

WHAT'S IN A NAME? THE FEASIBILITY AND DESIRABILITY OF NAMING FORCED MARRIAGE AS A SEPARATE CRIME UNDER INTERNATIONAL HUMANITARIAN LAW

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*Visibility and accountability for gender crimes through international justice mechanisms can advance the cause of justice for women.*¹

*For only when sexual violence is perceived as a political event, when it is made public and analyzed, can its causes and contexts be probed and strategies to overcome it be considered.*²

INTRODUCTION

The phenomenon of forced marriages during armed conflict has recently garnered international attention, as it has become apparent that these coerced relationships are not mere happenstance, but are often the result of strategic planning on the part of armed groups and are thus an integral part of ongoing conflicts around the globe. The purpose of this paper, therefore, is to critically examine the phenomenon as it manifests itself in armed conflict situations, with a specific focus on Sierra Leone, and to unpack the various violations that occur under the guise of this pernicious labeling to see whether it is desirable and justifiable to name forced marriage as a separate crime under international humanitarian law (IHL), or whether the phenomenon is adequately addressed within the framework of existing IHL. I will ultimately argue that the recognition of this separate and distinct crime under IHL is a necessary and logical development in the law, as it forms part of a trend toward increasing recognition of the

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1 Binaifer Nowrojee, "Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims" (2005) 18 Harv. Rts. J. 85 at 88.

2 A.L. Barstow, *War's Dirty Secret: Rape, Prostitution, and Other Crimes against Women* (Cleveland: Pilgrim Press, 2000), as cited in Eugenia Trabucchi, "Rape Warfare and International Humanitarian Law" (2008) 4 Journal of the Sociology of Self-Knowledge 39 at 47.

unique gender-based harms that women and girls face within armed conflict.

While some authors have argued that naming the crime *forced marriage* leads to a “complete misrepresentation and distortion” of the women and girls’ experience within these relationships,³ this paper will argue that it is not the naming of forced marriage as a crime that will lead to this misrepresentation and distortion. The ultimate goal in arguing for the naming of forced marriage as a separate and distinct crime under IHL is to help avert, at least partly, this body of law inscribing and reinforcing a “partial and distorted vision of women that has little to do with the reality of their lives, or the way they experience warfare.”⁴ This article will suggest that naming is an important step in rendering this crime visible and thus in enabling the international community to express its condemnation of forced marriage, but more importantly in giving voice to the experience of the women and girls who are coerced into forced marital relations.

The first section of this article provides a contextual backdrop to the discussion to follow by presenting the experiences of the “wives” of Sierra Leone in their own words, thus allowing for the formulation of a definition of forced marriage that captures the true nature of these “marriages” as they are understood by affected Sierra Leonean women and girls. The second section introduces the 2008 decision of the Special Court of Sierra Leone (SC-SL) in *Prosecutor v. Alex Tamba Brima, et. al.*,⁵ which found that forced marriages are a crime against humanity. The third section addresses the constituent elements of the overarching crime of forced marriage, namely sexual slavery and enslavement, other sexual violence, and the use of child soldiers, to show how prosecution of the individual components of forced marriage is inadequate. The final section argues that naming forced marriages as a separate crime within IHL is essential in that it forms part of a recent trend of gendering IHL, gives voice to the victim-wives, and may have a normative and practical influence beyond the boundaries of IHL.

I. FORCED MARRIAGES IN CONTEXT

1. Women’s Experiences under Forced Marriages

The purpose of this section is to present a practical backdrop to the more theoretical legal discussion to follow. As this paper ultimately argues that forced marriage should be considered and named as a separate crime under IHL, it is important to begin with

3 Graça Machel, Govt’ of Canada, Int’l Conf. on War-Affected Children: *The Impact of Armed Conflict on Children* (2000), ch. 2, para. 3, as cited in Karine Bélair, “Unearthing the Customary Law Foundations of ‘Forced Marriages’ During Sierra Leone’s Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women’s Rights in Post- Conflict Sierra Leone” (2006) 15:3 Colum. J. Gender & L. 551 at 553.

4 Judith G. Gardam & Michelle J. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001) at 251.

5 *Prosecutor v. Brima, et. al.*, Case No. SCSL-2004-16-A, Special Court for Sierra Leone, Judgment, Appeals Chamber, 22 February 2008 at para. 2 [*Brima II*].

an examination of the phenomenon as it actually plays out in real women's lives in conflict situations, in order to ensure that it is, indeed, something that is capable of being stigmatized and that should be criminalized. Also, as it will be argued that the naming of this crime is important in the sense that it might help give voice to women who have suffered within these "marriages," it is essential to present the experiences of women in their own words – to the extent possible – to ensure that any legal regulation or prosecution effectively captures the true nature of this crime. "We need to ask the girls to tell their own stories of war [...] rather than assuming the right to speak for them;"⁶ for to do otherwise is to risk that the proposed naming becomes a self-defeating exercise. Furthermore, while the discussion below focuses specifically on Sierra Leone, this is not to suggest that the phenomenon is limited to this region. There are reports of these coerced unions in Uganda, Rwanda, Liberia, Mozambique, the DRC, Algeria, Kashmir, East Timor, and Afghanistan.⁷ The purpose of this section, therefore, is to provide a contextualized analysis of forced marriages to make them more visible and to ensure that they can be documented and recognized wherever they appear.

2. Forced Marriages in Sierra Leone

The devastating civil war in Sierra Leone that began in 1991 and raged until 2001 has been characterized by some as the "war against women," due to the exceptionally high recorded rates of violence against women and girls during the conflict period.⁸ The U.N. Special Rapporteur on the Elimination of Violence Against Women estimates that 72% of Sierra Leonean women and girls suffered human rights abuses, and that over 50% of them were victims of sexual violence.⁹ Within this general climate of gender violence, mostly girls, but some women, were abducted and brought to the rebel camps of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the West Side Boys, where they became the "wives" of combatants and commanders in the camps.¹⁰ While the exact number of women and girls who were

6 C. Nordstrom, *Girls and Warzones: Troubling Questions* (Upsala: Life and Peace Institute, 1997) at 36, as cited in Myriam Denov, *Girls in Fighting Forces: Moving Beyond Victimhood* (Canadian International Development Agency, 2007) at 4.

7 Katerina Novotna, "Forced Marriage in the Jungle: Time to Stop Beating About the Bush" (2007) 81 Aust. L.J. 302 at FN 1.

8 Jeanne Ward, "Gender Based Violence among Conflict-affected Populations: Humanitarian Program Responses" in Helen Durham & Tracy Gurd, eds., *Listening to the Silences: Women and War* (Leiden: Martinus Nijhoff Publishers, 2005) 67 at 78.

9 See Nowrojee, *supra* note 1 at 86.

10 While there is no exact data on the age of the women and girls taken as "wives," qualitative research studies indicate that the majority of these "wives" were girls, rather than adult women, with most commanders' wives ranging in age from 9 to 19 (Augustine Park, "Other Inhumane Acts: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone" (2006) 15:3 Social & Legal Studies 315 at 322). This conclusion is further supported by the fact that 25% of all cases of 'sexual slavery' heard before the Sierra Leone Truth and Reconciliation Commission involved girls who were 12 years and younger (*ibid.* at 323). However, adult women were forced into these "marriages" as well. Human Rights Watch reports that one 50 year old woman was abducted in Freetown and taken as the wife of commander "Bird Bod" who was in his thirties (Human Rights Watch, "We'll Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict" (January 2003) 15:1(A) Human Rights Watch 1 at 38) [HRW].

coerced into “marriage” to their captors remains unknown, one population-based study done by Physicians for Human Rights found that 9% (or nine out of ninety-four women) reported a forced marriage.¹¹

These forced marriages typically began with the forcible abduction of the women and girls during brutal attacks on their towns. Binta K., an eighteen year old girl who became a rebel’s “wife,” describes her experience as follows:

As the rebels were pulling out of Freetown, they came to our house and captured us. They even killed some of the other girls in our house. I was hiding with some girls when they found us. We were told that if we didn’t come with them, they’d kill us. While I was begging them not to take me, a little boy, about ten years old who was with them piped up “If she doesn’t want to come, pass her over to me and I’ll chop her hands.” I agreed to go. I was raped and held there in the bush. I wanted to run away, to escape, but there was no way. If you were caught trying to escape, you were killed or put in a box.¹²

Another thirteen year old girl, M.F., who was abducted from Koinadugu town in 1998 after an RUF/AFRC attack, recounts being gang-raped by the rebels before being “given to one of them” as his wife: “They forced me to go down on my hands and knees with my bottom in the air and raped me both vaginally and anally. Five rebels raped me on that first day.”¹³

These women and girls were then assigned to a “husband” and taken back to the camp. A small number of the girls were married in formal ceremonies, with a commander officiating,¹⁴ while the majority were simply distributed to the men, with “marriage” taking the form of a unilateral assertion by the “husband.” One woman, I.S., describes the wife selection process in the following words:

One of the commanders said he was going to amputate all of us. But another commander C.O. Blood, said “Don’t kill them, let’s choose them as wives.” Then we were divided up. The one who seemed to be in charge, C.O. Blood, chose me. When he looked at me I was frightened. His pupils were huge – he was high on drugs.¹⁵

Despite the lack of formalities, many of the girls felt that they did, in fact, belong to the

11 Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment* (Physicians for Human Rights, 2002) at 48 [Physicians]. This report also concludes, however, that sexual violence and forced marriage was probably underreported.

12 *Ibid.* at 70.

