeled a rebel ‘wife’ and the corresponding rejection by the community.”⁹⁵ Following the Prosecution’s understanding of the crime, she emphasized the “[s]erious psychological and moral injury” imposed on victims as a result of being labeled a

⁸⁹ The Prosecutor v. Brima, Kamara, Kanu (AFRC Case), SCSL-2004-16-T, Trial Judgment, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(c), Section B ¶ 6, (June 20, 2007) [hereinafter Justice Sebutinde Concurring Opinion].

⁹⁰ *Id.*

⁹¹ Per Justice Sebutinde’s Separate Concurring Opinion, Sebutinde characterized forced marriage by the following:

- I. The ‘bush husband’ exercised any or all the powers attaching to the right of ownership over his ‘bush wife’ whereby not only was she was held under captivity and not at liberty to leave but, in addition, she was forced to render gender-specific forms of labor (conjugal duties) including cooking, cleaning, washing clothes and carrying loads for him, for no genuine reward.
- II. Invariably, the ‘bush husband’ regularly subjected his ‘bush wife’ to sexual intercourse, often without her genuine consent and to the exclusion of all other persons.
- III. The ‘bush husband’ abducted and forcibly kept his ‘bush wife’ in captivity and sexual servitude with the intention of holding her indefinitely in that state or in the reasonable knowledge that it was likely to occur.

⁹² AFRC Trial Judgment, *supra* note 76, at ¶ 713.

⁹³ AFRC Trial Judgment, *supra* note 76, at ¶ 713-174 & 719.

⁹⁴ Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-T, Judgment: Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (‘Forced Marriages’), (June 20, 2007) [Doherty Partly Dissenting Opinion].

⁹⁵ *Id.* at ¶ 42.

combatant's 'wife.'⁹⁶ In recognition of these distinct elements that yielded long-term stigma and trauma to the victims, Justice Doherty concluded that forced marriage was not equivalent to the crime of sexual slavery and, therefore, constituted an inhumane act.⁹⁷ Regardless, by majority opinion, forced marriage as an inhumane act under count 8 was dismissed and ruled to be subsumed by the charge of sexual slavery, which was to be implicitly prosecuted under count 9. In 2007, the Trial Chamber found all three defendants guilty of 11 of 14 counts, including count 9.⁹⁸

D) Analysis of the AFRC Trial Chamber's Ruling and The AFRC Appeal

During the Prosecution's Seventh Ground of Appeal, the issue of equating acts of forced marriage and the crime of sexual slavery was raised.⁹⁹ Upon examination, the Appeals Chamber concluded that:

“No tribunal could reasonably have found that forced marriage was subsumed by the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors.”¹⁰⁰

The Appeals Chamber subsequently defined forced marriage as a criminal offense distinct from sexual slavery in two ways: (1) the mode of association and (2) the relationship of exclusivity.¹⁰¹ Arguably, these distinctions are highlighted by focusing on the gendered dimensions of the crime.

First, the Appeals Chamber ruled that forced marriage is defined by the imposition of a “forced conjugal association...[that results] in suffering, or serious physical or mental injury on the part of the victim.”¹⁰² By defining the crime on the basis of a “forced conjugal association,” the Appeals Chamber recognized the ‘marriage’ as (1) the perpetrator’s method for associating with the victim and (2) an act that caused serious suffering/injury for the victim. This implies that the crime of forced marriage differs from sexual slavery in terms of how the perpetrator associates with the victim and asserts power over them. During forced marriage, the relationship between

⁹⁶ In dissent Justice Doherty wrote: “The 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 victim... the conduct contemplated as ‘forced marriage’ does not necessarily involve elements of physical violence such as abduction, enslavement, or rape, although the presence of these elements may go to proof of the lack of consent of the victim. The crime is concerned primarily with the mental and moral suffering of the victim.” *See Id.* at ¶ 70.

⁹⁷ *Id.* at ¶ 54-57.

⁹⁸ AFRC Trial Judgment, *supra* note 76, at section XIII: Disposition.

⁹⁹ The Prosecutor v. Brima, Kamara, Kanu (AFRC Case), SCSL-2004-16-A, Appeals Chamber Judgment, (Feb. 22, 2008) [hereinafter AFRC Appeals Chamber Judgment]

<https://www.rscsl.org/Documents/Decisions/AFRC/Appeal/675/SCSL-04-16-A-675.pdf>

¹⁰⁰ *Id.* at ¶195.

¹⁰¹ *Id.*

¹⁰² *Id.*

the victim and perpetrator is one of ‘marriage’ rather than ‘ownership,’ as is the case in sexual slavery.^{103 104} A focus on the gendered dimensions of forced marriage reveals this key distinction. With the understanding that forced marriage is a gender-based crime reliant on socially constructed ideas regarding the victim’s gender and corresponding spousal role, it becomes evident that the perpetrator uses ‘marriage’ to associate with the victim and force them to fulfill the gendered role of ‘wife.’ In contrast, sexual enslavement is defined by direct ownership of the victim rather than a ‘marriage’ substantiated by gender-based power dynamics and societal expectations of a ‘wife’s’ role in society.

Second, the Appeals Chamber ruled that “unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and the ‘wife,’ which could lead to disciplinary consequences for breach of this exclusive arrangement.”¹⁰⁵ As outlined by the Expert Report, ‘non bush wives’ were not subject to an exclusive (conjugal and sexual) relationship with their captor.¹⁰⁶ In contrast, ‘bush wives’ were subject to an exclusive relationship with their perpetrator under a forcible ‘marriage.’ As a result of their forced exclusive relationship, victims of forced marriage suffered additional harms. For example, the relationship of exclusivity between the ‘husband’ and ‘wife’ created additional social stigma and consequences if this arrangement was breached. As outlined in the Expert Report, if a ‘wife’ ‘violated’ her exclusive ‘marriage’ with her ‘husband’ she was deemed disloyal and punished.¹⁰⁷ Further, labeling a victim as a rebel’s exclusive ‘wife’ placed a long-term social stigma on the victim, creating difficulties for former ‘bush wives’ reintegration into society after the conflict.¹⁰⁸ The exclusive relationality between the perpetrator and his ‘wife’ through the institution of ‘marriage’ created additional social stigma distinct from that associated with victims of sexual violence alone.¹⁰⁹ These consequences may be broadly defined as gender-based harms as they result from a crime perpetrated on the basis of socially constructed ideas associated with the victim’s gender and corresponding spousal role. Overall, the social stigma and long-term consequences associated with being a captor’s exclusive ‘wife’ add an additional gendered dimension to the crime that is not captured by charges of sexual slavery or crimes related to acts of sexual violence alone.

Under these distinctions, the Appeals Chamber dismissed the Trial Chamber’s characterization of forced marriage as an offense equivalent to sexual slavery, ruling that “[t]hese distinctions imply that forced marriage is not a predominately sexual crime” and therefore cannot be

¹⁰³ *Id.* at ¶190.

