

2004

Forced Marriage as a Prosecutable Crime Against Humanity

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: FORCED MARRIAGE AS A PROSECUTABLE CRIME AGAINST HUMANITY

Prepared by Suzanne D. Mattler
Fall 2004

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Treaties and Other International Instruments

1. Abuja Ceasefire Agreement between the Government of Sierra Leone and the Revolutionary United Front (“Abuja Ceasefire Agreement”), 10 Nov. 2000
2. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 Jan. 2002, art. 1(1) available at <http://www.sc-sl.org/scsl-agreement.html>
3. Allied Control Council No. 10, 10 Dec 1945, available at http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW09.pdf
4. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284, [Hereinafter Nuremburg Charter] *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.
5. Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, available at <http://www.un.org/womenwatch/daw/cedaw/econvention.htm>
6. Elements of Crimes, 3-10 September 2002, U.N. Doc. ICC-ASP/1/3
7. European Convention on Human Rights, 4 Nov. 1950, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>
8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug, 1949, 75 U.N.T.S. 287
9. International Covenant on Civil and Political Rights, 23 March 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm
10. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, (“Lome Peace Agreement”) 7 July 1999.
11. Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/Conf. 183/9 (1998)
12. Statute of the Special Court of Sierra Leone (2000)
13. Supplementary Convention on the Abolition of Slavery, and the Slave Trade, an Institutions and Practices Similar to Slavery, 7 Sept. 1956, available at <http://www.unhchr.ch/html/menu3/b/30.htm>.
14. Universal Declaration of Human Rights, 10 Dec. 1948, available at <http://www.un.org/Overview/rights.html>

International Tribunal Cases

15. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998
16. *Prosecutor v. Kayishema*, ICTR-95-1-A, Judgment, at para 151, 1 June 2001.
17. *Prosecutor v. Kupreskic et al.*, IT-95-16, Judgment 14 Jan. 2000
18. *Prosecutor v. Kunarac*, IT-96-23-T, Judgment 22 Feb. 2001
19. *Prosecutor v. Tadic*, IT-94-1-T, Judgment, 7 May 1997

U.N. Resolutions and Documents

20. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808. U.N. Doc S/25704 (3 May 1993)
21. Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, U.N. Doc S/1995/134 (13 Feb 1995)
22. Fourth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc S/2000/455 (19 May 2000)
23. Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc S/2000/751(31 Jul. 2000)
24. Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc S/2000/915. (4 Oct. 2000)
25. Note by Secretary-General, Report of the United Nations High Commissioner for Human Rights on assistance to Sierra Leone in the field of human rights, U.N. Doc A/59/340 (9 Sept. 2004)

Journals and Law Review Articles

26. Kelly D. Askin, *Stefan A. Riensenfeld Symposium 2002: Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, (2003)
27. Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, (2001)
28. Matthew Lippman, *International Law and Human Rights Edition: Crimes Against Humanity*, 17 B.C. Third World L.J., (1997)

29. Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int'l L. 605 (2004)

Treatises and Books

30. 45 AMERICAN JURISPRUDENCE 2d, INTERNATIONAL LAW.

31. 52 AMERICAN JURISPRUDENCE 2d, MARRIAGE

32. MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW (2003)

33. CAROLINE BLEDSOE AND GILLES PISON, NUPUALITY IN SUB-SARAHAN AFRICA: CONTEMPORARY ANTHROPOLOGICAL AND DEMOGRAPHIC PERSPECTIVES (1994)

34. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003)

35. MARIANE C. FERME, THE UNDERNEATH OF THINGS: VIOLENCE, HISTORY, AND THE EVERYDAY IN SIERRA LEONE (2001)

36. GEORGE FISHER, EVIDENCE (2002)

Miscellaneous

37. Codex Ius Canonici (1983)

38. Criminal Procedures Act (1963) (Sierra Leone)

39. Hindu Marriage Act (1955) (India)

40. Human Rights Watch, Sexual Violence Within the Sierra Leone Conflict, 26 February 2001, available at <http://www.hrw.org/background/africa/sl-bck0226.htm>

41. Jennifer Swallow, *Brutalized Legacy; Jennifer Swallow reports from Sierra Leone on the continuing civil war*. Morning Star, July 10, 2004. at 9

42. MERRIAM-WEBSTER ON-LINE DICTIONARY (2004) at <http://m-w.com/cgi-bin/dictionary?book=Dictionary&va=attack>

43. Physicians for Human Rights, War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment, 64-73 (2002) available at http://www.phrusa.org/research/sierra_leone/pdf_files/04_qualitative.pdf

44. President Alhaji Dr. Ahmad Tejan Kabbah, Speech at the Ceremony Marking the Conclusion of Disarmament and the Destruction of Weapons, Lungi (18 January 2002) (Transcript available at <http://www.sierra-leone.org/kabbah011802.html>)

45. US Department of State, Bureau of African Affairs, Background Note: Sierra Leone (Nov. 2003) available at <http://www.state.gov/r/pa/ei/bgn/5475pf.htm>.

I. Introduction and Summary of Conclusion

A. Issues

At the height of the fighting in the civil war in Sierra Leone, thousands of women were abducted and forced to “marry” their captors against their will. These women were forced to assume all the obligations of a wife while simultaneously rendered unable to acquire any of the rights or privileges traditionally and legally given to a spouse. To force a woman into a marriage without her consent and deny her equal rights within that marriage is repugnant to human rights and customary international law. Moreover “forced marriage” is unique and grave enough to warrant prosecution of such conduct as a distinct crime. When perpetrated as part of a systematic and widespread attack on a population, forced marriage rises to the level of crimes against humanity, specifically as an “other inhumane act,” and can and should be prosecuted accordingly.

B. Summary of Conclusions

1. Forced marriage can be prosecuted as a crime against humanity because customary international law recognizes the constitutive acts as giving rise to individual criminal liability and the international community has a vested interest in protecting the institution of marriage.

To understand the gravity of the crime of forced marriage, it must first be understood that forced marriage is more than the sum of its parts. As a “spouse” in a forced marriage, a woman may endure all or some combination of sexual slavery, rape, forced pregnancy, enslavement, and torture. Each of these constituent acts are crimes egregious enough on their own to be recognized in the Statute of the Special Court of Sierra Leone as crimes against humanity when committed on a systematic and widespread basis.¹ However, forced marriage is more than the

¹ Statute for the Special Court of Sierra Leone, art. 2 (2000) [Hereinafter Statute SC-SL] [Reproduced in accompanying Notebook I at Tab 1]

protracted suffering of the constituent crimes at the hands of the perpetrating spouse. To force another individual into such a state and call it “marriage” demeans and distorts the social and spiritual institution of marriage itself. The perpetrator actually uses the rights of a spouse, that is the obligations one spouse is able to extract from the other in the marriage state, as well the social and legal protections of marriage to bind the victim in the marriage indefinitely. Since international law recognizes the gravity of the acts perpetuated through a forced marriage, and since the international community has a vested interest in preserving the family and marriage, it is logical then to recognize forced marriage as a distinct and unique crime against humanity.

2. Forced marriage meets the criteria for a crime against humanity under the “other inhumane acts” designation in the statute of the Special Court of Sierra Leone, and it would not be duplicitous to pursue forced marriage as a crime against humanity along with similar crimes against humanity such as enslavement or sexual slavery.

Forced marriage is not specifically listed as a crime against humanity in the statute of the Special Court of Sierra Leone. It must be pursued under the “other inhumane acts” classification in accordance with Article 2(i).² Forced marriage, when committed as part of a widespread and systematic attack directed against a civilian population, easily fulfills the requirements of an “other inhumane act.” The perpetrators of forced marriage inflict great suffering, serious injury to body or mental or physical health via inhumane acts that are similar in nature to the other enumerated crimes against humanity as is required to satisfy Article (2)(i). The constituent acts in a forced marriage: rape, forced pregnancy, slavery, sexual slavery, and torture, have long been recognized as crimes against humanity when carried out in similar circumstances. Therefore, it is appropriate to conclude that the crime of forced marriage is comparable to other enumerated crimes against humanity both in gravity of the crime and suffering of the victims. Though the

² *Id.* [Reproduced in accompanying Notebook I at Tab 1]

constituent acts that define a forced marriage could be prosecuted by themselves, it is appropriate to prosecute forced marriage as a separate and distinct crime. By using the institution of marriage and the rights of a spouse to trap the victim within the “marriage,” the perpetrator debases a venerable institution and exposes the victim to a wholly unique form of suffering that can only be appropriately addressed by recognizing forced marriage as a unique crime.