13 HRW, *supra* note 10 at 30.

14 *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Special Court for Sierra Leone, Judgment, Trial Chamber II, 20 June 2007, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (‘Forced Marriages’), 581 at paras. 43-44 [Doherty Dissent].

15 HRW, *supra* note 10 at 46.

men who had claimed them. One fifteen year old girl, Isatu, explains how, “*when they capture young girls, you belong to the soldier who captured you. I was married to him.*”¹⁶

At the camp, the women and girls were forced to perform various tasks, including cooking, cleaning, washing clothes, carrying ammunition and looted items, and farm work, as well as providing sexual services for their “husbands.”¹⁷ One woman, testifying before the Sierra Leone Truth and Reconciliation Commission (TRC), explained her duties in the following words:

I later got forcefully married to “DU-DU Boy” as my “bush husband”. I was then assigned to the responsibilities of doing all the laundry, cooking their food, ironing their clothes and many other household duties. Most of their clothes had blood stains on them. Some of the female abductees who refused to have sex with them were killed. That gave me the cause to yield to their sexual demands in order to save my life.¹⁸

Another abductee echoes a similar experience: “*I became wife to another Commander named Mohammed. As usual, my duties were to prepare food and to satisfy him sexually, any time he needs me.*”¹⁹ Not all “wives” were subjected to rape and sexual violence, however. HRW reports that “one Commander [...] prevented the rape of an eight-year-old girl by a ten-year-old child combatant by ordering him to use her ‘only for cooking and cleaning for now.’”²⁰ Furthermore, not all “wives” were forced to perform routine labour. One witness before the SC-SL claimed that she was “not forced to do any work for Colonel Z.”²¹ It seems, however, that sexual violence and forced labour were the norm.

These marriages were often, although not always, characterized by a degree of exclusivity in which the “wife” was protected against sexual violence from other men. As one girl stated,

At the beginning, I was raped daily [...] I was every man’s wife. But later, one of them, an officer, had a special interest in me. He then protected me against others and never allowed others to use me. He continued to [rape me] alone and less frequently.²²

This exclusive arrangement of “husband” and “wife” was not always protective, how-

16 Amnesty International, *Sierra Leone: Childhood: A Casualty of Conflict* (2000), as cited in Park, *supra* note 10 at 315.

17 HRW, *supra* note 10 at 43-44.

18 The Sierra Leone Truth & Reconciliation Commission, *Witness to the Truth: Report of the Sierra Leone Truth & Reconciliation Commission* (5 October 2004) at para. 211 [TRC].

19 TRC, *supra* note 18 at para. 211.

20 HRW, *supra* note 10 at 46.

21 Doherty Dissent, *supra* note 14 at para. 43.

22 Denov, *supra* note 6 at 9.

ever, as some of the women were raped while their “husbands” were out on patrol.²³ Some “husbands” also offered their “wives” to other men for sexual purposes. One woman, speaking before the TRC, maintained that “*if there is a bachelor amongst them, those that didn't have women were free to go and pick any woman to make them happy for the night.*”²⁴ Regardless of their treatment at the hands of their “husbands,” however, “wives” were expected to be intimate with them and to show them love and affection. This perverse element of the forced “marriage” is captured by the following statement made by I.S., who was abducted by the AFRC in 1999:

We stayed there for months and they were always going on attacks in the Port Loko area. Occasionally C.O. Blood was nice to me and I had to kiss him and play love with him. But I could never tell him what was really in my heart; that I missed my family and wanted to escape. Other days he would beat me for nothing. He did the same thing to his other “wife.” Neither of us could complain.²⁵

Beyond sexual violence, “wives” were also subjected to intense forms of physical violence and forced drug use, which helped create an environment of psychological terror that ensured submission. H.K., a sixteen-year-old who was accused of stealing her “husband” Colonel Jaja’s money, remembers this experience:

Then the rebels took me into a stream and tied me to a tree in the water. They told people to beat me. I was in water up to my head. “Jaja” said the boys should cut down the tree and let me drown. I was there for several days, maybe up to a week or so. Once a water snake swam by and ate my foot in the water. When I was tied there, Jaja cut my neck and put cocaine into my body. He also gave me marijuana cigarettes to smoke. Finally he untied me and put me in an old container where I stayed for several days. While in the guardroom Jaja and Alhaji “Cold Boots” came several times to give me drugs.²⁶

Other women and girls were physically mutilated when their husbands carved their faction’s letters into the bodies of their “wives,” making escape much more difficult, as they were physically branded as rebels and risked being killed by government forces.²⁷ Even without these physical markings, however, escape was difficult and many of the “wives” felt powerless to even try.

There is also evidence that “husbands” exerted near-total control over their wives’ re-

23 HRW, *supra* note 10 at 41; 43-45.

24 TRC, *supra* note 18 at para. 302.

25 HRW, *supra* note 10 at 44. It is interesting to note that this feature of forced intimacy has been used by senior figures in the RUF, who were interviewed by HRW, to deny that any violence had happened. They claimed that these women and girls had joined the movement voluntarily, and simply fallen in “love” with their “husbands” (*ibid.* at 46).

26 *Ibid.* at 33.

27 *Ibid.* at 43-44. See also TRC, *supra* note 18 at para. 218.

productive freedom. I.S. recalls unsuccessfully trying to abort the baby she was to have with her rebel husband: *"He warned me that if I tried to flush the baby out, he'd kill me. He said he wanted the baby and hoped it would be a boy."*²⁸ Although less documented, there are stories of forced abortions as well. M.K., the abducted "wife" of one of the West Side Boys, reported that *"the rebels saw that I was pregnant and said to Umaro, 'We are not going to work along with any pregnant woman, we should kill her.' Umaro said that he wanted to take me as his wife and that I should be given an injection instead."*²⁹

Women and girls in these camps were not merely "wives," however, as many of them were trained and participated in direct combat as well. McKay and Mazurana claim that "sixty percent of the girls involved with fighting forces in Sierra Leone acted as 'wives.'"³⁰ Moreover, these authors note that a certain number of the Commanders' "wives" were put in charge of small boys units (SBU) and small girls units (SGU) within the group.³¹ Some of these girls and women were therefore actively engaged in committing atrocities. As one girl recounts, *"after the training with the guns, they would bring someone for us to kill. Each of us was forced to kill."*³²

The roles of these women and girls within the camps were thus complex, as was their relationships with their "husbands" and other "wives" in the camp. Not all of the "husbands" physically abused their wives and some of them tried to stop others from misusing their own "wives." H.K., the wife of "Jaja," claims that her husband's commanding officer used to criticize him for the way he treated his wives: *"Colonel Stagger used to say, 'Look, when we take these kids, we should take care of them and now you beat her for nothing.' Jaja used to say it was not Stagger's business. Stagger's own abductees were treated pretty well. He never beat them."*³³ Also, there was a clear hierarchy within which commanders' "wives" exerted a fair degree of power over others, at least within the RUF compounds, and made decisions about the distribution of food and looted items and disciplinary actions in the absence of their "husbands."³⁴

The trauma suffered by these "wives" did not necessarily end if they managed to escape or were released at the end of the armed conflict. While some were welcomed back into their communities, many that returned faced rejection, stigma and isolation due to their "marital" association with the men who had brutalized their communities, and the violence that was done to them within these "marriages." The story of Aminata K., who was forced to marry a West Side Boy named James, is illustrative of the plight of a countless number of "ex-wives":

28 HRW, *ibid.* at 40. See also TRC, *ibid.* at para. 306.

29 HRW, *supra* note 10 at 40.

30 Park, *supra* note 10 at 316.

31 Susan McKay & Dyan E. Mazurana, *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (Montreal: Rights and Democracy, 2004) at 94.

32 Denov, *supra* note 6 at 6.

33 HRW, *supra* note 10 at 44.

34 McKay & Mazurana, *supra* note 31 at 93.

Since returning from her captivity, her husband left her and they have divorced. She said that after she returned he kept saying, “this is not my child – you are pregnant with child – this is not my child,” and after a few months he left her. She wanted to abort using herbs, but her family asked her not to as it might kill her and offered to help raise the new child. She said she is worried, however, because she has no husband or means and is completely dependent.³⁵

Moreover, an unknown number of “wives” still remain with their “husbands” today. Some stay because they “adjusted to the level of violence with the rebels, which over time became normal,”³⁶ and established a form of surrogate “family” within the camp. Some, perhaps, stay by choice. Others stay because there is no other choice, as their social and economic options in the post-conflict world are bleak, particularly if they have children from their “marriage.”³⁷

3. A Contextualized Definition of Forced Marriages

Drawing on the above stories, it is clear that while these women’s experiences of forced marriage – and their perceptions of their identities and roles as “wives” – shared many similar characteristics, they were not monolithically the same. Most of them were subjected to sexual violence, while others’ “wifely duties” included only domestic labour. Some were actively engaged in combat, while others were relegated to the “home” front. And while the post-conflict situation for the majority of the “ex-wives” was grim, this, too, was not universally the case. What is true for all of these women, as is evident within the narratives above, is that the “wives” did not choose their status, but were labelled as such through either force or coercion, often in the context of exceptional violence and fear.³⁸ Consent to marriage was therefore entirely absent, either on the part of the girl or woman herself, or on the part of her family.³⁹ What this reality suggests is that forced marriages are those in which the term “marriage” serves not only to mask the gendered violence occurring below the surface of the relationship, but also to bind the women/girls to their captors/“husbands” through the use of a label that has important social and cultural connotations. As Scharf and Mattler note, “by virtue of attaching the rights of a spouse to her, her ‘husband’ traps her within the forced marriage through social and cultural mores in place to protect valid mar-

35 Physicians, *supra* note 11 at 66.

36 HRW, *supra* note 10 at 44.

37 *Ibid.* at 44-45.