¹⁰⁴ *Note*, my arguments around the forced marriage for the purpose of a coercive marital arrangement versus ‘ownership’ for the purpose of enslavement are reflective of an attempt to distinguish the crime of forced marriage from the elements of sexual slavery on a definitional basis. As this paper will show, this distinction has been used by prosecutors, judges and scholars alike to highlight the definitional differences between forced marriage as a distinct inhumane act versus a form of sexual slavery. However, in doing so it is important to note that victims of forced marriage may experience feeling of ‘ownership’ at the hands of their perpetrators. I argue that this is reflective of the fact that the way in which forced marriage occurs depends on the societal context and social norms surrounding gendered role of wife in the given society. This argument is not meant to invalidate victims’ experiences, but rather highlight the ‘marriage’ as the key component of the crime that yields certain duties, expectations and consequences for victims.

¹⁰⁵ *Id.* at ¶195.

¹⁰⁶ Expert Report on Forced Marriage, *supra* note 51, at section 2.1(ii).

¹⁰⁷ *Id.* at section 2.1(i).

¹⁰⁸ *Id.* at section 2.2(ii)

¹⁰⁹ *Id.*

subsumed by the crime of sexual slavery.¹¹⁰ In correction, the Appeals Chamber ruled that forced marriage adequately met the qualifications of an inhumane act as a crime against humanity as the “imposition of a forced conjugal association” caused suffering for victims of similar gravity to other crimes against humanity outlined in the Court’s Statute.¹¹¹ However, in recognizing forced marriage as an inhumane act distinct from sexual slavery, the Appeals Chamber noted that the Prosecution’s placement of forced marriage (count 8) under the category of “sexual violence” was misleading.¹¹² Therefore, the Appeals Chamber failed to enter fresh convictions. Regardless, the Appeals Chamber’s analysis of forced marriage developed extensive jurisprudence that was later utilized by the Court and eventually by the ICC.

The AFRC Appeals Chamber’s discussion of forced marriage highlights the problematic nature of equating forced marriage with sexual slavery and, more broadly, confining forced marriage to an act of sexual violence rather than a broader gender-based crime. First, equating forced marriage to the crime of sexual enslavement dismissed key gender-based harms experienced by victims of the atrocity. For example, as explained in the Expert Report, forced marriage yielded distinct consequences for victims. This often included the forced completion of domestic and reproductive duties, the forced exclusive relationship with a rebel, lasting social stigmatization, and difficulties reintegrating after the conflict.¹¹³ It is critical to recognize that these harms were inherently gendered as they arise from labeling victims as ‘wives’ and a forced ‘marriage’ reliant on socially constructed ideas related to the victim’s gender and corresponding spousal role. Therefore, confining acts of forced marriage to charges of sexual slavery meant the dismissal of critical gender-based harms that were unique to forced marriage. Second, as opposed to sexual slavery, in which the perpetrator attaches the right of ownership to victims, during forced marriage, the perpetrator asserts power over the victim via ‘marriage.’ Using a gendered lens reveals that this ‘marriage’ was not used for ownership as is the case during enslavement but rather as a coercive mechanism to force the victim to fulfill the gendered role of ‘wife.’ Again, focusing on the gendered dimensions of the crime reveals key distinctions between forced marriage and sexual slavery. Thus, given the foundational role of labeling victims as ‘wives’ and the use of ‘marriage’ to force the victim to fulfill the gendered role of spouse, forced marriage is best understood as a gender-based crime rather than a strictly sexual offense equivalent to sexual slavery. This highlights the importance of examining the gendered dimensions of forced marriage, as failure to do so risks confining such to acts of sexual violence rather than a broader gender-based offense.

E) The RUF Case: Prosecutor v. Sesay, Kallon and Gbao

Following the jurisprudence developed by the Appeals Chamber ruling in the AFRC Case, The Revolutionary United Front (RUF) Case prosecuted three defendants with the following crimes against women and girls:

¹¹⁰ AFRC Appeals Judgment, *supra* note 99, ¶195.

¹¹¹ *Id.* at ¶197-203.

¹¹² *Id.* at ¶181.

¹¹³ Expert Report on Forced Marriage, *supra* note 51, at section 2.2(ii)

- Count 7: Sexual slavery as a crime against humanity per Article 2(g)
Count 8: Forced marriage as an inhumane act as a crime against humanity per Article 2(i)
Count 9: Outrages on personal dignity, including rape, sexual slavery and ‘forced marriage per Article 3(e)¹¹⁴

The indictment alleged that, throughout the conflict, RUF rebel fighters abducted an unknown number of civilian women and girls, some of whom were forced to ‘marry’ combatants.¹¹⁵ Throughout the trial, numerous women and girls testified of their experiences, particularly regarding the RUF’s practice of taking women and girls as ‘wives’ in the Wenedu, Koidu, and Kissi-Town areas.¹¹⁶ Similarly to the AFRC’s practice of forced marriage, the RUF trial revealed that ‘bush wives’ were forced to fulfill the role of a combatant’s ‘wife’ by acting as his exclusive partner. As ‘wives,’ victims were expected to cook and clean for their ‘husbands,’ launder their clothes, bear and raise their children, and submit to forced sexual acts.¹¹⁷ The Prosecution stressed that victims experienced unique traumas and lasting social stigmatization due to forced marriage, writing that “[b]eing labeled rebel ‘wives’ resulted in women being stigmatized, ostracized and even rejected from their communities.”¹¹⁸ Referencing the Appeals Chamber’s conceptualization of forced marriage, the Prosecution held that forced marriage is (1) not a predominately sexual offense equivalent to sexual slavery and (2) an offense that contained unique conduct and harms of sufficient gravity to qualify as an inhumane act distinct from sexual slavery.¹¹⁹

In alignment with the Appeals Chamber’s ruling in the AFRC Case, the Trial Chamber prosecuted forced marriage as an inhumane act and sexual slavery as separate crimes against humanity.¹²⁰ Ultimately, the Trial Chamber concluded that the defendants were guilty of both sexual enslavement per count 7, forced marriage per count 8, and outrages on personal dignity per count 9. Regarding sexual slavery, the Chamber ruled that:

“[T]he perpetrators intended to deprive the women of their liberty by exercising powers attaching to the right of *ownership* over them, including by forcing the women to engage in acts of a *sexual nature*. The Chamber thus finds ... RUF rebels forced an unknown number of women into sexual slavery in Koidu... Wenedu... [and] Kissi-Town, as charged in Count 7”¹²¹

¹¹⁴ Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Case), SCSL-2004-15-PT, Amended Consolidated Indictment, (May 13, 2004) [hereinafter RUF Indictment].

<http://www.rscsl.org/Documents/Decisions/RUF/108/SCSL-04-15-PT-122.pdf>.

¹¹⁵ RUF Indictment, *supra* note 114 at ¶ 54-60.

¹¹⁶ Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Case), SCSL-2004-15-T, Prosecution Final Brief, ¶ 645, (Aug. 7, 2008) [hereinafter RUF Prosecution Final Brief].

<http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1222.pdf>

¹¹⁷ *Id.* at ¶ 644.

¹¹⁸ *Id.* at ¶ 648.

¹¹⁹ *Id.* at ¶ 546-550.

¹²⁰ Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Case), SCSL-2004-15-T, Judgment, ¶ 467, (Mar. 2, 2009) [hereinafter RUF Judgement].