II. Factual Background

A. The conflict in Sierra Leone

In March, 1991 small groups of men, organized as the Revolutionary United Front (“RUF”) began attacking villages along the eastern Sierra Leone-Liberia border, fighting against then head of state Maj. Gen. Joseph Saidu Momoh.³ Throughout the early 1990’s, the RUF steadily advanced, seizing control of more and more of the nation.⁴ In 1997, after being pushed back to the eastern border by government-hired mercenaries, the RUF was invited to join the government by Maj. Johnny Paul Koroma, who had overthrown President Ahmad Tejan Kabbah. The RUF’s grip on political power was to be short-lived, however; ten months later they were ousted and President Kabbah was reinstated.⁵ Less than a year later, the RUF regrouped and again tried to seize Sierra Leone. A violent campaign began on 6 January 1999, with the fighting reaching all the way west to Freetown. Thousands were killed before the RUF was again driven back.⁶ On 7 July 1999, the Lome Peace Agreement between President Kabbah and RUF leader Foday Sankoh established a cease-fire. Both sides agreed to allow international peacekeeping

³ US Department of State, Bureau of African Affairs, Background Note: Sierra Leone <http://www.state.gov/r/pa/ei/bgn/5475pf.htm>. (Nov.2003) [Hereinafter Backgrounds Note: Sierra Leone] [Reproduced in accompanying Notebook I at Tab 2]

⁴ *Id.* [Reproduced in accompanying Notebook I at Tab 2]

⁵ *Id.* [Reproduced in accompanying Notebook I at Tab 2]

⁶ *Id.* [Reproduced in accompanying Notebook I at Tab 2]

forces (Nigerian ECOMOG and United Nations forces) to assist in disarming and stabilizing the country.⁷ Eventually, the Nigerian forces withdrew and peacekeeping duties were assumed wholly by the United Nations Mission in Sierra Leone (“UNAMSIL”).⁸ The RUF violated the terms of the peace agreement almost immediately, raiding supply lines and taking hundreds of UNAMSIL personnel hostage.⁹ Sporadic fighting and unrest continued throughout the country for the next three years despite the signing of a second cease-fire agreement in November 2000.¹⁰ The civil war was finally declared officially over on 18 January 2002.¹¹

B. *Marriage in Sierra Leone*

There are three types of marriage recognized in Sierra Leone: customary, religious (Islamic or Christian), and civil ceremonies. The three types are not as clearly delineated, however, as that simple statement may lead one to believe.¹² Rather, marriage in Sierra Leone is often a complex amalgam of customary rites and religious and civil ceremonies.¹³ Customary rites of marriage derive from indigenous tribal traditions and involve many intermediate steps and ceremonies, rather than one defining event as in a civil, Islamic, or Christian marriage.¹⁴ More

⁷ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999. [Reproduced in accompanying Notebook I at Tab 3]

⁸ Background Notes: Sierra Leone *supra* note 3. [Reproduced in accompanying Notebook I at Tab 2]

⁹ *Id.* [Reproduced in accompanying Notebook I at Tab 2]

¹⁰ Abuja Ceasefire Agreement between the Government of Sierra Leone and the Revolutionary United Front, (10 November 2000). [Reproduced in accompanying Notebook I at Tab 4]

¹¹ President Alhaji Dr. Ahmad Tejan Kabbah, Speech at the Ceremony Marking the Conclusion of Disarmament and the Destruction of Weapons, Lungi (18 January 2002) (Transcript available at <http://www.sierra-leone.org/kabbah011802.html>) [Reproduced in accompanying Notebook I at Tab 5]

¹² Anastasia J. Gage and Caroline Bledsoe, *The effects of education and social stratification on marriage and the transition to parenthood in Freetown, Sierra Leone*, NUPTUALITY IN SUB-SAHARAN AFRICA: CONTEMPORARY ANTHROPOLOGICAL AND DEMOGRAPHIC PERSPECTIVES 150 (Caroline Bledsoe and Gilles Pison ed., 1994). [Reproduced in accompanying Notebook I at Tab 6]

¹³ *Id.* [Reproduced in accompanying Notebook I at Tab 6]

than just a union between two individuals, customary marriage is viewed as a union between the two families.¹⁵ The relatives of the intending spouses, especially the bride's family, are heavily involved in all steps of a customary marriage and an intending husband usually needs the consent of the family of the bride before the couple can wed.¹⁶ Because the formalization of transition from the unwed to wedded state is gradual rather than defined by a single event, the customary marriage process may begin when the bride-to-be is still a young child, far earlier than the age at which an individual could be wed in a civil or religious ceremony under Sierra Leonean marriage laws.¹⁷ Two intending spouses may have completed several steps toward the progression to marriage; e.g., giving of gifts to the woman and her family, first sexual relations, cohabitation, child bearing, etc, but their relationship may still fall well short of a recognized entrance into the marital state and its attendant rights and responsibilities.¹⁸ Increasingly, in modern Sierra Leone, the customary rites are combined with either a civil or religious ceremony. The intending spouses may participate in the ceremonies of a customary marriage as part of an "engagement" period before a religious or civil marriage; they may undertake a full customary marriage first and then a civil or religious marriage; or they may have a civil or religious marriage first and

¹⁴ *Id* at 151. [Reproduced in accompanying Notebook I at Tab 6]

¹⁵ MARIANE C. FERME, *THE UNDERNEATH OF THINGS: VIOLENCE, HISTORY, AND THE EVERYDAY IN SIERRA LEONE*, 88 (2001) [Reproduced in accompanying Notebook I at Tab 7]

¹⁶ *Id.* at 90 [Reproduced in accompanying Notebook I at Tab 7]

¹⁷ Gage and Bledso, *supra* note 12, at 151. [Reproduced in accompanying Notebook I at Tab 6]

¹⁸ *Id.* To try and put it into comparable western terms, if a man takes a woman out on a date, it is assumed to show his intention of courtship. The couple may then progress to a stage where they agree to see each other exclusively and their status changes to "dating." After that, they may cohabit and the relationship become "serious." If all goes well there, then there may be a proposal, the couple is considered "engaged." These are the steps a western couple generally undertakes prior to marriage, but they are not considered to be married after or during any of those steps. In customary African marriage the status of the couple similarly evolves, and the individual steps may be more ceremonial but there is no final, culminating event that marks the couple as married. [Reproduced in accompanying Notebook I at Tab 6]

then complete the customary rites.¹⁹ Both spouses are equally capable of dissolving the marriage under Sierra Leonean law, but under customary marriages, the woman's ability to dissolve the marriage is highly dependent on the will of her relatives.²⁰

C. *Forced marriage in the Sierra Leonean Civil War*

Amidst the other atrocities committed during the ten year civil war, thousands of women were abducted and forced to become the sexual partners of their captors, remaining with their abductors for years.²¹ These women were considered "wives" of their captors, known locally as "bush wives," and were coerced, usually by force or threat of violence, to undertake all of the duties normally expected of a wife. They were raped by their captors and their captors' associates, cooked for them, cleaned for them, and bore and raised their captors' children.²² The exact number of women who were "wed" under these circumstances is difficult to establish. Only a small percentage of these "marriages" were ever formalized in a ceremony, though it is clear that the women who were "wed" to their abductors without a military official pronouncing it so were just as bound to their "husbands" as those who were married in official ceremonies. In fact, many "bush wives" currently remain with their spouses even though the conflict has ended.²³ These forced marriages were a stark departure from marriage as it was typically understood under the laws and customs of Sierra Leone. The few official ceremonies that were

¹⁹ *Id.* at 152. [Reproduced in accompanying Notebook I at Tab 6]

²⁰ Ferme, *supra* at note 15, at 104. [Reproduced in accompanying Notebook I at Tab 7]

²¹ Human Rights Watch, Human Rights Watch Report 2001: Sexual Violence Within the Sierra Leone Conflict, (26 February 2001) at <http://www.hrw.org/background/africa/sl-bck0226.htm> [Reproduced in accompanying Notebook I at Tab 8]

²² Jennifer Swallow, *Brutalized Legacy; Jennifer Swallow reports from Sierra Leone on the continuing civil war*. Morning Star, July 10, 2004. at 9 [Reproduced in accompanying Notebook I at Tab 9]

²³ Fourth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc S/2000/455 (19 May 2000) [Reproduced in accompanying Notebook I at Tab 10]

performed did not conform to any recognized religious or civil union; they occurred in the absence of consent by the “wife” or her family in violation of the requirements and forms of such marriages. These forced marriages were also anomalous in the context of customary marriages. The consent of the woman’s family was not obtained, nor, in many case, was the family a party to the proceedings or paid bridewealth, typically a substantial element of the customary marriage and generally considered one of the main bases of the marriage’s legitimacy.²⁴ Additionally, the woman’s transition from the unwed to wedded state was accomplished by one defining act, namely the perpetrating spouse declaring the woman his “wife.”