38 Nowrojee, *supra* note 1 at 102.

39 This is not to suggest that a “wife” could not later consent to her assumed marital status and relationship if she were genuinely free to leave the relationship and chose not to. See Kelly D. Askin, “The Jurisprudence of the International War Crimes Tribunals: Securing Gender Justice for Some Survivors”, in Durham & Gurd, *supra* note 8, 125 at 149.

riages.”⁴⁰ It is the label itself, and the way in which it is so violently imposed, that separates this phenomenon from other acts of gender discrimination and/or violations that women experience within armed conflicts. The use of the marker “wife” has long-term psychological and social consequences for the women and girls; thus, for the purposes of this paper, it is the forced imposition of the status of marriage itself upon the woman or girl, and not merely the various violations that she experiences *within* the context of her relationship, that is to be considered a crime.

II. FORCED MARRIAGE AS AN “OTHER INHUMANE ACT”: *BRIMA II*

The SC-SL is a “hybrid” court that was jointly set up by the United Nations and the government of Sierra Leone in 2002. Its mandate is to prosecute crimes against humanity, war crimes, and other serious violations of IHL and Sierra Leonean law, and to try those who bear the “greatest responsibility” for the atrocities committed during the civil war.⁴¹ The Statute of the SC-SL explicitly refers to certain crimes of sexual violence, including “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” which can be prosecuted as crimes against humanity when committed as “part of a widespread or systematic attack against any civilian population.”⁴² The Statute also expressly lists “rape, enforced prostitution and any form of indecent assault” as serious violations of IHL, which can be tried as war crimes.⁴³ The explicit naming of these crimes has provided a viable framework from which to explore forced marriages in conflict situations. In fact, in its landmark 2008 judgment, *Brima II*, the Appeals Chamber of the SC-SL set international precedent by ruling that forced marriage constitutes a crime against humanity, as an “Other Inhumane Act.”

The three accused, Brima, Kamara, and Kanu, who all held senior command positions in the AFRC, had been charged with six counts of serious violations of IHL, seven counts of crimes against humanity, and one count of “other serious violations” of IHL, namely the use of child soldiers. The Prosecutor specifically charged the three ac-

40 Michael P. Scharf & Suzanne Mattler, “Forced Marriages, Exploring the Viability of the Special Court of Sierra Leone’s New Crime Against Humanity” (October 2005) Case Research Papers Series in Legal Studies, Working Paper 05-35 at 9. The authors provide as an example the fact that under certain customary marriages in Sierra Leone, the dissolution of a marital relationship requires the permission of the woman’s relatives. In the context of the forced marriages as seen in the stories above, these women were entirely cut off from their communities and families making the usual customs surrounding the end of marriages impossible to follow.

41 *Brima II*, *supra* note 5 at para. 2. The SC-SL’s jurisdiction is temporally limited to events that occurred after November 30, 1996. Regarding Sierra Leonean law, the SC-SL is mandated to try crimes found in the *Prevention of Cruelty to Children Act, 1926*, which deals with offences relating to the abuse of girls and abductions for “immoral purposes (Nowrojee, *supra* note 1, at 97-98), although no charges have been brought under this statute.

42 Statute of the Special Court of 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, United Nations and Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138, art. 2(g) [SC-SL Statute].

43 *Ibid.* art. 3(e).

cused on counts of “sexual slavery and any other form of sexual violence,” “other inhumane act,” and “outrages upon personal dignity” in relation to forced marriages.⁴⁴ At the Trial Chamber II, the three accused were convicted on the majority of the counts, but were acquitted on the sexual slavery and other inhumane acts charges. The Trial Chamber held that any act of forced marriage was entirely subsumed by the sexual slavery charge, and was thus redundant.⁴⁵ Furthermore, it ruled that the charge of sexual slavery had been improperly pleaded, as the charge read “sexual slavery and other sexual violations” (which is properly two separate counts), and was thus found to be duplicitous.⁴⁶ The evidence relating to these forced marriages was thus considered only under the war crime charge of “outrages upon personal dignity.”⁴⁷

The Prosecutor appealed this decision, and the Appeals Chamber accepted the prosecution’s arguments on the forced marriage charge and ruled that a coerced marital association can be considered as a separate and distinct crime from that of sexual slavery, as it is not predominantly a sexual crime, and the use of the term “wife” signifies more than the mere assertion of “ownership” over the victim.⁴⁸ The Appeals Chamber defined forced marriages as follows:

44 *Prosecutor v. Brima, Kamara and Kanu*, “Further Amended Consolidated Indictment Submitted by Prosecutor David M. Crane” (18 February 2005), Case No. SCSL-2004-16-PT, Special Court for Sierra Leone, Trial Chamber II, 20 June 2007 at paras. 51-57.

45 *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Special Court for Sierra Leone, Judgment, Trial Chamber II, 20 June 2007 at para. 711 [*Brima I*].

46 *Ibid.* at paras. 92-95.

47 See Doherty Dissent, *supra* note 14. Justice Doherty dissented on count 7 (sexual slavery) and count 8 (forced marriages). She held that the majority’s approach to count 7 was overly formalistic (at para. 2). She would not have dismissed the charge of sexual slavery in its entirety, but rather would only have considered evidence relating to sexual slavery, not sexual violence (at para. 12). Regarding forced marriages, Justice Doherty considered the evidence of the Prosecution’s expert witness, Mrs. Zanaib Bangura, and held that forced marriages could constitute a crime against humanity. The expert witness had interviewed women and girls who had been married to combatants and found that all of them had been abducted; that neither their consent nor that of their families was obtained (at para. 27); that these women and girls “belonged” to one person in an exclusive relationship (at para. 29); that forced marriage was a means of survival (at para. 29); that many of them became pregnant and were forced to give birth, although miscarriages and sexually transmitted diseases were common (at para. 30); that they were expected to gratify their husbands sexually upon demand and were forced to carry out a variety of domestic tasks (at para. 31); that they were further expected to show “undying loyalty to her husband to reward him with ‘love’ and affection” and that punishment for “disloyalty” was severe (at para. 32); and that many faced long-term stigmatization upon their return to their communities, due to the “widespread belief that any person who lives with a rebel leader for more than a day becomes tainted and acquires ‘rebel behaviour’” (at para. 33); and that many of the former “wives” remained with their rebel “husbands” (at para. 33). Considering this evidence, Justice Doherty argued that the “use of the term ‘wife’ is indicative of forced marital status which has lasting and serious impacts on the victim ... [and] would therefore have held the *actus reus* and *mens rea* of an Other Inhumane Act, forced marriage, are satisfied” (at para. 51). The evidence presented by the Prosecution’s expert mirrors, in many ways, the stories of the “wives” in Sierra Leone seen above. The difference, however, is that there is no discussion of any combat role on the part of the “wives” and also a less nuanced discussion of the complexities of the various relationships between “wives” and “husbands” and between the women and girls within the camps.

48 *Brima II*, *supra* note 5 at para. 195.

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.⁴⁹

Importantly, the Appeals Chamber also held that there is a “clear and convincing distinction” between forced marriages during armed conflict and the practice of arranged marriages among certain communities during peacetime:

While traditionally arranged marriages involving minors violate certain international human rights norms such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), forced marriages which involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.⁵⁰

The Appeals Chamber further held that the prohibition of other inhumane acts in international law is intended to serve as a residual category, “so as to punish criminal acts not specifically recognised as crimes against humanity, but which, in context, are of comparable gravity to the listed crimes against humanity,”⁵¹ and is not intended to “foreclose the possibility of charging as ‘Other Inhumane Acts’ crimes which may [...] have a sexual or gender component.”⁵² Taking into account the “atmosphere of violence” and the “vulnerability of the women and girls” and the “effect of the perpetrator’s conduct on the physical, moral and psychological health of the victims,” the Appeals Chamber held that forced marriage is of a similar gravity to the enumerated crimes against humanity,⁵³ and that due to the systematic nature of the abductions and the “prevailing atmosphere of coercion and intimidation,” the perpetrators could not have “been under any illusion that their conduct was not criminal.”⁵⁴ The Appeals Chamber thus found that forced marriage is criminal in nature and can give rise to individual criminal responsibility in international law, as it constitutes an “other inhumane act.” The Appeals Chamber declined, however, to enter a cumulative conviction, alongside “outrages upon personal dignity,” because it felt that “society’s disapproval” of this particular act was adequately reflected by the recognition alone that forced marriage is criminal in nature.⁵⁵

49 *Ibid.* at para. 196.

50 *Brima II, supra* note 5 at para. 94.

51 *Ibid.* at para. 183.

52 *Ibid.* at FN 284.

53 *Ibid.* at para. 200.

54 *Ibid.* at para. 201.

55 *Brima II, supra* note 5 at para. 202.

