GENDER VIOLENCE OR VIOLENCE AGAINST WOMEN? THE TREATMENT OF FORCED MARRIAGE IN THE SPECIAL COURT FOR SIERRA LEONE

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The article considers the case for viewing forced marriage, a prevalent form of violence suffered by women during the Sierra Leone conflict, as a gender crime. The article begins with a brief examination of the Special Court for Sierra Leone trials, commonly known as the Armed Forces Revolutionary Council Trial, *the* Armed Forces Revolutionary Council Appeal, *the* Revolutionary United Front Trial *and the* Charles Taylor Trial. *Part IV then puts forward a conceptualisation of forced marriage as a gender crime and not purely violence suffered by women. It is argued that in order to fully reflect the nature of the harm suffered, the gender element of the violence must be foregrounded. This argument rejects calls for forced marriage to be viewed as enslavement or sexual slavery and emphasises the specific harm stemming from the label 'wife' as demonstrative of the force of socially assigned gender roles; these roles are integral to the crime rather than just forming the broader social context. This suggests that forced marriage as a gender crime should be seen as a stand-alone crime separate from other instances of forced marriage. In Part V and Part VI, it will be argued that the categorisation of forced marriage as a gender crime is a vital step towards the recognition of this type of gender violence as being within the scope of international law. Specifically, this article considers the characterisation of forced marriage under international criminal law in light of its interest to international refugee law, where similar violence might be raised as 'persecution' under the definition in art 1A(2) of the* Convention relating to the Status of Refugees.

CONTENTS

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I INTRODUCTION

The trials, judgments and appeals heard before the Special Court for Sierra Leone ('SCSL') have attracted much interest on a range of issues — some supportive and some critical.[1] The court was criticised for failing to address so-called 'lower level' violence but a limited mandate and restricted resources meant indictments were brought against only 13 senior members of the rebel forces and the former Liberian President, Charles Taylor.[2] Concerns were also raised as to the pleadings of these crimes as joint criminal liability cases.[3] However, amongst the most hotly debated issues was how to charge the endemic violence against women during the conflict partially because this was the first time such charges had attracted serious international judicial interest.[4] Although the SCSL prosecutions of forced marriage had set a precedent in many ways, there remains considerable lack of clarity in defining and recognising forced marriage.[5] This article considers the case for viewing forced marriage — a widespread form of violence against women during the conflict — as a gender crime. It suggests that it is not only accurate to label forced marriage in the context of Sierra Leone as a gender crime but it is also imperative to do so in order to confirm the status of gender violence in other related areas of international law.

There is by no means universal agreement amongst those seeking greater action on gender violence and violence against women as to the utility of international law. However, the recognition of rape and sexual slavery as international crimes and the corresponding acknowledgment of rape as persecution under refugee law might be said to demonstrate that international law is capable of being a site for meaningful engagement in addressing violence against women.[6] Yet, as will be explored below, despite all the progress made in recognising violence against women as within the scope of international criminal law,[7] the place of gender violence remains arguably ambivalent, with much work to be done to establish gender violence as being appropriate for international legal concern. The prosecutions of forced marriage before the SCSL offered an arguably missed opportunity to clarify a key emerging area of international law concerning crimes influenced to a significant degree by the gender of the victim.

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1 See, eg, Cecily Rose, 'Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes' (2009) 7 *Journal of International Criminal Justice* 353; Micaela Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime against Humanity' (2008) 6 *Journal of International Criminal Justice* 1033.

2 Rose, above n 1, 355–7.

3 See, eg, ibid.

4 Ibid 367.

5 Ibid.

6 See, eg, *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex ('*Statute of the Special Court for Sierra Leone*') art 2(g) ('*SCSL Statute*'). See also Valerie Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution' (2006) 17 *Duke Journal of Comparative & International Law* 49.

7 Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409, 409.

This article will demonstrate that forced marriage in Sierra Leone represents one such crime, with gender roles and inequalities forming an integral part of the crime.

As such, this is part of the so-called 'feminist project' in international law, where international law is used to name and address the most serious manifestations of gender constructs and male dominance.[8] Buss identifies four main aims of postwar feminist engagement with international criminal law:

(i) to gain recognition of the 'gendered and sexualised forms of harm experienced by women' during armed conflicts;
(ii) to establish links 'between gendered and sexualised harm and the definitions of crimes under international law';
(iii) to situate wartime rape within the broader context of 'peacetime' inequality and violence against women which, Buss argues, shapes and makes possible much of the conflict violence against women; and
(iv) to ensure that rape is a visible gendered crime.[9]

The first aim might be said to have been at least partially achieved by the charge of rape as a crime against humanity and as a form of genocide at the tribunals set up to address violence in Rwanda and the former Yugoslavia.[10] Progress continues to be made with ongoing prosecutions, such as those before the International Criminal Court ('ICC') concerning Kenya.[11] The second aim, discussed further below, remains controversial amongst feminists with some suggesting that gender harms ought not to be equated with other international wrongs but need to be established in their own right as violations of international

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8 Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 615.

9 Buss, 'Performing Legal Order', above n 7, 412–13. This is not to say that the other aims have been entirely achieved. Rather, as the focus of this article is not on international criminal law per se but on the broader implications of characterisations of conduct as criminal under international law, the latter two aims are of particular note here.

10 SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex ('*Statute of the International Criminal Tribunal for Rwanda*') art 3(g) ('*ICTR Statute*'); *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [417], [461], [507]–[508], [692], [696] ('*Akayesu Trial*'); Alexandra A Miller, 'From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape' (2003) 108 *Penn State Law Review* 349, 363–6; SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) art 5(g) ('*ICTY Statute*').

11 See, eg, *Prosecutor v Muthaura (Decision on the Prosecutor's Application for Summonses to Appear)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 8 March 2011). Muthaura, Kenyatta and Ali faced five counts of crimes against humanity for violence, including widespread reports of rape, that occurred during January 2008 in the Republic of Kenya's central rift region: at [13]. Similar proceedings are ongoing against those thought to be responsible for violence in the Democratic Republic of Congo: *Prosecutor v Mbarushimana (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 28 September 2010). For a comprehensive overview of recent international criminal prosecutions connected with gender violence, see generally Valerie Oosterveld, 'Atrocity Crimes Litigation Year-In-Review (2010): A Gender Perspective' (2011) 9 *Northwestern University Journal of International Human Rights* 325.

law.[12] This will ensure that women are not seen as inevitable victims of gender violence while still ensuring that gender violence is identified and addressed. This article takes up the latter two aims with regard to forced marriage and seeks to contribute to a growing body of scholarship addressing the judicial treatment of forced marriage by the SCSL, focusing in particular on the implications for international refugee law. Recent cases 'point to a continuing theme within international criminal law: while there is ever increasing awareness and knowledge of the role of gender in the commission of atrocities, there are also lingering misconceptions'.[13] There is, then, still much work to be done in clarifying the position of gender violence in international law.

This article will address the issue of how to conceptualise forced marriage as a gender crime. Part III will examine briefly *Prosecutor v Brima* ('*AFRC Trial*'),[14] *Prosecutor v Sesay* ('*RUF Trial*'),[15] *Brima v Prosecutor* ('*AFRC Appeal*')[16] and the recent judgment against Charles Taylor in *Prosecutor v Taylor* ('*Charles Taylor Trial*'),[17] where the issue of forced marriage was raised and considered by the SCSL. Part IV will then put forward a conceptualisation of forced marriage as a gender crime. In Part V, It will be argued that the gender dimension of forced marriage is integral to the characterisation of the crime. This argument rejects calls for forced marriage to be viewed as enslavement or sexual slavery and seeks to emphasise the specific harm stemming from the label 'wife', as demonstrative of the force of socially assigned roles and power inequalities between the genders. In Part VI, it will be argued that an additional benefit of categorising forced marriage as a gender crime is the applicability of this approach to other areas of international law, specifically international refugee law, where similar violence might be raised as 'persecution' under the definition in art 1A(2) of the *Convention relating to the Status of Refugees* ('*Refugee Convention*').[18]

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[12] See, eg, Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486; Hilary Charlesworth, 'Human Rights as Men's Rights' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, 1995) 103, 110–11. Chinkin argues that feminist progress in engaging international law has so far only achieved an '"add women and stir" approach that does not demand any radical rethinking of programmes or gender-awareness': Christine Chinkin, 'Feminist Interventions into International Law' (1997) 19 *Adelaide Law Review* 13, 18. The concern is that human rights and international crimes are defined by men and, as Charlesworth argues, 'defined by the criterion of what men fear will happen to them': Hilary Charlesworth, 'Women and International Law' (1994) 9 *Australian Feminist Studies* 115, 112.