<http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>

¹²¹ *Id.* at ¶ 1294 [italics added for emphasis].

Per count 8, the Trial Chamber ruled that the conduct described by victims and witnesses met the definition of forced marriage, stating that:

“The *conjugal association* forced upon the victims carried with it a *lasting social stigma* which hampers their recovery and reintegration into society. This suffering is in addition to the physical injuries that forced intercourse commonly inflicted on women taken as ‘wives.’ The Chamber thus finds that the perpetrators’ actions in taking ‘wives’ in Koidu inflicted grave suffering and serious injury to the physical and mental health of the victims, and that the perpetrators were aware of the gravity of their actions.”¹²²

As for count 9, the Chamber found that instances of rape, sexual enslavement, and forced marriages committed by RUF combatants each constituted a case of “severe humiliation, degradation and violation of the dignity of the victims and the perpetrators knew or ought to have known that their acts would produce this effect.”¹²³ Therefore, each defendant was found guilty of outrages upon personal dignity as a war crime per count 9 of the indictment.

The Trial Chamber conviction of forced marriage and sexual slavery under separate counts represents the first conviction of forced marriage as an inhumane act as a crime against humanity in an international court.¹²⁴ Alongside the AFRC Appeals Chamber ruling, the RUF conviction solidified the Court’s view of forced marriage as an inhumane act as a crime against humanity that is distinct from sexual enslavement in the following ways:

1. **Method of association:** Forced marriage relies on a constructed marriage-like scenario in which the perpetrator forces their victim to fulfill the gendered role of spouse. In the case of the forced marriage of women and girls in Sierra Leone, victims were forced to fulfill the role of a rebel’s ‘wife’ and comply with all of their ‘husband’s’ sexual and nonsexual demands. During forced marriage, the perpetrator associates with and asserts power over the victim via ‘marriage’ rather than ownership for the purpose of enslavement.¹²⁵ It is crucial to recognize that this ‘marriage’ relies on socially constructed ideas related to the victim’s gender and corresponding spousal role in the given society.
2. **Exclusivity:** In contrast to victims of sexual slavery, victims of forced marriage are subject to an exclusive relationship with their perpetrator. This includes sexual and conjugal exclusivity. In the case of forced marriage in Sierra Leone, if the exclusive nature of their relationship was breached (for example, if other rebels raped the victim), the victim was subject to punishment.¹²⁶ This element of exclusivity results in additional social stigmatization experienced by victims after the conflict.¹²⁷
3. **Unique harms:** Forced marriage carries unique harms, namely those arising from labeling victims as ‘wives.’ These unique harms included the forced completion of domestic and reproductive duties in line with the gendered expectations of a ‘wife’s’ role

¹²² *Id.* at ¶ 1296-1297 [italics added for emphasis].

¹²³ *Id.* at ¶ 1298

¹²⁴ *Id.* at section IX Disposition.

¹²⁵ AFRC Appeals Judgment, *supra* note 99, ¶190.

¹²⁶ AFRC Appeals Chamber Judgment, *supra* note 99, at ¶195.

¹²⁷ Expert Report on Forced Marriage, *supra* note 51, at section 2.1(ii).

in society, in addition to the “lasting social stigma which hampers [victims’] recovery and reintegration into society.”¹²⁸

4. **Forced marriage as an inhumane act as a crime against humanity:** Forced marriage constitutes a crime against humanity that is not captured by other previously enumerated sexual crimes (such as “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” under article 2(g)).¹²⁹ As concluded by the AFRC Appeals Chamber ruling and RUF conviction, forced marriage is not equivalent to the crime of sexual slavery. Instead, forced marriage best qualifies as a distinct crime against humanity amounting to a separate inhumane act. This is because (1) forced marriage is not a predominately sexual offense, and (2) the harms resulting from forced marriage are both unique and of sufficient gravity to qualify as an inhumane act as a crime against humanity per article 2(i).¹³⁰

The RUF Trial Chamber’s conviction of forced marriage as an inhumane act distinct from sexual slavery arguably recognized forced marriage as a broader gender-based crime that was not confined to acts of sexual violence alone. As sustained by the AFRC Appeals Chamber ruling and the RUF Trial Chamber’s conviction, there are key distinctions between forced marriage and sexual enslavement, namely the element of exclusivity, the presence of ‘marriage’ as opposed to direct ownership, and the unique harms suffered by victims. As this article has argued, focusing on the gendered dimensions of the crime reveals some of these key distinctions. For example, focusing on the gendered dimensions of forced marriage reveals that the perpetrator targets the victim because of socially constructed ideas related to the victim’s gender and corresponding spousal role. Since the perpetrator aims to force the victim to fulfill the role of their ‘wife,’ the perpetrator associates with and asserts power over the victim via ‘marriage’ rather than direct ownership. With that ‘marriage’ comes a range of unique harms, such as the element of exclusivity, forced reproductive and domestic obligations, and the lasting social stigma arising from being a rebel’s ‘wife.’ It is critical to recognize these harms as gendered as they result from a crime reliant on socially constructed ideas of what it means to be male/female and ‘husband’/‘wife’ in the given society.

Focusing on the gendered dimensions of forced marriage not only reveals key distinctions between forced marriage and sexual slavery but allows for the contextualization of forced marriage as a broader gender-based crime that is not limited to acts of sexual violence. Arguably, the prosecution of forced marriage as an inhumane act recognized forced marriage as a gender-based crime containing offenses, conduct, and harms beyond the scope of sexual violence. The Court’s conclusion that forced marriage is not a “predominately sexual offense” echoes this sentiment. Therefore, although the OTP initially failed to define forced marriage and justify its categorization as an inhumane act distinct from sexual slavery, the Appeals Chamber’s exploration of forced marriage and RUF conviction produced jurisprudence that the ICC would eventually use to solidify the view of forced marriage as a gendered crime distinct from sexual slavery.

¹²⁸ RUF Judgement, *supra* note 120 at ¶ 1296-1297.

¹²⁹ Statute for the Special Court of Sierra Leone, *supra* note 56, at Article 2(g).

¹³⁰ RUF Judgment, *supra* note 120 at ¶164-170.

