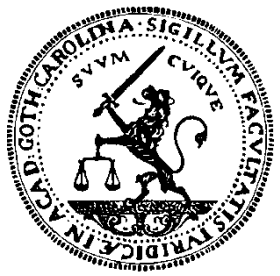

FACULTY OF LAW

Lund University

Amelia Möller Andréewitch

Forced Marriage – A “new” Crime Against Humanity?

JURM02 Master Thesis

International Human Rights Law

30 higher education credits

Supervisor: Eduardo Gill-Pedro

Term: Spring 2020

Contents

Summary

Forced marriage is one of the newest crimes to be tried as a crime against humanity before an international court. During the Sierra Leone civil war, victims of sexual violence were often referred to as 'bush wives' or 'rebel wives'. The Special Court for Sierra Leone (SCSL) was the first international criminal tribunal to charge, try and convict persons for forced marriage as a crime against humanity.

The inconsistency in the legal characterisation of forced marriage as a crime against humanity either as an 'other inhumane act' or as sexual slavery by the SCSL, provides the framework for this thesis. The research identifies two different branches of the jurisprudence. The first branch, emerging from the Trial Chamber judgement of the *Prosecutor* v. *Brima* (the AFRC case) and further developed in the *Prosecutor* v. *Taylor* (the Taylor case), reflects the conclusion that acts of forced marriage are adequately pursued as sexual slavery. The second branch, emerging from the judgement of the Appeals Chamber in the AFRC case and the judgement of the Trial Chamber in *Prosecutor* v. *Sesay, Kallon, and Gbao* (the RUF case), demanded further conviction under 'other inhumane acts' in order to capture the entire wrongdoing of acts of forced marriage.

The research explores potential underlying causes for the conflicting case law. These causes are linked to the principle of legality and the tension of the law as it is (*lex lata*) and the law as it ought to be (*lex feranda*). The research makes an attempt to question whether the crime of 'forced marriage' has reached the necessary level of recognition for it to be considered an international crime. Whether the phenomenon of 'forced marriage' fall under the definition of sexual slavery or under 'other inhumane acts' remains uncertain.

Sammanfattning

Tvångsäktenskap är ett av de nyaste brotten som har prövats som brott mot mänskligheten vid en internationell domstol. Under inbördeskriget i Sierra Leone kallades offer för sexuellt våld ofta för 'bush wives' eller för 'rebel wives'. Specialdomstolen för Sierra Leone (SCSL) var den första internationella brottsdomstolen som åtalade, prövade och dömde personer för 'tvångsäktenskap' som ett brott mot mänskligheten.

Den juridiska karaktäriseringen av tvångsäktenskap visar sig vara inkonsekvent. Tvångsäktenskap betraktas som ett brott mot mänskligheten, både under kategorin en 'annan omänsklig handling', och under kategorin 'sexuellt slaveri', av SCSL. Denna inkonsekventa rättspraxisen utgör ramen för examensarbetet. Arbetet identifierar två olika grenar av rättspraxis. Den första uppfattningen framgår utifrån rättegångskammarens dom i AFRC-fallet som senare utvecklades vidare av rättegångskammaren i Taylor-fallet, och speglar slutsatsen att tvångsäktenskap omfattas av brott mot mänskligheten avseende 'sexuellt slaveri'. Den andra grenen återfinns i överklagandekammarens dom i AFRC-fallet samt i RUF-fallet, som istället slår fast att tvångsäktenskap omfattas av brott mot mänskligheten avseende kategorin 'andra omänskliga handlingar'.

I uppsatsen så undersöks potentiellt underliggande orsaker till den spretande rättspraxisen som kopplas till legalitetsprincipen och spänningen mellan lagen som den är (*lex lata*) och lagen så som den borde vara (*lex feranda*). Arbetet gör ett försök att ifrågasätta huruvida brottet 'tvångsäktenskap' har erkänts på det sätt som krävs för att det ska anses utgöra internationell sedvanerätt. Huruvida fenomenet 'tvångsäktenskap' faller under kategoriseringen sexuellt slaveri eller under 'andra omänskliga handlingar' förblir dock osäkert.

Abbreviations

AC	Appeals Chamber
APC	All People's Congress – Sierra Leone government X-X
AFRC	Armed Forces Revolutionary Council
CAH	Crimes against humanity
CDF	Civil Defence Forces
CLICC	Commentary on the Law of the International Criminal Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human Rights Law
NPFL	National Patriotic Front of Liberia
PTC	Pre-Trial Chamber
RUF	Revolutionary United Front
SCSL	Special Court of Sierra Leone
SRSG-SVC	Special Representative of the Secretary-General on Sexual Violence in Conflict
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council
OTP	ICC Office of the Prosecutor

1 INTRODUCTION

1.1 Opening remarks

The inconsistency in the legal characterization of forced marriage, or conjugal association, as either sexual slavery or an 'other inhumane act' by the Special Court of Sierra Leone (SCSL) – provides the framework for this thesis. The aim is to analyse how the SCSL dealt with the crime of forced marriage and also to understand why incidents of forced marriage was prosecuted both under the residual offence of crimes against humanity of 'other inhumane acts' (as a "new" international crime), and *also* as a crime against humanity of sexual slavery.

In times of civil war and conflict, women and children are often the most victimized.[1] In the last decades, international criminal courts and tribunals have called significant attention to sexual and gender-based crimes. Sexual crimes are now recognised internationally as subcategories of genocide, torture, crimes against humanity.[2] These crimes were first prosecuted by the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) at the beginning of the new millennium.

In several conflicts around the world, such as in the Democratic Republic of Congo, Uganda, Sierra Leone, Liberia, Rwanda, Iraq and Syria - forced marriage has been a common feature.[3] For a long time, forced marriage has

[1] Cf. Physicians for Human Rights, War-Related Sexual Violence in Sierra Leone, at 3-4 (2002); Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Prosecutor Hollis Hails the Historic Conviction of Charles Taylor, Special Court for Sierra Leone, (Apr. 26, 2012) - Prosecutor Brenda J. Hollis commenting that sexual violence against women and girls was a key part of operations in Sierra Leone.

[2] See e.g. the Rome Statute of the International Criminal Court UNGA, 17 July 1998. Hereinafter, the Rome Statute.

[3] See generally A. Bunting 'Forced Marriage in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' (2012) 1:1 Canadian Journal of Human Rights p.

mainly been a concern for the international human rights community. At this point in time, forced marriage is one of the newest crimes to be tried by the international criminal law regime as a crime against humanity and was first introduced as an international criminal offence by the SCSL in 2007.[4]

When forced marriage was brought before the SCSL as an international crime, the Court took different views on whether the conduct should be prosecuted as crimes against humanity either under the residual offence of inhumane acts (as a 'new' international crime), or as sexual slavery. The main theme of the thesis is hence devoted to an analysis of how the different SCSL Chambers performed and presented their legal reasoning for justifying either characterisation. The thesis will explore potentially underlying causes for this conflicting case law, linking to, *inter alia,* the principle of legality and the tension (or confusion) of the law as it is (*lex lata*) and the law as it ought to be (*lex feranda*). This will be done by analysing the developments in international criminal law on the subject of 'forced marriage' as an international crime.

The pending trial in the *Prosecutor* v. *Dominic Ongwen (Ongwen* case)[5] case before the International Criminal Court (ICC) that currently deals with the legal categorisation of forced marriage will also be included and presented in the thesis.

161; Girls not Brides, 'Child Marriage in Humanitarian Settings' (The Global Partnership to End Child Marriage, 2017). https://www.ohchr.org/Documents/Issues/Children/HumanitarianSituations/GirlsNotBrides.pdf accessed 16 April 2020.

[4] See Eboe-Osuji, Chile, International Law and Sexual Violence in Armed Conflicts (International Humanitarian Law Series) [Electronic resource], Brill, 2012 p. 222 ff.

[5] See Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, (Mar. 23, 2016).

1.2 Research questions and purpose

The thesis will strive to answer two main questions. The first research question asks:

> How were incidents of forced marriage charged before the SCSL and how was the issue discussed by the SCSL at the different trials? What arguments were used by the Court for potentially convicting the accused on the charge of forced marriage as either a crime against humanity of 'other inhumane acts' (as a "new" international crime), or as a crime against humanity of sexual slavery?

In connection with the above exposition, the second research question asks:

> Why were incidents of forced marriage prosecuted both under the residual offence of crimes against humanity of 'other inhumane acts', and *also* as crimes against humanity of sexual slavery at the SCSL?

Regarding the first research question, reviewing and analysing case law and its legal outcomes and issues is relevant. Especially so when the legal interpretation and the case law regarding a particular issue, such as forced marriage, have resulted in such differing approaches to the conduct. Uniformity of law within the international criminal law system is desirable if the right prerequisites are present since fragmentation of the law can potentially be linked to issues of legality, such as foreseeability and non-retroactivity.

The second research question is devoted to an analysis regarding the potential reasons for the outcome of a conflicting jurisprudence. The analysis will go deeper into what could potentially explain the conflicting case law. Potential

prerequisites for the demonstrated different understandings of the crime as such will be analysed by entering a discussion of the often-complex relationship between the law as it ought to be (*lex feranda*) and the law as it is (*lex lata*), hence how this might have played a role when the Court reached its different conclusions in the different judgements. The question also draws upon whether forced marriage as a separate crime has reached the point of recognition as such, or whether there is a yearning gap for a more generally accepted method of correction, other than the jurisprudence from the SCSL.

The analysis is meant to spark a discussion as to whether there are other ways to go towards the goal of ending impunity for the practice of forced marriage. Another way could for example be to amend the ICC Statue by incorporating forced marriage as a distinct crime of crimes against humanity.

As the ICC "has the potential to be an especially powerful vehicle for norm expression"[6], meaning that its ruling has an impact on international criminal law as a whole, the so far delivered rulings of the ICC in the *Ongwen* case will be reviewed. This will be done in consideration of the Rome Statute of the International Criminal Court with the purpose to conclude whether these decisions conform to the analysis of the SCSL jurisprudence. Subsequently, an assessment of what path the ICC is likely to take will be provided. Notwithstanding what decision the ICC will deliver on forced marriage, it will most likely contribute to the understanding of the phenomenon and also the development of international criminal law.

1.3 Delimitations and scope

For the purpose of analysing how the SCSL dealt with incidents of forced marriage as a crime against humanity of 'other inhumane acts', or as a crime

[6] See M. deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M. Bergsmo (ed), Thematic Prosecution of International Sex Crimes (TOAEP, Beijing 2012) p. 33.

against humanity of sexual slavery, the thesis only covers the jurisprudence of the aforementioned conduct from the SCSL. For the same purpose, the thesis only focuses on the aforementioned crimes against humanity within the SCSL statute[7] framework, although the Rome Statute and case law of other international courts will be presented when needed for the purpose of the analysis.

Only the cases where incidents of forced marriage were charged as either a crime against humanity of 'other inhumane acts', or as a crime against humanity of sexual slavery will be covered in detail. Regarding this delimitation, the following trials and judgements of the SCSL will be covered: *Prosecutor* v. *Brima et al,*[8] also commonly referred to as the trial of the AFRC, both the Trial Chamber judgement and the Appeals Chamber judgement[9]; *Prosecutor* v. *Sesay,*[10] later commonly known as the RUF trial; and lastly the case of *Prosecutor* v. *Taylor*[11]. The judgements have been selected since they contain a discussion on forced marriage, not all judgements however led to final convictions of forced marriage. The case of *Prosecutor v. Fofana et al*[12]*,* also known as the trial of the CDF (Civil Defence Forces) is excluded since sexual violence was not part of the CDF Indictment. The Prosecutor attempted to amend the Indictment to include crimes of sexual violence but was denied.[13]

---

[7] See Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

[8] See Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment (Special Court for Sierra Leone June 20, 2007). Hereinafter, the AFRC Trial Chamber Judgement.

[9] See Prosecutor v. Brima, Case No. SCSL-04-16-A, Judgment, (Special Court for Sierra Leone Feb. 22, 2008). Hereinafter, the AFRC Appeals Judgement.

[10] See Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, (Special Court for Sierra Leone Mar. 2, 2009). Hereinafter, the AFRC Trial Chamber Judgement.

[11] See Prosecutor v. Taylor, Case No. SCSL-03-01-T-1283, Judgment, (Special Court for Sierra Leone May 18, 2012). Hereinafter, the Taylor Trial Chamber Judgement.

[12] See Prosecutor v. Fofana, Case No. SCSL-04-15-T, Judgment (Special Court for Sierra Leone Aug. 2, 2007).

[13] See Prosecutor v. Fofana, Case No. SCSL-04-15-T, Majority Decision on the Prosecution's Application for Leave to File and Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hunga Norma, Moinina Fofana, and Allieu Kondewa (Special Court for Sierra Leone Aug. 2,

The issue of forced marriage has also been considered by the Extraordinary Chambers of Cambodia (ECCC). However, because of the limited scope of the thesis, and because the delivered decisions in the Ongwen case before the ICC primarily have relied on the case law from the SCSL, the jurisprudence from the ECCC has been excluded from the research.

Furthermore, the thesis only focuses on the different categorisations of forced marriage within the scope of crimes against humanity. The conduct has been prosecuted for war crimes of 'outrages on personal dignity'[14] which will not be covered. This is because of the main purpose of the thesis, which is to explore the different reasoning behind the legal categorisation of forced marriage as a crime against humanity either as 'other inhumane acts' or as sexual slavery.