III. Legal Issues

A. Forced marriage is a violation of customary International Law

Any prosecution of a previously unidentified crime against humanity must be guided first by the principle of *nullum crimen sine lege*.²⁵ This principle serves an important function in protecting the fundamental rights of the accused from infringement by capricious or arbitrary prosecution for acts which were not recognized as crimes when they were committed.²⁶ To prosecute an individual for a previously unrecognized crime against humanity, but still pay proper heed to the principle, one must study established customary international law to see if it speaks to the crime.²⁷ If the perpetrator’s conduct is clearly criminal under customary international law, then it can be assumed that the perpetrator indeed had knowledge that his

²⁴ Iman Ngondo A Pitshandenge, *Marriage Law in Sub-Saharan Africa*, in NUPTUALITY IN SUB-SAHARAN AFRICA: CONTEMPORARY ANTHROPOLOGICAL AND DEMOGRAPHIC PERSPECTIVES 118 (Caroline Bledsoe and Gilles Pison ed., 1994). [Reproduced in accompanying Notebook I at Tab 11]

²⁵ Antonio Cassese International Criminal Law §7.2 pg 145 (2003) [Reproduced in accompanying Notebook I at Tab 12]

²⁶ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

²⁷ *Id.* at § 7.4.3 [Reproduced in accompanying Notebook I at Tab 12]

conduct was criminal and should have an expectation of punishment for that conduct.²⁸ The conduct does not have to be recognized as a crime in the country where it was perpetrated to be considered a crime against humanity.²⁹

Related to *nullum crimen sine lege* principle is the general prohibition of *ex post facto* law: the retroactive application of criminal penalties to acts that were not criminalized at the time they were committed.³⁰ Freedom from retroactive punishment has been established in various human rights treaties and has gained acceptance as a fundamental human right.³¹ This does not, however, prevent courts from refining, elaborating on, or clarifying existing rules, nor does it prevent courts from relying on precedent.³²

The crimes enumerated in the Statute for the Special Court of Sierra Leone all properly recognize the principle of *nullum crimen sine lege*.³³ The enumerated crimes against humanity, including “other inhumane acts,” have all been culled directly from earlier tribunals, the International Criminal Tribunal for Yugoslavia (“ICTY”) and the international Criminal Tribunal for Rwanda (“ICTR”) and have thus passed into customary international law entailing individual criminal responsibility.³⁴ The “other inhumane acts” category enjoys a particularly strong assurance of compliance with *nullum crimen sine lege*, as it has been a crime against humanity

²⁸ Cassese *supra* note 25 at § 7.4.2 [Reproduced in accompanying Notebook I at Tab 12]

²⁹ The Allied Control Council Law No. 10, Art. 2(1)(c). (10 Dec. 1945). [Reproduced in accompanying Notebook I at Tab 13]

³⁰ Cassese *supra* note 25 at §7.4.2 [Reproduced in accompanying Notebook I at Tab 12]

³¹ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

³² *Id.* [Reproduced in accompanying Notebook I at Tab 12]

³³ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, at para. 12, U.N. Doc S/2000/915. (4 October 2000). [Reproduced in accompanying Notebook I at Tab 14]

³⁴ *Id.* at para. 14. [Reproduced in accompanying Notebook I at Tab 14]

since its incorporation into the Nuremberg charter.³⁵ Since its inception, the “other inhumane acts” category has existed as a “catch-all” category ensure prosecution of those crimes against humanity not previously envisioned, in effect safeguarding against human ingenuity.³⁶ The concept of an “other inhumane act” has passed into customary international law, but the acts constituting “other inhumane acts” have remained vague and purposefully ill-defined to the present.³⁷ Other inhumane acts have included economic discrimination, confiscation, pillage, and plunder of Jewish property,³⁸ beatings and general inhumane treatment,³⁹ and sexual violence in the form of forced public nudity.⁴⁰ Recent decisions have contemplated causing a third party to witness torture as an other inhumane act.⁴¹ What constitutes an “other inhumane act” is to be determined on a case-by-case basis.

No specific act that has been designated a crime against humanity under the “other inhumane acts” category has been successfully appealed on *nullum crimen sine lege* due to the long established compliance of the general category with the principle. Even so, it is prudent to scrutinize the specific act in *nullum crimen sine lege* terms. This both ensures that forced marriage will not be subject to appeal on *nullum crimen sine lege* grounds and that the act will

³⁵ Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284, 288 [Hereinafter Nuremberg Charter] *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

³⁶ *Prosecutor v. Kupreškic*, IT-95-16-T, Judgment, at para. 563, 14 Jan. 2000. [Hereinafter *Kupreškic*] [Reproduced in accompanying Notebook I at Tab 16]

³⁷ *Id.* [Reproduced in accompanying Notebook I at Tab 16]

³⁸ Matthew Lippman, *International Law and Human Rights Edition: Crimes Against Humanity*, 17 B.C. Third World L.J., 171, 201 (1997) [Reproduced in accompanying Notebook I at Tab 17]

³⁹ *Prosecutor v. Tadic*, IT-94-1-T, Judgment, at para. 730, 7 May 1997 [Hereinafter *Tadic*] [Reproduced in accompanying Notebook II at Tab 18]

⁴⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, at para 697, 2 Sept. 1998 [Hereinafter *Akayesu*] [Reproduced in accompanying Notebook II at Tab 19]

⁴¹ *Prosecutor v. Kayishema*, ICTR-95-1-A, Judgment, at para 151, 1 June 2001. [Hereinafter *Kayishema*] [Reproduced in accompanying Notebook II at Tab 20]

fall into the “other inhumane acts” category. Though it is a catch-all category, “other inhumane acts” is not to be used to prosecute obscure or minor offenses. Acts prosecuted under “other inhumane acts” must be comparable to the enumerated crimes against humanity.⁴² Turning to customary international law, then, is an efficient way to ensure that the act of forced marriage is viewed as comparable to the other crimes against humanity in the eyes of the international community and to head off any possible *nullum crimen sine lege* appeals.

The act of forced marriage does withstand *nullum crimen sine lege* scrutiny. The subject matter jurisdiction of the Special Court of Sierra Leone includes “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law....”⁴³ During the formation of the ICTY, the Secretary-General limited the tribunal to the application of rules that were doubtlessly part of customary international law.⁴⁴ The Secretary-General then limited what qualified as customary international law to the law embodied in the Geneva Conventions, the 1907 Hague Conventions, the Conventions on the Prevention and Punishment of the Crime of Genocide, and the Charter of the International Military Tribunal.⁴⁵ The next tribunal to be established, the ICTR, was given a more expansive definition of applicable international law. The Security Council did away with the enumerated instruments and allowed customary international law to encompass international instruments “regardless of

⁴² Elements of Crimes, art. 7(1)(k), 3-10 September 2002, U.N. Doc. ICC-ASP/1/3 [Reproduced in accompanying Notebook II at Tab 21]

⁴³ Statute SC-SL *supra* note 1 at Art. (1)(1) [Reproduced in accompanying Notebook I at Tab 1]

⁴⁴ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808.at parat. 34 U.N. Doc S/25704 (3 May 1993) “In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary international law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.” [Reproduced in accompanying Notebook II at Tab 22]

⁴⁵ *Id* at para. 35 [Reproduced in accompanying Notebook II at Tab 22]

whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.”⁴⁶

Under the more expansive definition of customary international law set forth for the ICTR, customary international law is clear on the subject of forced marriage: the practice is an affront to long-established and well-documented human rights doctrines, as well as a degradation of the institution of marriage, which the international community has expressed an interest in protecting and preserving.

1. The international community has long recognized the constitutive physical acts perpetrated against the victimized spouse of a forced marriage as crimes against humanity.