IV. Prosecuting Forced Marriage at the ICC

A) Background: Conceptualizing Forced Marriage at the ICC

The ICC has made significant progress in recognizing and prioritizing the prosecution of gender-based crimes.^{131 132} This section aims to map that progress by examining the Court’s prosecution of the forced marriage of women and girls in conflict situations. To date, the ICC has attempted to prosecute factual scenarios of the forced marriage of women and girls in three cases: Prosecutor v. Germain Katanga, Prosecutor v. Dominic Ongwen, and Prosecutor v. al Hassan. By analyzing these three cases, this section maps how the OTP and Trial Chambers have conceptualized forced marriage as either a distinct inhumane act as a crime against humanity or a predominantly sexual offense equivalent to the crime against humanity of sexual slavery. This section concludes that despite past difficulties and persistent objections to the validity of forced marriage as an inhumane act, the ICC’s recent final conviction of Dominic Ongwen suggests significant progress in the ICC’s orientation towards forced marriage as a gender-based crime. This step is likely to be solidified if the ICC convicts al Hassan of forced marriage as the crime against humanity of ‘other inhumane acts.’ Once again, this section concludes that focusing on the gendered dimensions of forced marriage reveals key distinctions between the crime of sexual slavery and forced marriage. Further, the prosecution of forced marriage as an inhumane act constituting a separate crime against humanity charge offers the Court an opportunity to prioritize the prosecution of gender-based atrocity crimes committed against women and girls, including those that reside beyond the scope of sexual violence. This progress comes at a critical time as the Court approaches conflict situations involving gender-based crimes that are not limited to acts of sexual violence, such as that present in conflict in Nigeria under Boko Haram¹³³ and Afghanistan under Taliban rule.¹³⁴

B) Prosecutor v. Germain Katanga

Germain Katanga, former leader of the Patriotic Resistance Force (“FRPI”), an armed rebel group in the DRC, was accused by the ICC of committing seven counts of war crimes and three counts of crimes against humanity during a 2003 attack on Bogoro, a village in the Eastern DRC.¹³⁵ On April 21, 2008, the Prosecution submitted charges against Katanga, alleging the presence of women serving as sex slaves at FRPI camps under Katanga’s command. The brief

¹³¹ FIDH & Women's Initiatives for Gender Justice, *Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy* 1 (2021), <https://www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf>.

¹³² Rosemary Grey, Chapter 5: Finding the Positives, in *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential*, pg. 247-307, (2019) <https://www.cambridge.org/core/product/identifier/9781108652346/type/book>.

¹³³ See Office of the Prosecutor, *Report on Preliminary Examination Activities 2020*, ¶ 254-256 (Dec. 14, 2020) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>

¹³⁴ See Situation in the Islamic Republic of Afghanistan, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red, ¶72, 115-121 (Nov. 20, 2017) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06891.PDF

¹³⁵ Amnesty International, *DRC: All You Need to Know About the Historic Case Against Germain Katanga* (2014), <https://www.amnesty.org/en/latest/news/2014/03/drc-all-you-need-know-about-historic-case-against-germain-katanga/>.

stated that some of the women held captive “were sometimes given as a ‘wife’ to their captors.”¹³⁶ Despite the AFRC Appeals Chamber’s adjudication on the topic of forced marriage earlier that year, the Prosecution framed the taking of women as ‘wives’ as a “sexual offense” indicative of sexual slavery.¹³⁷ Echoing this sentiment, the Pre-Trial Chamber charged Katanga with sexual slavery under the finding of “sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack, imprisoned, and forced into becoming the [combatant’s] ‘wives.’”¹³⁸ As combatants’ ‘wives,’ victims were required to cook and clean as well as engage in forced sexual acts.¹³⁹ However, in contrast to the AFRC Appeals Chamber’s orientation towards the crime, the OTP and Pre-Trial Chamber framed instances of forcing civilian women to become combatant’s ‘wives’ as a sexual crime indicative of sexual slavery.^{140 141} As a result, Katanga was charged with the following counts related to crimes committed against women and girls under his leadership:

Count 6: Sexual slavery as a crime against humanity per Article 7(1)(g)

Count 7: Sexual slavery as a war crime per Article 8(2)(b)(xxii)

Count 8: Rape as a crime against humanity per Article 7(1)(g)

Count 9: Rape as a war crime per article per Article 8(2)(b)(xxii)¹⁴²

In its decision to charge the situations in which women were forced into becoming combatants’ ‘wives’ as sexual slavery, the Pre-Trial Chamber cited two key documents. First, the Pre-Trial Chamber cited the 1957 *UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. This document defines certain forms of forced marriage as practices constituting a form of enslavement.¹⁴³ This includes the following situations:

- i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

¹³⁶ The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, (Apr. 21, 2008), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2008_02068.PDF.

¹³⁷ *Id.* at ¶ 89

¹³⁸ The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of Charges (Int’l Crim. Court Sept. 30, 2008), [hereinafter Katanga Confirmation of Charges], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF.

¹³⁹ *Id.* at ¶ 348

¹⁴⁰ *Id.* at ¶ 349

¹⁴¹ Note, the ICC’s 2013 *Elements of Crimes* defines sexual slavery by the following elements:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹⁴² Katanga Confirmation of Charges, *supra* note 138

¹⁴³ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Apr. 30, 1957, 226 U.N.T.S. 3.

- ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- iii) A woman on the death of her husband is liable to be inherited by another person.¹⁴⁴

Second, the Pre-Trial Chamber cited a 1998 UN report on contemporary forms of slavery, which states:

“Sexual slavery also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.”¹⁴⁵

Without contemplating alternative charging strategies, the Pre-Trial Chamber ruled to charge instances of forced marriage as sexual enslavement under counts 6 and 7. In summary of this decision, the Pre-Trial Chamber expressed in Katanga’s Confirmation of Charges that:

“In the view of the Chamber sexual slavery also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labor involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in ‘rape camps’ or ‘comfort stations’, forced temporary ‘marriages’ to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery.”¹⁴⁶

Therefore, from the view of the Pre-Trial Chamber, instances of forced marriage present during the conflict in the DRC were conducive to the crime against humanity and the war crime of sexual enslavement. This suggests the Chamber interpreted such acts as (1) a predominately sexual crime and (2) a method used to assert ownership of the victim in furtherance of enslavement. Therefore, rather than a distinct offense best categorized as an inhumane act, forced marriage was conceptualized as a form of sexual enslavement. This interpretation was reaffirmed in the Trial Chamber’s 2014 Judgment, which stated that:

“The Chamber is of the view that in the specific context of the immediate aftermath of the attack on Bogoro, the statement that someone was ‘taken as a wife’ by a combatant or that she was to ‘become his wife’ is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature... the fact that the combatants declared that the civilians captured in Bogoro and brought to their camps were ‘their wives’ does show they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them.”¹⁴⁷

¹⁴⁴ *Id.* at Article 1(c)

¹⁴⁵ *Special Rapporteur of the Working Group on Contemporary Forms of Slavery, Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13, ¶ 30 (1998).

¹⁴⁶ Katanga Confirmation of Charges, *supra* note 138, at ¶ 431.