[13] Oosterveld, 'Atrocity Crimes Litigation', above n 11, 328.

[14] *(Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) ('*AFRC Trial*').

[15] *(Judgment)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) ('*RUF Trial*').

[16] *(Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) ('*AFRC Appeal*')

[17] *(Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) ('*Charles Taylor Trial*').

[18] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').

II THE CONTEXT

In 1991, war broke out in Sierra Leone when a rebel group, the Revolutionary United Front ('RUF'), entered the country from Liberia.[19] The war went on with increasing brutality until peace was finally declared in January 2002.[20] The estimated death toll reached 70 000 and no area of the country was left untouched but the fighting and brutality was especially heavy in rural regions concentrated around the diamond mining areas in the east.[21] During this civil war, forced marriage was rife, to the extent that the 'concept of women being "taken as wives" was well-known and understood'.[22] Women and girls captured or abducted during the conflict could be chosen as 'wives' by male combatants — most markedly by those commanding or fighting for the RUF and the Armed Forced Revolutionary Council ('AFRC').[23] In what were known as 'bush marriages', although rarely formalised, women were considered to be 'wives' of the combatant who had 'chosen' them and could then be forced to do as their 'husbands' wished.[24] 'Bush wives' were forced to cook and clean for male combatants and were subjected to frequent sexual violence, rape and forced pregnancies.[25] Girl soldiers were also required to take on domestic and sexual tasks alongside their role as combatants and were subject to brutality by male soldiers throughout the conflict.[26]

The widespread experience of forced marriages and violence against women was not unique to Sierra Leone.[27] The *Statute of the Special Court for Sierra Leone* ('*SCSL Statute*') gave prosecutors unprecedented capacity to tackle violence against women as it not only covered rape, as the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('*ICTY Statute*') and the *Statute of International Criminal Tribunal for Rwanda* ('*ICTR Statute*') had

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19 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [12].

20 Ibid [44].

21 Ibid [45]–[46]. See also Mary Kaldor and James Vincent, 'Case Study: Sierra Leone — Evaluation of UNDP Assistance to Conflict-Affected Countries' (Report, United Nations Development Programme, 2006) 4.

22 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1295].

23 Rose, above n 1, 367.

24 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 *Columbia Journal of Gender and Law* 551, 552.

25 Ibid 554–6.

26 Female soldiers did, however, also take part in the fighting, making the victim/perpetrator line blurred in a way often unacknowledged: Chris Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Cornell University Press, 2009) 126. This article focuses only on the experiences of 'bush wives' and women forced into marriage with rebel soldiers as addressed by the Special Court of Sierra Leone ('SCSL'). This article acknowledges that viewing these women solely as victims might be seen as creating a problematic dichotomy between male perpetrators and female victims as well, as it arguably denies the agency women did show during the conflict. However, further exploration of these issues is beyond the scope of this article.

27 Forced marriage reportedly arose from conflicts across Africa, specifically in Rwanda, Mozambique and Uganda: Bridgette A Toy-Cronin, 'What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity' (2010) 19 *Columbia Journal of Gender and Law* 539, 557–61.

done,[28] but also sexual slavery, enforced prostitution, forced pregnancy and 'any other form of sexual violence'.[29] This allowed for a greater range of options in charging the defendants for the violence suffered by women during the conflict. The charges of rape and sexual violence had clear precedent to follow created by the International Criminal Tribunal for the Former Yugoslavia ('ICTY') in the much discussed case of *Prosecutor v Kunarac* ('*Kunarac*').[30] However, the use of the term 'wife' for captured women and the domestic nature of the arrangement, in many cases, added new elements to the character of violence against women during the conflict in Sierra Leone not seen during the Yugoslavian conflict or addressed by previous international criminal tribunals. On this issue, precedent was far from clear. Indeed, there was little consensus on the correct label and, therefore, the charges for the crimes.[31]

III THE CHARACTERISATION OF FORCED MARRIAGE BEFORE THE SCSL

The following section will briefly outline the *AFRC Trial*, the *RUF Trial*, the *Charles Taylor Trial* and the *AFRC Appeal* concerning the characterisation of forced marriage.

A AFRC Trial

In the first set of indictments heard by the court in the *AFRC Trial*, the focus was on the issues of forced marriage, sexual slavery and sexual violence. Forced marriage was not listed as a separate prohibited act under the *SCSL Statute*. The long-term, multifaceted nature of the abuse — including physical, mental and sexual violence as well as general repression and control — meant that these forced marriages do not fit easily within the paradigm built by the International Criminal Tribunal for Rwanda ('ICTR') and the ICTY for addressing violence against women. The paradigms created by the ICTR and the ICTY focused predominantly on short-term sexual violence.[32] The combination of sexual and non-sexual, violent and nonviolent derogations inherent in forced marriage

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28 *ICTY Statute* art 5(g); *ICTR Statute* art 3(g).

29 *SCSL Statute* art 2(g) specifically includes '[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence' as crimes against humanity and art 3(e) lists '[o]utrages upon personal dignity', including rape, as war crimes.

30 *(Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) ('*Kunarac*').

31 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [701]–[707]. For the differing opinions on the labelling of forced marriage, see at [14]–[15], [46]–[71] (Judge Doherty); [1]–[7], [16]–[18] (Judge Sebutinde).

32 Although *Kunarac* contained instances of longer-term abuse, this was not considered as forced marriage; the label 'wife' being used neither formally or informally. The International Criminal Tribunal for the Former Yugoslavia ('ICTY') had prosecuted Bosnian Serb military leaders and some individual soldiers for repeated rape and detention of Muslim women and men in *Kunarac* but this was not labelled sexual slavery; instead it was characterised as enslavement under art 5(c) of the *ICTY Statute*: *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [515]–[543]. For detailed discussion, see Patricia Sellers 'Wartime Female Slavery: Enslavement?' (2011) 44 *Cornell International Law Journal* 115, 125–7. See, eg, *Prosecutor v Katanga (Decision on the Confirmation of Charge)* (International Criminal Court, Pre-Trial Chamber I, ICC-01/04-01/07-716-Conf, 26 September 2008) for the use of the category 'any other inhumane act'. See also M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011) 410.

presented a challenge to the SCSL prosecutors and judges in conceptualising 'bush marriages' and other instances of forced marriage during the conflict.[33] The prosecutors began by deciding to charge the conduct as a crime against humanity under the category of 'any other inhumane act', which had previously been used by the SCSL and other courts as a veritable 'catch-all' including conduct as varied as public marching of women and forced disappearances.

As forced marriage was not an already recognised international crime, in order to bring it within the category of crimes against humanity the SCSL prosecutors had to demonstrate that forced marriage constituted 'other inhumane acts' by fulfilling the criteria of the *SCSL Statute*.[34] This required prosecutors to demonstrate four elements:

(i) great suffering inflicted by means of the inhumane act;
(ii) similarities in character to other crimes against humanity;
(iii) a nexus between the enumerated act and broader widespread and systematic violence; and
(iv) the need to create a new, distinct category of crime.