The crime against humanity of forced marriage is more complex than a crime such as murder, where there is only one act (the unlawful taking of a human life). It is not simply the single act of forcing someone to take a vow of marriage or designating them as a “spouse,” forced marriage covers a multitude of sins. It comprises multiple constituent acts some or all of which are perpetrated upon the victim within the confines of the forced marriage: rape, torture, enslavement, sexual slavery, and forced pregnancy.⁴⁷ All of these constituent acts are already recognized as crimes against humanity in their own right.⁴⁸ The horrors inflicted upon women in forced marriage have a long history of vigorous prosecution as crimes against humanity; anyone committing them has an expectation of punishment.⁴⁹ The constituent acts remain just as grave

⁴⁶ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, at para 12, U.N. Doc S/1995/134 (13 Feb 1995) [Reproduced in accompanying Notebook II at Tab 23]

⁴⁷ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 U.C. Davis J. Int'l L. & Pol'y 197, 205 (2001) [Reproduced in accompanying Notebook II at Tab 25]

⁴⁸ Statute SC-SL *supra* note 1, art. 3 [Reproduced in accompanying Notebook I at Tab I]

⁴⁹ Control Council No. 10, *supra* note 29 Art.II(3)(c) lists rape, enslavement, and torture as crimes against humanity. [Reproduced in accompanying Notebook I at Tab 13] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. Art.27 prohibits rape, Art. 32 prohibits torture, Art. 40 prohibits forced labor. [Reproduced in accompanying Notebook II at Tab 25] The Rome Statute of the International

when subsumed under the label of forced marriage. It is inconceivable that these atrocities cause any less suffering or are any less serious breaches of human rights or international humanitarian law simply because they were perpetuated repeatedly upon a woman under the guise of a “marriage.”⁵⁰

2. The international community has a vested interest in protecting the family and the institution of marriage

The international community recognizes the family as the most basic unit of society.⁵¹ It has also recognized the necessity of protecting and encouraging the stability of the family.⁵² Marriage has long been viewed in both the secular and ecclesiastical realms as the foundation of the family. It is through the joining of the two spouses in marriage that a family is initially formed. Marriage is the most common means by which a family is established and its attendant rights and responsibilities are conferred upon its members. The international community, then, has a vested interest in protecting the institution of marriage as a means of protecting the family. Forced marriage undermines marriage by using the institution to justify the egregious crimes of rape, torture, enslavement, sexual slavery, and forced pregnancy, and to entrap the victim for indefinite periods of time via the rights and status attaching to a spouse. A marriage under these conditions does not serve to protect and foster a stable, healthy family or a stable, healthy base for society as a whole.

Criminal Court, art. 7(1)(g) July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998) [hereinafter “Rome Statute] recognizes sexual slavery and forced pregnancy as crimes against humanity. [Reproduced in accompanying Notebook II at Tab 26]

⁵⁰ Kalra, *supra* note 47, at 203-204. [Reproduced in accompanying Notebook II at Tab 24]

⁵¹ “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” International Covenant on Civil and Political Rights, art 23(3) 23 March 1976 [Hereinafter CCPR] available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm [Reproduced in accompanying Notebook III at Tab 27], Universal Declaration of Human Rights, art. 16 10 Dec. 1948. [Hereinafter UDHR] available at <http://www.un.org/Overview/rights.html> [Reproduced in accompanying Notebook III at Tab 27]

⁵² *Id.* [Reproduced in accompanying Notebook II at Tabs 26 and 26]

A fundamental part of the institution of marriage is the change in social and legal status of the spouses and the attendant rights and privileges that flow from marriage. This includes both the intrinsic rights and obligations shared between the spouses in the marriage and the extrinsic rights and obligations conferred by state and ecclesiastical authorities upon a married couple. The matrimonial state is more than simply identifying of the spouses as “married;” the spouses are afforded certain rights and obligations to each other within the marriage that they do not share with other members of society, such as monogamy, shared responsibility for children, or expectations of privilege and confidentiality.

A married couple is afforded certain rights and obligations by state and religious bodies as well. The marital status of two individuals has a significant impact on how they are treated by religious institutions and will affect how laws pertaining to inheritance, taxes, health care, child welfare, and even criminal law⁵³ affect them. In some states, a married woman is legally a minor and dependent upon her husband, who may gain rights over her property, assets, or even welfare.⁵⁴ Beyond the legal realm, society as a whole has certain expectations and rules of comportment for married individuals, whose societal status differs from unmarried individuals.

The changes in the societal, legal, and religious status of a married couple are meant to protect the marriage and respect the autonomy and privacy of the married couple within the family sphere. Marriage enjoys a favored and often protected status in the law and in public policy.⁵⁵ Religious and social taboos regarding adultery exist to protect the marital relationship from infidelity in a manner not afforded to non-marital relationships. However, in a forced

⁵³ Both the United States and Sierra Leone recognize spousal privilege. GEORGE FISHER, EVIDENCE, 841 (2002) [Reproduced in accompanying Notebook III at Tab 29] and Criminal procedures Act §83(3) (1963) (Sierra Leone). [Reproduced in accompanying Notebook III at Tab 30]

⁵⁴ Pitshandenge *supra* note 24 at 124. [Reproduced in accompanying Notebook I at Tab 11]

⁵⁵ 52 Am Jur 2d. Marriage §2 [Reproduced in accompanying Notebook III at Tab 31]

marriage, changes in status are used to trap the non-consenting spouse within the forced marriage. As discussed above, for a woman to dissolve her customary marriage, she needs the permission of her relatives, to whom a victim of forced marriage rarely has access. By virtue of attaching the rights of a spouse to her, her “husband” traps her within the forced marriage through cultural and social mores in place to protect valid marriages. In Sierra Leone, strong taboos exist regarding to rape.⁵⁶ A woman who has been raped may be seen as unfit for marriage but if she is “married” to her rapist, then the sexual violence is merely a part of the marital relationship and the woman is spared censure. The difference in cultural status between a wife and a rape victim compels the victim to stay in her forced marriage. The institution of marriage enjoys protected status because it facilitates the betterment of the individual and of society, objectives that cannot be met in a forced marriage. The international community, therefore, has a clear interest in sending a strong message that forced marriage is an unacceptable perversion of a protected and valued institution, and it, and the threat it poses to the family, will not be tolerated.

3. All marriages require the consent of both parties to be valid

The international community has a vested interest in protecting valid marriages because it is through valid marriages that families are formed. But, as was briefly illustrated in the discussion of marital custom in Sierra Leone above, there are many types of marriage: religious, regional customary, and civil, all of which are considered equally valid and all of which are equally deserving of the protections afforded to marriages by the State. The state is generally reticent to intrude into the private family sphere out of deference to the marriage, but in the case of forced marriage, the state must pry into the “marriage.” It is clear that a forced marriage is

⁵⁶ *Qualitative comments and testimonies of women and girls* in Physicians for Human Rights, War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment, 78-79 (2002) available at http://www.phrusa.org/research/sierra_leone/pdf_files/04_qualitative.pdf [Hereinafter Physicians for Human Rights][Reproduced in accompanying Notebook III at Tab 32]

not a valid marriage and therefore not entitled to the protected, deferential status valid marital unions enjoy. Before any prosecution of *forced* marriage can commence forced marriages must be distinguished from *valid* marriages.

The fundamental element in of a valid marriage is consent; a marriage is not valid unless entered into with the full and free consent of both spouses.⁵⁷ This holds true in secular law as well as in ecclesiastical law.⁵⁸ Clearly, no such consent is given in the case of a forced marriage. The women in forced marriages in Sierra Leone do not enter into them of their own will; instead they are compelled by violence or coerced through exploitation of the vulnerable position in which they, like all civilians, find themselves during conflict. Therefore, a forced marriage is not a valid marriage and does not warrant the deference usually afforded to marriage.

4. **The crime of “forced marriage” is distinct from an arranged marriage**

If marriage requires consent to be valid, it necessarily raises the question: why is forced marriage a crime against humanity while arranged marriage is a matter of cultural relativism? There are two bases upon which the distinction between the crime against humanity of forced marriage and arranged marriage can be made. First, there is still consent in an arranged marriage. While intending spouses, or at least their fiduciaries, consent to the marriage itself in an arranged marriage, no such consent is present in a forced marriage. Second, forced marriage is a crime against humanity and must, therefore, be a part of a widespread and systematic attack

⁵⁷ CCPR and UDHR *supra* note 51 [Reproduced in accompanying Notebook III at Tabs 27 and 28]

⁵⁸ The Catholic Church maintains that “[a] marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power.” Codex Iuris Canonici 1983 CODE c. 1057 §1. [Reproduced in accompanying Notebook III at Tab 33] Islam also requires the full and free consent of both parties for a valid marriage. MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW, 133 (2003) [Reproduced in accompanying Notebook III at Tab 34] While Hinduism has recognized forced marriages in the past, the Hindu Marriage Act of 1955 also require that both intending spouses give valid consent to the marriage Hindu Marriage Act, § 5(ii) (1955)(India)(amended 1976). [Reproduced in accompanying Notebook III at Tab 35]

upon a civilian population. The practice of arranged marriage in no way constitutes an attack on a civilian population.

An arranged marriage can be understood as the intending spouses delegating the selection process to their family members rather than finding a spouse on their own. Granted, they may be consenting to cast their lot with someone whom they have never met before the ceremony, but recognized international law does not require that both spouses know each other well or at all, just that they consent to be wed to one another.⁵⁹ The spouses in an arranged marriage still consent to the marriage.