¹⁴⁷ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶1000-1001 (Mar. 7, 2014) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF

This conceptualization of forced marriage differs drastically from the SCSL’s AFRC Appeals Judgment and RUF Judgment. In contrast to the SCSL’s Appeals Chamber’s ruling on forced marriage as an inhumane act as a crime against humanity distinct from sexual slavery, the Katanga Case took an approach more similar to the AFRC Trial Chamber’s ruling by interpreting the crime as an offense equivalent to sexual slavery. This move is arguably indicative of the lack of clarity surrounding the international community’s understanding of forced marriage at the time, in addition to the historical tendency to view women and girls as victims of sexual violence instead of broader gender-based crimes.¹⁴⁸ Therefore, despite the precedents established by the SCSL, instances of forced marriages were subsumed by charges of sexual slavery. Ultimately, on March 7, 2014, Katanga was acquitted of rape and sexual slavery as both a war crime and crime against humanity (counts 6-9).¹⁴⁹

C) Prosecutor v. Dominic Ongwen

The prosecution of Dominic Ongwen, the Brigade Commander in the Lord’s Resistance Army (LRA) in Northern Uganda, represents the ICC’s second case to address forced marriage of women and girls in the context of conflict situations and the Court’s first case to successfully charge forced marriage as inhumane act as a crime against humanity.¹⁵⁰ Similarly to the forced marriage of women and girls during the conflict in Sierra Leone, forced marriage in the LRA involved primarily women and girls as victims and males as perpetrators.¹⁵¹ During forced marriages, women and girls were forced to serve as ‘wives’ by acting as their ‘husband’s’ exclusive partner and fulfilling a range of sexual and non-sexual obligations in line with gendered expectations of a ‘wife’s’ role in society.¹⁵²

In contrast to the Katanga Case, the OTP charged Ongwen with forced marriage as an inhumane act as a crime against humanity alongside charges of sexual slavery as a crime against humanity and war crime.¹⁵³ In its Pre-Confirmation Brief, the Prosecution alleged that Ongwen, both directly and indirectly through his command, had committed a range of sexual and gender-based crimes against women and girls, including forced marriage, rape, sexual slavery, enslavement, and torture.¹⁵⁴ Citing the SCSL, the Prosecution asserted the validity of forced marriage as an

¹⁴⁸ For more information on the historical tendency to view women and girls as victims of sexual crimes as opposed to broader gender-based offenses see Grey, Chapter 3: Reoccurring Tendencies, *supra* note 8 at section 3.1.3 Stereotyping Women.

¹⁴⁹ Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, (Mar. 7, 2014). https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF

¹⁵⁰ Lily Kather & Amal Nassar, *The Ongwen Case: A Prism Glass for the Concurrent Commission of Gender-Based Crimes*, *Völkerrechtsblog Int'l L. & Int'l Legal Thought* (2021), [hereinafter Lily Kather & Amal Nassar: The Ongwen case], <https://voelkerrechtsblog.org/the-ongwen-case-a-prism-glass-for-the-concurrent-commission-of-gender-based-crimes/>

¹⁵¹ See *supra* note 5 for information on male victimization during forced marriages in the context of the LRA.

¹⁵² O’Brien, Gender Dimensions of Forced Marriage, *supra* note 7, at pg. 23-26.

¹⁵³ The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Pre-confirmation brief, 21st December 2015, ICC-02/04-01/15-375-Conf-AnxC, ¶ 433, (Feb. 15, 2016) [hereinafter Ongwen Pre-confirmation Brief] <https://www.legal-tools.org/doc/5b9cce/pdf/>

¹⁵⁴ *Id.*, at ¶430.

inhumane act given the crime’s distinguishing features, namely, the element of exclusivity and unique harms arising from the forced status of ‘wife’ on victims.¹⁵⁵ By highlighting the exclusive nature of the crime, the addition of forced domestic labor, and the unique consequences suffered by victims, the prosecution asserted that the crime of forced marriage did not fit the definition of any previously enumerated crimes and therefore qualified as an inhumane act under article 7(1)(k) of the Court’s statute.¹⁵⁶ Critically, the prosecution highlighted that “[f]orced marriage irrevocably changed the status of its victims, both in the way that they perceived themselves and how they were perceived by others.”¹⁵⁷ By focusing on the status of the victim as a combatant’s ‘wife,’ the Prosecution highlighted the distinct psychological and social harms experienced by victims of forced marriage that differ from that of sexual enslavement. For example, the Prosecution noted that victims were often burdened by residual affection for their ‘husbands,’ especially if they had born and raised his children.¹⁵⁸ Additionally, the brief stated that victims of forced marriage were often regarded with suspicion and hostility by post-conflict society, making community reintegration extremely difficult and further distinguishing the crime from sexual slavery.¹⁵⁹

In alignment with the SCSL and the Prosecution’s view of forced marriage as an inhumane act as a crime against humanity, the Pre-Trial Chamber charged Ongwen with the following counts related to crimes against women and girls committed directly by Ongwen and indirectly under his command:

- Count 50: Forced marriage as a crime against humanity per Article 7(1)(k) (committed directly by Ongwen)
- Count 51: Torture as a crime against humanity per Article 7(1)(f)
- Count 52: Torture as a war crime per Article 8(2)(c)(i)
- Count 53: Rape as a crime against humanity per Article 7(1)(g)
- Count 54: Rape as a war crime per Article 8(2)(e)(iv)
- Count 55: Sexual slavery as a crime against humanity per Article 7(1)(g)
- Count 56: Sexual slavery as a war crime per Article 8(2)(e)(vi)
- Count 57: Enslavement as a crime against humanity per Article 7(1)(c)
- Count 58: Forced pregnancy as a crime against humanity per Article 7(1)(g)
- Count 59: Forced pregnancy as a war crime per Article 8(2)(e)(vi)
- Count 60: Outrages upon personal dignity per Article 8(2)(c)(iii)
- Count 61: Forced marriage as a crime against humanity per Article 7(1)(k) (committed indirectly by Ongwen)^{160 161}

¹⁵⁵ *Id.*, at ¶ 434-435.

¹⁵⁶ *Id.*, at ¶ 434.

¹⁵⁷ *Id.*, at ¶ 435.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, (Mar. 23, 2016), [hereinafter Ongwen Confirmation of Charges] https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02331.PDF

¹⁶¹ The Prosecutor v. Dominic Ongwen, ICC-PIDS-CIS-UGA-02-021/21_Eng, Case Information Sheet, (July 2021). <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/OngwenEng.pdf>

Ongwen’s Defense objected to counts 50 and 60, asserting that “the crime of forced marriage is subsumed by the crime of sexual slavery and cannot therefore be charged.”¹⁶² Citing the Prosecutor v. Germain Katanga, Ongwen’s defense dismissed forced marriage as an inhumane act, arguing that the ICC had already adjudicated on the topic.¹⁶³ Ongwen’s defense also repeatedly highlighted that forced marriage is not enumerated as a distinct offense in the Rome Statute and, therefore, should not constitute a separate charge.¹⁶⁴

Despite the Defense’s objections, the Pre-Trial Chamber upheld forced marriage as an inhumane act as a crime against humanity distinct from sexual slavery, with the Pre-Trial Chamber ruling that forced marriage “differs from the other crimes with which Dominic Ongwen is charged and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests.”¹⁶⁵ As a result, Ongwen was charged with forced marriage as an inhumane act and sexual slavery as separate crimes against humanity, marking the ICC’s first successful prosecution of forced marriage as an inhumane act as a crime against humanity. In alignment with the SCSL’s ARFC Appeals Chamber Judgment and the RUF Judgment, the ruling distinguished forced marriage from sexual slavery regarding conduct and harms to the victim. First, the Pre-Trial Chamber ruled that there is an element of exclusivity present in instances of forced marriage is not present in acts of sexual slavery.¹⁶⁶ Second, the Chamber highlighted the imposition of ‘marriage’ and labeling of a victim of a combatant’s ‘wife’ as central elements of the crime that yield distinct harms and consequences for victims.¹⁶⁷ Namely, this includes the forcible completion of domestic and reproductive duties assigned to the victims based on socially constructed ideas related to their gender and corresponding spousal roles in addition to the unique social stigma and psychological consequences resulting from being considered a rebel’s ‘wife.’ Based on these distinctions, the ICC adopted the view of forced marriage as an inhumane act as a crime against humanity rather than a predominately sexual offense subsumed by the crime of sexual slavery.