Forced marriages during the conflict uncontroversially established elements one to three both conceptually and evidentially — great suffering had been inflicted on women chosen as 'wives' and the constitutive parts of forced marriage were already recognised as crimes under customary international law.[35] In addition, the sexual violence and slavery elements had been prosecuted as crimes against humanity in the ICTY and ICTR.[36] The legal foundations for forced marriage of this type as a crime against humanity are thus irrefutable.[37] However, the fourth element required something beyond this conceptualisation of forced marriage as a crime against humanity; the SCSL prosecutors had to demonstrate to the court that, as a practical matter, forced marriage contained something distinct in order to justify a new category of crime.[38] The Trial Chamber judges felt that the prosecutors had failed to prove this, concluding

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33 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [701]–[707]. For the differing opinions on the labelling of forced marriage, see at [14]–[15], [46]–[71] (Judge Doherty); [1]–[7], [16]–[18] (Judge Sebutinde).

34 *SCSL Statute* art 2(i).

35 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [224]–[239].

36 *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23/T and IT-96-23/1-T, 22 February 2001) [4]–[11]; *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [270].

37 In addition, forced marriage prosecution also cannot be said to violate the principle of *nullum crimen sine lege* or of retroactivity as the constitutive parts were clearly criminal and unequivocally a part of international law and individual criminal responsibility since the case law of the ICTY and the International Criminal Tribunal for Rwanda ('ICTR'). Thus, the perpetrator cannot escape prosecution on the basis that the act(s) was/were not recognised as a crime at the time it was committed: see, eg, *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [436]–[592]; *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [638]–[744].

38 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [703]; *Prosecutor v Brima (Decision on Prosecution Request for Leave to Amend the Indictment)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-16-PT, 6 May 2004) [16].

instead that the treatment being characterised as forced marriage was subsumed in the crime of sexual slavery:

> Forced [m]arriage is in fact what we would like to classify, as a 'kindred offence' to those that exist in the consolidated indictment [ie rape, sexual slavery and other forms of sexual violence] in the view of the commonality of the ingredients needed to prove offences of this nature.[39]

Sexual slavery, in turn, was brought under the category 'outrage upon personal dignity'.[40]

This placed forced marriage firmly in the category of 'sexual crime'. The prosecutors and judges in the Trial Chamber did little more than nod towards the non-sexual elements of the prohibited conduct; instead, 'a strong focus on the sexual aspect' was maintained.[41] Indeed, the majority concluded that the charge of forced marriage was 'completely subsumed' by the crime against humanity of sexual slavery.[42] No further explanation for this conclusion was given.

At first glance, there is considerable overlap between the crimes of sexual slavery and forced marriage. The two central elements of the crime of sexual slavery are:

(i) the exercise of powers associated with a right to ownership of another person, involving a deprivation of liberty; and
(ii) causing the person to engage in one or more acts of a sexual nature.[43]

The crime of forced marriage undoubtedly features these elements but it is by no means only limited to them, which was entirely overlooked by the Trial Chamber. The judgment of the Trial Chamber has attracted much criticism particularly in the *AFRC Appeal*, which held that forced marriage was a distinct crime.[44]

B AFRC Appeal

The Appeals Chamber criticised the majority opinion for conflating sexual slavery and forced marriage and emphasised the non-sexual aspects of forced marriage, such as forced domestic labour and forced migration.[45] The Appeals

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39 *Prosecutor v Brima (Decision on Prosecution Request for Leave to Amend the Indictment)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-16-PT, 6 May 2004) [52].

40 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [718]–[722]. The charges were initially brought under art 2 of the *SCSL Statute*, rather than art 3 (relating to 'outrages against personal dignity'). The pleadings, therefore, initially equated forced marriage with sexual slavery but evidence was not heard on this as the sexual slavery charges were found to have been defectively pleaded and the charges were then heard under art 3.

41 Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the *Revolutionary United Front* Judgments' (2011) 44 *Cornell University Law Journal* 49, 51.

42 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [713].

43 See generally Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 *Michigan Journal of International Law* 605.

44 *AFRC Appeal* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [195].

45 Ibid [190].

Chamber, picking up on the arguments made by Doherty J in her dissenting judgment, concluded that 'no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery'.[46] The Appeals Chamber concluded that forced marriage was an inhumane act as it caused severe suffering and injury and that the label of 'inhumane act' adequately reflected the nature of the crime.[47] Although the Appeals Chamber declined to enter fresh convictions on this count,[48] the judgment contained some interesting observations on the nature of forced marriage and arguably adopted a gendered approach that would be of benefit to international law in general.[49] In particular, the Appeals Chamber focused on the harm stemming from the label 'wife' and that stemming from the forced conjugal duties associated with forced marriage that separated this prohibited conduct from sexual slavery.[50]

The Appeals Chamber approach seemed to draw on the prosecutorial argument in the Trial Chamber that the word 'wife' signifies a 'rebel's control over a woman'.[51] The use of the term 'wife' suggests 'control over a woman' because even in peacetime Sierra Leone, 'wives' are considered to be in a subordinate position.[52] Whilst the *AFRC Trial* and the *AFRC Appeal* provide descriptions of conduct amounting to forced marriage in the context of the conflict in Sierra Leone, they provide little general guidance or principles that could clearly be applied in other contexts.

C RUF Trial

The *RUF Trial* saw indictments entered for a range of crimes against women. The defendants were charged variously with rape as a crime against humanity, sexual slavery as a crime against humanity, the crime against humanity of other inhumane acts — specifically forced marriage — and outrages against personal dignity as a violation of Common Article 3 of the *Geneva Conventions*.[53] From the outset, then, forced marriage was raised under the heading of 'other inhumane acts' and the court focused on whether the elements of forced marriage could be said to fulfil the definition of an inhumane act. It did not, therefore, consider the definition of forced marriage per se. Charges of rape and sexual slavery were brought separately, with the *actus reus* of slavery defined as:

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46 Ibid [195].

47 Ibid [197]–[203].

48 Ibid [202].

49 Ibid [190]–[195].

50 Ibid [190]–[193].

51 Ibid [192]–[195].

52 For the notion that 'a married woman *belongs to* the husband' even outside of the conflict, see Coulter, above n 26, 80 (emphasis in original).

53 *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

(i) that the accused exercised any or all of the powers of ownership over the person or persons; and
(ii) that the enslavement involved sexual acts.[54]

Although sexual slavery was tried as a separate crime, the Trial Chamber did note that forced marriages involved instances that would have fallen within the scope of sexual slavery.[55] They concluded that forced marriage involved 'similar deprivation of liberty' to those physically confined and also included specific acts such as forced drug taking in order to exercise control, which could be seen as a form of enslavement.[56] The Trial Chamber also linked forced marriage and sexual slavery with the separate charges of committing acts of terrorism brought against the defendants.[57] Although the *RUF Trial* might be said to repeat some of the misapprehensions of the *AFRC Trial* in charging forced marriage as a form of enslavement, it also contained some recognition of the distinctions between the two types of conduct, even if these were not sufficient in the eyes of the court to warrant a separate charge.[58] In particular, the Trial Chamber recognised that the distinction between forced marriage and these other related crimes was the use of the term 'wife' and the exclusive relationship this term conveyed.[59]

D Charles Taylor Trial

Finally, the trial of former President Taylor also contained charges relating to violence against women during the conflict.[60] The Trial Chamber found that rape of women and girls during the conflict had been widespread and that it was also perpetrated by Liberian forces.[61] Further, the prosecution succeeded in proving that the RUF, the AFRC and Liberian fighters committed widespread acts of sexual slavery against civilian women and girls.[62] Taylor was found to be criminally responsible under art 6(1) of the *SCSL Statute* for aiding and abetting such conduct.[63]

Although Taylor was not charged with forced marriage specifically, the issue of how to categorise forced marriage was raised once again in the judgment of the Trial Chamber.[64] The Trial Chamber found that forced marriage 'constitutes

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54 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [159]. These criteria stemmed from *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [543] discussed below.

55 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1464].

56 Ibid [158].

57 Ibid [1352].

58 See generally ibid. See also *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007).

59 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1466].

60 *Charles Taylor Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [124].