III. THE CONSTITUENT CRIMES THAT UNDERPIN THE CRIME OF FORCED MARRIAGE

Before entering into a discussion of the significance of the *Brima II* judgment in its recognition of forced marriage as a separate crime, it is important to examine the constituent elements of forced marriage to ensure that the introduction of this new crime in IHL is not redundant or unnecessary. As the Appeals Chamber itself recognized, tribunals must be careful to ensure that the category of Other Inhumane Acts is not made “too embracing as to make it a surplusage of what has been expressly provided for.”⁵⁶ While this paper ultimately argues that the ideal approach to addressing the phenomenon of forced marriages in armed conflict situations is to name it as a separate and distinct crime, as this is the best means by which to “provide the women who lived through the experience [with] a direct international acknowledgment of the acts to which they were subjected,”⁵⁷ if the violations that occur under the guise of the “marriage” can be adequately punished under existing international law then the formulation of a new category of international crime would be superfluous.⁵⁸ Furthermore, an exploration of alternative charging options is essential if other international or domestic tribunals decline to follow the precedent set by the SC-SL. To this end, possible charges of enslavement and sexual slavery, sexual violence, and the recruitment of child soldiers are examined in turn.

1. Enslavement and Sexual Slavery

It is clear that forced marriage shares many of the elements of the recognized crimes of both enslavement and sexual slavery.⁵⁹ For the purposes of this section, sexual slavery is defined as a specific form of the general crime of enslavement and thus the discussion of the former should be viewed as encompassing the latter.⁶⁰ The Trial Chamber II in *Brima I* ruled that sexual slavery consists of “the perpetrators exercising any or all of the powers attaching to the right of ownership over one or more persons by imposing on them a deprivation of liberty, and causing them to engage in one or more acts of a sexual nature.”⁶¹ The Trial Chamber II further held that the use of the term “wife”

56 *Ibid.* at para. 185.

57 Monika Satya Kalra, “Forced Marriage: Rwanda’s Secret Revealed” (2001) 7 U.C. Davis J. Int’l L. & Pol’y 197 at 203.

58 See Scharf & Mattler, *supra* note 40 at 15.

59 Sexual slavery is included in the SC-SL Statute, *supra* note 42 at art. 2(g).

60 Askin, *supra* note 39 at 136, argues that “in sexual slavery, the adjective ‘sexual’ should be indicative of the form or nature of the slavery, although not necessarily the exclusive or dominant form or nature.” “Enslavement” and “Sexual Slavery” are considered to be separate crimes against humanity under art. 2(c) and 2(g) of the SC-SL Statute, *supra* note 42; and under art. 7(1)(c) and art. 7(1)(g) of the Rome Statute of the International Criminal Court, (17 July 1998), U.N. Doc. A/Conf. 183/9 [Rome Statute].

61 *Brima I*, *supra* note 45 at para. 708.

signified intent to exercise ownership rights over the victim.⁶²

Sexual slavery was first codified as an international crime against humanity and a war crime when it was included in the Rome Statute of the International Criminal Court (ICC), although many argued that this was merely a clarification of the existence of a particular form of slavery under customary international law.⁶³ The definition of sexual slavery adopted by the Trial Chamber II echoes the definition of the crime as it is described in the Rome Statute, and elucidated in the ICC's *Elements of Crimes*:

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 [and the] perpetrator caused such person or persons to engage in one or more acts of a sexual nature [...]. It is understood that such deprivations of liberty may [...] include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 [*Slavery Convention*].⁶⁴

Oosterveld has noted that the reference to the 1956 *Slavery Convention* includes in its definitions of servitude "any institution or practice whereby [...] a woman, without the right to refuse, is promised or given in marriage for payment or a consideration in money or in kind to her parents, guardian, family or any other person or group."⁶⁵ The crime of sexual slavery under international law is thus one in which the perpetrator denies the victim his or her individual autonomy through sexual means.⁶⁶ This definition is clearly broad enough to include the incidents of forced marriage, particularly as marriage without consent is considered as a form of servitude under the *Slavery Convention*.

Moreover, various authors and reports have considered that forced marriage constitutes a form of sexual slavery or enslavement. McDougall, the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, discussing the phenomenon of forced marriages within Uganda's Lord's Resistance Army (LRA), argued that "the repeated rape and sexual abuse of women and girls under the

62 It should be noted that even Justice Doherty, who claimed that forced marriages should be recognized as a separate crime used the term "ownership" in referring to forced marriages: "some girls and women forced into marriage benefited from their 'marriage' insofar as their *ownership* by a particular rebel may have offered them some protection from rape and other forms of abuse by the other rebels" (See Doherty Dissent, *supra* note 14 at para. 46) [emphasis added].

63 Valerie Oosterveld, "Sexual Slavery and the International Criminal Court: Advancing International Law" (2003-2004) 25 Mich. J. Int'l L. 605 at 607.

64 International Criminal Court, *Elements of Crime*, U.N.Doc PCNICC/2000/1 Add.2 (2000), referencing art. 7 (1)(g) and art. 8(2)(b)(xxii), including FN 17 and FN 53.

65 Oosterveld, *supra* note 63 at 634.

66 *Ibid.* at 650.

guise of marriage constitutes slavery, as the victims do not have the freedom to leave, to refuse the sham marriage, or to decide whether and on what terms to engage in sexual activity.”⁶⁷ The TRC, in relation to forced marriages in Sierra Leone, also claims that “when ‘forced marriage’ involves forced sex or the inability to control sexual access or exercise sexual autonomy, which, by definition, forced marriage almost always does, it constitutes sexual slavery.”⁶⁸

There is also strong international jurisprudential support for the claim that forced marriages could constitute a particular form of sexual slavery. The Trial Chamber of the ICTY, in its 2002 *Prosecutor v. Kunarac*⁶⁹ judgment, found that the three accused, all members of the Serbian military, who had taken women and girls from detention centres in the town of Foča during the war and held them for their own personal sexual gratification and forced them to cook and clean during the day, were guilty of rape and enslavement as crimes against humanity.⁷⁰ The ICTY also provided a list of indicia for the crime of enslavement:

control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.⁷¹

As Bélair notes, these elements of sexual slavery were clearly present in the Sierra Leonean context:

The wives although not chained or confined were captives. The rebels took deliberate measures to prevent them from escaping: they threatened the women with death if they tried to flee, carved the faction’s initials onto their chests, and exercised pernicious psychological control over them by making them fear that their families would ostracize them.⁷²

67 UN ESC, Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, 52nd Sess., E/CN.4/Sub.2/2000/21 (6 June 2000) at para. 13.

68 TRC, *supra* note 18 at para. 184.

69 *Prosecutor v. Kunarac, Kovac, and Vukovic*, Case No. IT-96-23&IT-96-23/1-A, International Criminal Tribunal for the Former Yugoslavia, Judgment, Trial Chamber, 12 June 2002 [*Kunarac*].

70 Gardam & Jarvis, *supra* note 4 at 199. The separate charges of rape and enslavement were necessary, as the ICTY Statute does not specifically enumerate “sexual slavery” as a crime, as do the SC-SL Statute and the Rome Statute.

71 *Kunarac*, *supra* note 69 at para. 543.

72 Bélair, *supra* note 3 at 563. The Special Rapporteur, Gay J. McDougall, in *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-like Practices During Armed Conflict: Final Report*, E/CN.4/Sub.2/1998/13 (22 June 1998) at para. 29, has further noted that limitations on autonomy must be analyzed in a gender-conscious way and that “the mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery.”

Furthermore, the forced domestic labour performed by the “wives” in Sierra Leone serves as an additional indication of a situation of slavery, as does the use of force by the “husbands” and the incidents of physical and sexual abuse that were so apparent in the stories of the women and girls above.⁷³

While forced marriage could certainly be prosecuted as either enslavement or sexual slavery, or both, it should be noted that neither charge fully captures the true nature of the specific violation suffered by the “wives” in forced marriages. Similarly to the way in which the drafters of both the Rome Statute and the SC-SL Statute recognized that “sexual slavery is more than slavery and more than rape, [as] the victim of sexual slavery suffers differently from the victims of other crimes against humanity,”⁷⁴ it should be recognized that the victims of forced marriages are prejudiced in unique ways that are not fully encapsulated within the existing listed crimes against humanity or war crimes. The distinction resides in the fact that the degree of “ownership” exercised over women in forced marriages is of a particularly pernicious nature in that it is disguised within the legitimate institution of marriage. The “pseudo-familial form” of the enslavement and the intentional use of the labels of “husband” and “wife” to “obscure the stigma of rape” and other violations done to the women and girls⁷⁵ has particular emotional, psychological, and social repercussions for the victims of forced marriage that are not necessarily present, to the same extent, under situations of enslavement, or even of sexual enslavement. This view is supported by the Prosecution’s expert witness Mrs. Zainab Bangura’s testimony in the *Brima II* judgment:

The use of the term ‘wife’ by the perpetrator was deliberate and strategic. The word ‘wife’ demonstrated a rebel’s control over a woman. His psychological manipulation of her feelings rendered [her unable to deny him his wishes. By calling a woman his ‘wife’, the man or ‘husband’ openly staked his claim and she was not allowed to have sex with any other person.⁷⁶

The added element of “forced intimacy” and the exclusive nature of the relationship imposed upon the “wives” both have particular long-term and stigmatizing consequences that should be recognized.⁷⁷

73 See Bélair, *supra* note 3 at 564. Cecilia M. Bailliet, “Examining Sexual Violence in the Military Within the Context of Eritrean Asylum Claims Presented in Norway” (2007) 19:3 Int’l J. Refugee L. 471 at 483, has also argued that Eritrean female recruits could be viewed as “slaves” in that “similar to the ICTY *Kunarac* case, they described being forced to perform domestic duties, including washing clothes, cooking and preparing coffee, in addition to continuous sexual violation, thereby signaling a possible case of enslavement.”