1.4 Research methodology

The thesis has resorted to legal dogmatic method that will seek to ascertain the legal validity of the propositions of law regarding incidents of forced marriage as a crime against humanity before primarily the SCSL but also the ICC. The thesis aims at describing the ways in which the law can deal with conflicting arguments and will primarily be limited to the judgements of the SCSL dealing with the categorisation of forced marriage. The judgements from the SCSL will be viewed in light of the relevant international criminal

2004); Prosecutor v. Fofana, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Amend the Indictment (Special Court for Sierra Leone May 20, 2004).

[14] See e.g. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶¶ 1154-1155 (Special Court for Sierra Leone Mar. 2, 2009), at ¶ 1298 - The Trial Chamber in RUF case found that the crime of 'forced marriage' along with rape and sexual slavery amounted to 'outrages on personal dignity'.

law rules including the SCSL Statute[15] and the SCSL Rules of Procedure and Evidence.[16]

In order to achieve the objectives of the legal research, relevant human rights instruments, including both binding and non-binding instruments, are used to draw a picture of how international law has handled the issue at hand. This is partly because international criminal law is heavily influenced and informed by human rights law, in particular when defining crimes against humanity.[17] Furthermore, the Rome Statute and its associated interpretation instruments also constitutes sources of the thesis that will be relied upon, along with the relevant case law.

For the benefit of the analysis, the interpretation of the case law by experts in the field in form of scholarly literature will also be considered in addition to the primary legal sources. Subsequently, when discussing potential causes to an inconsistent jurisprudence within the concept of the crime of forced marriage, the comprehensions of the crime by the SCSL will be contrasted with views from experts in the field.

1.5 Structure of the thesis

The thesis consists of five parts. Part I constitutes the introduction where primarily the research question and the purpose of this thesis are presented. The introduction covers the background, the research questions and their

[15] See Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002. Hereinafter, the SCSL Statute.
[16] See The Rules of Procedure and Evidence of the Special Court for Sierra Leone, first adopted by the Plenary of Judges on 16 January 2002 and subsequently amended on 7 March 2003; 1 August 2003; 30 October 2003; 14 March 2004; 29 May 2004; 14 May 2005; 13 May 2006; 24 November 2006; 14 May 2007; 19 November 2007; 27 May 2008; 28 May 2010; 16 November 2011; 31 May 2012. Rule 1 provides for their entry into force, effective from 12 April 2002.
[17] See Henriksen, Anders, *International law*, Oxford University Press, Oxford, 2017, p. 307.

associated issues, the purpose of the thesis, the delimitation and scope of the research in whole, and lastly the methodology and structure of the thesis.

Part II begins with an overview of the international treaties prohibiting forced marriage, followed by a brief historical background of the emergence of the criminal justice theme of sexual violence. Attention is then directed towards the incidents of sexual violence during the civil war in Sierra Leone. Part II ends with an introduction to the establishment of the SCSL followed by a description of the relevant crimes under the SCSL Statute, along with the elements of the relevant crimes.

Part III of the thesis will trace the development of forced marriage in the judgements before the SCSL. The judgements which will be covered are those that dealt with the crimes relevant to the research questions, which is how and why forced marriage was prosecuted both under the residual offence of crimes against humanity of 'other inhumane acts' (as a "new" international crime), and also as a crime against humanity of sexual slavery. This will be followed by an analysis of the identified different trends of legal reasoning.

In Part IV, the characteristics of the crimes and the legal reasoning provided by the SCSL Chambers in the different trials will be further analysed and an attempt will be made to explain why forced marriage was prosecuted under two different categories. Diverging approaches to the interpretation will be identified and explained. The main conclusions and arguments of each trend will be presented. This will be accompanied by attempts to explain how the Court reached their different conclusions. Potential prerequisites for the demonstrated different understandings of the crime as such will be analysed by entering the discussion of the often-complex relationship between the law as it ought to be (*lex feranda*) and the law as it is (*lex lata*), hence how this might have played a role in causing a conflicting case law. The last section of Part IV will review the Ongwen case before the ICC. This will be done since the Ongwen case offers ICC a chance to clarify and establish an interpretation of forced marriage.

A conclusion is then provided for in In Part V, depicting the findings of this research.

2 Prosecuting forced marriage

Part II starts with providing an overview of the international treaties prohibiting forced marriage, as international human rights law can be instrumental in defining international crimes, for example in the case of the crime of forced marriage.[18] Forced marriage as it has been considered an international crime, should not be equated with forced marriage as prohibited in international human rights law. However, the mere fact that international human rights law prohibits forced marriage can provide basis for identifying international customary law. Human rights law was used in that way subsequently by some of the SCSL Chambers.[19]

Part II then accounts for how sexual violence emerged as a criminal justice theme in the beginning of the 21st century. Attention then turns to the sexual violence that took place during the Sierra Leone conflict. Part II ends with a presentation of the SCSL Statute where the relevant crimes under the Statute will be outlined along with the associated interpretation instruments.

2.1 International treaties prohibiting forced marriage

Forced marriage as a crime against humanity has not been specified in any treaty provision nor recognised as a 'separate' crime by other international courts or tribunals except the SCSL. International treaties and conventions, however, prohibit marriage without the consent of the parties.

International law, in forms of treaties, agreements and customary law, have long protected family rights. The landmark Universal Declaration of Human

[18] See Henriksen (2017) p. 307.
[19] See e.g. AFRC Trial Judgement, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and 8 ('Forced Marriages'), paras. 63-67.

Rights (UDHR)[20], adopted by the United Nations General Assembly in 1948, set out a clear prohibition of forced marriage and explicitly stated that the marriage shall be entered into "only with the free and full consent of the intending spouses" and additionally, that the family is "the natural and fundamental group unit of society and is entitled to protection by society and the State", pursuant to article 16 of the UDHR.

Family life is further recognised as a fundamental right in international law in other major international instruments and conventions, such as the International Covenant on Civil and Political Rights (ICCPR)[21] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[22]:

Article 23(3) of the ICCPR states that:

> …No marriage shall be entered into without the free and full consent of the intending spouses.

Article 10(1) of the ICESCR states that:

> The States Parties to the present Covenant recognise that … Marriage must be entered into with the free consent of the intending spouses.

These provisions are joined by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[23] which in article 16(1)(b) provides that men and women must equally have "the same right freely to choose a spouse and to enter into marriage only with their free and full consent". Additionally, the Convention on Consent to Marriage,

[20] See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[21] See UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[22] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[23] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

Minimum Age for Marriage and Registration of Marriages[24] article 1(1) provides that "no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."

As the right to marriage is granted broad protection by international law which dictates the right to marriage without discrimination and with the distinct requirement of the free and full consent, forced marriage violates the independently recognised basic right to consensually marry.[25] It should be noted that these aforementioned international instruments forbid discrimination on the basis of sex in the implementation of the right to marriage.[26]

While forced marriage has been either explicitly or implicitly banned by all of these mentioned treaties, the latest dating back to 1948, the conduct has a very limited history of prosecution by international courts. Not until the Prosecutor at the SCSL charged the accused with forced marriage as another inhumane act as a crime against humanity, was the world's attention brought to whether forced marriage could constitute an international crime.

2.2 Sexual violence as a criminal justice theme

The focus of this thesis – forced marriage as a crime against humanity – needs to be placed in its context. Even though the SCSL Chambers disagrees whether the conduct of forced marriage is "predominantly a sexual crime" or not, it can safely be said that forced marriage contains sexual violence. This

[24] See UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962.
[25] See generally UDHR art. 16; ICCPR art. 23; CEDAW art. 16.
[26] See e.g. ICCPR art. 26.

derives from the fact that SCSL did not point to a single instance where the evidence revealed incidents of forced marriage without sexual violation of the victim.[27]

The recognition of sexual violence as serious crimes has not come without decades of frequent criticism towards the international legal system community for its male organizational and normative structure. Not until after a long period during which primarily men dominated the international legal field has the occurrence of gender-based crimes gained greater recognition.[28]

To start, sexual violence affects women and men in all countries, whether peaceful, fragile or undergoing armed conflicts. Sexual violence, in a broad definition, includes a variety of sexually harmful behaviours and the kind. The sexual violence that has been primarily on the agenda of the international criminal law regime, is when there has been a linkage between the sexual violence and a conflict or post-conflict context.[29] Victims of international sexual crimes perpetrated within an armed conflict or an authoritarian regime have frequently suffered extreme violence which may have been part of a campaign of terror and torture intended to degrade, intimidate and target specific sectors of the population.[30] In several conflicts, such as currently in the Democratic Republic of Congo or in Nigeria, sexual violence is used as a

[27] But see e.g. AFRC Appeals Judgement, paras. 703–714 - No SCSL Chamber pointed to a single instance where evidence revealed an incident of 'forced marriage' without sexual violation of the victim. See also Eboe-Osuji (2012), pp. 229 and 231.
[28] See e.g. Hilary Charlesworth, Christine Chinkin & Shelley Wright, Feminist Approaches to International Law, 85 No. 4 AM. J. INT'L L. 615, 615 (1991).; Beth Van Schaack, Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda, Santa Clara Law Digital Commons., 2008, at 1.; MARIE-BÉNÉDICTE DEMBOUR, INTERNATIONAL HUMAN RIGHTS LAW 41 (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran & D.J. Harris eds., 3rd ed. 2017) (Chapter 3: 'Critiques [in] international human rights law).
[29] See Estelle Zinsstag and Virgine Busck-Nielsen Claeys, 'Sexual Violence as an International Crime, the Restorative Paradigm and the Possibilities of a More Just Response' in M Bergsmo (ed), Thematic Prosecution of International Sex Crimes (TOAEP, Beijing 2018) pp. 501-502.
[30] Ibid.

strategical weapon of war intended to destroy the core of communities, livelihoods and families. [31]

Historically, the commission of rape and sexual violence in conflicts has been considered inevitable or trivialized. It is more recently that war codes and international conventions have tried to offer tools to strengthen safeguards against the specific form of sexual violence. During the Nuremberg trials, rape and some other sexual violence crimes were entered into the record but was excluded from the Nuremberg Indictment and Judgement.[32] The crimes which has been evident in historical and in current conflicts have only recently been acknowledged by international tribunals and courts as genocide, torture, and as crimes against humanity.

Over the past few decades, the international community has taken several concrete steps in response to a greater recognition of sexual and gender-based violence as serious crimes.

The United Nations (UN) Security Council unanimously adopted Resolution 1820 in 2008, recognising sexual violence as a tactic of warfare and also as a serious threat to international peace and security.[33] In 2010, the Security Council unanimously adopted another resolution, Resolution 1960.[34] Apart from noting that sexual violence during armed conflict remains systematic, rampant, and widespread, this resolution contributed to the creation of institutional tools to combat impunity. It outlines specific steps needed for both the prevention of and protection from sexual violence in conflict.[35] In the same year, the UN established the United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC) and appointed Margot Wallström as the first Special

[31] See Zinsstag and Busck-Nielsen Claeys (2018) p. 502.
[32] See Beth Van Schaack, Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda, Santa Clara Law Digital Commons., 2008, p. 14.
[33] See S.C. Res. 1820 (June 19, 2008).
[34] See S.C. Res. 1960 (December 16, 2010).
[35] Ibid.

Representative.[36] The establishment of this office was an important development in the fight against impunity for conflict-related sexual violence, as it strengthens the UN efforts in this area.

The Secretary-General of the UN, António Guterres, stated in the 2019 report on Conflict-related sexual violence, that since the year of 2010 there has been a "paradigm shift" in the world's understanding of the crime of sexual violence in conflict.[37] Having traditionally regarded sexual violence as a reproductive health or development issue[38], the international community has begun to embrace the concept of conflict-related sexual violence, according to Guterres.

The ICC Office of the Prosecutor (OTP) has made several official statements indicating that sexual violence crimes are prioritised by the OTP.[39] The fourth strategic goal in the OTP Strategic plan for 2019-2021 confirms an integration of a gender perspective in every field of the OTP's work.[40] The commitment by the OTP to preclude impunity for sexual violence crimes is also displayed in the Policy Paper on Sexual and Gender-Based Crimes from 2014.[41] The Policy Paper deals with numerous procedural and practical issues requiring unique consideration in relation to sexual and gender-based violence when for example dealing with protective measures, deciding the composition of investigation teams or sentencing criminals.

[36] See The UN, Secretary-General Appointments. (2010, January 2) Secretary-General Appoints Margot Wallström of Sweden as Special Representative on Sexual Violence in Conflict [Press release]. Retrieved from https://www.un.org/press/en/2010/sga1220.doc.htm

[37] See U.N. Secretary-General, Conflict-related sexual violence: Rep. of the Secretary-General, U.N. Doc. S/2019/2080 (March 29, 2019), pt. 2.

[38] See U.N. Secretary-General, Report of the Secretary-General on the implementation of Security Council resolutions 1820 (2008) and 1888 (2009), U.N. Doc. A/65/592*-S/2010/604* (Nov. 24, 2010), s. 6.

[39] See ICC OTP 'Strategic Plan June 2019-2021' (17 July 2019).

[40] Ibid. p. 5.

[41] See ICC OTP 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014).