Though it is easy to distinguish consented to arranged marriages from forced marriages, the reality of arranged marriages is often closer in spirit to a forced marriage than the state described above. In some cases, betrothals are made when the intending spouses are still legal minors. The “consent” of a woman entering into an arranged marriage may be less a product of her own will than pressure from her family. It is growing increasingly difficult to accept such unions in the face of modern human rights law.⁶⁰ In fact, if the marriage is made in exchange for monetary or similar consideration, the “marriage” is considered slavery and under customary

⁵⁹ The relevant portion of the UDHR reads:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending parties
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Supra at note 51. [Reproduced in accompanying Notebook III at Tab 28]

The CCPR reads:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending parties
4. State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provisions should be made for the necessary protection of any children.

Supra at note 43 [Reproduced in accompanying Notebook III at Tab 27]

⁶⁰ Convention on the Elimination of All Forms of Discrimination Against Women, art. 16, 18 Dec. 1979, available at <http://www.un.org/womenwatch/daw/cedaw/econvention.htm> [hereinafter CEDAW]. [Reproduced in accompanying Notebook III at Tab 36]

international law could be subject to prosecution by any state at any time.⁶¹ Even if one were to accept such arranged marriages as valid although one or both of the intending spouses have not consented to the marriage, one can still distinguish between these family-imposed arranged marriages and forced marriage. In an arranged marriage, the woman's family or guardian still must consent to the union to make the marriage valid. Someone in a fiduciary relationship with the woman, theoretically looking out for her best interests, is the ultimate arbiter of the union in an arranged marriage. In a forced marriage, consent is obtained neither from the forced spouse nor anyone with a fiduciary relationship to her.

Distinguishing arranged marriage from forced marriage based upon the legal foundations of the marriages can be difficult, especially in those cases of arranged marriage in which the intending spouses have no ability to object to the marriage. These types of arranged marriages are becoming increasingly disfavored among customary international human rights instruments that emphasize consent between the intending spouses alone.⁶² Even so, the practice of arranged marriage does not and cannot rise to the level of a crime against humanity as forced marriage does, because arranged marriage is not a systematic and widespread attack on a civilian population; it is not an "attack" at all. To "attack" is to "affect or act upon injuriously."⁶³ Those cultures that practice arranged marriage do so to *assist* the civilian population. Parents arrange marriages for their children to protect their children's welfare, assist them in the difficult and

⁶¹ Supplementary Convention on the Abolition of Slavery, and the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1(c)(i), 7 Sept. 1956, available at <http://www.unhchr.ch/html/menu3/b/30.htm>. [Reproduced in accompanying Notebook II at Tab 37]

⁶² UDHR *supra* note 51 [Reproduced in accompanying Notebook III at Tab 28] CCPR *supra* note 51 [Reproduced in accompanying Notebook III at Tab 27], CEDAW *supra* note 60 [Reproduced in accompanying Notebook III at Tab 36].

⁶³ MERRIAM-WEBSTER ON-LINE DICTIONARY (2004) at <http://m-w.com/cgi-bin/dictionary?book=Dictionary&va=attack>. Attack.(v.) 1.To set upon or work against forcefully. 2.To assail with unfriendly or bitter words. 3. To begin to affect or to act on injuriously. 4. To set to work on. 5. To threaten (a piece in chess) with immediate capture. [Reproduced in accompanying Notebook II at Tab 37].

vital process of selecting a mate, and ensure the perpetuation of social, cultural, and religious values. The practice of arranged marriage is not injurious to the groups that practice it in intent or result. Forced marriage, however, has no basis in the benevolent parental objectives to assist children or perpetuate of important values, and it is highly injurious to its victims.

B. Recognizing Forced marriage as a crime against humanity under the category of “other inhumane acts.”

Article 2 of the Statute of the Special Court of Sierra Leone vests the court with the power to prosecute crimes against humanity.⁶⁴ Forced is not enumerated as a crime against humanity in the statute. For it to be legitimately prosecuted, it must be done so under the broad category “other inhumane acts.” Crimes eligible for prosecution under this category are those in which:

1. The perpetrator inflicted great suffering, serious injury to body or mental or physical health by means of an inhumane act;
2. Such act was of a character similar to any other crime against humanity;⁶⁵
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; and
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 population⁶⁶

This category of crimes against humanity is intended as a “catch-all” for serious violations of human rights that were not contemplated by the statute’s drafters. The category of “other

⁶⁴ Statute SC-SL *supra* note 1, art 2. [Reproduced in accompanying Notebook I at Tab 1]

⁶⁵ *Id.* This would include the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, any other form of sexual violence, and persecution on political, racial, ethnic, or religion grounds.

⁶⁶ Elements of Crimes, *supra* note 42 art. 7(1)(k) [Reproduced in accompanying Notebook II at Tab 21]

inhumane acts” is therefore purposefully vague to free the prosecution from unnecessary constraints when confronted by such crimes.⁶⁷ The ICTY trial court in *Kupreškic et al.* sought to provide a practical definition of “other inhumane acts,” which court defined acts that, under the proper circumstances, are grave and serious violations of standard international human rights.⁶⁸ The standard international human rights can be extrapolated through study of various international human rights instruments.⁶⁹ The previous section amply demonstrates how forced marriage violates many human rights as they are enumerated in multiple international instruments. For forced marriage to be a crime valid for prosecution, then, it must be (1) a source of great suffering for its victim; (2) of a character similar to the other listed crimes against humanity, and (3) part of a widespread and systematic attack against the civilian population – qualifications which it most emphatically meets.

1. Perpetrators of forced marriage inflict great suffering, and serious injury to body or mental or physical health by means of an inhumane act upon their victims

“Great suffering,” in the context of crimes against humanity falling into the category of other inhumane acts, is judged upon an *ejusdem generis* standard; i.e., the suffering of the victim of the “other inhumane act” must be of comparable gravity and severity to suffering of victims of the crimes against humanity already enumerated in the statute.⁷⁰ There must also be a “nexus” between the inhumane act and the victim’s suffering.⁷¹ There can be no doubt of the gravity of the suffering endured by the victims of forced marriages during the armed conflict in Sierra

⁶⁷ Cassese *supra* note 25, at § 4.3.10 [Reproduced in accompanying Notebook I at Tab 12]

⁶⁸ *Kupreškic.*, *supra* note 36 at para. 566 [Reproduced in accompanying Notebook I at Tab 16]

⁶⁹ *Id.* [Reproduced in accompanying Notebook I at Tab 16]

⁷⁰ *Id.* [Reproduced in accompanying Notebook I at Tab 16]

⁷¹ *Kayishema supra* note 41 at para. 146. [Reproduced in accompanying Notebook II at Tab 20]

Leone nor the connection between their suffering and the forced marriage. Survivor accounts more than adequately to demonstrate that the depth of their suffering is comparable with that of other victims of crimes against humanity. According to these accounts, women were taken, usually during raids of villages after witnessing the rape, maiming, and murder of friends and family by rebel forces.⁷² Girls as young as thirteen years old⁷³ were forced into the bush, where were their captors informed them that they were now the wives of the men who had taken them. Now “married,” they were raped repeatedly.⁷⁴ These rapes often resulted in pregnancy⁷⁵ and sexually transmitted diseases.⁷⁶ Women were given narcotics by their “husbands” to keep them compliant and as a means of compelling them to commit other crimes.⁷⁷ Captor husbands carved the letters “RFU” into their “wives” bodies⁷⁸ or branded them.⁷⁹ The women were often beaten and forced into labor for their “husbands.”⁸⁰ The suffering of women subjected to such treatment is certainly comparable to the suffering of victims of other crimes against humanity including rape, sexual slavery, torture, forced pregnancy, and enslavement.