74 Scharf & Mattler, *supra* note 40 at 16.

75 Bailliet, *supra* note 73 at 483.

76 *Brima II*, *supra* note 5 at 192.

77 See Kalra, *supra* note 57 at 215; Askin, *supra* note 39 at 149.

2. Sexual Violence: Forced Pregnancies to Rape

It would also be possible for prosecutions of forced marriages to focus on the specific acts of sexual violence to which “wives” are subjected over the course of their “marriages.” Many authors writing prior to the release of the *Brima II* judgment, in fact, argued that the sexual nature of the crime, particularly the prolonged rape of the “wives” by their “husbands,” should be the starting point for classifying forced marriages as crimes against humanity or war crimes. Kalra, for example, suggests that “the very nature of marriage has sexual connotations, and the intimacy of such a relationship clearly falls within the requirement that a crime be of a sexual nature.”⁷⁸ Furthermore, the specific inclusion of rape, forced pregnancy, and any other form of sexual violence in both the SC-SL Statute and the Rome Statute⁷⁹ suggests that the separate charging of the various sexual components of forced marriages could be an effective and simple prosecutorial strategy.

It is evident that “husbands” who abduct their “wives” and subject them to non-consensual sex could be charged with the specific crime of rape. As certain authors have noted, “the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent” to sexual activity,⁸⁰ thus suggesting that the abduction of the women and girls prior to their being labeled as “wives” indicates a clear instance of rape where they are afterwards forced to engage in sexual relations with their “husbands.”

It is also clear that forced marriages could fall under the umbrella term of “sexual violence.” Indeed, the Trial Chamber of the ICTY in *Prosecutor v. Kvočka* held that “sexual violence is broader than rape,” and listed sexual molestation, forced marriage, and forced abortion as examples of other gender-related crimes that should be prosecutable as such.⁸¹ The advantage of bringing a charge of “sexual violence” in relation to forced marriages, rather than one of rape, is that it enables a broader and more nuanced reading of the harms suffered by the “wives” within their “marriages,” as sexual violence has been defined as “any violence, physical or psychological, carried out through sexual means or by targeting sexuality,”⁸² and as “any act of a sexual nature which is committed against a person under circumstances which are coercive.”⁸³ Based on similar considerations of physical or psychological violence, forced marriages could

78 Kalra, *supra* note 57 at 209.

79 SC-SL Statute, *supra* note 42 at art. 2(g), and also art. 3(e), which lists “Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” This same language is found in the Rome Statute, *supra* note 60, at art. 7(1)(g) -- with the distinction that “other sexual violence” is qualified by “of comparable gravity” -- and at art. 8(2)(b)(xxii).

80 McDougall, *supra* note 72 at para. 25.

81 *Prosecutor v. Kvočka, et al.*, IT-98-30/1-T, International Criminal Tribunal for the Former Yugoslavia, Judgment, Trial Chamber, 2 November 2001, at para. 180.

82 McDougall, *supra* note 72 at para. 21.

83 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, Judgment, 2 September 1998, at para. 688

also be prosecuted as war crimes, either under the heading of “violence to life, health and physical or mental well-being of persons,” or “outrages upon personal dignity,”⁸⁴ as forced marriages invariably involved either actual force, or the threat of force, and clearly included instances of “violence” and/or a serious affront to “dignity.”⁸⁵

Lastly, charges relating to the elimination of the wives’ reproductive freedom could also be brought against “husbands” who either forced their “wives” to remain pregnant or who actively induced abortions, as there was evidence of both practices in Sierra Leone. Under the Rome Statute, forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”⁸⁶ Askin argues that rape, resulting in pregnancy, could plausibly give rise to a charge of forced pregnancy, as “the victimiser merely needs to intend to engage in the conduct, the sexual activity, not intend the pregnancy,” as pregnancy is clearly a foreseeable consequence of sex.⁸⁷ She also argues that a woman can still be considered as a victim of forced pregnancy even if she “bears, keeps and loves the child borne of rape.”⁸⁸ It could also be possible to prosecute forced abortions, as crimes of “sexual violence,” “other inhumane acts,” or “outrages upon personal dignity,” where a woman loses her pregnancy against her will in violation of international law, such as where physical abuse or sexual violence results in a miscarriage, and where the “pregnancy was known or obvious and the miscarriage is a foreseeable outcome of the violence.”⁸⁹

While bringing separate charges related to the sexual crimes committed under the veneer of the forced marriage is certainly a viable prosecutorial strategy, this approach is inadequate in that it does not suffice in capturing the highly gendered nature of the crime of forced marriage, an argument that will be further explored below in Part IV. The exclusive focus on the sexual nature of the crime masks the fact that these women and girls are being forced to perform “wifely” duties, constructed on the basis of highly rigid and discriminatory gender roles and stereotypes, and which include many elements, such as domestic labour, that cannot be directly equated with sexual violence. Furthermore, as expressed in the stories of some of the “wives” in Sierra Leone, not all of them were subjected to sexual violence, suggesting that this piecemeal approach to criminalizing forced marriage will not adequately protect the rights of the women and girls themselves, nor effectively stigmatize the true nature of the violence done to them.

84 SC-SL Statute, *supra* note 42, arts. 3(a), 3(e); Rome Statute, *supra* note 60, arts. 8(2)(b)(xxi) and 8(2)(c)(i).

85 Kalra, *supra* note 57 at 219.

86 Rome Statute, *supra* note 60, art. 7(2)(f).

87 Askin, *supra* note 39 at 144.

88 *Ibid.* at 144.

89 Askin, *supra* note 39 at 151.

3. Recruitment of Child Soldiers

Another constituent element of forced marriages in Sierra Leone, in some although not all cases, is the forced recruitment of women and girls into the military structure of the rebel groups that abducted them. While an exploration of the treatment of child soldiers under IHL, and the gaps that exist in terms of their protection within this system⁹⁰ is beyond the scope of this paper, it should be noted that the “wives” of Sierra Leone were not merely victims, but also active combatants in certain instances, an aspect of their experience that is generally ignored in legal argument and writing. This section of the paper aims to explore the feasibility of regulating forced marriages by focusing on the issue of “child soldiers” rather than on the sexual or gendered nature of the phenomenon of forced marriage, an issue that is particularly relevant in the context of Sierra Leone, as the SC-SL is specifically mandated to address crimes committed against child soldiers as “other serious violations of international humanitarian law.”⁹¹

There is a plausible argument that the absence of a discussion of the role of “wives” in participating in active combat is related to the desire to recognize the victimization of these girls and to ensure that they are protected, rather than prosecuted. However, neatly slotting these wife-soldiers into the category of “victim” does not necessarily give voice to their true experiences and might actually do them a disservice, in the sense that it may make reintegration into their communities more difficult.⁹² Without a recognition of the ways in which forced marriage is an integral part of many armed groups’ recruitment and war-waging strategies and operations, these “wives” may get lost in the shuffle and become doubly victimized: first by their abductors/“husbands,”

90 See Sarah Wells, “Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law” (2004) 12 Tul. J. Int'l & Comp. L. 287, for an insightful examination of the lacuna that exists in regard to the protections offered to child soldiers within international humanitarian law due to the “dated distinctions between persons involved in hostilities and persons needing protection from the effects of hostilities” (*ibid.* at 288).

91 SC-SL Statute, *supra* note 42, art. 4(c) states that the SC-SL has jurisdiction to prosecute the “Conscripting or enlisting of children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.” This exact language is also found in the Rome Statute, *supra* note 60, art. 8(2)(e)(vii) for non-international conflicts, and in *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, at art. 4(3)(c) as well.

92 Wells, *supra* note 90 at para. 305, for example, argues that recognizing the direct role that some children play in armed conflicts “may more effectively contribute to the public’s understanding of the conditions under which children become killers, fostering its contribution to reconciliation and the reintegration of child soldiers in the post-conflict period.” Park, *supra* note 10 at 323, further argues that a failure to recognize the role that girls, including “wives,” play in combat groups affects their treatment post-conflict: “Disarmament, demobilization and reintegration (DDR) programmes largely ignore the needs of girls [...]. In Sierra Leone, the ‘cash for weapons’ programme disadvantaged girls who did not possess their own weapons, whose commanders confiscated their weapons, or who did not serve in a capacity involving arms. Programmes are also not adequately sensitive to girls’ experience with sexual violence, their needs as mothers, or their relationships to their captor-‘husbands’ and their home communities [...]. DDR programmes routinely underestimate the number of girls involved with fighting forces, and often do not see women and girls as ‘real soldiers’, preferring to focus on male soldiers.”

and second by an international community that refuses to recognize the duality of their roles and the agency that they exercised in their combatant roles. Park, for example, argues that “[s]implistic representations of boys always carrying AK-47s and of girls as exclusively sexual victims obfuscate the range of children’s experiences.”⁹³ Without addressing this element of the crime of forced marriage, any deterrent effect that the naming of forced marriage may have on future conduct during armed conflict will remain incomplete and inadequate.