61 Ibid [12]: see Count 4 of the charges brought.

62 Ibid: see Count 5 of the charges brought.

63 Ibid [149].

64 Ibid [422]–[430]. See also *Prosecutor v Taylor (Prosecution Opening Statement)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-2003-01-T, 4 June 2007) 304, where the Prosecutor stated:

a serious attack on human dignity, falling within the scope of outrages upon personal dignity'.[65] Despite the acknowledgment that forced marriage represented a compound crime where the sexual and non-sexual elements were inseparable, the specific harm intended and caused by attaching the label 'wife' to the victims was again overlooked.[66] The Trial Chamber, eager to distinguish these so-called marriages from formal unions, found that forced marriage ought to 'be considered a conjugal form of enslavement'.[67] The judgment remained unclear on the significance of labelling forced marriage as a 'conjugal' form of enslavement.[68] However, the characterisation of forced marriage as a form of enslavement, which happened to take the form of an informal 'marriage', seems to identify the loss of liberty as the predominant factor defining the crime.[69] Thus, whilst the judgment contained some promising remarks including the clear acknowledgment that the crime of forced marriage constituted an attack on human dignity,[70] it contained disappointingly scarce analysis of the claims for forced marriage to be classified as a gender crime.

IV FORCED MARRIAGE AS A GENDER CRIME

From these different approaches to addressing violence against women during the conflict in Sierra Leone a feasible approach should be adopted. This Part seeks to broadly adopt the approach taken by Doherty J in the *AFRC Trial* — which was largely confirmed by the *AFRC Appeal* and *RUF Trial* — and argues that an approach to forced marriage as a gender crime is the most convincing and transposable of the models put forward by the SCSL.[71] This article uses the approach advocated by Doherty J to argue that the victim's status as a woman and 'wife' were central to the abuse and consequently

> You will hear that Sierra Leonean women captured by the RUF or AFRC were forced to make strategic choices that no woman should ever have to make. These women would seek to become attached to a single commander or fighter as a 'bush wife' because this was the best way to limit the abuse they would suffer. The alternative was that, and I quote a witness, 'to be treated like a football in the field,' being exposed to one rape after another perpetrated by many men without any consideration for health, feelings or lives.

65 *Charles Taylor Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [432]. For a discussion of forced marriage, see at [422]–[432].

66 Ibid [424]:

> The Trial Chamber considers, as expressed by both Justice Doherty and Justice Sebutinde in the AFRC case, that the sexual and non-sexual acts involved in this forced conjugal association cannot be considered separately as they are integrated in this form of abuse.

67 Ibid [427].

68 Ibid [428]–[430].

69 Ibid [427].

70 Ibid [432].

71 *Transposable* differs from *transferable* and does not suggest that the model can be transferred to international refugee law wholesale but rather that it may have uses as an interpretive guide: *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [14]–[71] (Judge Doherty); *AFRC Appeal* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [193]–[195]; *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1466].

transformed the abuse from violence against women into gender violence.[72] This approach suggests that the ownership element of enslavement stems not just from wartime conditions or the powerful position of the men as soldiers but also from the views held about women — these views were used in part to justify and condone the treatment of women as slaves.[73] In particular, Doherty J's approach of recognising the harm stemming from the word 'wife'[74] suggests that it is relevant that this abuse took place in a society where women were treated routinely as property of male relatives.[75] It is for this reason that the term 'wife' automatically indicates a significant degree of control and ownership. In this context, marriage was almost inevitably based on male dominance, of which forced marriage was a particularly serious manifestation. The gender elements of this crime are significant enough to be foregrounded in the characterisation of the crime so as to be seen as an integral element rather than part of a broader social context.

There is much to be said in favour of acknowledging both the enslavement elements and sexual elements of the acts in a forced marriage; an understanding of forced marriage without an emphasis on the perceived ownership of the woman by her 'husband' would be problematic.[76] However, the gender approach does not neglect the element of ownership inherent in the term 'forced' — instead, it argues that the source of the force of this ownership comes from socially constructed roles. Viewing forced marriage as a gender crime points towards the influence of constructed roles of 'woman' and 'wife' and argues that ownership stems from this socially constructed role. This establishes a different perspective to labelling forced marriage as a gender-neutral crime of enslavement where the ownership stems from actual physical control over the victim.

This view of forced marriage as a gender crime is one that has been challenged by those who express justifiable concern that labelling acts as 'gender crimes' will result in these crimes becoming equated only with women, setting up a false dichotomy between 'male' and 'female' violence.[77] Similarly, Oosterveld, though a great champion for victims of gender violence, also sees great value in classifying forced marriage as a gender-neutral crime.[78] In her eyes, forced marriages ought to be recognised as a form of terrorism as it was used as a method to terrorise the civilian population.[79] This was also recognised

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[72] *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [29]–[33], [51]–[57] (Judge Doherty). See also at [10], [12], [15], [18] (Judge Sebutinde).

[73] See sources cited at above n 52.

[74] *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [16]–[17], [33], [42], [45]–[48], [51] (Judge Doherty).

[75] Women are considered as '*being for* or *being of*' someone else in the social context of Sierra Leone: see Coulter, above n 26, 75 (emphasis in original).

[76] See Sellers, 'Wartime Female Slavery', above n 32, 138. The word 'forced' demands a reasonably high degree of compulsion which may include the fact that the victim is unable to withdraw from the union: Neha Jain, 'Forced Marriage as a Crime against Humanity' (2008) 6 *Journal of International Criminal Justice* 1013, 1026.

[77] Sellers, 'Wartime Female Slavery', above n 32, 143.

[78] See, eg, Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone', above n 41.

[79] Ibid 66.

by the Trial Chamber in the *RUF Trial*.[80] Much important work has been done by the 'integrationists' of human rights law in ensuring that what happens to women is also 'registered on the record of human atrocity'.[81] These concerns are not set aside lightly but it is argued that they are outweighed by the need to ensure that the gender dimension of forced marriage is clearly and formally acknowledged as the element that ties together all of the disparate conduct that constitute forced marriage.[82] Indeed, Oosterveld also expresses equal concern that recognising forced marriage as terrorism risks obscuring the most significant harm done to the 'wives' themselves as this approach focuses on the harm done to the community without seeking to address the gender elements of forced marriage.[83]

Although it is the context of the conflict in Sierra Leone that places forced marriage within the scope of international criminal law — and, as such, the 'conflict context' attracts much of the focus in classifying and addressing crimes — this is not to say it should be the sole focus.[84] It is also easy to relegate gender to the category of broader social context.[85] However, in the case of forced marriage in Sierra Leone, gender is not merely a part of the broader social or conflict context in which the crime is viewed but is integral to the crime. Gender is a defining feature of the crime as perpetrated in Sierra Leone. The aim of this article is to isolate forced marriage and the elements of forced marriage as an international crime from the social context — relevant to forced marriage as a gender crime — and from the conflict context, which is relevant to forced marriage as an international crime. Although the conflict context is important to international criminal law, it can be set aside conceptually, if not empirically, when examining forced marriage as a gender crime.

Undoubtedly, any approach that seeks to draw out general principles from a specific context runs the risk of obscuring the real experiences of the victims and the actual complexity of the crimes committed. Nevertheless, this article seeks to attach a general label to the crimes of forced marriage perpetrated in Sierra

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80 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1352].

81 Catharine MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5, 5. See also at 5–16. Alice Edwards refers to them as 'integrationist': Alice Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19 *Leiden Journal of International Law* 349, 351.

82 This is not to suggest that all violence against women during the conflict in Sierra Leone falls under the rubric of gender violence. Here, only the crime of forced marriage is examined, but it cannot be ignored that there was widespread 'random' violence against women, such as mass rapes and sexual violence, which have rightly been charged separately: see generally Kelli Muddell, 'Capturing Women's Experiences of Conflict: Transitional Justice in Sierra Leone' (2007) 15 *Michigan State Journal of International Law* 85, 85–6.

83 Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone', above n 41, 67. See also Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217, 228:

> To emphasize the reproductive impact on the community would threaten once again to reduce women to being simply the vehicles of the continuity of the targeted population. It would also tend toward a biological as opposed to socially constructed view of the identity as the value intended to be protected by the concept of genocide.