The act of systematically abducting women and girls, raping them, forcing them to perform sexual services, domestic labour, undergo pregnancies and have children with rebels, combined with the constant threat of punishment or death for not complying with these circumstances, is known to be a common feature of conflicts. This was reality in Sierra Leone, but also in many other countries such as Rwanda and Uganda. As set out above, this thesis aims at analysing how the SCSL dealt with these incidents. Emphasis is placed on the inconsistent categorisations of forced marriage as a crime against humanity either as 'an other inhumane act', or as sexual slavery.

2.3 Sexual violence in the Sierra Leone Conflict

After the conviction of former Liberian president Charles Taylor before the SCSL, Prosecutor Brenda J. Hollis made a comment on the sexual violence that had plagued so many during the Sierra Leone Conflict:

> Sexual violence against women and girls was a key part of operations in Sierra Leone. Victims were savagely and repeatedly raped, and were then used as sex slaves, handed from owner to owner. The emotional and physical trauma suffered by these victims will continue for a lifetime.[42]

In this section of the thesis, a general account of the civil war and the sexual violence that took place during the conflict will be provided. While providing contextual information, it is acknowledged that this brief background will not successfully cover the complete sociocultural and historical context in which the events of the civil war in Sierra Leone unfolded.

[42] See the Special Court for Sierra Leone Office of the Prosecutor (Apr. 26, 2012) Prosecutor Hollis Hails the Historic Conviction of Charles Taylor [Press release]. Retrieved from http://www.rscsl.org/Documents/Press/OTP/prosecutor-042612.pdf

In 1961, Sierra Leone, a former British colony, became an independent State within the Commonwealth. After its independence and for most of the three next decades, Sierra Leone was governed by the All People's Congress (APC) who established a one-party State in 1978. Despite its rich natural resources, Sierra Leone experienced economic decline during the 1980s as a result of corruption and nepotism under the APC regime.[43] In 1984, frustration with government corruption and fiscal mismanagement led to the formation of the Revolutionary United Front (RUF) which aimed to overthrow the APC. The difficulties in the country were compounded in March 1991 when the armed fighters of the RUF attacked Sierra Leone from Liberia, triggering the civil war that was to last ten years.[44] The civil war was complex, featuring a number of armed groups which formed alliances with each other and also experienced internal divisions and fracturing.[45]

During the ten-year conflict in Sierra Leone, horrible crimes against civilians took place. There is consistent reliable evidence that rape and other forms of sexual violence were rampant throughout the civil war.[46] Disturbing reports of incidents by both rebel forces and government troops revealed the common occurrence of widespread rape and abduction of women and girls, subjecting them to repeated acts of rape and other forms of sexual violence and sexual slavery.[47] The Truth and Reconciliation Commission in Sierra Leone found that perpetrators singled out women and children for some of the most brutal violations of human rights recorded in any conflict.[48] Victims were as young as eight years old.[49] A common practice for rebels was to keep women and

[43] See generally Taylor Trial Judgement, paras. 19-20; BRITANNICA ACADEMIC ENCYCLOPEDIA, "SIERRA LEONE", academic-eb-com.ludwig.lub.lu.se/levels/collegiate/article/Sierra-Leone/110795 (last visited Aug. 5, 2019).
[44] Ibid.
[45] Ibid.
[46] See SIERRA LEONE TRUTH & RECONCILIATION REPORT, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION (vol. 2, 2004).
[47] See BRITANNICA ACADEMIC ENCYCLOPEDIA, "SIERRA LEONE" Retrieved from academic-eb-com.ludwig.lub.lu.se/levels/collegiate/article/Sierra-Leone/110795
[48] SIERRA LEONE TRUTH & RECONCILIATION REPORT, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION pp. 503-504 (vol. 2, 2004).
[49] Ibid.

girls subject to their control as sex slaves and to force conjugal relationships on women and girls who unwillingly became their "wives".[50]

Other violations that has been recorded included other forms of sexual violence, killings, forced pregnancy, enforced sterilisation, slave labour, amputations, torture, trafficking, mutilations and enforced cannibalism.[51]

[50] See e.g. the RUF Trial Judgement, para. 1465.

[51] SIERRA LEONE TRUTH & RECONCILIATION REPORT, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION (vol. 2, 2004), p. 497.

2.4 Relevant crimes under the SCSL Statute

The SCSL was established for the purpose of prosecuting persons who carried the greatest responsibility for the serious violations of international crimes committed in Sierra Leone.[52] The SCSL was set up in 2002 and was dissolved in 2013. The SCSL was an independent hybrid Court established under an Agreement between the United Nations and the Government of Sierra Leone pursuant to UN Security Council Resolution 1315 (2000) of 14 August 2000.[53] The Court was governed by its Statute[54] and by its Rules of Procedure and Evidence.[55]

The SCSL Statute empowered the SCSL to prosecute persons responsible for the commission of certain crimes against humanity; certain serious violations of article 3 Common to the 1949 Geneva Conventions on the Protection of War Victims and of the 1977 Additional Protocol II thereto; certain other serious violations of international humanitarian law; and certain crimes under Sierra Leonean law.[56]

The applicable laws of the SCSL were the following: the SCSL Statute, the Agreement of its establishment, the Rules of Procedure and Evidence[57], other

[52] See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002 pursuant to U.N. Doc. S/RES/1315 (2000); Article 1(1) of the Statute of the Special Court for Sierra Leone.
[53] See U.N. Doc. S/RES/1315 (2000).
[54] See UN Security Council Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.
[55] See the Rules of Procedure and Evidence of the Special Court for Sierra Leone, first adopted by the Plenary of Judges on 16 January 2002 and subsequently amended on 7 March 2003; 1 August 2003; 30 October 2003; 14 March 2004; 29 May 2004; 14 May 2005; 13 May 2006; 24 November 2006; 14 May 2007; 19 November 2007; 27 May 2008; 28 May 2010; 16 November 2011; 31 May 2012. Rule 1 provides for their entry into force, effective from 12 April 2002. Hereinafter, the Rules of Procedure and Evidence of the SCSL.
[56] See SCSL Statute Article 2-5.
[57] See the Rules of Procedure and Evidence of the SCSL.

applicable treaties and the principles and rules of international customary law and general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles were not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognised norms and standards.[58]

In this thesis, the judgements under review and analysis will be covered to the extent that they concern incidents of forced marriage and crimes against humanity punishable under article 2 of the SCSL Statute;

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Article 2 of the Statute is entitled 'Crimes against humanity' and provides as follows:

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

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.

[58] See Rule 72bis, Rules of Procedure and Evidence of the SCSL.

Primarily relevant for the thesis at hand is the crime of sexual slavery in article 2(g) and of 'other inhumane acts', pursuant to article 2(i). The elements of those crimes in addition to the chapeau requirements for crimes against humanity pursuant to article 2 of the SCSL Statute are clarified in the following.

In order for liability to be established under article 2 of the Statute, the acts of the accused must have formed part of a widespread of systematic attack against any civilian population. Article 2 of the Statute differs from provision in the Rome Statute, the governing statute of ICC, as it does not specifically require the perpetrator's "knowledge of the attack" (unlike its ICC counterpart).[59] The five *chapeau* requirements for crimes against humanity pursuant to article 2 of the SCSL Statute are as follows:

a. There must be an attack
b. The attack must be widespread or systematic
c. The attack must be directed against any civilian population
d. The acts of the perpetrator must be part of the attack
e. The perpetrator must have knowledge that his acts constitute part of a widespread or systematic attack directed against a civilian population[60]

With regards to the research questions, the thesis will refrain from entering any details about the SCSL Chamber's reasonings of the *chapeau* requirements for crimes against humanity, which in all judgements covered in this thesis were found to have been present.[61]

[59] See the AFRC Trial Judgement, para. 212. See also the Rome Statute, article 7.
[60] See Decisions on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 'Rule 98 Decision', para. 42. Case No. SCSL-04-16-T. 31 March 2006.
[61] See e.g. RUF Trial Judgement, para. 942.

Crime against humanity of sexual slavery, article 2 (g) of the SCSL Statute

Sexual slavery is a particular form of enslavement which includes limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity.[62] It is partly based on the definition of enslavement identified as customary international law by the ICTY in the Kunarac case.[63]

Sexual slavery is thus considered a form of enslavement with a sexual component.[64] Its definition includes the exercise of any or all of the powers attached 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". The person should have been made to engage in acts of a sexual nature.[65] In contrast to the crime of rape, which is a completed offence, sexual slavery constitutes a continuing offence.[66]

In addition to the *chapeau* requirements of crimes against humanity pursuant to article 2 of the Statute, the elements listed below constitutes the crime of sexual slavery and must be proved beyond reasonable doubt. The Chambers of the AFRC case, the RUF case and the Taylor case presented a united approach in the determination of the elements of the crime of sexual slavery,

[62] See Maria Sjöholm, "Article 7(1)(g)-2", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute.
[63] See *Prosecutor v Kunarac, Kovac and Vukovic*, (Case No. IT-96-23), ICTY T. Ch., 22 February 2001, para. 543; Maria Sjöholm, "Article 7(1)(g)-2", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute.
[64] See Maria Sjöholm, "Article 7(1)(g)-2", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute.
[65] Ibid.
[66] Ibid.

albeit in slightly different wording, based on its interpretation on the Elements of Crimes of the ICC Statute.[67]

Elements sexual slavery:

a. 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.
b. The perpetrator caused such person or persons to engage in one or more acts of sexual nature;
c. 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.

The first two elements, representing the *actus reus,* are based on those for sexual slavery in the ICC's Elements of Crimes document.[68] The first element is that the Accused exercised any or all of the powers attaching to the right of ownership of a person or persons (the slavery element) and the second, that the enslavement involved sexual acts (the sexual element).[69] The *mens rea* for the violations consists in the intentional exercise of any or all of the powers attaching to the right of ownership over the victim.[70]

Crime against humanity of other inhumane acts, article 2(i) of the SCSL Statute

The crimes of other inhumane acts are linked with the other crimes against humanity, pursuant to the similarity requirement. A residual provision of this

[67] See Taylor Trial Judgement, para. 418; RUF Trial Judgement, para. 158; AFRC Trial Judgement, para. 708. See also Supplement A. See also Rome Statute Elements of Crimes, Article 7(1)(g).
[68] See Rome Statute Elements of Crimes, Article 7(1)(g).
[69] See Kunarac et al. Trial Judgement, para. 540; Taylor Trial Judgement, para. 419.
[70] See Kunarac et al. Appeals Judgement, para 122.

kind, indicating that the list of expressly named acts is not exhaustive, were included in the ICTY and ICTR Statutes and also in the Nuremberg Charter.[71] The reason behind the provision is that the drafters sought to achieve a more precise definition and thereby consistency with the principle of *nullum crimen sine lege*. In the case *Prosecutor v. Katanga and Ngudjolo* before the ICC, the Pre-Trial Chamber referred to the principle of *nullum crimen sine lege* in relation to Art 7(1)(k) of the Rome Statute and clarified that none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) of the Rome Statute, could concurrently be considered as an 'other inhumane act'.[72] In determining whether a particular act meets these requirements, considerations are given to all the factual circumstances.[73]

The notion of 'other inhumane acts' contained in article 2(i) of the SCSL Statute forms part of customary international law.[74] The Chambers of the AFRC case, the RUF case and the Taylor case presented a united approach in the determination of the elements of the crime of other inhumane acts albeit in slightly different wording, based on the Rome Statute article 7(1)(k) and the Elements of Crimes.[75] In addition to the chapeau requirements of crimes against humanity pursuant to article 2 of the SCSL Statute, the following elements of the crime of other inhumane acts were adopted:

a. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
b. The act was of a gravity similar to the acts referred to in article 2(a) to (h) of the Statute; and

---

[71] See Jonas Nilsson, "Article 7(1)(k)", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute.
[72] See Jonas Nilsson, "Article 7(1)(k)", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC PT. Ch. I, ICC-01/04-01/07-717, 30 September 2008, para. 452.
[73] Ibid.
[74] See AFRC Appeals Trial Judgement, para. 198.
[75] See AFRC Trial Judgement, para. 698; AFRC Appeals Judgement, para. 198; RUF Trial Judgement, para. 168; Taylor case, para. 711. See also the Rome Statute Elements of Crimes, Article 7(1)(k).

c. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act.[76]

The provision in article 2(i) of the SCSL Statute constitutes a balancing act between the necessity of not formulating an exhaustive list of acts that constitute crimes against humanity, and at the same time securing the consistency with the principle of *nullum crimen sine lege.*[77] According to the Commentary on the Law of the International Criminal Court (CLICC) one author has expressed that "the capacity of human beings to conduct novel forms of atrocity is a constant source of discomfort and shame and it is critical that provisions exist to facilitate prosecution of such actions not currently known or experienced".[78]

[76] See e.g. AFRC TC, para. 698.
[77] See Jonas Nilsson, "Article 7(1)(k)", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute.
[78] Ibid.

3 FORCED MARRIAGE AT THE SCSL

Part III will trace forced marriage as a crime in the SCSL judgements which handled the crimes relevant to the first research question: How were incidents of forced marriage charged before the SCSL and how was the issue discussed by the SCSL at the different trials? What arguments were used by the Court for potentially convicting the accused on the charge of forced marriage as either a crime against humanity of 'other inhumane acts' (as a "new" international crime), or as a crime against humanity of sexual slavery? In order to address these questions, the relevant judgements are examined followed by an analysis of the identified different trends of legal reasoning at the different trials. The judgements that will be examined are selected based on their inclusion of a conviction and/or a discussion on forced marriage as either an 'other inhumane act' or sexual slavery.