On February 4, 2021, the Trial Chamber convicted Dominic Ongwen of 61 charges of crimes against humanity and war crimes, including forced marriage as an inhumane act as a crime against humanity and sexual slavery as both a crime against humanity and war crime.¹⁶⁸ In its judgment, the ICC cited the SCSL, officially defining forced marriage as:

“The imposition, regardless of the will of the victim, of duties that are associated with marriage - including in terms of exclusivity of the (forced) conjugal union imposed on the victim - as well as the consequent social stigma.”¹⁶⁹

¹⁶² Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Further Redacted Version of “Defense Brief for the Confirmation of Charges Hearing”, filed on 18 January 2016, ¶ 8, (Mar. 3, 2016), [hereinafter Ongwen Defense Brief for the Confirmation of Charges Hearing] <https://www.legal-tools.org/doc/267b68/pdf>

¹⁶³ *Id.*, at ¶128-129.

¹⁶⁴ Lily Kather & Amal Nassar: *The Ongwen case*, *supra* note 150.

¹⁶⁵ Ongwen Confirmation of Charges, *supra* note 160, at ¶ 92.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, at ¶ 93.

¹⁶⁸ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Trial Judgment, (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF

¹⁶⁹ *Id.*, at ¶2748.

In line with this definition, the Ongwen Trial Chamber stressed the differences between forced marriage and sexual slavery in terms of the crime’s elements, asserting that forced marriage “does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement.”¹⁷⁰ Further, the Chamber emphasized the additional suffering experienced by victims of forced marriage, stating that “[w]hen a concept like ‘marriage’ is used to legitimize a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone.”¹⁷¹ In focusing on the effects of the forced marital status, the Trial Chamber recognized the unique harms suffered by victims of forced marriage, including social ostracization and extensive mental trauma.¹⁷² It is important to note that these distinctions and harms arise from the ‘marriage’ of a victim and her resulting status as a combatant’s ‘wife,’ which, as this article has highlighted, relies on socially constructed ideas regarding the victim’s gender and corresponding spousal role. Therefore, by prosecuting and distinguishing the crime based on these aspects, the Trial Chamber not only recognized forced marriage as a crime distinct from sexual slavery but conceptualized forced marriage as a broader gender-based offense.

Ongwen’s Defense appealed the Trial Chamber’s conviction of forced marriage as an inhumane act as a crime against humanity, writing that “neither the Pre-Trial nor Trial Chamber has inherent jurisdiction to add new crimes, or to interpret the Statute in respect to new crimes.”¹⁷³ In response, the Appeals Chamber commissioned Amici Curiae briefs on the topic of forced marriage and sexual slavery under international law.¹⁷⁴ The Appeals Chamber endorsed the view of the Oosterveld et al. Amici Curiae Brief, which contextualized forced marriage as a gendered offense distinct from sexual slavery and of sufficient gravity to qualify as an inhumane act as a crime against humanity.¹⁷⁵ In the exploration of past jurisprudence related to the prosecution of forced marriage in international courts, the Oosterveld et al. Amici Curiae Brief recognized forced marriage as a distinct offense composed of two types of harm:

(1) The deprivation of a victim’s relational autonomy and corresponding consequences: Forced marriage is concerned with the violation of an individual’s right to freely and consensually marry. Deprivation of the victim’s relational autonomy occurs during the imposition of a forced conjugal union that disregards the will of the victim and violates their fundamental right to choose their spouse. This is a violation of international human rights law and international criminal law.¹⁷⁶ As a result, victims of forced marriage experience harms that include “stigmatization, social and cultural ostracism, mental trauma, a serious attack on

¹⁷⁰ *Id.*, at ¶2750.

¹⁷¹ *Id.*

¹⁷² *Id.*, at ¶2748-50.

¹⁷³ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Public Redacted Version of “Defense Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, (Feb. 4, 2021), <https://www.icc-cpi.int/court-record/icc-02/04-01/15-1866-red>

¹⁷⁴ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 A, Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), (Oct. 25, 2021) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_09458.PDF

¹⁷⁵ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 A, Prosecution Response to Amici Curiae observations, ¶ 45, (Jan. 17, 2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_00187.PDF

¹⁷⁶ Oosterveld et al. Amici Curiae Brief, *supra* note 4 at ¶13.

the victim's dignity, and the deprivation of the victim's fundamental rights to choose a spouse and/or a conjugal relationship, all in a context of extreme coercion."¹⁷⁷

(2) A constellation of rights violations: In addition to the deprivation of relational autonomy, victims of forced marriage experience a range of human rights violations. These rights violations vary by the situation but may include “abduction, rape, sexual slavery, enforced exclusivity in the sexual relationship, inability to leave the conjugal union for fear of violent retribution, non-consent to being coerced into a polygamous conjugal situation, forced pregnancy, forced childbearing and childrearing, physical violence, forced domestic labour such as cooking and cleaning, and forced portering... restrictions on the freedom of movement, psychological violence, psychological and physical effects on children born of forced marriage, and constant threat of death.”¹⁷⁸

In support of the Trial Chamber's characterization of forced marriage as the crime against humanity of ‘other inhumane acts,’ the Oosterveld et al. Amici Curiae Brief described forced marriage as an offense that differed from other crimes enumerated in Article 7(1) of the Court's statute in two ways:

“First, the forced ascription of the status of ‘spouse’ is not reflected in the other enumerated acts, and second, while certain of the constellation of rights violations may overlap with the enumerated acts (such as rape, sexual slavery, and enslavement), some may not.”¹⁷⁹

Namely, these distinct violations include the following:

- 1) The imposition of a forced conjugal association (‘marriage’) opposed to ownership as in the case of sexual slavery.
- 2) The forced relationship of exclusivity and resulting consequences if this arrangement is breached.
- 3) The unique forms of trauma and stigma experienced by victims of forced marriage.¹⁸⁰

Importantly, the Oosterveld et al. Amici Curiae Brief recognized forced marriage of women and girls as a crime reliant on “gendered assumptions about the role of females for sex and in caregiving.”¹⁸¹ Therefore, in support of the Trial Chamber's decision to prosecute forced marriage as an inhumane act as a crime against humanity distinct from sexual slavery, the Oosterveld et al. Amici Curiae Brief successfully articulated forced marriage as a gendered offense distinct from sexual slavery. That is, by centering the victims' gender and perpetrators' corresponding gendered assumptions and expectations of a victim's role as ‘wife’, the Brief highlighted the gendered dimensions of forced marriage and the unique harms that result from such. Namely, this includes the harms resulting from the denial of relational autonomy, such as

¹⁷⁷ *Id.*, at ¶16.

¹⁷⁸ *Id.*, at ¶17.

¹⁷⁹ *Id.*, at ¶18.

¹⁸⁰ *Id.*, at ¶19.

¹⁸¹ *Id.*, at ¶34.

unique stigma and social ostracization experienced by victims, and a constellation of human rights violations that are not limited to sexual offenses alone.