84 Sellers, 'Wartime Female Slavery', above n 32, 128.

85 Bélair, above n 24, 573–6.

Leone and to advocate that this label should be 'forced marriage as a gender crime'. The labelling of conduct as criminal by international criminal law goes far beyond the initial, albeit arguably the most important, task of holding individuals accountable for criminal behaviour and serves a number of different — and, at times, perhaps even contradictory — purposes.[86] The SCSL cases could be 'tremendously influential in how potential forced marriage claims are adjudicated before other international criminal tribunals such as the ICC'.[87] It also has the more subtle role of providing a 'grammar of pain'[88] or 'a language by which the Tribunal can identify, and witnesses can testify to, their experiences of (legally recognised) harm'.[89] Further, there is a 'messaging' aspect of law 'in which trials, verdict and punishment communicate legal and social meaning about the rule of law … help[ing to] build [a] normative consensus'.[90] A key role of international criminal law is to identify prohibited conduct relevant to international concern and to establish principles to be used in subsequent international criminal law cases as well as by international law in general.[91]

Following these assertions, this article argues that international criminal law should not be blind to the wider implications of categorising harms; in particular, categorising harm as either gender-neutral or gendered. The prosecution of forced marriage before the SCSL offered an opportunity to clearly label the conduct as a gender crime and to recognise the potentially destructive force of power inequalities between the genders.[92] This article argues that the predominant factor in motivating violence is also of particular relevance in cases of widespread violence because the reduction of a person to one dominant feature of their identity — such as seeing the target as 'a Muslim', 'a Christian' or 'a woman' — whilst disregarding other characteristics of identity is part of what allows the perpetrators to act in such a violent manner.[93] Thus, whilst it is always somewhat simplistic to speak as if there is only one contributing factor to violence, where there is a predominant factor such as gender inequality or gender

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86 Jain, above n 76, 1032; Buss, 'Performing Legal Order', above n 7, 413.

87 Jain, above n 76, 1032. In fact, although eager for international criminal law to take a greater role in setting precedent, Jain expresses concern that the definition of forced marriage provided by the SCSL trials is even sufficient to be of use in charging similar conduct in the future, stating, at 1022 (citations omitted):

> The neat definition of the crime it outlines is a little too brief to be of sufficient guidance in locating the disparate elements of forced marriage. For this reason, coupled with its exclusive focus on the situation of forced marriage in Sierra Leone, it may not be very helpful in potential forced marriage charges before other international tribunals.

88 Fiona C Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (Pluto Press, 2003) 1. For an elaboration of this term, see also Doris E Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 *Feminist Legal Studies* 145, 155.

89 Buss, 'Rethinking "Rape as a Weapon of War"', above n 88, 155.

90 Buss, 'Performing Legal Order', above n 7, 413, citing Diane Marie Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 21 *International Criminal Law Review* 93, 117–24. Buss argues, at 411, that '[c]riminal law … can be read discursively for the ideas and legal subjects called into service in its operation, and it can be examined in terms of its material effects, for example, on particular communities'.

91 See *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) pt 3 ('*Rome Statute*').

92 Sellers, 'Wartime Female Slavery', above n 32, 137.

93 Amartya Sen, *Identity and Violence: The Illusion of Destiny* (W W Norton, 2006) 1–3, 16–17, 20–1, 76, 79, 172–6, 178–9.

roles, this might rightly be described as gender violence, notwithstanding other elements of the crime.

Before commencing on a more detailed characterisation of forced marriage in Sierra Leone as a gender crime, it is important to clarify first what is meant by the term 'gender crime'. 'Gender' in the *Rome Statute of the International Criminal Court* ('*Rome Statute*') is defined as referring 'to the two sexes, male and female, within the context of society'.[94] The term 'gender' does not indicate any meaning different from the above. The *United Nations High Commissioner for Refugees Gender Guidelines* follows a similar pattern:

> Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.[95]

Gender is, then, a normative concept defining what is expected of men and women and their relative positions and roles in society, against which actual experiences are measured. Gender violence is violence connected to these socially constructed roles.

Gender violence is often used simply as a synonym for 'violence against women'.[96] This not only overlooks the possibility of men being subjected to gender persecution but also muddies the conceptual category of gender violence to an extent that can render it meaningless. There are distinct forms of harm involving different elements of gender persecution:

> 'gender-specific harm' … refer[s] to harm that is unique to, or more commonly befalls, members of one sex … [and] 'gender-related persecution' refers to a causal relationship between the persecution and the reason for the persecution [ie the victim's gender].[97]

A woman may be subjected to violence as a woman or *because* of her gender. Equally, a man might be subjected to violence as a man or *because* he is a man. Only the latter is gender-related persecution or 'gender-specific violence'.[98]

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94 *Rome Statute* art 7(3).

95 High Commissioner for Human Rights, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the* 1951 Convention *and/or its* 1967 Protocol relating to the Status of Refugees, UN Doc HCR/GIP/02/01 (7 May 2002) ('*UNHCR Gender Guidelines*') [3].

96 Patricia Viseur Sellers, 'Gender Strategy is Not a Luxury for International Courts' (2009) 17 *American University Journal of Gender, Social Policy & the Law* 301.

97 Anthea Roberts, 'Gender and Refugee Law' (2002) 22 *Australian Year Book of International Law* 159, 164. In an observation as pertinent to international criminal law as to international refugee law, Roberts considers the distinction between gender violence and violence against women. Roberts notes, at 189, that although it may be useful analytically we should keep in mind that persecution may be multilayered:

> If a woman who was vaginally raped would have been persecuted in another way had she been a man, then the crime may be gender-specific, but it would not amount to gender-related persecution. However, if that woman would not have been subjected to persecution had she been a man, then the persecution may be gender-related.

98 For discussion of gender violence perpetrated against men, in particular the use of sexual violence with the intention of 'emasculating' victims: see, eg, Sandesh Sivakumaran 'Sexual Violence against Men in Armed Conflict' (2008) 18 *European Journal of International Law* 253.

This important conceptual distinction is also reflected in arts 7(1)(h) and 7(2)(g) of the *Rome Statute* where it is acknowledged that persecution may be suffered solely due to socially constructed roles of male/female or that persecution may take a specific form because of the socially constructed roles of male/female.[99] Despite the danger of oversimplification, a general observation can be made at this juncture that there is an important distinction between 'gender violence' and 'violence inflicted due to the victim's sex'. To accurately reflect real experiences, to clearly see the existing problems and to combat such problems in the future, it is necessary to be clear about the type of violence being dealt with. Whether a crime is labelled as gender violence or not is of empirical and conceptual importance in order to have a clear conceptual and legal category to be applied in the future.[100] Due to the empirical and conceptual importance of addressing the crime of forced marriage in the SCSL, it is necessary to accurately reflect the actual harm done *and* to be clear about what amounts to or what does not amount to gender violence.

Yet this distinction between gender violence and violence against women was largely overlooked by the majority in the *AFRC Trial* and the conclusion that forced marriage is entirely subsumed in the crime of sexual slavery, as postulated by Oosterveld, demonstrates how deep this conceptual confusion runs.[101] A charge of sexual violence does not indicate if this is gender violence or violence inflicted due to the victim's sex — the distinction lies in the causal link, or lack thereof, between the violence and the victim's gender.[102] Therefore, in order to assess gender violence, we must consider whether the victim's gender was a key factor in explaining the violence. If another causal factor was primary such as race, religion or ethnic origin, then although the form of violence may have been selected due to the victim's sex, this would not be primarily categorised as gender violence.[103] The distinction was not explicitly raised or explored during the *AFRC Trial* but it is an important one.

If women were subjected to the prohibited conduct amounting to forced marriage because they were women, forced marriage would primarily be a gender crime. If, however, women were not exposed to forced marriage due to their identity as women but because of other factors — for example, due to their associations with a specific rebel force — then although the form of violence may have been adapted due to the victim's sex this would not be gender violence. Thus, forced marriage would not differ analytically from gender-neutral crimes such as torture or enslavement. Where the forced marriage is due to other factors unrelated to the victim's identity as a woman, forced marriage might rightly be charged under enslavement or as sexual slavery in order to reflect the prevalence of sexual violence.