When forced marriage as an international crime was first brought to the SCSL's attention, the Prosecutor in the Indictment had charged the Accused with the crime of 'other inhumane acts' pursuant to article 2(i) of the SCSL Statute for acts of "forced marriage".[79] The Trial Chamber in the AFRC case, which was the first to be handling the phenomenon of forced marriage, had to decide whether it fell under the definition of 'other inhumane acts' or if it fell under the definition of sexual slavery. This would prove not to be such an easy task.

At the first trial, the Trial Chamber in the AFRC case decided that the phenomenon of forced marriage was subsumed within the crime of sexual slavery. The Appeals Chamber in the AFRC case, however, came to a

[79] See AFRC Trial Judgement, para. 6.

different conclusion and pronounced the new crime of forced marriage to be tried under the residual offence of 'other inhumane acts'.[80]

In the second trial before the SCSL, in the RUF case, the Trial Chamber took the view of the AFRC Appeals Chamber and convicted the accused of 'forced marriage' as another inhumane act, but also as sexual slavery.[81]

Later on at the last trial, the Trial Chamber in the Taylor case revisited the interpretation of the AFRC Trial Chamber and convicted the accused only of sexual slavery, dismissed the existence of a crime of forced marriage as another inhumane act, and renamed the phenomenon of forced marriage to 'conjugal slavery'.[82]

This unsettled nature of the jurisprudence has led to inconsistencies in the legal characterisation of forced marriage. A more detailed account of the Chamber's reasoning in the different cases is provided for in the following.

3.1 *AFRC Trial*, the Trial Chamber judgement

On 20 June 2007 the Trial Chamber of the SCSL provided one of the most substantial rulings on 'forced marriage' to date. The ruling on 'forced marriage' would later be reversed at the Appeals Chamber, but the judgement of the Trial Chamber provides an insight to the initial view on the crime and also paved way for the later findings of the Taylor trial.

In the case of the *Prosecutor v. Brima et al,*[83]also commonly referred to as the trial of the AFRC (Armed Forces Revolutionary Council), the SCSL

[80] See AFRC Appeals Judgement, paras. 190-195.
[81] See RUF Trial Judgement, paras. 728-741.
[82] See Taylor Trial Judgement, paras. 427-430.
[83] See AFRC Trial Judgement.

prosecuted a joint case against senior members of the AFRC: Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, for a multitude of international crimes committed during the Sierra Leone conflict. The Indictment comprised of 14 counts, whereas in Count 8, the Prosecution charged the Accused with the crime of 'other inhumane acts' pursuant to article 2(i) of the Statute for "acts of forced marriage".[84]

The Trial Chamber explained that in order for 'forced marriage' to amount to a crime against humanity under the residual category of 'other inhumane acts', the crime must not be otherwise defined in the Statute.[85] The Trial Chamber was not satisfied that the evidence presented by the Prosecutor established the elements of a non-sexual crime of "forced marriage" independent of the crime of sexual slavery under article 2(g) of the Statue.[86] Therefore, since the crime was found elsewhere, the crime could not be charged as a crime against humanity under the residual category of 'other inhumane acts'.

The Trial Chamber submitted that sexual slavery was a specific form of slavery and that the prohibition against sexual slavery is a *jus cogens* prohibition in the same manner as slavery for the purpose of physical labour.[87] The Chamber referred to the *Kunarc* case (ICTY) where the accused was convicted of enslavement as a crime against humanity for holding girls in slavery-like conditions for the purpose of sex.[88]

---

[84] See AFRC Trial Judgement, para. 6.
[85] Ibid, para. 703.
[86] Ibid, para. 704.
[87] Ibid, para. 705.
[88] See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001 - The Prosecution in the Kunarac case grouped charges of enslavement and rape as crimes against humanity together and a conviction was entered for enslavement as a crime against humanity involving rape, treatment of girls as private property and forced performance of household chores: Kunarac Trial Judgement paras 542, 543, 728; AFRC Trial Judgement, para. 705.

Although egregious, the crime alleged by the Prosecution was not distinguishable from that of sexual slavery. As the so called "marriage" were bogus, the conduct committed within the confines of the "marriage" were that of sexual slavery, which did not constitute an independent crime.[89] The Trial Chamber made this determination partly based on that the victims did not claim that they had suffered any distinct trauma than that of sexual slavery from being a rebels "wife". Even if they had suffered additional harm, it would not be sufficient enough to amount to the necessary gravity to justify a potential separate crime against humanity.[90]

The Trial Chamber focused on ownership – the distinguishing element of sexual slavery. It found that the totality of the evidence presented by the Prosecution as proof of "forced marriage" established the elements of sexual slavery. The evidence showed that the relationship between the perpetrator and their so called "wives" was one of ownership, which involved the exercised control by the perpetrator over the victim.[91]

The Chamber awarded less importance to the status of the so called "marriage" and to the husband-wife-relationship. This would the upcoming judgement of the Appeals Chamber go against. The Trial Chamber argued that the term "wife" was 'indicative of the *intent* of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband-wife-relationship. In support of reducing the significance of the epithet "marriage" and "wife", the Trial Chamber referred to the absent evidence that any of the women who were taken as "wives" stayed on with their rebel "husbands" following the end of hostilities.[92] This would imply that neither the witnesses seemed to have put decisive weight to the slave-like relationship they had been forced to endure. In other words, the term 'wife' did not lead to any additional inhumane act, beyond that of sexual

[89] See AFRC Trial Judgement, para. 710.
[90] Ibid.
[91] Ibid, para. 711.
[92] Ibid, para. 712.

slavery.[93] Even if it did, it would not be of the same gravity compared to the other crimes against humanity – constituting one of the elements of the crime of another inhumane act.[94]

With these considerations, the Trial Chamber held that the evidence was completely subsumed by the crime of sexual slavery and that there was no lacuna in the law which would necessitate a separate crime of 'forced marriage' as an 'other inhumane act'.[95] Count 8 was found by a majority (Justice Doherty dissenting) of the Court to be redundant insofar as the crime of sexual slavery would be dealt with under another Count. Count 8: other inhumane acts of 'forced marriage' was therefore dismissed.[96]

Dissenting opinion Justice Doherty

Justice Doherty dissented from the majority decision that held that the evidence of forced marriage was completely subsumed by the crime of sexual slavery, which had led the Trial Chamber to dismiss Count 8 for redundancy.[97] The majority decision had not dealt properly with whether 'forced marriage' is of sufficient gravity to meet the requirements of an 'other inhumane act', according to Doherty.

Justice Doherty held that the women who were subjected to 'forced marriage' were subjected to more than the sexual violence that the crime of sexual slavery entailed, as they were also obligated to carry the status of "wife" and perform household tasks for their "husbands" such as carrying their supplies, cooking for them, and other obligations typical of traditional marriages.[98] The intent of the "husband" was, rather than ownership, to oblige the victim to work and care for him and his property, to fulfil his sexual needs, remain

[93] See AFRC Trial Judgement, para. 710.
[94] Ibid.
[95] Ibid, para. 713.
[96] Ibid, para. 714.
[97] See AFRC Trial Judgement, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and 8 ('Forced Marriages'), (June 20, 2007), paras. 14-15.
[98] Ibid, para. 49.

faithful and loyal to him and to bear children.[99] The phenomenon should therefore be distinguished from sexual slavery. [100]

Justice Doherty called upon the societal implications that were forced upon the women who were forced in to these marriages, and how the victims were not provided with any choice but rather a means for survival which had consequences of forced pregnancies, miscarriages, and sexual health issues such as becoming HIV positive.[101]

Justice Doherty also argued that the forced marriage phenomenon transgresses the internationally accepted conventions that both parties must consent to a marriage.[102]

Justice Doherty recalled statements by witnesses which established that also post-conflict, these women continually suffered from holding these positions.[103] Upon returning home, many women and girls were faced with stigmatisation from their communities thinking they were prone to "rebel behaviour", based on their former experience.[104] In some cases, women were rejected from communities and/or families, prolonging their mental trauma.[105] The act of forced marriage should therefore be considered of similar gravity and nature to the other enumerated crimes against humanity.[106]

In summary, Doherty held that the act of forced marriage is distinguished from sexual slavery and of similar gravity and nature to the other enumerated

[99] See AFRC Trial Judgement, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and 8 ('Forced Marriages'), (June 20, 2007), para. 49.
[100] Ibid, para. 50.
[101] Ibid, para. 30.
[102] Ibid, para. 71.
[103] Ibid, para. 30.
[104] Ibid, paras. 33 and 49.
[105] Ibid.
[106] Ibid, paras. 55-57.

crimes against humanity.[107] Therefore, she held that forced marriage constitutes the crime of 'other inhumane acts' of crimes against humanity.[108]

3.2 *AFRC Trial*, the Appeals Chamber judgement

The Prosecution brought the deletion of Count 8 (forced marriage as another inhumane act) for redundancy up on Appeal. The Appeals Chamber in the AFRC case reached a different conclusion than the Trial Chamber.

The Appeals Chamber recalled that the Trial Chamber had found that article 2(i) of the SCSL Statute (other inhumane acts) must be restrictively interpreted to exclude crimes of a sexual nature. This was because article 2(g) of the Statute (rape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*) did "exhaustively" enumerate sexual crimes. The Trial Chamber had held that, as the Prosecutor did not show that forced marriage was a non-sexual crime, there was no necessity to create a separate crime of forced marriage as another inhumane act.[109] According to the Appeals Chamber, the Trial Chamber had erred in law on this issue.[110]

The Appeals Chamber began with founding that the Trial Chamber did err as a matter of law in holding that the list in article 2(g) was exhaustive and that other crimes which have a sexual and gendered component therefore could not be charged under article 2(i) (other inhumane acts).[111] Hence, crimes with a sexual and gendered component could be charged as 'other inhumane acts'. As the victims also had to preform non-sexual acts, they suffered additional harm (loyalty to exclusive husband, stigma of being a 'rebel wife' and

[107] See AFRC Trial Judgement, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and 8 ('Forced Marriages'), (June 20, 2007), paras. 55-57.
[108] Ibid, paras. 71 and 54.
[109] See AFRC Appeals Judgement, paras. 175-176.
[110] Ibid, para. 187.
[111] Ibid.

conjugal duties).[112] Forced marriage cannot thereby be handled as completely covered by the crime sexual slavery. The subsequent trauma suffered by victims was part of the justification of the categorisation of the crime as another inhumane act.

The Appeals Chamber argued that despite there being an overlap between sexual slavery and forced marriage, such as non-consensual sex and deprivation of liberty, distinctions are present which highlights that forced marriage is not predominantly a sexual crime.[113] Firstly, the Chamber pointed to the fact that ‘‘forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim.’[114] This reflects an element of the crime ‘other inhumane acts’. Secondly, the Chamber pointed to that ‘unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement.’[115] A significant importance was thus placed on the “exclusivity” of the sexual relationship between the perpetrator and the victim, which was proof of marriage.

The Appeals Chamber provided its definition of forced marriage:

> forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.[116]

[112] See AFRC Appeals Judgement, paras. 169-203.
[113] Ibid, paras. 194-195.
[114] Ibid.
[115] Ibid.
[116] Ibid. para. 196.

The Appeals Chamber concluded that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator is responsible for the employment of words or other conduct to compel a person by force, threat of force, or coercion to serve as a conjugal partner in a manner that results in severe physical or psychological injury to the victim.[117]

The Appeals Chamber reversed the Trial Chambers ruling on 'forced marriage'. It found that forced marriage is a crime against humanity that fits under the heading of 'other inhumane acts' and convicted the Accused for the crime.[118]

3.3 *RUF Trial*, the Trial Chamber judgement

The second trial before the SCSL was *Prosecutor v. Sesay, Kallon, and Gbao*, later commonly known as the RUF (Revolutionary United Front) case.[119] The three Accused were leaders of the RUF during the Sierra Leone conflict.[120] One of the many charges the three Accused were faced with, was the charge of 'forced marriage' as a crime against humanity, in Count 8.[121] Sexual Slavery was conferred in Count 7.[122]

The witness testimonies provided by the Prosecution established that fighters kidnapped and abducted women and girls from their villages or along the side of the road to forcibly become the "wives" to rebel fighters on multiple occasions.[123] In these forced marriages, the women and girls were obligated to provide domestic services to the fighters such as cooking and housework,

[117] See AFRC Appeals Judgement, paras. 196.
[118] Ibid, paras. 197-203.
[119] See RUF Trial Judgement.
[120] Ibid, para. 4.
[121] Ibid, para. 164.
[122] Ibid.
[123] Ibid, paras. 1154-1155.

and were also simultaneously subject to sexual violence to fulfil the sexual needs of their captors.[124] The victims were forced to be subjected not only to sexual violence but also to such domestic association that was mentally and physically traumatic for the victims. One of the witnesses provided a testimony which concerned the helpless environment the women were placed in by emphasising that these conjugal associations were without choice and that women had no option but to become wives, as they had no leverage to negotiate and "could not escape for fear of being killed."[125]

In the RUF Trial judgement, the legal findings are divided into sections depending on the geographical district were the crimes took place. Under each heading of relevant geographical place, 'forced marriage' (Count 8) and sexual slavery (Count 7) are handled *in conjunction* by the Chamber. This could be seen as an indication of that the Chamber did not attempt to make any clear distinctions between sexual slavery and forced marriage.