With these considerations in mind, it is possible to argue that focusing on the stigmatization and the criminalization of the use of child soldiers may be an effective, or at least feasible, way of addressing the issue of forced marriages during conflict situations. First, if the aim of IHL is to protect to the fullest extent possible all victims of war, then the most desirable way of achieving this is to address the conditions that enable the waging and prolonging of warfare. To this end, the abduction of girls into forced marriage could be viewed as a form of perverse military recruitment into armed groups that struggle to attract fighters to their cause, and one that serves to sustain armed conflict.⁹⁴ In support of this thesis, authors have noted that the “exploitation of girls’ domestic labour was fundamental to the continuation of fighting as it sustained the armed group”⁹⁵ and that “the kinds of tasks and roles girl soldiers are allotted and in some cases forced to undertake are part of a larger planning process deliberately created by those looking to sustain and gain from the armed conflict.”⁹⁶ Furthermore, forced marriage itself is, at times, an inherent part of the rebels’ organizational structure, as was the case in Uganda with the LRA, and arguably in Sierra Leone with the various armed factions:

The testimony of children describes a strictly hierarchical structure within the LRA founded on a macabre re-ordering of experiences familiar to children. The bedrock of internal organization is what the children describe as the ‘family’. This relies, in the end, on the abduction of girls for forced marriage -- without forced marriage the ‘families’ would not exist.⁹⁷

It could be argued, therefore, that the best means of preventing forced marriages during armed conflicts is to increase the protections offered to children within IHL and to vigorously stigmatize and prosecute their use as child soldiers, as this may address the root cause of *why* girls are being abducted into forced marriages.⁹⁸ The UNICEF defi-

93 Park, *supra* note 10 at 321.

94 McKay & Mazurana, *supra* note 31 at 28.

95 Park, *supra* note 10 at 324.

96 McKay & Mazurana, *supra* note 31 at 109.

97 Amnesty International, “‘Breaking God’s Commands’: the Destruction of Childhood by the Lord’s Resistance Army” (1997), online: Amnesty International <<http://www.amnesty.org/en/library/asset/AFR59/001/1997/en/dom-AFR590011997en.html>> at 15.

98 McKay & Mazurana, *supra* note 31 at 120 argue, for example, that focusing on the role that girls play in combat forces, and an assessment of gender as a key factor, may lead to, a “deeper understanding of what it takes to create and maintain the kinds of fighting forces and armed conflicts we are now seeing.”

inition of “child soldier,” as set out in the *Cape Town Principles*, offers a way forward in this regard, through its recognition that a child soldier is “any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group *in any capacity*.”⁹⁹ As Park notes, “this capacious definition” includes those children who act in a “support capacity” or “who are recruited for the purpose of marriage, or to render sexual services.”¹⁰⁰ Adopting this expansive view of child soldiers would allow the prosecution of forced marriages to be carried out as part of an attempt to eradicate the use of under-age combatants and thus reduce the capacity of armed groups to sustain their war efforts.

The problem with pursuing this avenue for addressing the issue of forced marriages is that not all “wives” abducted into fighting forces would be deemed to be child soldiers under international law, and thus would not be offered protection or redress. Moreover, while the child soldier approach is advantageous in the sense that it does not unduly stereotype women and girls as mere “super-victims,” and allows an examination of specific vulnerabilities based on age, it is inadequate in that it does not specifically address the gendered violence that underpins forced marriages. Just as ignoring the combat role of “wives” obscures the complexities of their experiences within forced marriages, so would ignoring the other components of their lives with their “husbands,” including sexual and gender violence. I argue, therefore, that the “recruitment and enlistment of child soldiers” should be charged alongside forced marriage as a violation of IHL, as the former category does not fully address the true nature of forced marriages, but can add depth and breadth to the international community’s understandings of both phenomena.¹⁰¹

4. More Than a Sum of Its Parts

In conclusion, while the examination of the above-explored constituent elements of forced marriage highlights the egregious nature of the acts that are often contained *within* the “marriage,” it also provides evidence that prosecuting the component parts does not serve to adequately address the institutionalization of all of these various violations under the guise of a legitimate social relationship. The ongoing abuse suf-

99 “Definitions”, *Cape Town Principles and Best Practices on the Recruitment of Children into Armed Forces and on Demobilization and Social Reintegration of Child Soldiers* (UNICEF, 1997) [*Cape Town Principles*].

100 Park, *supra* note 10 at 319. The definition of “child soldier” in the *Cape Town Principles* explicitly recognizes that forced marriage is a form of “recruitment”: “The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.” (*Cape Town Principles, ibid.*)

101 The courts in *Brima I and II*, which were the first international tribunals to prosecute the crime of the recruitment of child soldiers under international law, failed to draw any connection between the forced marriages and the war effort, despite evidence on record that supported this association (see *Brima I, supra* note 45 at para. 1260) and despite noting that “any labour or support given to the war that gives effect to, or helps maintain, operations in a conflict constitutes active participation” (*ibid.* at 1266, referring to children guarding diamond mines as an integral part of the structure of the war effort). Thus the rigid dichotomy in IHL regarding its treatment of civilians and combatants remains intact, despite the presence of these “wives”/soldiers who inherently challenge this paradigm.

ferred by the women and girls, who often became dependent on their captors – many of whom killed, maimed or assaulted the women’s families prior to abducting them and laying claim to them as their “wives” – and the element of forced intimacy within the relationship, alongside the psychological trauma of being viewed as married to their captors, are significant violations that go above and beyond the various component parts and require specific and separate recognition within IHL.¹⁰² Existing categories of crimes may be “too narrow” to capture the variety of violations that the independent crime of forced marriage could, *and should*, encompass; a broader crime of forced marriage might thus allow for more accurate identification and appropriate characterization of the nature of the crime.¹⁰³ As Bennoune notes, “creatively patching together interpretations of texts to find space for women’s experience of war may not ultimately be enough.”¹⁰⁴ Instead, what is required is recognition of the sexual component of forced marriage with a simultaneous understanding that this alone does not effectively capture the totality of the crime of forced marriage, thus implying that this unique crime must be acknowledged and prosecuted as a new and distinct category under IHL.

IV. THE NEED TO NAME FORCED MARRIAGE AS A SEPARATE CRIME

The preceding sections of this article were aimed at highlighting the various ways in which forced marriage cannot be adequately addressed within the existing framework of IHL. The section that follows underscores the specific reasons why naming forced marriage as a separate crime is a reasonable and necessary response to the phenomenon. The precedent set by the SC-SL Appeals Chamber in *Brima II* offers the international community a viable way forward in terms of recognizing and prosecuting perpetrators of forced marriages, and hopefully of lessening some of the specific harms faced by women and girls in armed conflicts.

1. Part of a Continuum of the Recognition of Gender Crimes

It is arguable that the regulation of forced marriage under IHL is at once feasible and desirable due to the recent trend of recognizing and prosecuting sexual and gender-based crimes under international law. In some ways, therefore, the naming of forced marriage as a crime can be viewed as part of a continuum, or the next necessary step

102 See Scharf & Mattler, *supra* note 40 at 15. See also Kalra, *supra* note 57 at 205, who argues that “different forms of assault cannot be weighed against each other to measure trauma; rather, they must be recognized individually to convey their gravity. The psychological trauma of the ongoing rape, torture, and emotional abuse reinforces the need to acknowledge the gravity of the specific act of forced marriage.”

103 See Oosterveld, *supra* note 63 at 622-624, who makes a similar argument regarding the necessary inclusion of the crime of sexual slavery within the Rome Statute to complement the already existing crime of enforced prostitution.

104 Karima Bennoune, “Do We Need New International Law to Protect Women in Armed Conflict?” (2006-2007) 38 Case W. Res. J. Int’l L. 363 at 387.

in the culmination of the process of “gendering” IHL, which notably began with the prosecutions of sexual violence before the *ad hoc* tribunals in both Rwanda and the Former Yugoslavia in the 1990s, and which has helped counter a long history of silence and invisibility of these crimes within IHL.¹⁰⁵ At the same time, however, one of the pressing reasons that forced marriages need separate recognition under IHL, as intimated above, is that they represent unique gender-based crimes that are not effectively captured within the context of existing enumerated crimes against women under IHL, which tend to focus more narrowly on crimes of a sexual nature.¹⁰⁶ While gender violence, as a category, encompasses sexual violence, the reverse is not true; thus, in only recognizing and prosecuting sexual crimes, a gap exists in terms of the protection of women’s fundamental rights and interests, which renders invisible some of the specific ways in which women are targeted within armed conflicts. Gender refers to the “socially constructed roles of men and women in public and private life,”¹⁰⁷ and gender-based violence is any violation that is “perpetrated against a person’s will, and that is based on socially-ascribed (gender) differences.”¹⁰⁸ Focusing on gender requires a more holistic view of what constitutes a violation under IHL, as it requires an analysis of the ways in which gender is constructed within societies, the implication this has for gendered violence within armed conflict, and the reality of continued gender violations, post-conflict.¹⁰⁹ While sexual violence may be (in theory) safely contained within a specific temporal framework, questions of gender-based violence mandate the adoption of a wider conceptual lens. While this analysis is far outside the scope of the traditional norms of IHL, this argument, by itself, is not sufficient to bar a re-formulation of the role that IHL is to play in regulating armed conflicts. The reality is that without an incorporation of a gendered analysis into the IHL framework, its prevention and regulation regime will remain woefully inadequate.

It is clear that forced marriages fall under the category of gender crimes and must be distinguished from sexual crimes if their true nature is to be recognized and stig-

105 See Park, *supra* note 10 at 325-26 who provides a brief overview of the trajectory of the historical treatment of sexual violence within IHL into the present time, culminating with the Women’s International War Crimes Tribunal’s symbolic victory regarding the “comfort women” held as sexual slaves by the Japanese military in WWII, and the explicit inclusion of specific sexual violence crimes as “crimes against humanity” in the Rome Statute.