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99 The *Rome Statute* could be said to provide solid legal footing for addressing gender violence as a separate crime.

100 See, eg, Toy-Cronin, above n 27, 541: due to the failure to recognise gender violence, 'the story of gender violence has remained largely untold'.

101 See Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone', above n 41. This point has also been made by Oosterveld in relation to international criminal law more generally: see Oosterveld, 'Atrocity Crimes Litigation', above n 11.

102 Roberts, above n 97, 164.

103 See ibid.

This article suggests that forced marriage in Sierra Leone was not a gender-neutral crime but rather that the victim's status as a woman was integral to the harm suffered. The social construction of women in Sierra Leone — particularly in the rural areas where the majority of victims and the rebel soldiers were from — constitutes an integral part of the crime, with the conflict providing the immediate context in which forced marriage became not only a gender crime but a weapon of terror against the civilian population.[104]

V GENDER VIOLENCE

The most persuasive evidence for viewing forced marriage as a gender crime is arguably to be found in the label of 'wife' attached to the victims. 'Wife' in this context, as was noted in the *RUF Trial*, was used to signify ownership.[105] This interpretation has been used to support the view of forced marriage as enslavement.[106] However, ownership here can be viewed in quite a different manner. At first glance, Sebutinde J's concurring opinion adopts a gendered approach with specific focus on the label 'wife' and the demands that this title 'allowed' the captor to place on the victim, including labour such as cooking, cleaning and transporting his baggage between camps alongside sexual demands.[107] These evidential observations as to the connection between the status as a 'wife' and the harm suffered were, however, disregarded in the categorisation of forced marriage.[108] Instead, Sebutinde J concluded that 'the sexual element inherent in these acts tends to dominate the other elements'.[109]

This conclusion, supported by the majority assertion that sexual slavery was an adequate charge, rejects by implication any particular or extra trauma or harm caused by the term 'wife'.[110] Doherty J's partly dissenting opinion makes some attempt to remedy this omission, pointing towards important gendered elements of the crime of forced marriage.[111] In particular, Doherty J seemed to acknowledge the force of the prosecutorial argument that twofold harm was experienced by the victims — this includes both physical and mental harm suffered in the marriage as well as the stigma and harm stemming from the label 'wife' in this particular society.[112] Doherty J noted that the label 'wife' did cause extra trauma and harm as it stigmatised the victim during the conflict and post-conflict and, as a result, many women were unable or unwilling to leave their 'husbands' once the conflict ended due to societal pressure.[113] Although

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104 Jain, above n 76, 1018.

105 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1466]–[1467], [1581].

106 See generally Sellers, 'Wartime Female Slavery', above n 32, 133.

107 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [10], [12], [14].

108 Ibid [6], [15]–[18] (Judge Sebutinde).

109 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [6], quoting *Prosecutor v Brima (Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98)* (Special Court of Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 31 March 2006) [14] (Judge Sebutinde).

110 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [703]–[714].

111 Ibid [49]–[57].

112 Ibid [16]–[17], [33], [42], [45]–[48], [51].

113 Ibid [46]–[48].

Doherty J was eager to draw distinctions between peacetime and conflict marriages, the use of the term 'wife' in 'bush marriages' might point towards the links between peace and conflict marriages, in particular the subordinate position assigned to women in Sierra Leone in some peacetime and most conflict marriages.[114] Sebutinde J, although also rejecting a direct link between arranged marriages and forced marriage, accepted the impact of peacetime gender stereotypes.[115]

However, those seeking to replace the charges of forced marriage with charges of enslavement fear that rejecting all links between enslavement and forced marriages of this type overlooks the non-gender elements — this would risk creating a false dichotomy between 'female' war crimes of rape and sexual slavery and 'male' war crimes of enslavement.[116] Thus, the advocates of this approach quite rightly wish to ensure that the experiences of female victims are not seen as entirely divorced from the experiences of male victims.[117]

There are certainly commonalities of experience between the genders of victims of rebel forces. During the conflict in Sierra Leone, men were also forced to perform tasks for soldiers — in particular civilian men were forced to mine diamonds under horrendous conditions — and this treatment was rightly characterised as forced labour and enslavement.[118] The crime of forced marriage might be said to consist of a similar inescapability and loss of liberty and, as such, might be seen as a form of enslavement.[119] There is considerable overlap between sexual slavery and forced marriage. However, in separating the crime from the broader conflict context, key differences that outweigh the commonalities can be seen between the male and female experiences — the central difference is the key role of gender inequalities in the female experience of forced marriage.[120] This would not be recognised if forced marriage as enslavement was charged as akin to the enslavement of male forced labourers. Equating forced marriage with enslavement would not convey the social pressure brought to bear on women once labelled as a 'wife', which stems from the concepts of gender being employed whereby women are seen as property rather than rights-holders.[121] The emphasis is not on the single word 'forced' but on the compound notion of 'forced marriage'.

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114 Ibid.

115 Ibid. Doherty J's reluctance to draw any formal links between peacetime and conflict marriage can perhaps be explained by the fact the defence sought to argue that forced marriage could not be a crime as it was, in fact, merely the usual form of customary marriage in Sierra Leone: at [36]. Therefore, Doherty J is not considering generalised evidence as to the treatment of women or wives in Sierra Leone but rather whether or not the similarities were such between customary marriage and forced marriages so as to render it incapable of prosecution.

116 See generally Sellers, 'Wartime Female Slavery', above n 32.

117 Ibid.

118 Ibid 134–5; *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [1295].

119 See Sellers, 'Wartime Female Slavery', above n 32, 139.

120 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [36], [49] (Judge Doherty).

121 *AFRC Appeal* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [196]. See also ibid [52]–[53], [70] (Judge Doherty).

The fact that the specific gender harm is not expressed in the term 'enslavement' also signifies that it is a separate crime. Viewing forced marriage as a separate crime also allows for multiple charges to be brought in relation to the same victim(s). Although victims in Sierra Leone may have experienced forced marriage as a whole, the constituent elements of the crime of forced marriage taken individually might be said to allow separate charges of rape, sexual slavery, enslavement and acts of terrorism to be brought. However, without the crime of forced marriage being charged separately, these constituent elements are never brought together as a single whole to represent the very specific sort of harm experienced by these women. In other words, recognising a separate crime of forced marriage allows for the recognition of not only the constituent harms but also of the cumulative trauma caused by those constituent harms. This represented a separate trauma as acknowledged by the perpetrators and as represented by the term 'wife'.

This twofold harm approach adopted by Doherty J and the prosecution team also recognises that without a specific view of women as property the term 'wife' would not carry with it implications of ownership.[122] Where women are not viewed as property, the term 'wife' might instead suggest love, partnership and respect or, indeed, a legal label allowing for certain rights and obligations; it would certainly not inherently signify ownership or control of any kind. Thus, although it is important not to view wartime slavery such as that experienced by 'bush wives' as purely a re-creation of peacetime forced marriages, equating forced marriages with enslavement is problematic as it portrays forced marriage as a gender-neutral crime.[123]

A gender approach acknowledges that although harm was often experienced through gender-neutral crimes such as sexual violence and enslavement, there was a specific gendered element inherent in the label 'wife'.[124] This label did not merely operate as an alternative to 'slave' but also signified a specific *type* of ownership a husband could expect to exert over a wife.[125] Thus, the use of the term 'wife' as opposed to 'slave' was 'strategic and deliberate' to signify a type of ownership a man might exert over a woman.[126] The victim, then, had been exposed to this harm specifically *because* she was a woman and it was not only a form of harm that had been dictated by her sex but also a harm that she would not have suffered if she were a man.