⁷² Physicians for Human Rights *supra* note 56, 64-73 [Reproduced in accompanying Notebook III at Tab 32]

⁷³ *Id.* at 68 [Reproduced in accompanying Notebook III at Tab 32]

⁷⁴ *Id.* at 66, 70 [Reproduced in accompanying Notebook III at Tab 32]

⁷⁵ *Id.* at 67-68, 70 [Reproduced in accompanying Notebook III at Tab 32]

⁷⁶ *Id.* at 68 [Reproduced in accompanying Notebook III at Tab 32]

⁷⁷ *Id.* at 66, 68 [Reproduced in accompanying Notebook III at Tab 32]

⁷⁸ *Id.* at 68 [Reproduced in accompanying Notebook III at Tab 32]

⁷⁹ Swallow, *supra* note 22. [Reproduced in accompanying Notebook I at Tab 9]

⁸⁰ Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc S/2000/751 (31 Jul. 2000) [Reproduced in accompanying Notebook III at Tab 39]

2. Forced marriage is an act of a similar character to the other specific crimes against humanity because it is composed of constitutive acts that are crimes against humanity in their own right

To qualify for prosecution under the designation “other inhumane acts,” the objective act or acts that define the crime must be comparable to the objective acts that comprise the other enumerated crimes against humanity. The gravity of the objective elements of the crime, the *actus reus*, is judged based upon the same *eiusdem generis* standard as the suffering of the victims.⁸¹ Unlike murder or torture, forced marriage is not composed of only one *actus reus*. Rather, it encompasses multiple constituent acts: rape, torture, enslavement, sexual slavery, and forced pregnancy. Each of these constituent acts are already recognized separately as crimes against humanity.⁸² In fact, some constituent acts, namely; enslavement, torture, and arguably rape, rise to the level of *jus cogens* norm violations.⁸³ Rights protected by *jus cogens* norms are nonderogable, binding on all states at all times, cannot be preempted by treaty, and can be prosecuted against anyone at any time.⁸⁴ It follows, then, that just as the suffering of a victim of forced marriage compares to that of victims of the enumerated crimes against humanity, forced marriage is sufficiently similar to the other enumerated crimes against humanity to fall into the “other inhumane acts” category because it encompasses those other enumerated crimes against humanity. It defies reason that combining these crimes and perpetrating them repeatedly, or by

⁸¹ *Kupreškic.*, *supra* note 36 par. 564. [Reproduced in accompanying Notebook I at Tab 16]

⁸² Statute SC-SL *supra* note 1 art. 2 [Reproduced in accompanying Notebook I at Tab 1] and Rome Statute *supra* note 49 at Art. 7 [Reproduced in accompanying Notebook II at Tab 26]

⁸³ Kelly D. Askin, *Stefan A. Riensfeld Symposium 2002: Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 *Berkeley J. Int'l L.* 288, 349 (2003) [Reproduced in accompanying Notebook III at Tab 40]

⁸⁴ 45 *Am.Jur.* 2d *International Law* §1 [Reproduced in accompanying Notebook III at Tab 41]

perpetrating the crimes under the guise of “marriage,” diminishes their severity or renders them any less “odious an attack on human dignity.”⁸⁵

3. Forced marriage was part of a widespread and systematic attack against the civilian population of Sierra Leone.

The widespread or systematic nature of an attack, and the fact that it is conducted against a civilian population, defines a crime against humanity.⁸⁶ These qualifications distinguish it both from mere acts of random violence and war crimes. A particular act does not need to be committed in a widespread and systematic manner to meet this qualification, but it must be part of a widespread and systematic attack.⁸⁷ The trial court in *Akayesu* defined “widespread” as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims,”⁸⁸ and “systematic” as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”⁸⁹ The policy is not required to be official state policy, but some kind of preconceived plan or policy must exist.⁹⁰ After a decade of incredibly bloody civil war, stretching from the eastern border of the country, there can be no doubt that a widespread attack was carried out in Sierra Leone.⁹¹ From the accounts of the survivors, civilian women and girls abducted from their homes during raids and forced to marry the rebel soldiers who abducted

⁸⁵ Cassese *supra* note 25 § 4.1.1 One of the defining features of crimes against humanity is that “They are particularly odious offenses in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings.” [Reproduced in accompanying Notebook I at Tab 12]

⁸⁶ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

⁸⁷ *Prosecutor v. Kunarac*, IT-96-23-T at para. 419, 22 Feb. 2001 [Reproduced in accompanying Notebook III at Tab 42]

⁸⁸ *Akayesu supra* note 40 at para 580 [Reproduced in accompanying Notebook II at Tab 19]

⁸⁹ *Id.* [Reproduced in accompanying Notebook II at Tab 19]

⁹⁰ *Id.* [Reproduced in accompanying Notebook II at Tab 19]

⁹¹ Notes: Sierra Leone *supra* note 3. [Reproduced in accompanying Notebook I at Tab 2]

them, it is also clear that forced marriage was a part of that widespread attack, which was carried out against the civilian population.

4. Forced marriage is more than the sum of its constituent acts and should be prosecuted as a separate crime in to appropriately recognize its gravity, prevent future instances, and properly recognize the suffering of the victims.

Since all of the constituent acts that comprise a forced marriage are already recognized as crimes against humanity by the statute of the Special Court of Sierra Leone,⁹² some consideration must be given to the practicality of creating a new category of crime. If the incidents of rape, sexual slavery, enslavement, torture, and forced pregnancy that take place within a forced marriage can all be sufficiently punished under existing international humanitarian law, formulating a new offense of “forced marriage” is unnecessary. Arguably, it would be redundant and a waste of judicial resources to pursue a new crime if the perpetrators can be adequately punished under existing law. If “forced marriage” were simply the sum of its parts, as atrocious as those parts may be, a new offense would not advance the interests of justice: the victims would receive no additional vindication, and there would be no need to take additional steps to prevent reoccurrence of these crimes. Forced marriage is far more than its constituent elements, however; it is inescapable rape, sexual slavery, torture, forced pregnancy, and enslavement on a continuing basis as well as the degradation of an internationally valued social and spiritual institution.

A useful paradigm for recognizing forced marriage as a crime against humanity can be found in the recent recognition of sexual slavery as a crime against humanity. Sexual slavery was first recognized as a distinct crime against humanity in 1998 when it was enumerated in the

⁹² Statute SC-SL *supra* note 1 art. 2. [Reproduced in accompanying Notebook I at Tab 1]

Rome Statute of the International Criminal Court (“ICC”).⁹³ Before this, conduct that would have constituted sexual slavery was prosecuted as other crimes against humanity, usually enforced prostitution or enslavement. Like forced marriage, sexual slavery is composed of multiple constituent acts, namely enslavement and rape, which are both recognized individually as crimes against humanity. However, the drafters of the Rome Statute recognized that sexual slavery was more than enslavement and more than rape.⁹⁴ Rape properly describes the sexual violence inherent in the conduct, but not the loss of individual liberty. Enslavement properly describes the deprivation of personal liberty but enslavement alone does not include the element of sexual violence that is vital to the crime. Because sexual slavery was more than slavery and more than rape, the victim of sexual slavery suffers differently from the victims of other crimes against humanity.⁹⁵ International human rights law recognizes that the enslavement for the purposes of forcing the victim to perform sexual acts is a particularly egregious form of enslavement deserving of specific recognition.⁹⁶ Rome Statute drafters and commentators endorsed the new classification of crime because it more accurately described the conduct than enslavement or rape.

Enforced prostitution was similarly insufficient to properly prosecute incidences of sexual slavery. It arguably conveyed a more accurate description of the complete *actus reus* of sexual slavery, that is, women detained and forcibly compelled to perform acts of sexual nature, but it did not fully convey the profound deprivation of personal liberty that accompanies the

⁹³ Rome Statute, *supra* note 49, at arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) [Reproduced in accompanying Notebook II at Tab 26]

⁹⁴ Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 Mich. J. Int’l L. 605 (2004) [Reproduced in accompanying Notebook III at Tab 43]

⁹⁵ *Id.* [Reproduced in accompanying Notebook III at Tab 43]

⁹⁶ *Id.* at 623 [Reproduced in accompanying Notebook III at Tab 43]

deprivation of the victim's sexual autonomy.⁹⁷ The deprivation of personal liberty that rises to the level of "slavery" may not be present in all types of enforced prostitution.⁹⁸ The term "enforced prostitution" was further unsuitable because it labels the victim a "prostitute." The term "prostitution" carries a certain stigma, connoting a certain degree of volunteerism from the victim, and conceals the violence inherent in the crime.⁹⁹ "Slavery" has far fewer negative connotations in that it does not carry the presumption of volunteerism, which makes it a more sensitive and more accurate characterization of the conduct.¹⁰⁰

Forced marriage parallels sexual slavery in that the conduct comprising forced marriage is a unique violation of human rights and international human rights law that is not fully captured by current enumerated crimes against humanity. None of the other crimes against humanity that comprise forced marriage describe the *totality* of the perpetrator's conduct or the victim's experience. Enslavement describes the loss of personal freedom, but obscures the sexual violence inherent in the crime.¹⁰¹ Sexual slavery describes the loss of personal freedom and the sexual violence, but does not speak to the forced domestic labor, childbearing, childrearing, and degradation of the institution of marriage.¹⁰² Torture, rape, and forced pregnancy do not address the victim's loss of personal liberty and individually may not be present in all cases of forced marriage.¹⁰³ Forced marriage is a profound deprivation of individual autonomy. None of the enumerated crimes against humanity recognize a crime where the victim is denied her personal

⁹⁷ *Id.* at 622 [Reproduced in accompanying Notebook III at Tab 43]

⁹⁸ *Id.* [Reproduced in accompanying Notebook III at Tab 43]

⁹⁹ *Id.* at 618-19. [Reproduced in accompanying Notebook III at Tab 43]

¹⁰⁰ *Id.* at 620. [Reproduced in accompanying Notebook III at Tab 43]

¹⁰¹ Elements of Crimes *supra* note 42 art. 7(1)(c) [Reproduced in accompanying Notebook II at Tab 21]

¹⁰² *Id.* at art. 7(1)(g)-2. [Reproduced in accompanying Notebook II at Tab 21]

¹⁰³ *Id.* at arts 7(1)(f), 7(1)(g)-1, and 7(1)(g)-4. [Reproduced in accompanying Notebook II at Tab 21]

liberty, and is forced into sexual acts, domestic labor, childbearing, and child rearing through the denigration of an important and protected social and spiritual institution. Therefore, it is appropriate to now create a new crime that will recognize the entirety of the conduct.