106 Bennoune, *supra* note 103 at 384, notes that “the focus of women’s IHL is seen to fall narrowly on sexual violence and pregnancy, rather than having a sense of the panoply of violence which befalls women in conflict.” See also Gardam & Jarvis, *supra* note 4 at 94, who argue that “women are valued in IHL in terms of their sexual and reproductive aspects of their lives.”

107 Donna Sullivan, *Integration of Human Rights into the work of the Special Rapporteur* (New York, UNIFEM, 1996), as cited in McDougall, *supra* note 72 at FN 4.

108 Refugees International, *Laos Without Justice* (Washington: Refugees International, June 2007) at Endnote 1. Gender is distinguished from sex as the latter is inherently rooted in biological differences and (at least presumed) immutable characteristics (Bailliet, *supra* note 73 at 495).

109 As Dyan E. Mazurana, *et al.*, “Girls in Fighting Forces and Groups: Their Recruitment, Participation, Demobilization and Reintegration” (2002) 8:2 *Peace and Conflict: Journal of Peace Psychology* 97 at 98, argue, “the experiences and concerns of men, women, boys, and girls before, during, and after armed conflicts are shaped by their gendered social roles. These roles are in turn formed by cultural, social, economic, and political conditions, expectations and obligations within the family, community and nation.”

matized. This fact was acknowledged by the Appeals Chamber in *Brima II*, which ruled that these arrangements “do not always involve the victim being subjected to non-consensual sex or even forced domestic labour[;] forced marriage is not a sexual crime.”¹¹⁰ While some have argued that forced marriages explicitly target and control female sexuality, by violating women’s sexual autonomy specifically,¹¹¹ what is being truly targeted, and appropriated by force, is women’s ascribed social roles as caretakers, domestic labourers, and sexual beings. As Denov notes, girls who are forcibly recruited into armed groups, “tended to be relegated to activities that reflected traditional gender roles including cooking, cleaning, looking after younger children and serving men, thus in many ways replicating the tasks that women and girls undertook in the broader society.”¹¹² The specific gendered component of this crime, and its interplay with social and cultural norms in times of peace, thus renders it more complex than traditional sexual violence and suggests the need for separate recognition. In failing to recognize the widespread and systematic gender abuses that occur within, and because of, forced marriages, and in potentially “collapsing sex into gender,”¹¹³ the present IHL regime is not equipped to address the phenomenon of forced marriages. The naming of forced marriage as a separate and independent crime is thus at once an acceptable consequence of the increased recognition of gender within the framework of IHL, but also a necessary step in ensuring that true gendered crimes, such as forced marriage, receive adequate recognition, stigmatization, and criminalization within the international system.

2. Giving Voice to Women

Another significant element of the naming of forced marriage as an independent and prosecutable crime under IHL is that the naming may serve to effectively give voice to the women and girls who are forced into these relationships. Certain scholars, including Rosalind Dixon, have called the need to specifically name sexual and gender crimes “the imperative of recognition,”¹¹⁴ others have termed it the “struggle for meaning,” as in the victims’ fight for recognition of the crime done to them and a consequent punishment of the perpetrators.¹¹⁵ Regardless of any formal labels, naming can play a potent role in allowing women forced into “marriages” during armed conflict to fully express what has been done to them, but also to understand the implications and natures of their “marriages” as well. The following statement from a child protection worker ac-

110 *Brima II*, *supra* note 5 at para. 189.

111 Bélair, *supra* note 3 at 581, argues that the violation of reproductive autonomy and the woman’s capacity to exercise control over her sexual activity and her own body is indicative of a sexual slavery situation.

112 Denov, *supra* note 6 at 10. These findings are from three research projects that explored the unique realities of girls affected by armed conflict in Angola, Sierra Leone, and Mozambique, Sierra Leone and Northern Uganda.

113 Valerie Oosterveld & Andrea Marlowe, “International Decisions” (2007) 101 *Am. J. Int’l L.* 848 at 854.

114 Rosalind Dixon “Rape as a Crime in International Humanitarian Law: Where to from Here?” in Gerry Simpson ed. *War Crimes Law Vol. I* (Ashgate 2004) 268, as cited in Bailliet, *supra* note 73 at 509.

115 Robert Lifton, “The Concept of Survivor”, in Joel E. Dimsdale, ed., *Survivors, Victims, and Perpetrators: Essays on the Nazi Holocaust* 113, 123, as cited in Nowrojee, *supra* note 1 at 104.

tive in Sierra Leone reflects the pressing need for a naming of this act as a crime so that the women and girls taken as “wives” are not forced to self-identify as such:

We have to recognize that maybe these girls [...] were taken quite young, and they don't see any other option, but they do consider the men to be their husbands, even if they don't necessarily want to be with that man. They still consider him to be their legitimate husband in some way. And it's older people and outside people who are saying that's not a legitimate marriage: just because you've been with him and you've been sleeping with him and you have a child, it's not a marriage [they say]. He is supposed to go to your parent's house and ask for you and do these things, which is what many NGOs have been encouraging and [also] what we've [INGO, the International NonGovernmental Organization] been encouraging [...] But the concept that they are wives and that these are their men is quite strong for them [...] they don't perceive themselves [as] at this point still held against their will [...] They're choosing to stay with men because they have no idea who possibly else would want to take care of them, and they've been told that nobody else would want them.¹¹⁶

The naming of these crimes, and their prosecution under IHL, thus allows for “confirmation to the victim that they are not responsible for what happened to them, as well as the opportunity for the victim to tell their story.”¹¹⁷ This may have serious and important implications for the wives' reintegration in the post-conflict world, in that it may help in shifting the stigma of “marriage” onto the perpetrators of the crime, thus easing the burden of the “wives” in terms of normalizing their relationships with their families and communities.¹¹⁸

Moreover, without this specific recognition within IHL, the international community risks sending a message that acts of gendered violence, done within the confines of “marriages” during war time, are acceptable,¹¹⁹ making it plausible, as was the case in *Brima I*, to argue that “marriages,” even if forced, render any acts done within the confines of this specific institution unprosecutable and thus invisible, once again silencing the voices of these “wives”:¹²⁰

By not acknowledging forced marriage at all, the international community

116 Interview with Catherine Wiesner, June 5, 2002, as cited in McKay & Mazurana, *supra* note 31 at 56.

117 Gardam & Jarvis, *supra* note 4 at 131.

118 Kalra, *supra* note 57 at 220.

119 Nadine Dostrovsky, et al., *Annotated Bibliography on Comparative and International Law Relating to Forced Marriage* (Department of Justice Canada, August 2007) at 44.

120 See Doherty Dissent, *supra* note 14 at para. 19, which shows that the defendant, Kanu, relying on expert evidence, argued that forced marriages could not be deemed of similar gravity to other crimes against humanity due to the more nuanced relationship between husband and wife. Moreover, this same defendant attempted to argue that this could not be a crime against humanity as it was simply a replication of customary marriage (*ibid.* at para. 36).

fails to provide a potential deterrent for future cases of forced marriage. It may in fact create a loophole for combatants, who may claim women as wives, rape them, and submit them to various forms of physical and psychological violence with impunity. By not trying these crimes, the international community sends a message that these acts are acceptable as long as they are done under the guise of 'marriage'.¹²¹

It has been argued by some scholars that naming the crime forced marriage is potentially problematic in the sense that it can operate as a serious misnomer and serve to inscribe the institution of marriage, more generally, with patriarchal views of what it means to be a "husband" and "wife." However, it should be noted that many of the women and girls of Sierra Leone, as seen in the stories above, self-identify as the "wives" of their captors/"husbands," and to choose another label under IHL would only serve to further mask the problem and undermine the project of giving voice to the women who called these men their "husbands" and who were, in turn, named their "wives."¹²² Instead of calling forced marriage by another name to avoid incongruous uses of the term "marriage," the term should be given real meaning and content within IHL so that *forced* marriages cannot be equated with marriages more generally, and so that women will not disappear into degrading, abusive, and violent relationships during armed conflicts under the guise of a legitimate social institution.

While it is recognized that the criminalization of acts at an international level, even where there is vigorous prosecution, does not serve as a panacea, in that there is no addressing of the larger socio-economic and cultural issues that may potentially render these women and girls more vulnerable to becoming captive "wives" in the first place,¹²³ I argue that criminalization is a necessary first step to protecting these girls' and women's rights and interests during armed conflict and in giving them a voice to express what has been done to them. The hope is that naming and prosecuting under IHL will serve in helping to end impunity for gender-based crimes, to challenge gender stereotypes that aid in perpetuating gender violence, and to set important precedent for future cases.¹²⁴

121 Kalra, *supra* note 57 at 203.

122 See Bélair, *supra* note 3 at 553, for the argument that the "term 'marriage' is a criminal misnomer that masks what, under international criminal law, was clearly a situation of slavery." Also see Nowrojee, *supra* note 1 at 94, who argues that we must "take care that patriarchal gender stereotypes of a wife's role, such as household cooking and cleaning, are not inadvertently incorporated into jurisprudence that nominally seeks to make gains for women."

123 Amy E. Ray, *Gender-Based Terrorism in the Former Yugoslavia*, (1997) 46 Am. U.L. Rev. 793, 830, as cited in Bélair, *supra* note 3 at 580, notes, for example that "international human rights law through a war crimes tribunal addressed only one moment during entire lives of sexual discrimination and sexual terrorism [and] it ignores each incident of sexual terrorism until a soldier representing a state violates women's rights during times of 'war.'" Others, such as Park, *supra* note 10 at 316, have argued that "international law is not a silver bullet to alleviate the structural barriers, constraints and challenges that entrench girls' vulnerability in peacetime and wartime."