This is not to say that men did not suffer during or before the conflict in Sierra Leone but that the harms suffered are analytically distinct.[127] Men and boys may have been conscripted into a rebel army, subjected to torture, sexual abuse and forced labour — as indeed many girls were too.[128] But men and boys were not

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122 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [16]–[17], [29], [42], [46], [48], [51].

123 *Contra* Sellers, 'Wartime Female Slavery', above n 32.

124 See, eg, *AFRC Appeal* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [179], [186].

125 *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [16]–[17], [29], [31], [42], [46], [48], [51] (Judge Doherty).

126 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1466].

127 See, eg, Sellers, 'Wartime Female Slavery', above n 32, 134–5.

128 Ibid. See also Sivakumaran, above n 98.

particularly subjected to forced conjugal relationships.[129] In these gender-neutral crimes, the so-called domestic elements of forced marriage — forced pregnancies, the responsibility of child rearing, cleaning and cooking and the sexual demands made of the victims of forced marriage as women — would have been absent.[130] War and gender are almost always interlinked, which is in part an expression of existing patriarchal structures; in other words, militarisation is informed by and informs gender relations in the wider society.[131] But this is not to say that forced marriage or other forms of violence associated in particular with women, such as rape, are only an effect of war — rather, they are certainly forms of war that this article argues are dictated not only by the gender of the victim but predominantly by the construction of that gender by the particular society in question.[132]

With respect to forced marriage, this article argues that the so-called domestic elements, including conjugal 'duties', child rearing with no support from the father and domestic duties, were also types of demands that were placed on women in marriages in Sierra Leone outside of the conflict.[133] This was a society where a man's position was inherently more powerful than that of a woman. As we have seen in other international criminal tribunals, in cases relating to genocides in Rwanda and former Yugoslavia, scale, brutality and motivation might transform human rights abuses into war crimes, crimes against humanity and/or genocide.[134] But the labelling of the individual acts as criminal has a value beyond the particular context and prosecutions.[135] Therefore, it is important to be clear on which acts are being labelled criminal within forced marriage and why these acts are being labelled as criminal before addressing the factors transforming these individual cases into international crimes. For this

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129 Cf Sivakumaran, above n 98 (where gender violence against men lacks the characteristics associated with forced marriage).

130 Ibid. See also *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [997] (for a victim's account of the domestic elements of forced marriage).

131 See Cynthia Enloe, *The Morning After: Sexual Politics at the End of the Cold War* (University of California Press, 1993) 68–70.

132 In the same manner, men may be victims of gender crimes in times of war if concepts of traditional masculinity inform the methods of war used against them: see generally Sivakumaran, above n 98. Concepts of masculinity may be as likely to impact on treatment of male prisoners. For example, as concepts of femininity are to impact on treatment of female prisoners. However, violence against women may have an additional element in that it reflects unequal power relations between the genders: see, eg, Catharine MacKinnon, 'On Torture: A Feminist Perspective on Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff, 1993) 21, 26–7.

133 Jain, above n 76, 1018. See also *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [10]–[12]. See also Khadija Alia Bah, *Rural Women and Girls in the War in Sierra Leone* (December 1997) Conciliation Resources <http://www.c-r.org/sites/c-r.org/files/RuralWomenandGirls_1997_ENG.pdf>; Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties under Article 18 of the* Convention on the Elimination of All Forms of Discrimination against Women*: Combined Initial, Second, Third, Fourth and Fifth Periodic Reports of States Parties, Sierra Leone*, UN Doc CEDAW/C/SLE/5 (14 December 2006).

134 See, eg, *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998); *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001).

135 Jain, above n 76, 1032; Buss, 'Performing Legal Order', above n 7, 413.

reason, I seek to label the constitutive elements of the crime of forced marriage — and, most particularly, forced marriage — in its totality as a gender crime. This recognises that even without the transformative factors rendering these women victims of international criminal acts, they were victims of gender-based human rights abuses as forced marriage is a crime even outside of an armed conflict.[136]

The issue of marriage in pre-conflict society occupied the criminal tribunals only briefly and the focus was on acts that took place during the conflict — these came within the scope of international criminal law. However, in order for the issue of forced marriage to be addressed more broadly and for the gender elements to be fully revealed, some consideration of the pre-conflict and post-conflict society must be undertaken. An ethnographer, Chris Coulter, describes the 'normative model' for gender roles in rural Sierra Leone as being

> based on the polarization of men and women with regard to what their positions and roles in society should be, what women and men should do, and how they should relate to each other, as illustrated by marriage, the sexual division of labor, and status under the law.[137]

The formal equality of men and women under the *Constitution of Sierra Leone 1991*[138] was reportedly rarely observed with many women treated as legal minors.[139] Therefore, although the element of physical control forms the crime of enslavement, it is not what determined the marriage as forced. Instead, this was a

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136 Indeed, the *SCSL Statute* does not require a nexus to armed conflict in its definition of crimes against humanity: art 2. Similarly, the *ICTR Statute* and *Rome Statute* also do not require this nexus: see *ICTR Statute* art 3; *Rome Statute* art 7. See also Jain, above n 76. The context of widespread or systematic attack against a civilian population must be present to establish a charge of crime against humanity. This would not, however, prevent the precedent being used outside the context of widespread violence. Once conduct has been labelled as capable of constituting a crime against humanity when part of widespread violence, it can be said to constitute persecution: see, eg, *Refugee Convention* art 1(2), where there is no requirement for a broader violent context (although there must still be a failure of state protection).

137 Coulter, above n 26, 58.

138 *Constitution of Sierra Leone 1991* art 27.

139 Although, of course, one should be wary of generalising to too great a degree. The force of gender stereotypes was found by Coulter to be great in rural areas and in northern regions, although likely to be experienced to some degree by women across Sierra Leone and across all levels of society: Coulter, above n 26, 58. Coulter argues that it was also experienced differently by women depending on their age, with older wives being able to assert authority over younger wives and thereby gaining an element of autonomy not experienced in youth: at 59. For further evidence of the position of women in pre-conflict marriages and the impact of these gender roles on conflict violence and post-conflict reconciliation, see Bélair, above n 24; Muddell, above n 82. The continuums between pre-conflict violence and violence during conflict against women were accepted also in evidence before the Truth and Reconciliation Commission: Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Graphic Packaging, 2004) vol 3B, 102–8.

general ownership asserted over women in a society where 'a woman cannot *be* for herself; she is always *of* or *for* someone else'.[140]

In the context of the war, 'bush wives' became '*of* or *for*' their rebel husbands.[141] Although forced marriage was a gender crime experienced by many in peacetime as well, it transformed in wartime in terms of scale, lack of familial consent, lack of formalisation and the level of brutality inevitably experienced.[142] However, the actual experiences of men and women depend on 'their ability to manage and draw on these [opportunities and obligations afforded to individuals by virtue of their gender] effectively'.[143] A victim of forced marriage — with her 'husband' and his fellow rebel soldiers, bolstered by the context of a brutal and bloody civil war — has her opportunity to manage the role of woman effectively denied and is propelled into the role of the 'wife' with none of the usual formalities.[144] The duties demanded of the victim as a 'wife' were also extracted with more violence and with little chance of escape or reprieve.[145] The United Nations *Declaration on the Elimination of Violence against Women* recognises this type of violence as both a reflection of and a mechanism for maintaining socially constructed roles, stating that the 'violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position'.[146]

In wartime, it has been observed that 'gender intersects with other aspects of the woman's identity such as ethnicity, religion, social class or political affiliation'.[147] Despite recognition of the complexity of violence in wartime, where there is unlikely to be a single 'cause', this article argues that a predominant factor can be identified which can separate violence against women from gender violence. Violence in the case of 'bush marriages' was suffered partly in the form of sexual violence or physical violence but this was inflicted due to unequal power relations between genders, which resulted in pressure brought to bear on the girls and women — even without physical violence — to

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140 Coulter, above n 26, 58. Following the conflict, there has been legislative recognition of the previously unacceptably weak position of women before the law in Sierra Leone, with the passing of the so-called 'Gender Bills'. The *Domestic Violence Act 2007* (Sierra Leone) No 20 contains a broad definition of abuse, thereby allowing both the police and the individual the means to permit criminal and civil action when there is a violation: at s 1. The *Registration of Customary Marriage and Divorce Act 2009* (Sierra Leone) No 1 introduces a minimum age of eighteen years to marry and requires consent of both parties for such marriages to be valid: at s 2. Finally, the *Devolution of Estates Act 2007* (Sierra Leone) No 21 ensures that if a husband dies without a will, his wife is entitled to his property: at pts 4, 6, 8 and 9.