The Trial Chamber found that women and girls had been subjected to sexual slavery and 'forced marriage' in the Kono District, the Kailahun District and in Freetown and the Western Area, as charged under Counts 7 and 8 of the indictment.[126] The incidences of forced marriage in these aforementioned districts were used to establish *both* the elements of sexual slavery and the elements of forced marriage as another inhumane act.

The first district that concerned Count 8 ('other inhumane acts') was the Kono District. The Trial Chamber contended that the rebel's actions of capturing women and taking them as wives satisfied "the *actus reus* of 'forced marriage,' namely the imposition of a forced conjugal association."[127] The Chamber further noted that the conjugal association forced upon the victims carried with it a lasting social stigma "which hampers their recovery and

[124] See RUF Trial Judgement, para. 1155.
[125] Ibid, paras. 1410-1412.
[126] Ibid, paras. 1291-1297; 1465-1473 and 1579-1582.
[127] Ibid, para. 1295.

reintegration into society" – which should be seen as an additional suffering compared to the common stemming from forced intercourse.[128] The Chamber emphasised the impact of the 'forced marriage' title, referring to a long-lasting stigmatisation, which made it a unique crime which did not constitute just sexual enslavement.[129] The holding in the RUF case acknowledged that forced marriage was a "pattern of conduct" of the RUF.[130] The Trial Chamber acknowledged that this method was used to instil fear while acting with the knowledge that this would cause psychological and physical harm to victims.[131]

The perpetrators' actions of forced marriage inflicted great suffering and serious injury to body or to mental or physical health of the victims, thereby satisfying the central element of 'other inhumane acts'.[132] The Chamber also found that the perpetrators were aware of the gravity of their actions.[133] The Chamber thereby ruled that the acts of forced marriage constituted inhumane acts as charged in Count 8.[134]

In relation to Count 7 (sexual slavery), the Chamber concluded that women who were forced into conjugal relationships and forced to engage in sexual intercourse and perform domestic chores with fear of violent retribution if they were to escape – had been subjected to sexual slavery. The 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.[135] Accordingly, the elements of sexual slavery were fulfilled and the Chamber concluded that also the crime of sexual slavery had been committed.

[128] See RUF Trial Judgement, para. 1296.
[129] Ibid, para. 248.
[130] Ibid.
[131] Ibid.
[132] Ibid, paras. 1295-1297.
[133] Ibid.
[134] Ibid, para. 1297.
[135] Ibid, para. 1294.

The factual findings and the legal findings concerning the sexual crimes of forced marriage and of sexual slavery in the Kono District, was nearly identical to findings concerning the crimes committed in the Kailahun District and in Freetown and the Western Area.[136]

In the RUF case trial judgement, the acts attributed to the perpetrators and the associated evidence of forced marriage and sexual slavery were conflated. Concerning the legal findings regarding the sexual crimes in the Kailahun District, the Chamber formulated its conclusion as follows: "all the elements of sexual slavery and of 'forced marriage' as an 'other inhumane act' have been established [and] women were subjected to sexual slavery and 'forced marriage' in Kailahun District, as charged under Counts 7 and 8 of the Indictment."[137] Note that the Chamber is not conclusively defining the crime of forced marriage. It is rather introducing the possibility that forced marriage could be prosecuted under several different categories under international law.

The Trial Chamber in the RUF case handled forced marriage as another inhumane acts in conjunction with sexual slavery. [138] The Chamber took the view of the AFRC Appeals Chamber in terms of convicting the accused of 'forced marriage' as another inhumane act, but also held that the crime of sexual slavery had been committed by relying on the evidence of the occurrences of forced marriage.[139]

In summary, the Trial Chamber relied on incidents of forced marriage in its conviction of the Accused for crimes of forced marriage as another inhumane act and also of sexual slavery.[140] It did so without providing a distinction to

[136] Cf. RUF Trial Judgement, paras. 1291-1297; 1465-1473 and 1579-1582.
[137] See RUF Trial Judgement, para. 1473.
[138] See e.g. RUF Trial Judgement, paras. 1291-1297 and 1579-1582.
[139] See RUF Trial Judgement, paras. 1292-95 and 1581.
[140] Ibid, paras. 1291-1297; 1465-1473 and 1579-1582. See also Bunting, A. and Ikhimiukor, I. K. (2018) 'The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law', International Criminal Law Review, 18(2), p. 342.

which facts were being provided in support of each count.[141] Thus, one of the key points of the RUF case was that 'forced marriage' could be charged distinctly as another inhumane act *and* alongside sexual slavery.

3.4 Charles Taylor *case*, the Trial Chamber judgement

The case of *Prosecutor* v. *Charles Taylor*[142] against the former president of Liberia, was the last case to be heard by the SCSL. The judgement benefitted from the previous legal analysis undertaken in the former cases which allowed the Trial Chamber the opportunity to confirm, expand, and clarify international criminal law on the allegedly committed crimes.[143]

On 26 of April 2012, after four years of hearings, Trial Chamber of the SCSL rendered the final judgement.[144] Charles Taylor was convicted of aiding and abetting and planning crimes against humanity and war crimes and accordingly sentenced to fifty years in prison.[145] He was the first conviction of a former Head of State by an international criminal tribunal since the Nuremburg trials in 1946.[146]

The Accused was the President of Liberia from August 1997 to August 2003. He resigned from Presidential office due to the political pressure following

[141] See RUF Trial Judgement, paras. 1291-1297; 1465-1473 and 1579-1582. See also Bunting, A. and Ikhimiukor, I. K. (2018) 'The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law', International Criminal Law Review, 18(2), p. 342.
[142] See Taylor Trial Judgement.
[143] See also Valerie Oosterveld, Gender and the Charles Taylor Case at the Special Court for Sierra Leone, 19 WM & MARY J. WOMEN & L. 7, 10 (2012).
[144] See Taylor Trial Judgement.
[145] See Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Chamber II, Sentencing Judgement, 40 (May 30, 2012).
[146] See the Special Court for Sierra Leone Office of the Prosecutor (Apr. 26, 2012) Prosecutor Hollis Hails the Historic Conviction of Charles Taylor [Press release]. Retrieved from http://www.rscsl.org/Documents/Press/OTP/prosecutor-042612.pdf

the unsealing of his Indictment and Warrant of Arrest on 4 June 2003 by the SCSL.[147] As President of Liberia and as leader of the NPFL (National Patriotic Front of Liberia), the Accused was alleged to have acted in collusion with members of rebel groups such as the RUF, the AFRC and the AFRC/RUF Junta in Sierra Leone, terrorising the civilian population.[148]

The Indictment comprised of 11 counts, out of which three counts concerned sexual violence.[149] Unlike in the AFRC case and the RUF case, 'forced marriage' was not charged in the Indictment.[150] Incidents of forced marriage was however used as evidence under the charges relating to Sexual Violence. The Trial Chamber in the Taylor case decided to consider the incidents of forced marriage as such, in line with the Indictment as abducted by the Prosecution.[151]

Sexual violence was charged under counts 4, 5 and 6. Count 5 charged the Accused with sexual slavery as a crime against humanity, punishable under article 2(g) of the Statute. The crime against humanity of 'other inhumane acts' constituted crimes of *physical* violence (e.g. beatings and amputations) and was charged under Count 8 in the Indictment.[152]

Concerning the factual and legal findings on the alleged crimes of sexual slavery under Count 5, the Trial Chamber found that each of the aforementioned crimes in the Kailahun District, the Kono District, Freetown and the Western Area had been committed.[153] The perpetrators had intentionally exercised powers of ownership over their victims by depriving them of their liberty, and in some cases forcing them to work. In all cases the

[147] See Taylor Trial Judgement, para. 9.
[148] Ibid, paras. 12-13.
[149] Ibid.
[150] See Prosecution's Second Amended Indictment, Prosecutor v Taylor, SCSL-03-01-PT (29 May 2007); Taylor Trial Judgement, para. 12.
[151] See Taylor Trial Judgement, para. 422.
[152] See Prosecution's Second Amended Indictment, Prosecutor v Taylor, SCSL-03-01-PT (29 May 2007).
[153] See Taylor Trial Judgement, paras. 422, 1075, 1146, 1191.

victims were forced to engage in acts of a sexual nature, thus the crime of sexual slavery pursuant to article 2(g) of the Statute had been committed.[154]

When the Trial Chamber considered sexual slavery, it also discussed the phenomenon of 'forced marriage'. The evidence presented by the Prosecution under the charge of sexual slavery included extensive testimony by women and girls concerning forced conjugal association to which they had been subjected. Since the Trial Chamber was considering evidence of forced marriage, albeit as proof of sexual slavery, it took the opportunity to express its views on forced marriage.[155]

The Trial Chamber discussed the linkages between sexual slavery and 'forced marriage' that had been expressed in the former AFRC and RUF cases. In these cases, the Prosecutor had covered the "bush wife" phenomenon by charging the crime of 'forced marriage' under the crime against humanity of 'other inhumane acts'. The Trial Chamber in Taylor expressly held that the Prosecution had been wrong when it in earlier cases had charged 'forced marriage' as a crime that fell within the scope of other inhumane acts. It indirectly claimed that the Prosecution in the Taylor case thereby was right not to include "forced marriage" as another inhumane act in current Indictment.[156]

According to the Trial Chamber, the term 'forced marriage' was a misnomer for the forced conjugal association that was imposed on women and girls in the circumstances of armed conflict, as there was no actual marriage.[157] The Trial Chamber did not consider the nomenclature of "marriage" to be helpful in describing what happened to the victims of this forced conjugal association and found it inappropriate to refer to their perpetrators as "husbands".[158]

---

[154] See Taylor Trial Judgement, paras.1073, 1144, 1190.
[155] Ibid, para. 424.
[156] Ibid, paras. 424-426.
[157] Ibid.
[158] Ibid.

The conjugal associations that had been forced upon women and girls in Sierra Leone was not marriage in the universally understood sense – and should rather be considered a conjugal form of enslavement.[159] The Trial Chamber further noted that all forms of forced marriage violate human rights under international law, and that the abuses perpetrated on women and girls in this context was clearly criminal in nature.[160]

The Chamber proposed the term "conjugal slavery" instead of "forced marriage" as it best described the incidents – and while they may constitute more than sexual slavery, such as forced labour, they nevertheless satisfy the elements of sexual slavery.[161]

By splitting the classification of what had previously been termed 'forced marriage' into evidence of the existing crimes of sexual slavery and enslavement, the Trial Chamber satisfied the critique that the term of 'forced marriage' referred to "marriage" while yet no marriage as defined by international human rights law or domestic Sierra Leonean law existed.[162]

The indicators of enslavement concerning the so-called forced marriage were clear, according to the Trial Chamber, as the perpetrator exercised the powers attached to the right of ownership over their "bush wives" and imposed on them a deprivation of liberty. The Chamber emphasised that both sexual acts and non-sexual acts fall within the definition of enslavement.[163] It further noted that, with respect to ownership, there is no differentiation between the forced sexual and non-sexual acts described.

In light of the above considerations, the Trial Chamber argued that conjugal slavery is better conceptualised as a distinctive form of the crime of sexual slavery. The Trial Chamber was of the view that the additional component of

[159] See Taylor Trial Judgement, para. 427.
[160] Ibid, para. 427.
[161] Ibid, paras. 425 and 428.
[162] See also Valerie Oosterveld, Gender and the Charles Taylor Case at the Special Court for Sierra Leone, 19 WM. & MARY J. WOMEN L.7 (2012), p. 21.
[163] See Taylor Trial Judgement, para. 427.

forced conjugal *labour*, is simply a descriptive component of a distinctive form of sexual slavery. It is not a definitional element of a new crime, in the same way that gang rape is a distinctive form of rape, yet nevertheless falls within the scope of the crime of rape.[164] The intent of the Trial Chamber was not to conceptualise a new crime, establishing additional elements, but merely to capture the distinctive form of sexual enslavement under the correct heading.[165]

Conjugal slavery is not a new crime with additional elements – unlike how the concept of "forced marriage" was presented by the Prosecution in the AFRC and other cases before SCSL. Rather it is a practice with certain additional and distinctive f*eatures* that relate to the conjugal aspects of the relationship between the perpetrator and the victim, such as the claim by the perpetrator to a particular victim as his "wife" and the exercise of exclusive sexual control over her, barring others from sexual access to the victim, as well as the compulsion of the victim to perform domestic work such as cooking and cleaning. In the Trial Chamber's view, these were not new elements that require the conceptualization of a new crime.[166]

The Trial Chamber in the *Taylor* judgement added detail to the different forms of sexual slavery. The significance of the *Taylor* case was that it turned away from 'forced marriage' to conjugal slavery - a combination of forced labour and sexual violence, involving acts that may constitute more than sexual slavery, but nevertheless satisfied the elements of sexual slavery.[167]

[164] See Taylor Trial Judgement, para. 429.
[165] Ibid, paras. 429-430.
[166] Ibid, para. 430.
[167] Ibid, para. 428.

4 Forced marriage, a distinct crime against humanity?

This part of the thesis takes on the second research question. In order to answer the question: *Why* were incidents of forced marriage before the SCSL prosecuted both under the residual offence of crimes against humanity of 'other inhumane acts' (as a "new" international crime), and *also* as crimes against humanity of sexual slavery, the fourth part is devoted to an analysis of potential reasons for this. As a first step, two diverging approaches of the interpretations by the SCSL Chambers will be identified and explained, along with a presentation of the main arguments of each trend.