124 Suzan M. Pritchett, "Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court" (2008) 17 *Transnat'l L. & Contemp. Probs.* 268 at 298.

3. Influence on Other Legal Systems

While it is clear that the naming of forced marriage as an independent crime under IHL will not have an entirely transformative effect in terms of gender equality or the treatment of women and girls within society, as noted above, it is arguable that it can play an important role as a precedent, not only in the international system, but for domestic systems of law as well. As Bélair notes, “giving a court jurisdiction over a crime of sexual [or gender] violence enables it to elaborate on the essence of such crime and perhaps even generate progressive normative discourse”¹²⁵ that may have repercussions elsewhere. The naming of this specific crime under IHL, and the rendering of it more visible, could contribute to the ongoing discourse seeking to advance the protections of women at all levels of society by providing a counterpoint to the truism that “violence against women has been misconceived as a private thing, an incidental thing, an unfortunate thing and a cultural thing. Anything but a human rights thing.”¹²⁶ In other words, it is plausible that viewing forced marriages as a crime may help draw parallels with discriminatory practices that exist beyond times of armed conflict. As Reynolds notes, “identifying why sexual violence remains a too frequent occurrence in war builds a nexus with peacetime sexual violence: this would increase awareness of how to confront the attitudes and images that perpetuate violence against women.”¹²⁷

It is conceded, of course, that the argument above is problematic. First, there may be active state resistance to the notion of criminalizing forced marriage, both at an international level, and within domestic systems of law. While the courts in *Brima* scrupulously sought to distinguish forced marriages during armed conflict from more traditional “arranged” marriages in times of peace (where the former are rooted in an absence of consent on the part of the woman or girl’s family and a lack of formal ceremonies binding the spouses together),¹²⁸ the distinctions drawn by the courts are not as clear-cut as to render the naming of forced marriage as a crime unproblematic in terms of state acceptance for those nations that could plausibly view this as an undue interference in cultural matters. It has been noted by several authors, for example, that there was concerted resistance by a group of Arab states to the inclusion of the crime of sexual slavery in the Rome Statute. These states sought to include an addendum to the definition of “ownership” under this crime so as to exclude any possibility that the powers of ownership could be construed as including any reference to the

125 Bélair, *supra* note 3 at 585.

126 Margareth Etienne, “Addressing Gender-Based Violence in an International Context” (1995) 18 *Harv. Women’s L.J.* 139 at 158.

127 Sarnata Reynolds, “Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict” (1998) 16 *Law & Ineq.* 601 at 604.

128 See Doherty Dissent, *supra* note 14 at para. 36, where she argues that, “having considered the description of traditional marriages in parts of West Africa given by the Defence expert and the evidence of both the Prosecution expert and the witnesses, I am of the view that the abduction of girls and their coercion into marital unions [...] is not the same nor comparable to arranged or traditional marriages. In particular, the consent of the girl and/or her parents is not sought, there is no involvement of the family of either ‘spouse’ and there is no ceremony or ritual fulfilled.”

“rights, duties, and obligations incident to marriage between a man and a woman.”¹²⁹ The overarching concern for these Arab states was in protecting cultural practices that could plausibly be considered as comprising a crime against humanity under the new definition of sexual slavery:

These states feared that the law on crimes against humanity was too ambiguous and might be used by activist judges not simply to deal with atrocities but as a tool of ‘social engineering’. These countries explained in the negotiations that protecting religious or cultural practices and traditions was a particular priority. In some of the Arab states making the proposal, national laws made obtaining a divorce more difficult for women than for men, and some cultural practices required wives to have their husbands’ permission to participate in public activities. These states were concerned that an argument might be made that these practices amounted to sexual slavery.¹³⁰

The notion that forced marriage could constitute an independent crime under IHL would assumedly draw the same concerns and criticisms, namely that the international community, under the guise of IHL and international criminal law, was illegitimately attacking customary norms and practices. Furthermore, there is the argument that an international tribunal is not instituted to address *all* social ills, but rather “must maintain its focus on only the most serious international crimes if it is to maintain its credibility and stature.”¹³¹ The deep connections between the institution of marriage and cultural practice thus may render the criminalization and stigmatization of forced marriages inherently difficult to achieve, particularly at the level of state acceptance and compliance with any new IHL standards.

Second, without a state’s or group’s willingness to accept the norms and principles that underpin IHL, including any criminalization of forced marriages, the possibility of actually affecting conduct both within armed conflict and in times of peace is duly complicated. For an effective change to occur there needs to be a sense on the part of those engaging in such practices that the conduct is, in fact, criminal behaviour; or, as Packer argues, if groups are to feel morally compelled to comply with various laws, then “they must believe that a law is needed, for which they must first be convinced that the practice is ‘wrong’.”¹³² If women are viewed as being entirely subordinated within

129 Oosterveld, *supra* note 63 at 636.

130 *Ibid.* at 636.

131 Bélair, *supra* note 3 at 580.

132 Corinne A.A. Packer, “Using Human Rights to Change Tradition: Traditional Practices Harmful to Women’s Reproductive Health in Sub-Saharan Africa” (2002) 153, as cited in Bélair, *supra* note 3 at 601.

marriages at all times based on traditional cultural practices and customs,¹³³ then it is arguable that any law under IHL that seeks to eradicate harmful treatment of “wives” will remain practically unenforceable and will bear little impact on domestic systems, as the mistreatment of the women and girls under forced marriages will merely be a “gross magnification of ‘ordinary’ violence and attitudes, not an aberration.”¹³⁴

Nevertheless, recognition of the violations done under the name of “marriage” within armed conflict, and the forced imposition of this label itself, must be understood as constituting a serious crime. While certain cultural practices may violate women’s human rights, the absolute lack of consent on the part of either a woman or her family, or even her community, distinguish this practice from arranged marriages under customary laws and should be viewed as criminal in nature. Furthermore, in addressing this issue at the international level, there is hope that it will provide the “language and law” required to conceptualize this degree of gender violence as harmful to women and girls, even when accepted domestically. As Bélair argues, “if international criminal law thus serves to stimulate reflection on the need to bring those practices to the state’s attention, and on the best way to eradicate those practices, it will have greatly contributed to the advancement of women’s rights on a national level.”¹³⁵

CONCLUSION

The purpose of this paper has been to explore the phenomenon of forced marriages in armed conflict situations, drawing on the experiences of the women and girls of Sierra Leone who acted as the “wives” of their captor/“husbands,” and seeking to establish that this phenomenon is not merely a collection of various violations, but a serious gender-based crime in and of itself that requires separate recognition as such within

133 Sierra Leone has enshrined formal guarantees of rights and freedoms for women in its Constitution (*The Constitution of Sierra Leone*, 1991 (Act. No. 6 of 1991) at art. 15), and there have been recent legislative initiatives, such as *The Child Rights Act*, Supplement to the Sierra Leone Gazette Extraordinary Vol. CXXXVIII, No. 43 dated 3rd September, 2007, regarding the rights of women and girls that suggest a new focus on substantive equality rights as well. The Child Rights Act, for example, sets the minimum age of marriage at 18 and mandates that “no person shall force a child ... to be married” (art. 34(1)(c)), on penalty of criminal punishment (art. 35). Nevertheless, many authors and reports have pointed to “structural discrimination by practice, custom, and law” and the fact that “such discrimination pervaded the social, political, and economic public setting as well as in the family. The TRC argued that the application of customary and statutory laws to women and girls, especially in the field of personal law, was discriminatory and did not adequately protect them against violence” (Bélair, *supra* note 3 at 595). The TRC has further argued that “the abductions and use of young girls and women as bush wives and sex slaves by armed groups during the war could be attributed to the traditional beliefs that governed this issue prior to the war. Some of the armed groups did not consider it an aberration to rape young women or use them as sex slaves” (TRC, *supra* note 18 at 85). Thus, while the new legislative changes are clearly positive developments, unless structural changes and shifts in attitude occur as well, the project of furthering women’s protections and rights within marriage will remain incomplete.

134 Bennoune, *supra* note 103 at 370.

135 Bélair, *supra* note 3 at 606.

IHL. While it is acknowledged that questions of cultural relativism and the limitations of IHL itself in terms of its ability to address serious gender violence with long-lasting effects act as potential roadblocks to an effective criminalization of this conduct at an international level, it is also contended that these arguments may simply be rooted in an “ingrained acceptance of the boundaries of the law,”¹³⁶ which ought to be challenged if meaningful change is to occur in the lives of women and girls caught up in armed conflict.

That said, however, while the stigmatization of forced marriages is an important step, it also must be recognized that when it comes to a consideration of how to build, sustain and promote sustainable peace, while addressing the needs of women within IHL, there is an imperative to “think longitudinally, comprehensively, creatively and contextually”¹³⁷ and to appreciate that no one single solution will address all of the needs of the women and girls trapped in forced marriages. However, it is also essential to consider that this specific naming may operate as “an important symbolic and legal gesture towards recognizing and advancing the rights of women and girls”¹³⁸ and that even moderate improvements in these same lives are at once desirable and feasible.

136 Gardam & Jarvis, *supra* note 4 at 106.

137 Hayli Millar, “Facilitating Women’s Voices in Truth Recovery: An Assessment of Women’s Participation and the Integration of a Gender Perspective in Truth Commissions”, in Durham & Gurd, *supra* note 8, 171 at 220.

138 Park, *supra* note 10 at 332.