5. Forced marriage is a unique crime and it would not be duplicitous to proceed with charges of forced marriage in light of the existence of similar crimes against humanity of enslavement and sexual slavery

As discussed in the previous section, one of the difficulties that arose in describing and defining the crime of sexual slavery was in differentiating it from other, already established crimes against humanity, namely enforced prostitution and enslavement. The constitutive acts that made up the different crimes were undeniably similar; it would have been a waste of judicial time and resources, as well as an affront to the principle of due process, to pursue different charges if they were tantamount to the exact same crime. Though sexual slavery shared some subjective elements with enforced prostitution and enslavement, neither one encompassed all of the subjective elements, and the differences between them were significant enough to classify sexual slavery as a separate crime.

The same concern for judicial resources and the formulation of duplicitous crimes quickly arises when evaluating the viability of forced marriage as a crime against humanity. At first blush, enslavement and sexual slavery both appear strikingly similar to the crime of forced marriage. However, as in the case of sexual slavery, as one examines the essential elements of each crime, substantial differences between the two crimes quickly appear.

As defined by the Rome Statute the elements of sexual slavery are:

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.¹⁰⁴

Sexual slavery and forced marriage share elements 3 and 4 as these define them as crimes against humanity.¹⁰⁵ However, further examination of the two crimes shows them disparate with respect to the first two elements.

The defining element that makes sexual slavery “slavery” is the perpetrator’s attaching the right of ownership to the victim. This deprivation of the victim’s liberty and personal autonomy distinguishes sexual slavery from other sexually-based crimes against humanity.¹⁰⁶ The personal liberty of a “wife” in a forced marriage is similarly constrained in a forced marriage, but the constraint is accomplished not through attachment of right of ownership, but through the enforced, nonconsensual attachment of the rights and privileges of marriage. Wives compelled into forced marriages are not “owned” as the victims of sexual slavery are, but are still inextricably bound to their captors by the ties matrimony and the obligations flowing from it that the perpetrator foists upon the victim. As discussed above, marriage changes the rights and duties owed to the individuals within the marital relationship as well as their rights and duties in the eyes of extrinsic institutions. In a forced marriage, the perpetrator extracts the privileges normally expected within a marital relationship – sexual congress, labor, child bearing, child rearing, fidelity, obedience and more – from “wives,” who never consented to be so bound.

¹⁰⁴ Elements of Crimes, *supra* note 42, art. 7(1)(g)-2. [Reproduced in accompanying Notebook II at Tab 21]

¹⁰⁵ Cassese *supra* note 25 at §4.1.2 [Reproduced in accompanying Notebook I at Tab 12]

¹⁰⁶ Elements of Crimes *supra* note 57 arts. 7(1)(g)1-6. None of the other sexually based crimes against humanity have deprivation of liberty listed in the elements. [Reproduced in accompanying Notebook II at Tab 21]

There is also no equality of rights in these relationships. While the roles of each spouse in a marriage may differ, both spouses should have equal rights within the marriage at all times.¹⁰⁷ This is not true of a forced marriage, within which the perpetrator holds all the power. The attachment of the rights of a spouse to the victim drastically changes how she is perceived by social, state, and religious entities. Depending on the victim's religious convictions, it may change her responsibilities and rights within the faith, and it may also change her rights in certain situations under secular law even though the victim has never consented to such a status change. Laws and customs about the transfer of property, the bearing and rearing of children, or the ability of the victim to contract for other marriages, which were meant to protect spouses, now entrap the victimized spouse. While a victim of sexual slavery is bound intrinsically by her captor and his ability to restrain her movement, a victim of sexual slavery is bound both intrinsically by her captor and extrinsically by the bonds placed upon a married couple by religion, society, and state.

The second element of sexual slavery which states that, “[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature,” underscores the violation of the victim's sexual autonomy and the sexual violence that inheres in the crime. Here again, a distinction can be drawn between sexual slavery and forced marriage. Sexual violence is a serious and substantial element of forced marriage. Sexual intimacy is an important element to marriage, the most cursory review of religious and legal views of adultery make that abundantly clear. One of the hallmarks of forced marriage is that the victim is forced to become her captor's sexual partner and is repeatedly raped as her captor extracts the marital privilege of sexual

¹⁰⁷ CCPR *supra* note 51 [Reproduced in accompanying Notebook III at Tab 27] UDHR *supra* note 35 [Reproduced in accompanying Notebook III at Tab 27] and European Convention on Human Rights, art. 6, 4 Nov. 1950 *available at* <http://www.echr.coe.int/Convention/webConvenENG.pdf> [Reproduced in accompanying Notebook III at Tab 44]

congress from his victim.¹⁰⁸ This is especially significant in Sierra Leone, where there is no recognition of marital rape.¹⁰⁹ The theory is that a woman who has entered into a marriage has given implied consent to sexual intercourse at all times within the marriage, and a husband may resort to force if his sexual overtures are rebuffed.¹¹⁰ But there are more obligations owed between husband and wife than simply sexual relations. Marriage also includes shared duties of fidelity, child bearing, child rearing, and the physical labor necessary to run of a household. Since these additional obligations are assumed to attach to the victim under the rubric of marriage, they too should be recognized as part of the crime of forced marriage. Since the duties attaching under right of a spouse include more than sexual congress, the crime of forced marriage necessarily encompasses these additional violations of the victim's autonomy as well. Forced marriage is not just a violation of the victim's sexual autonomy; it is impressment into domestic labor; it is denial of the victim's reproductive autonomy; and it prevents the victim from contracting for marriage with someone of her or her family's choice. Reflecting only the sexual elements, sexual slavery does not adequately address these other aspects of the crime: defining such far-reaching conduct as sexual slavery is far too narrow and fails to address the other substantial, non-sexual elements of the crime. Forced marriage, then, should be distinguished from sexual slavery to capture these other elements.

If sexual slavery is insufficient to describe the conduct that constitutes forced marriage, then enslavement is similarly ill-equipped to accurately and concisely characterize the crime that is forced marriage. The only distinguishing element of the crime against humanity of

¹⁰⁸ Human Rights Watch *supra* note 21. [Reproduced in accompanying Notebook I at Tab 8]

¹⁰⁹ Note by Secretary-General, Report of the United Nations High Commissioner for Human Rights on assistance to Sierra Leone in the field of human rights, U.N. Doc A/59/340 at para. 30, 9 Sept. 2004 [Reproduced in accompanying Notebook III at Tab 45]

¹¹⁰ *Id.* [Reproduced in accompanying Notebook III at Tab 45]

enslavement is “[t]he 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.”¹¹¹ It is broader than sexual slavery and can be construed as to encompass both the sexual and non-sexual elements of the crime, but to classify these crimes as “enslavement” alone is an inexact description of the crime at best and misleading at worst. In the crime of enslavement, as in sexual slavery, the perpetrator’s control over the victim comes from attaching of the right of ownership to the victim, while in forced marriages the perpetrator obtains control over the victim by attaching the obligations of a spouse to the victim. The victim is bound not only by the force exerted over them by the perpetrator but by the shift in legal, social, and religious rights and status arising from marriage. Additionally, enslavement is silent on the sexual violence and forced labor aspects of the crime. While the sexual element should not be emphasized to the exclusion of all other elements of the crime, as it would be in sexual slavery, the sexual violence inherent in the crime makes it particularly offensive to human dignity and should be acknowledged accordingly along with forced labor, forced pregnancy, and the other acts that constitute forced marriage. Enslavement lacks the specificity necessary to accurately describe the crime of forced marriage and would inevitably lead to confusion as to how the perpetrator maintained control over the victim.