As a second step in Part IV, the thesis will go deeper into what could potentially explain the conflicting case law. Potential prerequisites for the different understandings of the crime as such will be analysed by entering the discussion of the often-complex relationship between the law as it ought to be (*lex feranda*) and the law as it is (*lex lata*). Thus, showcasing how this might have played a role in the resulted inconsistent jurisprudence. In the last section of Part IV, the Ongwen case before the ICC will briefly be reviewed as the judgement on the issue of forced marriage is likely to increasingly establish the interpretation of the crime by future bodies with criminal jurisdiction.

4.1 Forced marriage: 'other inhumane acts' versus sexual slavery

What has been accounted for so far is the reasoning of the SCSL Chambers concerning forced marriage. It is clear from a review of the case-law of the SCSL that there exist two diverging approaches to the interpretation of forced

marriage as a crime against humanity – either as another inhumane act or as sexual slavery.

The jurisprudence could be categorised into two different branches. The first branch emerged from AFRC Trial Chamber judgement and was later further developed in the Taylor case. This first branch presents the conclusion that acts of forced marriage are adequately pursued as sexual slavery. The second branch emerged from the AFRC Appeals Chamber judgement and the RUF case, which demanded that in order to capture the entire wrongdoing of forced marriage, further conviction under other inhumane acts is necessary.

THE FIRST BRANCH

The Trial Chamber in the AFRC case declined to convict the accused on the charge of forced marriage as an 'other inhumane acts'. The residual provision of other inhumane acts was rejected as, according to the Trial Chamber, there is no crime known to international law as 'forced marriage'.[168] According to the majority of the Trial Chamber, what the Prosecution had charged as forced marriage was already subsumed within other crimes against humanity, such as sexual slavery.[169]

With regards to the element of ownership, the central element of slavery, the Trial Chamber held that the perpetrator exercised the powers attached to the right of ownership over their "bush wives" and imposed on the victims a deprivation of liberty. Justice Sebutinde expressly submitted that it was her "firm view that the phenomenon of forced 'marriage' during the Sierra Leone conflict bears all the hallmarks or characteristics of the crime against humanity of Sexual Slavery".[170]

[168] See AFRC Trial Judgement, paras. 710-711.
[169] See AFRC Trial, para. 709. See also generally Eboe-Osuji (2012), p. 223.
[170] See AFRC Trial Judgement, Separate Concurring Opinion of Justice Sebutinde (Special Court for Sierra Leone June 20, 2007), para. 16.

This view by the AFRC Trial Chamber was revisited in the Taylor case, the last case before the SCSL, which convicted the accused of sexual slavery.[171] The Trial Chamber in the Taylor case also renamed the phenomenon of 'forced marriage' to 'conjugal slavery'. According to the Taylor Trial Chamber, the Prosecution had "erred in other Indictments (from earlier trials) by charging 'forced marriage' as a crime that falls within the scope of the crime against humanity of other inhumane acts".[172] The Trial Chamber in the Taylor case distinctly ruled that the phenomenon of forced marriage was not a new crime.

To the AFRC and Taylor Trial Chambers, it was clear that the conduct of forced marriage was sexual in nature. The AFRC Trial Chamber expressed that it had not found a single instance in which the evidence produced by the Prosecution of 'forced marriage' had not involved the sexual factor.[173] As no evidence established elements of a non-sexual crime, the conduct of 'forced marriage' should be regarded as completely covered by sexual slavery.

The AFRC Trial Chamber argued that not much significance could be placed as to the term 'wife' and the allegedly existing "marriage". The "marriage" at hand were bogus. The conduct committed within the confines of the "marriage" were that of sexual slavery and no evidence showed that the victims had suffered distinct trauma from being a "wife". The suggested additional trauma arising from the mere fact of a rebel declaring the victim his wife, had not been proved. Even if it did cause trauma, the conduct would not have been of sufficient gravity for it to amount to a crime against humanity.[174] The Trial Chamber also resolved that none of the witnesses themselves considered themselves married to their husbands, as the relationship was forced upon on them against their will and they claimed to have been 'taken' as wives.[175] Moreover did no evidence show that the

[171] See Taylor Trial Judgement, para. 421.
[172] Ibid, para. 424.
[173] See AFRC Trial Judgement, paras. 703-714.
[174] Ibid, para. 710.
[175] Ibid, para. 712.

victims stayed with their rebel husbands after the end of hostilities, which further demonstrated the notion of the non-existence of anything that could be characterised as something close to a marriage. The term "wife" was rather indicative of the intent of the perpetrator to exercise ownership over the victim (element of sexual slavery), not an intent to assume a marital status with the victim in the sense of establishing mutual obligations inherent in a husband-wife-relationship.[176] The Trial Chamber in the Taylor case agreed with the AFRC Trial Chamber on this point.

The Trial Chamber in *Taylor* further contended that no marriage as defined by international human rights law or domestic Sierra Leonean law was involved in these incidents.[177] This was part of the reasoning why the notion of 'forced marriage' should be renamed to 'conjugal slavery', since there was no "actual marriage" involved.[178]

The incidents of conjugal slavery reflected a distinctive form of sexual enslavement and according to the Trial Chamber in the Taylor case, the correct charge of the incidents of "forced marriage" was thereby conjugal slavery, as a distinct form of sexual slavery.[179]

Something that neither the Trial Chamber in the AFRC nor the Taylor case elaborates on, but could be worth noting, is that the consequence of recognising the existence of a "marriage" actually could pose an increased risk of stigmatisation by ascribing a sense of agency to the victim.

According to the AFRC Trial Chamber, there was no lacuna in the law which necessitated a separate crime of 'forced marriage'. In the Taylor case, the Prosecution in its Final Trial Brief expressly submitted that women and girls

[176] See AFRC Trial Judgement, para. 711; A. Adams *'Sexual Slavery: Do We Need This Crime in Addition to Enslavement?'* (2017) Criminal Law Forum, vol. 29, no. 2 p. 303.
[177] See also Valerie Oosterveld, Gender and the Charles Taylor Case at the Special Court for Sierra Leone, 19 WM. & MARY J. WOMEN L. 7, 21 (2012).
[178] See Taylor Trial Judgement, paras. 418-430.
[179] Ibid, para. 427.

who were abducted and held as "sex slaves", often were referred to as "'wives', 'bush wives', 'jungle wives', or 'rebel wives'".[180] The Prosecution is hereby describing victims of sexual slavery and that they occasionally were referred to as wifes. Thus, it becomes clear that any decisive distinguishing factor between sexual slavery and forced marriage would be difficult to identify.

Both Trial Chambers in the AFRC and Taylor case admitted that the conduct of forced marriage, or conjugal slavery, contained distinct features but not that the potentially additional harm caused by those features could amount to the need to consider it a new crime.[181] The Trial Chamber in the Taylor case expressed that the conduct was a distinctive form of sexual slavery with additional non-sexual elements such as forced labour. The Trial Chamber further expressed that conjugal slavery should be considered as a type of enslavement which causes the victims to engage both in sexual and non-sexual acts.[182]

In sum, the incidents of forced marriage did not give rise to the need to describe the conduct of forced marriage as anything else than a different form of sexual slavery. The enforcement on victims to perform domestic work such as cooking and cleaning were not new elements that require the conceptualization of a new crime, rather they are additional and distinctive f*eatures* that relate to the conjugal aspects of the relationship between the perpetrator and the victim [183] The Trial Chamber in *Taylor* made an attempt to clarify its reasoning by presenting the comparison to gang rape. Gang rape is a distinctive form of rape, yet nevertheless within the scope of the crime of rape. The same was true with forced marriage as a distinctive form of sexual slavery.

[180] See Taylor Trial Judgement, para. 1019.
[181] See e.g. Taylor, para. 1019.
[182] See Taylor Trial Judgement, para. 427.
[183] Ibid, para. 430.

Decisive conclusions by the AFRC Trial Chamber and Taylor Trial Chamber:

- The conduct of 'forced marriage' is covered by sexual slavery.
- The feature of ownership is clear, which is a central element of slavery.
- The conduct is clearly a sexual offence.
- The epithet "marriage" and "wife" should not play a significant role in the legal characterization of forced marriage.
- The potentially caused additional harm does not reach the necessary level of gravity for the conduct to constitute a "new" crime against humanity under the residual offence of 'other inhumane acts'.

THE SECOND BRANCH

The second branch emerged from the AFRC Appeals Chamber, in a reversal of the Trial Chamber's decision, and instead characterised forced marriage as an 'other inhumane acts' of crimes against humanity. This was affirmed in the RUF case, both by the Trial and the Appeals Chamber.

The Appeals Chamber in the AFRC case initially explained that the crime of other inhumane acts is designed to be inclusive in nature, intended to avoid restricting the Statute's application to crimes against humanity.[184] The element of the severe suffering, or physical, mental or psychological injury to the victim can mount to a characterisation of a conduct under the rubric of 'other inhumane acts'. This element was present in the case of forced marriage which indeed was a recognised international crime, according to the AFRC Appeals Chamber.[185]

The AFRC Appeals Chamber presented the definition of forced marriage:

> forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of

[184] See AFRC Appeals Judgement, para. 183 - citing Blagojevic and Jokic Trial Judgement, para. 625 and Akayesu Trial Judgement, para. 585.
[185] See AFRC Appeals Judgement, para. 711.

> force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.[186]

One should note that this definition of forced marriage originates from the first definition that was framed by the Prosecutors in the Closing Brief that was submitted at the end of the AFRC trial. Later on, this formulation was accepted by Judge Doherty in her Partially Dissenting Opinion in the Trial Chamber.[187] This ideation of forced marriage was next accepted and presented by the Appeals Chamber, as accounted for above.[188] This definition did not include any reference to any sources outside their formulator's own authority, neither by the Appeals Chamber, Justice Doherty or by the Prosecution.[189]

The Appeals Chamber in the AFRC case convicted the perpetrators of other inhumane acts and held that 'forced marriage' is not covered by the crime of sexual slavery. Unlike sexual slavery, the Appeals Chamber explained, 'forced marriage' is not a predominantly a sexual crime.[190] However, as has been accounted for earlier, despite that the Appeals Chamber argued that the crime was not a sexual offence, the Chamber did not once point to an instance where forced marriage did not include a sexual violation of the victim.[191]

The Appeals Chamber held that a distinguishing factor of the forced marriage was that it implies a relationship of exclusivity between the victim and the perpetrator.[192] Unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of this exclusive arrangement.[193] The forced marriage and the associated indication of a relationship of exclusivity

[186] See AFRC Appeals Judgement, para. 195.
[187] See AFRC Trial Judgement, Partly Dissenting Opinion of Judge Doherty, para 53.
[188] See AFRC Appeals Judgement, paras. 189-195.
[189] See also Eboe-Osuji (2012) pp. 232 and 245.
[190] See AFRC Appeals Judgement, para. 195.
[191] See AFRC Appeals Judgement, paras. 703.714; Eboe-Osuji (2012), pp. 229 and 231.
[192] AFRC Appeals Judgement, para 195.
[193] Ibid.

between the 'husband' and 'wife' was hence significant, according to the Appeals Chamber.[194] The emphasis placed on the exclusivity between the "husband" and "wife" in the forced marriage could be worth questioning.

During the Taylor trial, several testimonies suggests that the proposed distinguishing factor of exclusivity, presented by the AFRC Appeals Chamber, could be considered as quite unreliable. For example, one of the victims testified that she was made to be "a wife" to three of the rebels whose names she did not know[195], another that she still was raped by other rebels despite having a "husband",[196] and another that "husbands" would still rape other women who could not refuse.[197] These testimonies undermine the proposed distinctive factor which would characterise the forced marriage.

In the RUF case, the Trial Chamber found the additional condemnation of 'forced marriage' as other inhumane acts beneficial as "not all aspects of the conduct were covered under sexual slavery".[198] In the RUF case however, the accused were still convicted for sexual slavery in addition to forced marriage as another inhumane act. The Appeals Chamber in the RUF also went with this approach.[199] It can be worth noting that the Prosecution in the RUF case initially characterised the offence of forced marriage as another inhumane act as "predominantly sexual in nature", but later changed its position in the Rule 98 motion to describing the crime as *not* predominantly sexual in nature.[200]

According to the AFRC Appeals Chamber, the impact on the victims of the 'marriage' title in itself, included a long-lasting stigmatisation, which made it a unique crime which did not constitute sexual enslavement, but a crime

[194] See AFRC Appeals Judgement, paras. 169-203.
[195] See Taylor Trial Judgement, para. 1114.
[196] Ibid, para. 1136.
[197] Ibid, para. 1113.
[198] See RUF Trial Judgement, paras. 158-164, 457; Adams (2017), p. 304.
[199] See RUF Appeals Judgement, paras. 726-740; V. Oosterveld *'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments'* (2011) Cornell International Law Journal 44 (1), pp. 65-66.
[200] Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15T, Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98, 25 October 2006 [RUF Oral Rule 98 Decision].

against humanity under the category of 'other inhumane acts'.[201] The Appeals Chamber seemed to stress the additional harm caused by the non-sexual acts that the victims also had to perform in forms of so called "conjugal duties", such as being forced to express loyalty to their exclusive "husbands" and the stigma of being a 'rebel wife'.[202] Because this stigma and suffering was not covered by the offence of sexual slavery, forced marriage should constitute a crime against humanity of other inhumane acts. This was one of the main arguments of the AFRC Appeals Chamber and the RUF Trial Chamber.[203] The stigma of the designation of 'wife' or 'marriage', the lack of free will to enter a marriage and the non-sexual acts of the conduct could altogether not be covered by the crime of sexual slavery.