Utilizing the Oosterveld et al. Amici Curiae Brief's articulation of forced marriage as an inhumane act and gendered offense, on December 15, 2022, the Appeals Chamber upheld the Trial Chamber's conviction, further affirming the legitimacy of forced marriage as an inhumane act as a crime against humanity distinct from sexual slavery.¹⁸² Overall, the Ongwen final conviction represents the ICC's first successful prosecution of forced marriage as a distinct crime against humanity amounting to an inhumane act. In sum, the ruling recognized the definitional distinctions between forced marriage and sexual slavery, the gendered elements of the crime, and the resulting harms suffered by victims. Further, the successful conviction of forced marriage as an inhumane act demonstrated the Court's ability to prosecute gender-based crimes outside the Statute's previously enumerated sexual offenses using the 'other inhumane acts' clause.

D) The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

The ongoing case against al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (al Hassan) represents the ICC's third case to address the forced marriage of women and girls in conflict situations. Al Hassan, a Malian jihadist associated with al Qaeda in the Islamic Maghreb ("AQIM") and Ansar Dine, was the de facto Chief of Islamic police in Timbuktu, Mali, between 2012-2013.¹⁸³ As Chief of the Islamic Police, the OTP accused al Hassan of committing the following crimes against women and girls:

Count 8: Other inhumane acts (forced marriage) as a crime against humanity per Article 7(1)(k)

Count 9: Sexual slavery as a crime against humanity per Article 7(1)(g)

Count 10: Sexual slavery as a war crime per Article 8(2)(e)(vi)

Count 11: Rape as a crime against humanity per Article 7(1)(g)

Count 12: Rape as a war crime per Article 8(2)(e)(vi)

Count 12: Persecution (on the grounds of gender) as a crime against humanity per Article 7(1)(h)^{184 185}

¹⁸² Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 A, Judgment on the appeal of Mr. Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", (Dec. 15, 2022), [hereinafter Ongwen Appeals Chamber Judgment], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF

¹⁸³ The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Case Information Sheet, (Feb. 2022), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/al-hassanEng.pdf>

¹⁸⁴ For more information on persecution on the grounds of gender in the al Hassan Case, see Rosemary Grey et al., *Gender-based Persecution as a Crime Against Humanity: The Road Ahead*, 17 *Journal of International Criminal Justice*, pg. 968 (2019), <https://academic.oup.com/jicj/article-abstract/17/5/957/5688946> & The Office of the Prosecutor, Int'l Crim. Ct., *Policy on the Crime of Gender Persecution*, (2022) [hereinafter 2022 ICC Policy on the Crime of Gender Persecution] <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

¹⁸⁵ The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Public Redacted Version of the Amended and Corrected Version of the Document Containing the Charges Against Mr. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud, (July 2, 2019) [hereinafter al Hassan DCC].

The OTP alleged that as the Chief of Islamic police, al Hassan was responsible for implementing and enforcing institutions of control in line with the religious ideology of the AQIM/Ansar Dine ‘Organization,’ including a system of forced marriage.¹⁸⁶ In line with the Organization’s ideology, men “were prohibited from having sex outside of marriage and were instead encouraged to ‘marry’ local women and girls to satisfy their sexual wants.”¹⁸⁷ The forced marriage of women and girls to members of the Organization had multiple aims. First, forced marriage was used to condone acts of sexual violence against local women and girls while still adhering to the Organization’s no sex outside of marriage ideology. Second, forced marriages were used as a mechanism to integrate members of the Organization into the local population.¹⁸⁸ During forced marriages, victims were forced to marry members of the Organization and made to perform various household chores and endure acts of sexual and physical violence.¹⁸⁹ Once married, victims were seen as ‘wives of jihadists’ and subject to the demands of their ‘husbands.’¹⁹⁰ Due to their ‘marriage’ to members of the Organization, victims suffered social stigmatization and ostracization.¹⁹¹

In its Document Containing the Charges, the OTP argued that forced marriage was a crime distinct from sexual slavery, asserting that victims of forced marriage suffered additional harm and stigmatization as a result of being labeled a ‘jihadist’s wife.’¹⁹² Additionally, the OTP stated that the crime of forced marriage differed from other sexual crimes in terms of the protected interests, namely “the right to marry and found a family by consent.”¹⁹³ Given the unique stigmatization suffered by victims and differing protected interests, the OTP charged al Hassan with both forced marriage as an inhumane act and sexual slavery as two distinct crimes against humanity.¹⁹⁴

During the confirmation of charges, the Pre-Trial Chamber affirmed the OTP’s characterization of forced marriage as an inhumane act distinct from other previously enumerated offenses within the Court’s Statute. Specifically, in differentiating forced marriage from other sexual crimes, the Pre-Trial Chamber described forced marriage as a crime resulting in “conduct, interests protected, damage suffered and objectives sought, beyond the sexual relationship alone.”¹⁹⁵ The Pre-Trial Chamber emphasized that forced marriage is concerned with the imposition of ‘marriage’ and resulting sexual, domestic, and social harms.¹⁹⁶ These harms include acts of

¹⁸⁶ The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Prosecution's final written observations regarding confirmation of the charges, (Oct. 10, 2019) [hereinafter Prosecution's final written observations regarding confirmation of the charges].

¹⁸⁷ Prosecution's final written observations regarding confirmation of the charges, *supra* note 186 ¶ 161.

¹⁸⁸ al Hassan DCC, *supra* note 184 at ¶ 767.

¹⁸⁹ *Id.*, at ¶ 763.

¹⁹⁰ *Id.*, at ¶ 750.

¹⁹¹ *Id.*, at ¶ 787.

¹⁹² *Id.*, at ¶ 750.

¹⁹³ *Id.*, at ¶ 778.

¹⁹⁴ *Id.*, *See* Section 8.5.2: Forced marriages as a crime of other inhumane acts.

¹⁹⁵ The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, Decision on the confirmation of charges against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ¶ 553, (Nov. 13, 2019), [hereinafter al Hassan Confirmation of Charges], <https://www.icc-cpi.int/court-record/icc-01/12-01/18-461-corr-red>;

¹⁹⁶ *Id.*

sexual violence, forced domestic and reproductive labor, and the social consequences and trauma resulting from being labeled a ‘jihadist’s wife.’ Again, it is essential to recognize these harms as gendered as they result from a crime dependent on socially constructed ideas related to the victim’s gender and corresponding spousal role.¹⁹⁷

In terms of the crime’s elements, the Pre-Trial Chamber defined forced marriage as the following:

- 1) Forced marriage is a crime that involves the imposition of a forced marital arrangement in which the victim is forced to fulfill the role of the perpetrator’s spouse. The concept of forced marriage is broader than the sexual aspect alone and also accounts for the social and domestic dimensions of the crime that result from the imposed marital status.¹⁹⁸
- 2) Forced marriage is a crime that violates an individual’s fundamental right to choose their spouse.¹⁹⁹
- 3) Forced marriage is a crime that results in great physical and/or mental suffering on the part of the victim. Part of this suffering is concerned with the social stigmatization of victims.²⁰⁰
- 4) The concept of exclusivity may be one “clue” used to detect to presence of forced marriage; however, the absence of such does not negate the presence of the crime.²⁰¹

On the basis of these distinctions, the Pre-Trial Chamber ruled that forced marriage best qualifies as an inhumane act as a crime against humanity as it contains elements distinct from the other previously enumerated sexual crimes, namely sexual slavery.²⁰² Following the recent Ongwen final judgment, the Trial Chamber’s forthcoming ruling in the al Hassan case (January 2024) has the potential to further solidify the Court’s orientation toward forced marriage as a distinct gender-based crime. If the Trial Chamber convicts al Hassan of forced marriage as an inhumane act alongside separate charges of sexual slavery as a war crime and crime against humanity, the ruling will likely be a landmark ruling contributing to the Court’s recognition of forced marriage as a distinct gender-based crime.