C. The Elements of Forced Marriage

Thus far, the crime of forced marriage has been described in terms of international custom and other crimes against humanity. It has been distinguished from valid marriage, including arranged marriage. The constituent acts of the conduct have been examined with respect to other crimes against humanity to prove that forced marriage is comparable, both in the

¹¹¹ Elements of Crimes, *supra* note 42, art. 7(1)(c). [Reproduced in accompanying Notebook II at Tab 21]

nature of the conduct and the degree of suffering inflicted upon the victims, to the other crimes against humanity listed in the statute of the Special Court of Sierra Leone. It has been distinguished from the similar crime against humanity of sexual slavery and enslavement to prove that forced marriage is unique enough to warrant independent prosecution. Thus far, forced marriage has been described in terms of what it is *not*, but in order to prosecute the crime, one must define it for what it *is*. The elements of the crime of forced marriage are:

1. The perpetrator attached the right of marriage to one or more persons without the individual's consent by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent;
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature, and/or forced domestic labor, child bearing, or child rearing;
3. The perpetrator makes it so that the individual is unable to dissolve the marriage;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
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.

The first element of the crime is distinct when compared to the other sexually-based crimes against humanity.¹¹² Unlike sexual slavery, where there is a similar attaching of rights to the victim by the perpetrator, forced marriage requires that the rights be attached without the consent of the victim. The consent element is the first distinction between forced marriage and enslavement or sexual slavery and it distinguishes a valid marriage from a forced marriage. Since no one can consent to slavery, individual autonomy being a nonderogable right, consent is a moot point in cases of slavery. However, individuals can consent to marriage, and as discussed

¹¹² See Elements of Crimes *supra* note 57 arts. 7(1)(a)-(i) [Reproduced in accompanying Notebook II at Tab 21]

above, that consent is what validates the marriage. The lack of valid consent through force or coercion, then, is an integral part of what makes the attaching of the rights of marriage a grievous violation of the victim's autonomy and abhorrent to human rights.

It is also vital that the right attached to the victim by the perpetrator is classified as the *right of marriage* or the *right of a spouse* rather than the *right of ownership*, which attaches in cases of enslavement or sexual slavery. First, this highlights the fact that forced marriage is a perversion of the protected institution of marriage which is one of the reasons it is repugnant to international law and custom. Second, there are conceivably situations where an individual could be forced into a marriage and unable to escape the perpetrating spouse because of the obligations and duties placed upon them by marriage, but where the perpetrator has not attached the right of ownership to the spouse. Without this distinction, there is a substantial risk that the perpetrators of forced marriage will be able to avoid prosecution for their conduct under the enslavement crimes because they "married" their victims, which does not rise to the deprivation of liberty required for enslavement.

The second element of the crime recognizes, in a manner not available under any of the enumerated crimes against humanity, that there is more to the crime of forced marriage than the sexual crimes committed against the victim during the forced marriage. The second element is constructed this way for several reasons. First, it acknowledges the range of constituent acts that may be present in a forced marriage and that those constituent acts may extend beyond sexual acts alone. Forced marriage can properly be defined as a sexually-based crime against humanity. However, as was discussed with respect to the first element, for the crime to constitute forced marriage, the perpetrator must have attached the right of a spouse to the victim. The rights owed to a spouse within a marriage encompass more than conjugal duties; they also include all acts

necessary to establish and maintain of a family, such as domestic labor, child bearing, and child rearing. This necessitates adding of forced labor, child bearing, and child rearing to the list of constituent acts that define forced marriage. Including these other acts does not to diminish the severity and gravity of the sexual violence suffered by the victims of forced marriage, nor does it suggest that forced acts of a sexual nature are insufficient alone to constitute a crime meeting the other three criteria to the status of forced marriage. It is simply meant to recognize that since the rights of a spouse extend beyond sexual intercourse, the range of acts the victim of forced marriage may suffer extends beyond sexual acts. This construction also broadens the reach of forced marriage to situations where the perpetrator has attached the right of marriage to the victim, the victim has the social and legal status of a spouse, and the victim is forced into domestic labor and child rearing, but there is no sexual element.

Second, it puts the proper emphasis on *all* of the constituent acts that make up forced marriage. When forced marriage was compared previously with sexual slavery and enslavement difficulties arose regarding how much importance to place on the sexual violence inherent in the crime. With the enumerated crimes against humanity, it was an all or nothing situation; either the sexual element of the crime was not addressed in the elements of the crime, or it was the only aspect of the crime addressed. Neither of these extremes is appropriate in the case of forced marriage. This construction finds a suitable middle ground by acknowledging the sexual violence that is integral to the crime of forced marriage while simultaneously recognizing that the sexual acts are not the *only* constituent acts and that there is more to forced marriage than sexual violence alone.

Third, it bears mentioning that the list is not meant to be exhaustive, but merely illustrative of some of the traditionally recognized duties of one spouse to another. Different

cultures define those duties and rights owed between spouses within a marriage differently. The expected duties of a spouse should always be considered within the cultural context of the situation.

The third element is included to acknowledge the inequity of the rights of the “spouses” within the forced marriage and to emphasize the fact that the victimized spouse suffers a severe deprivation of liberty. According to some of the major international human rights instruments, both spouses should have equal rights within the marriage as well as to the dissolution of the marriage.¹¹³ Within a forced marriage, however, no such equality exists, the recourses normally available to a spouse in a situation of marital inequality, sexual violence, physical violence, and forced labor, namely dissolution of the marital state, are lost to the victim of forced marriage, effectively trapping her with the perpetrating spouse.

The fourth and fifth elements of forced marriage are shared with all crimes against humanity. The fourth distinguishes the conduct as a crime against humanity.¹¹⁴ Crimes against humanity do not encompass acts committed against enemy combatants, those crimes are relegated to the area of war crimes.¹¹⁵ It is the systematic and widespread nature of the conduct that elevates it to the status of a crime against humanity and brings it within the jurisdiction of the Special Court rather than the jurisdiction of the State courts.¹¹⁶ To be a crime against humanity, the crime must be of such a magnitude that it constitutes an attack on *humanity* and not simply a sporadic event. The fifth element is the subjective *mens rea*, element of all crimes

¹¹³ CCPR *supra* note 51 [Reproduced in accompanying Notebook III at Tab 27], UDHR *supra* note 51 [Reproduced in accompanying Notebook III at Tab 28] and European Convention on Human Rights *supra* note 91. Art. 6 [Reproduced in accompanying Notebook II at Tab 44]

¹¹⁴ Cassese *supra* note 25 at §4.1 [Reproduced in accompanying Notebook I at Tab 12]

¹¹⁵ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

¹¹⁶ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

against humanity. The intent element extends beyond the criminal intent (recklessness) of the underlying crime and also requires that the perpetrator know the offense is part of a broader system or policy of widespread abuse.¹¹⁷ It is not necessary that the perpetrator anticipate all the consequences of the conduct, only that he is aware of the risk that the conduct will yield grave consequences.¹¹⁸ It is also not necessary for the perpetrator to know that his conduct and a system of policy, just that there is an attack on a civilian population and that he is a part of that attack.¹¹⁹ This element also helps to distinguish crimes against humanities from war crimes.¹²⁰

Finally, throughout this memorandum, the crime of forced marriage is discussed as a crime against women, and it is assumed that the forced spouse is the wife. It is for the sake of clarity that this assumption is made. This memorandum addresses the crime of forced marriage with in the context of the conflict in Sierra Leone, and in that conflict the victimized spouse was always the “wife.” Forced marriage should be universally condemned regardless of the victimized spouse’s gender.

IV. Conclusions

It is the duty of the Special Court of Sierra Leone 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 30 November 1996.”¹²¹

Recognizing forced marriage as a crime against humanity under the categorization of “other

¹¹⁷ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

¹¹⁸ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

¹¹⁹ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

¹²⁰ *Id.* [Reproduced in accompanying Notebook I at Tab 12]

¹²¹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, at. 1(1) 16 Jan. 2002, *available* at <http://www.sc-sl.org/scsl-agreement.html> [Reproduced in accompanying Notebook III at Tab 46]

inhumane acts” will greatly assist the Special Court to carry out that mandate. During the conflict, thousands of women were abducted and forced into marriage to men who had murdered their friends and families. Within these marriages the perpetrators violated their victim’s fundamental human rights through rape, violence, torture, forced pregnancy, and forced labor and exposed them to unimaginable suffering. The perpetrators used the rights and privileges attaching to the protected institution to bind their victims to them, often to the extent that many victims of forced marriage remain “married” to their captor-husbands today. The crime of forced marriage is unique and distinct from the other crimes against humanity, which are inadequately formulated to capture all of the conduct that constitutes a forced marriage and properly describe the conduct and subsequently characterize the experiences of the victims. The most efficient way, then, for the court to address these particular violations of humanitarian and international law, is to recognize and prosecute forced marriage as the unique crime that it is.