<u>Decisive conclusions by the AFRC Appeals Chamber and RUF Trial Chamber:</u>

- Forced marriage is a recognised international crime under the rubric of 'other inhumane acts' of crimes against humanity.
- The crime of 'forced marriage' is a non-sexual offence. The crime is *not* predominantly sexual in nature.
- Forced marriage' could be charged distinctly *and* alongside rape and sexual slavery and was not "subsumed" under those crimes.
- The additional harm suffered by the victims of forced marriage such as being forced to perform conjugal duties and the lasting social stigma is so severe it reflects the necessary level of gravity to constitute the crime of 'other inhumane acts'.

[201] See AFRC Appeals Judgement, paras. 169-203.
[202] Ibid.
[203] See RUF Trial Judgement, para. 1296.

4.2 A recognised crime in international law?

The two diverging approaches to the interpretation of forced marriage that have been identified indicates that it remains unclear whether the phenomenon of 'forced marriage' should be prosecuted either as a separate "new" international crime, or as sexual slavery.

A telling example of the evident confusion is reflected in how the crime of 'forced marriage' has been pleaded differently by the Prosecution. In the RUF case for example, the Prosecution initially characterised the offence as being primarily a sexual crime in the 2004 Request for Leave to Amend the Indictment. The Prosecution then changed its position in its Rule 98 motion, and herewith characterised the crime instead as one which was *not* predominantly sexual in nature.[204]

This section will proceed with exploring what could potentially explain the conflicting case law. Where there any notable implications of the rulings of the SCSL which could help answer the question w*hy* incidents of forced marriage were prosecuted both as other inhumane acts' and as sexual slavery? Primarily, the rulings of the Appeals Chamber in the AFRC case and the Trial Chamber in the RUF case will be in focus since they took the significant view that a new characterisation was necessary in order to properly capture the conduct legally of forced marriage.

If we are to begin with the stance that a judicial decision is based on the evidence presented in the case under adjudication, it can be argued that the SCSL Chambers that claimed the need for a "new" crime of forced marriage could have done better in the attempt to justify the existence of this norm.

[204] See Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15T, Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98, 25 October 2006 [RUF Oral Rule 98 Decision].

It can be questioned whether the Appeals Chamber in the AFRC case and the Trial Chamber in the RUF case did exhaustively explain how they found that a crime of 'forced marriage' actually exists in international law. First of all, the formulation of the crime of forced marriage without attaching any authoritative sources to it, is noteworthy. The definition of forced marriage presented by the Appeals Chamber in the AFRC case was initially formulated by the Prosecutor and also then presented with no prior authoritative reference. Further, the term 'forced marriage' constitutes a human rights violation but not an international crime. Arguably, the human rights violation has little to do with the conduct as the human rights regime protects the value of consent, what is under scrutiny from a criminal law perspective is rather the behaviour (abduction, violence, sex, work) that took place under the name of an alleged marriage.[205] Even Judge Doherty, who argued for the existence of a crime of forced marriage under international law, submitted that there was no offence known as forced marriage in international law. She contemplated more specifically that "Forced marriage as a crime against humanity has not been specified in any treaty provision nor recognised as a separate crime by the other International Tribunals".[206] The last issue that can be pointed to is that there is no evidence that forced marriage has been recognised under customary international law as a crime or in any of the other sources of international law identified in article 38(1) of the Statute of the International Court of Justice (ICJ).[207] When dealing with a phenomenon of which criminalisation is new to the world, an exhaustive judicial reasoning should be expected. Questions about the sufficient recognition of forced marriage as a crime against humanity were left unresolved. It is therefore possible to claim that the reasoning of the Appeals Chamber in the AFRC

[205] See generally Adams (2017), p. 307.
[206] See AFRC Trial Judgement, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and 8 ('Forced Marriages') (Special Court for Sierra Leone June 20, 2007), para. 58.
[207] See also Eboe-Osiju (2012), p. 224; Adams (2017), p. 306.

case and the Trial Chamber in the RUF case were less consistent with generally accepted methods of judicial reasoning.[208]

An interesting claim that has been made by some scholars is that the Trial Chamber in the AFRC case, by *not* admitting forced marriage as a separate crime, had reduced the 'forced marriage' to a sexual offence.[209] Thereby it had not contemplated the non-sexual aspects of the crime. In other words, the crime of sexual slavery was not "enough" to atone appropriately in question.[210] These attempts however, to justify the categorisation of forced marriage as something other than sexual slavery, since sexual slavery cannot reflect the particular detriment of women, risks indicating a hierarchy of the crimes of sexual slavery and the crime of forced marriage as another inhumane act. It would be unfortunate if such an approach would take hold as arguably, measuring the suffering of victims of crimes against humanity generally is uncertain and perhaps also inappropriate. Especially as slavery represents one of the most serious crimes of the Statute.[211] To further explain why this should be seen as uncertain, instances where for example the Trial Chamber in the Taylor case, distinguished sex slaves from bush wives are referred to. It became apparent that incidents of when women were forced to become a "wife" of one commander, also could carry certain benefits such as food and protection, while women who did not became forced to become "wifes" but were held as sex-slaves were continuously sexually abused by multiple combatants.[212] What destiny caused the greatest suffering? This would have to be decided on a case-by-case basis, of which any fixed before-hand decided hierarchisation would be unfortunate. It could also be seen as contradictory trying to punish incidents of forced marriage under the catch-all provision of other inhumane acts when arguably, the requirements of the offence of sexual slavery is actually more specific and serious.[213]

[208] See Eboe-Osiju (2012), p. 229.
[209] See generally Adams (2017), pp. 312-318; Oosterveld (2012), pp. 67-70.
[210] Ibid.
[211] See Adams (2017), p. 312.
[212] See Taylor Trial Judgement, para. 1020.
[213] See Eboe-Osuji (2012) pp. 229 and 240.

Different approaches are also found among scholars. A number of scholars disagree whether sexual slavery does capture this specific harm, or if the prosecution of forced marriage as another inhumane act was actually legally justifiable. Neha Jain, as an example, has been criticising the first strand of the case law originating from the AFRC Trial Chamber's decision.[214] She held that the elements constituting forced marriage in Sierra Leone were not completely subsumed within the crime of sexual slavery and questions the view that the sexual violence was an inherent component of the forced marriage in Sierra Leone. This undermined the harm caused by the forced labour included in the forced marriage. She thereby welcomes the recognition of forced marriage as a distinct crime, joining the ranks of other scholars, such as Valerie Oosterveld, who considers the recognition of forced marriage as a distinct crime in international law as a positive development in transitional justice.[215] Chile Eboe-Osuji on the other hand, as an example, claims that the conduct of forced marriage as another inhumane act of crimes against humanity, unfortunately, is not a criminal offence in the sense that it is not reflected in international customary law.[216] He describes the way in which the crime of forced marriage became criminalised as "smuggling in through the back door something which one could not bring in through the front door."[217]

The complex relationship between realism and idealism, the law as it is (*lex lata*) and the law as it ought to be (*lex feranda*), might be able to offer some explanations for these divergent views on the matter of forced marriage.[218] Could this friction between these two contradictions have played a role at SCSL considering the different conclusions on the same issue reached in the different judgements? Possibly.

---

[214] See Neha Jain, '*Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution'* (2008) Volume 6 Journal of International Criminal Justice, pp. 1018-1019.
[215] See e.g. Oosterveld (2012); Bunting (2018), p. 342.
[216] See Eboe-Osuji, p. 256. See also Adams (2017).
[217] See Eboe-Osuji, p. 229.
[218] See generally Eboe-Osuji, pp. 97-100.

To begin to attend this relationship and its potential significance, the *nullum crimen sine lege* principle has to be mentioned. The principle stipulates that only actions which are prohibited by law can be deemed as criminal.[219]

The principle is enshrined in article 22 of the Rome Statute, which the SCSL based its interpretation of the principle on.[220] The principle acknowledges that the individual virtually always is the weaker part in the criminal process and that the individual therefore has a need to be protected from a misuse of powers by the judiciary.[221] Apart from it being enshrined in statutes and international treaties, the *nullum crimen sine lege* principle constitutes a 'general principle of international law'.[222]

As international criminal liability can be based on customary law, provided the custom applied fulfils the requirements of "a general practice accepted as law", as laid down in article 38 of the ICJ Statute, international criminal courts serve an important function in finding and interpreting existing law. In finding and interpreting customary international criminal law, the judicial decision-making ought to be an exercise of applying legal norms to facts, while the judge is guided and constrained by legal method in order not to overstep his/her obligation to uphold the principle of legality. This question opens the door to further theoretical analysis on the interpretation of international law and the rules governing the finding of when and how a certain norm has crystallised as customary international law.

A question that has been asked by scholars is whether the crime of 'forced marriage' has reached the point of recognition necessary for it to be considered as constituting customary international law.[223] As Eboe-Osuji

[219] See Camilla Lind, "Article 22", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute..
[220] See e.g. AFRC Trial Judgement 'Written reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of Principles of Nullum Crimen Sine Lege and Non-retroactivity as to several counts' 31 March 2004.
[221] See Camilla Lind, "Article 22", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute.
[222] See Henriksen (2017), p. 305.
[223] See e.g. Eboe-Osuji (2012), p. 239; Alexandra Adams (2017), p. 306.

explains, for forced marriage to be an existing crime in international law, the central tests for the determination of forced marriage as an international crime is firstly, whether the conduct under consideration 'inflicts great suffering, or serious injury to body or to mental or physical health, and is of a gravity similar' to other enumerated crimes against humanity[224] (the *actus reus* component) and secondly whether such a conduct has been *recognised* as a crime in international law.[225] The second central test regarding the existence of 'forced marriage' as a crime under international law – is arguably not sufficiently established by either the the Appeals Chamber in the AFRC case and the Trial Chamber in the RUF case, with reference to the earlier analysis.[226] The capacity of forced marriage to cause the manner of harm equivalent to the elements of the crime against humanity of other inhumane acts makes it an international crime *de lege feranda,* but it is insufficient to establish that it fulfil the criteria of making it a conduct in terms of *lex lata.*[227]

Generally, to hold the opinion that a conduct should be condemned by all available means is one thing but claiming that it currently constitutes a norm under international criminal law is something different.

The conflicting case-law forces us so ask hard questions about the indeterminable line between *lex lata* and *lex feranda,* the interpretation and formulation of customary international law and about the issues of legality. These issues will surely continue to perplex courts, especially with regard to customary international law which by its nature is in a process of continues development. The aim of this section of the thesis has been to introduce these issues which likely have played its part for causing the SCSL to draw such different conclusions with regards to forced marriage.

This thesis finds that that the legal situation seems unclear. Both judges of the SCSL and scholars disagree whether forced marriage as such qualify legally

[224] See AFRC Trial Judgement, para. 698; AFRC Appeals Judgement, para. 198. See also Rome Statute Elements of Crimes, Article 7(1)(k).
[225] See Eboe-Osuji (2012), pp. 239-244.
[226] See p. 56 of present thesis.
[227] See Eboe-Osuji (2012), p. 256.

as an international crime and the reason could possibly be found either because of an insufficient reasoning by the Appeals Chamber in the AFRC case and in the RUF case, or in the tension between the law as it ought to be. It will therefore be important for the ICC to justify its reasons to follow either branch of jurisprudence from the SCSL in a clear and transparent manner.

4.3 The *Ongwen* case before the ICC – A crossroads

In this last section of Part IV, the Ongwen case before the ICC will be revisited. The final judgement of the ICC in the Ongwen case on the issue of forced marriage is likely to reflect a further establishment of the interpretation of the crime, which makes it worthy to consider.

On 17 July 2019, the ICC Appeals Chamber confirmed the decision of the Trial Chamber and the Pre-Trial Chamber with regards to the charges against Mr Dominick Ongwen (the *Ongwen* case).[228] Ongwen was part of the senior leadership of the Lord's Resistance Army (LRA) Sinia brigade in Uganda which in the beginning of 2000 and allegedly executed a plan to abduct women and girls in order for them to serve as forced "wives", domestic servants and sex slaves to male LRA fighters.[229] Women and girls were systematically abducted in northern Uganda in line with this plan. They were distributed to LRA fighters as so-called "wives" with no choice on their part and were regularly raped by their so-called "husbands" for protracted periods of time. Their movement was also confined, and they were forced to perform various domestic duties. They lived under constant threat of death or severe physical punishment if they failed to respect the exclusivity of the so called

[228] See Appeals Chamber, *Prosecutor v Ongwen*, Judgement on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15 OA4.
[229] See Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, paras. 119-121

"marriage" imposed on them, if they did not submit to sexual intercourse, if they tried to escape, or if they failed to perform any other duty assigned to them. They were regularly beaten as punishment, coercion or intimidation.[230]

In March 2016, the charges against Ongwen were confirmed by the Pre-Trial Chamber which also concluded that incidents of forced marriage, insofar as demonstrated by the available evidence, constitutes the crime of an other inhumane acts.[231] The Prosecutor had charged the forced marriage situations as inhumane acts and as sexual slavery, while the defence argued that the acts were consumed by sexual slavery and could not *also* be convicted as inhumane acts.[232] In the context of addressing the Count of forced marriage as an 'other inhumane act, the Pre-Trial Chamber made attempts to distinguish forced marriage from sexual slavery and other crimes against humanity. The Pre-Trial Chamber came to the conclusion that forcing women to serve as conjugal partners constituted an other inhumane act, while also recognising that forced marriage was not explicitly included within the jurisdiction of the ICC. [233] It thereby relied on the case law from SCSL.[234] The Pre-Trial Chamber found that the "central element of forced marriage is the imposition of 'marriage' on the victim, *i.e.* the imposition, regardless of the will of the victim, of duties that are associated with marriage […] with the consequent social stigma".[235] It further held that the "element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage" and that the victims of forced marriage "suffer separate and additional harm to those of the crime of sexual slavery". With these last statements regarding the element of exclusivity, the stigma, and the additional harm, the Pre-Trial Chamber was following the same approach of the AFRC Appeals Chamber and the RUF Trial Chamber.