¹⁹⁷ O’Brien, Gender Dimensions of Forced Marriage, *supra* note 7, at pg. 29.

¹⁹⁸ al Hassan Confirmation of Charges, *supra* note 195, at ¶552.

¹⁹⁹ *Id.*, at ¶554; ¶649.

²⁰⁰ *Id.*, at ¶649.

²⁰¹ *Id.*, at ¶558.

²⁰² *Id.*, at ¶683

V. Concluding Remarks

This article has aimed to map the evolution of how the SCSL and ICC have conceptualized and prosecuted the forced marriage of women and girls in conflict situations, explicitly exploring each court's characterization of forced marriage as either an offense equivalent to the crime against humanity of sexual slavery or the crime against humanity of 'other inhumane acts.' Focusing on the gendered dimensions of forced marriage, this article has argued that forced marriage differs from sexual slavery in terms of how the crime is perpetrated and the resulting harms. Through contextualizing forced marriage as a broader gender-based crime reliant on socially constructed ideas of the victim's gender and corresponding spousal role, this paper has highlighted three key differences between forced marriage and sexual slavery.

First, forced marriage differs from sexual slavery in terms of how the perpetrator associates with and asserts power over the victim. That is, as opposed to ownership for the purpose of enslavement, during forced marriage, the perpetrator uses 'marriage' to force the victim to fulfill the gendered role of spouse. As stated throughout this article, this aspect of the crime is gendered as its perpetration relies on socially constructed ideas of what it means to be male/female and husband/wife in the given society.

Second, the subsequent labeling of victims as 'wives' and forcing them to fulfill the corresponding gendered duties expected of a wife in the given society results in distinct obligations and harms for the victim. Namely, these harms may include forced household labor, mental trauma, and social stigmatization resulting from being labeled a combatant's/ rebel's/ jihadist's wife. It is critical to recognize that these harms are (1) gendered as they result from a crime reliant on socially constructed ideas of the victim's gender and corresponding spousal role and (2) extend beyond the sexual realm. As stated by Justice Doherty of the SCSL, forced marriage "is concerned with the mental and physical trauma of being forced unwillingly into a marital arrangement, the stigma associated with being labeled a rebel 'wife' and the corresponding rejection by the community."²⁰³ This analysis echoes this perspective, concluding that forced marriage is a crime concerned with harms beyond that related to acts of sexual violence alone. The range of mental and social harms experienced by victims of forced marriage affirms that forced marriage is not confined to acts of sexual violence but rather best characterized as a broader gender-based crime. This orientation towards the crime has been recently affirmed at the ICC with the Court's explicit recognition of the unique social stigmatization and mental trauma experienced by victims of forced marriage in *Prosecutor v. Ongwen* and *Prosecutor v. al Hassan*.²⁰⁴

Third, forced marriage often involves an element of exclusivity that is not present during other crimes of sexual violence. The element of exclusivity not only distinguishes forced marriage from sexual slavery in terms of the crime's conduct but is a significant factor that contributes to the unique social stigmatization experienced by victims of forced marriage. However, as highlighted by the *al Hassan* case, the element of exclusivity may not always be present during forced marriage. Rather, the element of exclusivity may be only one 'clue' to detect the presence

²⁰³ *Id.* at ¶ 42.

²⁰⁴ *al Hassan Confirmation of Charges*, *supra* note 195, at ¶553.

of forced marriage, and the absence of such does not negate the existence of the crime.²⁰⁵ This fact further emphasizes that the form in which forced marriage occurs varies from society to society and is contingent on the perpetrator's idea of what marriage looks like and, subsequently, what role the victim plays in that arrangement. Again, this affirms the fact that forced marriage is a crime reliant on socially constructed ideas of gender and the victim's corresponding spousal role, therefore necessitating the prosecution of forced marriage as a broader gender-based crime.

This article has also explored the development of how the ICC has come to define forced marriage in terms of protected interests and corresponding rights violations. As detailed in *Prosecutor v. Ongwen*, forced marriage is a crime defined by (1) the denial of relational autonomy and (2) a range of human rights violations. First, forced marriage violates a victim's right to freely and consensually choose their spouse, a right enshrined under international human rights law and international criminal law.²⁰⁶ As a result of this violation, victims may experience various mental and social harms.²⁰⁷ Second, forced marriage is associated with a range of human rights violations. These rights violations vary according to the situation but may include rape, acts of sexual violence, sexual enslavement, forced domestic labor, forced pregnancy, and forced childbearing. Although forced marriages may consist of rights violations that overlap with other enumerated crimes, the crime of forced marriage also has distinct elements, namely that related to the forced ascription of 'spouse' and the unique harms resulting from that label, such as that mentioned in the paragraphs above.²⁰⁸ Based on these distinctions, forced marriage qualifies as a distinct inhumane act as a crime against humanity per article 7(1)(k) of the Rome Statute. The 2023 ICC *Policy on Gender-Based Crimes* has further affirmed the legitimacy of forced marriage as an inhumane act.²⁰⁹

Overall, by focusing on the gendered dimensions of forced marriage, this article has contextualized the forced marriage of women and girls in conflict situations as a broader gender-based crime as opposed to a predominantly sexual offense equivalent to sexual slavery. The crime's distinct conduct and harms affirms the legitimacy of forced marriage as an inhumane act as a crime against humanity. The ICC's recent final conviction of Ongwen and articulation of forced marriage as a gender-based crime distinct from sexual slavery marks major progress in the Court's recognition of atrocity crimes committed against women and girls that are not confined to sexual acts. This is a milestone that will likely contribute not only to the forthcoming al Hassan ruling but the Court's ability to prosecute a range of crimes committed against women and girls that extend beyond the scope of sexual violence alone, such as that of gender-based persecution.

²⁰⁵ al Hassan Confirmation of Charges, *supra* note 195, at ¶558; al Hassan DCC, *supra* note 184 at ¶ 783.

²⁰⁶ For a detailed explanation on the denial of relational autonomy in the eyes of international human rights law and international criminal law *see* Oosterveld et al. Amici Curiae Brief, *supra* note 4, at ¶10-16.

²⁰⁷ Oosterveld et al. Amici Curiae Brief, *supra* note 4 at ¶16.

²⁰⁸ *Id.*, at ¶18.

²⁰⁹ 2023 Policy on Gender-Based Crimes, *supra* note 30 at ¶ 63.