---

[230] See Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, para. 137.
[231] Ibid, para. 95.
[232] Ibid, paras. 87-95.
[233] Ibid, para. 88.
[234] Ibid.
[235] Ibid, para. 93.

In 2019, following the confirmation of charges-decision, Ongwen launched four defence motions alleging defects in the confirmation of charges, one of which concerned forced marriage.[236] The Defence argued that forced marriage is not recognised as a crime in the Rome Statute, it does not amount to a category of other inhumane acts and subsequently that it is subsumed in the crime of sexual slavery.[237] The Prosecution disagreed and had claimed the conduct to be tried under the separate charge of other inhumane acts.[238] The Trial Chamber however, decided not to try the issue of the categorisation of forced marriage since it dismissed the challenged due to untimeliness.[239] This was appealed by Ongwen.[240]

The Appeals Chamber confirmed the dismissal of the challenge due to untimeliness but did emphasise a significant matter.[241] According to the Appeals Chamber, the jurisdictional challenges advanced by Ongwen had already been decided and addressed by the Pre-Trial Chamber in the Confirmation Decision – and should therefore not additionally be addressed by the Trial or Appeals Chamber. Nevertheless, on the issue of forced marriage, the Appeals chamber added that questions concerning concurrence

[236] See Defence Motion on Defects in the Confirmation of Charges Decision: Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), ICC-02/04-01/15-1433 ('Defects Series Part IV').
[237] See the Appeals Chamber, The Prosecutor v. Dominic Ongwen, Judgement on the appeal of Mr Dominic Ongwen against Trial Chamber's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15-1562, OA4, para. 15.
[238] See Defects Series Part IV, para. 37.
[239] See Trial Chamber IX, The Prosecutor v. Dominic Ongwen, Decision on Defence Motions Alleging Defects in the Confirmation Decision, 7 March 2019, ICC-02/04-01/15-1476, paras. 14, 24-30 and 36.
[240] See Defence's appeal against the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 11 April 2019, ICC-02/04-01/15-1496.
[241] See the Appeals Chamber, The Prosecutor v. Dominic Ongwen, Judgement on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15-1562, OA4, para. 5.

of offences are better addressed by the trial chamber upon airing the entirety of the evidence, which had been the case in earlier trials.[242]

The characterisation by the Pre-Trial Chamber of the practice of forced marriage as the crime against humanity of 'other inhumane acts', following the approach of the AFRC Appeals Chamber and RUF Trial Chamber before the SCSL, is thus not in any way final. As the Appeals Chamber submitted, the final categorisation of forced marriage could be determined later at trial stage in light of the evidence.[243] Accordingly, the Trial and the Appeals Chamber have the ability to change the categorisation of forced marriage, depending on the development of the proceedings.

Lastly, one can hope that the contradictory practise of the SCSL will not be repeated before the ICC. Moreover, that the ICC will utilise the chance for clarification that the Ongwen case offers. Given that the ICC holds a central role in the international criminal justice system as a permanent court, important things are at stake, such as the integrity of the ICC. In view of past criticism of the ICC regarding, *inter alia,* consistency and credibility[244], the Court should seize the opportunity to strengthen its legitimacy by elaborating in detail how forced marriage should be addressed more thoroughly. The *Ongwen* case offers both the chance to strengthen the Court's legitimacy, but also the risk of undermining it, if it merely manages to add on to the current contradictory conceptions regarding the conduct of forced marriage.

With regards to the Ongwen case, the ICC Trial Chamber is currently deliberating on the proceedings and will pronounce its decision hopefully in the near future.

---

[242] Ibid, paras. 157 and 169-161; See also Lubanga A5 Judgment, paras 114-137; and Bemba Appeals Judgment, paras 74-119.
[243] Ibid, paras. 157 and 169-161; See also Lubanga A5 Judgment, paras 114-137; and Bemba Appeals Judgment, paras 74-119.
[244] See G. McIntyre '*The impact of a lack of consistency and coherence: How key decisions of the International Criminal Court have undermined the Court's legitimacy'* (2020) Questions of International Law, Zoom-in 25-57.

5 Conclusion

The sexual violence taking place during armed conflict continues to shock the conscience of humankind. The question is triggered as if we ever will be able to stop the atrocities of sexual violence. The international criminalisation of such conduct is a way to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes. As sexual violence impacting women historically has been close to invisible to international criminal law, the recent recognition of these crimes should be considered significant. This recent recognition has to be safeguarded and managed well.

Based on the analysis of the forced marriage-cases before the SCSL, it seems like the SCSL may have encountered difficulties in the application of the law to the phenomenon of 'forced marriage', depicted by the different conclusions in all cases. Whether the phenomenon of 'forced marriage' fall under the definition of sexual slavery or under 'other inhumane acts' remains uncertain. At present, there seems to exist two diverging approaches to the interpretation of forced marriage as a crime against humanity.

In mapping the strands of the jurisprudence of the SCSL, this thesis hope to have cast some light on potential underlying causes for this inconsistent case law. The causes are linked to the principle of legality, to at which point customary international law is crystallised, and to reflections of how women's inclusion as full subjects of the universal regime of international law is best achieved. The case law concerning forced marriage has brought about several questions, of which some have been outlined and analysed in this thesis. One conclusion is that the SCSL had the opportunity to contribute to the recognition of forced marriage as an international crime but in some ways failed to do so. This has given rise to the current uncertainty regarding whether forced marriage actually is a crime that exists in international law.

The question if the conduct qualify as an international separate crime remains, and worthy to say is that *de lege ferenda* sadly is insufficient to make a conduct an international crime accepted by states as such. If the political will is present to achieve justice for victims of forced marriage and it can be established that the current criminalisation lack sufficient recognition of customary law, an alternative way to proceed is to advocate for a review conference of the ICC to consider an amendment that will incorporate forced marriage as a distinct crime. This could create certainty and consistency in both the legal characterisation and definition.

With regards to the pending Ongwen case at the ICC, the last word about the categorisation of the crime of forced marriage has not been said. As the ICC Appeals Chamber in the Ongwen case has explained, the final categorisation of forced marriage will be determined at trial stage in light of the evidence. The ICC Trial Chamber is currently deliberating on the proceedings. Given the ICC's ability to influence and shape the direction of future prosecutions of forced marriage, both before the ICC itself and before future bodies with criminal jurisdiction, the Ongwen case entails an opportunity for the ICC to make far reaching provisions on the issue which one can only hope it will fully utilize.

Bibliography

Books

Cassese A and Gaeta P (eds), *Cassese's International Criminal Law* (OUP, Oxford 2013).

Eboe-Osuji, Chile, *International Law and Sexual Violence in Armed Conflicts (International Humanitarian Law Series) [Electronic resource]*, Brill, 2012.

Henriksen, Anders, *International law*, Oxford University Press, Oxford, 2017.

Klamberg, Mark (red.), *Commentary on the law of the international criminal court*, Torkel Opsahl Academic Epublisher, Brussels, 2017.s

Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (2nd ed.) *[Electronic resource]* TOAEP Beijing, 2012.

Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh & Harris, David J. (red.), *International human rights law*, Third edition, Oxford University Press, Oxford, 2018.

Journal Articles

G. McIntyre *'The impact of a lack of consistency and coherence: How key decisions of the International Criminal Court have undermined the Court's legitimacy*' (2020) Questions of International Law, Zoom-in 67, p. 25-57.

A. Bunting '*Forced Marriage in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes'* (2012) 1:1 Canadian Journal of Human Rights p. 161.

A. Adams '*Sexual Slavery: Do We Need This Crime in Addition to Enslavement?'* (2017) Criminal Law Forum, vol. 29, no. 2, p. 279.

J. Neha '*Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution'* (2008) Volume 6 Journal of International Criminal Justice, pp. 1018-1019.

Bunting, A. and I.K. Ikhimiukor *'The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law',* (2018) International Criminal Law Review, 18(2), p. 342.

H. Charlesworth, C. Chinkin & S.Wright, *Feminist Approaches to International Law*, (1991) 85 No. 4 AMERICAN JOURNAL FOR INTERNATIONAL LAW L. 615.

B. Van Schaack, '*Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda',* (2008) Santa Clara Law Digital Commons.

V. Oosterveld '*Gender and the Charles Taylor Case at the Special Court for Sierra Leone'*, (2012) 19 WM & MARY J. WOMEN & L. 7, 10.

V. Oosterveld '*The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments'* (2012) Cornell International Law Journal 44 (1): 49–74.

Other sources

Girls not Brides, 'Child Marriage in Humanitarian Settings' (The Global Partnership to End Child Marriage, 2017). https://www.girlsnotbrides.org/resource-centre/child-marriage-in-humanitarian-crises/ accessed 10 December 2019.

Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone*, at 3-4 (2002). https://phr.org/our-work/resources/war-related-sexual-violence-in-sierra-leone/ accessed 10 April 2020.

Britannica Academic Encyclopedia, "Sierra Leone". https://www.britannica.com/place/Sierra-Leone accessed 15 March 2020

Sierra Leone Truth & Reconciliation Report, Witness to Truth: Report of the Sierra Leone Truth & Reconciliation commission (vol. 2, 2004). https://sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents accessed 29 February 2020.

The UN, Secretary-General Appointments. (2010, January 2) *Secretary-General Appoints Margot Wallström of Sweden as Special Representative on Sexual Violence in Conflict* [Press release]. Retrieved from https://www.un.org/press/en/2010/sga1220.doc.htm

Table of Cases and Institutional Instruments

SCSL

Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment (Special Court for Sierra Leone June 20, 2007).

Prosecutor v. Brima, Case No. SCSL-04-16-A, Judgment, (Special Court for Sierra Leone Feb. 22, 2008).

Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, (Special Court for Sierra Leone Mar. 2, 2009).

Prosecutor v. Taylor, Case No. SCSL-03-01-T-1283, Judgment, (Special Court for Sierra Leone May 18, 2012).

Prosecutor v. Fofana, Case No. SCSL-04-15-T, Judgment, (Special Court for Sierra Leone Aug. 2, 2007).

Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15T, Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98, 25 October 2006 [RUF Oral Rule 98 Decision].

Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

The Rules of Procedure and Evidence of the Special Court for Sierra Leone, first adopted by the Plenary of Judges on 16 January 2002 and subsequently amended on 7 March 2003; 1 August 2003; 30 October 2003; 14 March 2004; 29 May 2004; 14 May 2005; 13 May 2006; 24 November 2006; 14 May 2007; 19 November 2007; 27 May 2008; 28 May 2010; 16 November 2011; 31 May 2012.

Decisions on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 'Rule 98 Decision', para. 42. Case No. SCSL-04-16-T. 31 March 2006.
Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment (Special Court for Sierra Leone June 20, 2007).

Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment (Special Court for Sierra Leone June 20, 2007). 'Written reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of Principles of Nullum Crimen Sine Lege and Non-retroactivity as to several counts' 31 March 2004.

ICC

Appeals Chamber, *The Prosecutor v Ongwen*, Judgement on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15 OA4.

Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red.

Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Motions Alleging Defects in the Confirmation Decision, 7 March 2019, ICC-02/04-01/15-1476.

Defence Motion on Defects in the Confirmation of Charges Decision: Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), ICC-02/04-01/15-1433 ('Defects Series Part IV').

The *Rome Statute of the International Criminal Court* UNGA, 17 July 1998.

ICC OTP 'Strategic Plan June 2019-2021' (17 July 2019).

ICC OTP 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014).

ICTY

Prosecutor v Kunarac, Kovac and Vukovic, (Case No. IT-96-23), ICTY T. Ch., 22 February 2001, para. 543.

International treaties and UN Documents

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962.

UN Security Council, *Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts]*, 19 June 2008, S/RES/1820 (2008).

UN Security Council, *Security Council resolution 1960 (2010) [on women and peace and security]*, 16 December 2010, S/RES/1960 (2010).

UN Security Council, *Security Council resolution 1315 (2000)* of 14 August 2000, U.N. Doc. S/RES/1315 (2000).

U.N. Secretary-General, *Conflict-related sexual violence: Rep. of the Secretary-General*, U.N. Doc. S/2019/2080 (March 29, 2019).

U.N. Secretary-General, *Report of the Secretary-General on the implementation of Security Council resolutions 1820 (2008) and 1888 (2009)*, U.N. Doc. A/65/592*-S/2010/604* (Nov. 24, 2010), s. 6.

Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.