141 Coulter, above n 26, 58 (emphasis in original).

142 The *RUF Trial* found this transformation to be on such a scale as to represent a deliberate campaign of terror: see *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1352].

143 Melissa Leach, *Rainforest Relations: Gender and Resource Use among the Mende of Gola, Sierra Leone* (Edinburgh University Press, 1994) 206.

144 Michael P Scharf and Suzanne Mattler, 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime against Humanity' (Working Paper No 05-35, Case Research Paper Series in Legal Studies, 2005) 4–5. See also Toy-Cronin, above n 27, 558.

145 See Toy-Cronin, above n 27, 557–9.

146 GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, Agenda Item 111, UN Doc A/RES/48/104 (20 December 1993) Preamble.

147 Binaifer Nowrojee et al, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath' (Report, Human Rights Watch, September 1996) 1–2.

conform to the practices that dictate she be offered as a prize to a man. Physical and sexual violence within this 'relationship' can be seen as more extreme mechanisms to exert control, which stem from these social pressures though they were intensified and perverted by the conflict.[148]

In addition, the label of 'wife' continued to haunt victims post-conflict not only due to the sexual nature of the harm suffered but also due to the role society assigned to women as property — first of their family and secondly of their 'husband'.[149] This view of women as property had a direct impact on the harm suffered by 'bush wives' post-conflict — namely it assigned the status of 'victim' to their families who had been deprived of their right to choose a partner for their daughters and had not been allowed to give their consent to the 'marriage' as was the usual custom.[150] The *RUF Trial* focused on the lack of consent from families in response to claims by the defendants that consent had been given with the Trial Chamber stating that 'parental and family consent to the so-called marriages of these sexually enslaved and abused women was conspicuously absent'.[151] The daughter, on the other hand, was not a victim but a form of 'fallen woman' as she now had sexual relations and lived as the 'wife' of an enemy solider.[152] Post-conflict reactions to 'bush wives' seem to suggest that the women were not always seen as victims but sometimes as collaborators.[153] These women were not welcomed back to communities but were ostracised due to their exposure to the life of a 'wife' during a 'bush marriage' — this now

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148 Jain, above n 76, 1018. See also *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [13]–[14].

149 Scharf and Mattler, above n 144, 9.

150 As Scharf and Mattler note, the marriage process in Sierra Leone in peacetime often included a long period of cohabitation and sexual relations before the marriage was formalised: ibid 4. Yet conflict 'marriages' differed from this customary practice, making it distinct from arranged marriage, as they did not include the consent of the girl's family or any dowry arrangement: at 10–12. This, however, serves only to distinguish conflict marriages and peacetime marriages and, as noted above, the lack of familiar consent should not be seen as a defining element of the crime. Further, there is considerable legal force to the requirement that both parties must consent to a marriage for it to be valid. Article 16(2) of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) states: 'Marriage shall be entered into only with the free and full consent of the intending spouses'. This requirement is repeated in other international treaties such as the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). Marriages that do not meet this standard may constitute a human rights violation of the party whose consent was not sought: for further discussion, see Jain, above n 76, 1027.

151 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1469].

152 Coulter, above n 26, 209.

153 Ibid 1–3: Coulter describes the story of Aminata who was captured during the war and became the 'bush wife' of a rebel solider. Following the end of the war, her family initially refused to see her and when contact was eventually re-established Aminata's mother was afraid 'Aminata would kill the other children': at 2. When her father tried to arrange a new marriage for her he was unable to do so because potential husbands rejected Aminata as 'she had been a rebel': at 2. Coulter found this story was, in its essentials, frequently repeated. This story also echoed the evidence presented both during the trials and before the Sierra Leone Truth and Reconciliation Commission: *Charles Taylor Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [1020]; *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1296]. See generally Sierra Leone Truth and Reconciliation Commission, above n 139.

made them ineligible to be a wife post-conflict.[154] Although the reference by the *RUF Trial* to a lack of consent by families[155] was relevant factually and formed a significant part of the crime when viewed from the point of view of the society as a whole, it ran the risk of ignoring the primary victims entirely — namely the women forced into marriages. A similar omission may have been made in the *Charles Taylor Trial*, where significantly greater attention was given to distinguishing pre-conflict and post-conflict arranged and forced marriages than in discussing the lack of consent by the victims.[156]

In peace or wartime, Sierra Leone society is not one where a woman can act entirely independently from male support, such as the protection of a father, brother or husband.[157] Thus, 'bush wives' post-conflict effectively became 'statusless'.[158] Indeed, the *RUF Trial* found that the rebel fighters had understood the stigma that would be attached to the victims and this had led them to cultivate sexual violence and 'bush marriages' with the express aim of destroying 'the existing family nucleus'.[159] The rebel fighters were deliberately and systematically condemning their victims to a life of trauma and ostracisation.[160] This was not only a targeted attack on women but also had a secondary gender element as it was intended to demonstrate that the men of the community had failed in their 'masculine' duty to protect 'their own wives, daughters, mothers and sisters'.[161] These gender elements are not reflected in the term 'enslavement' and, as such, the violence against women in Sierra Leone needs some term other than enslavement.[162] Forced marriage is far from an unproblematic term but it reflects the domestic nature of the violence, the societal pressure brought to bear on these women and the impact of gender roles on the violence; the gender roles assigned women a status of lesser importance and entrenched male dominance.

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154 Coulter, above n 26, 220.

155 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1469]–[1470].

156 *Charles Taylor Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [424]. There is no specific reference to consent in the judgment but for a clear statement on the distinction between arranged, traditional and indeed the general use of the term marriage see in particular [424], [426]–[427]. As Oosterveld notes, the primary violation is the lack of consent by the woman: see Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone', above n 41, 67. Similarly, Doherty J emphasises the lack of consent and involvement by families as the particular difference between peace and conflict marriages: *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [22]–[28]. This, whilst an important distinction, is not a distinction in the treatment of the 'wife' but in the treatment of her family. The expert evidence discussed by Doherty J found that whilst there were changes in urban areas allowing more freedom of choice for women, the treatment of women as inferior still existed: at [25]. Further, it is argued in this article that forced marriage is an extreme form of peacetime marriage but it is by no means an exact replication.

157 Jain, above n 76, 1018.

158 *RUF Trial* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [1474].

159 Ibid [1349].

160 Ibid.

161 Ibid [1350].

162 Monika Satya Kalra, 'Forced Marriage: Rwanda's Secret Revealed' (2001) 7 *University of California Davis Journal of International Law and Policy* 197, 200.

Although there is intersectionality between the crimes of forced marriage and enslavement, sexual slavery and rape, it is important for forced marriage of the type experienced in Sierra Leone to be represented as a gender crime and a separate crime.[163] Gender violence is related to the socially constructed roles of man and woman or of male and female. These constructed roles have a direct impact on the related constructed roles of 'husband' and 'wife'. The nature and impact of the socially constructed roles is expressed here in the assumption that 'ownership' stems inherently from the label 'wife'. We can see the power of the term 'wife' throughout the evidence from 'bush wives'.[164] Thus, the 'one-dimensional identity' assigned by perpetrators to the victims of violence here is that of a woman, which automatically and, most likely, subconsciously, signalled to the male perpetrator a person of lesser value.[165]

Evidence for the specifically gendered nature of forced marriage in Sierra Leone is also in contrast with forced marriage in Cambodia.[166] There are commonalities between forced marriages in Sierra Leone and Cambodia despite the differing surrounding circumstances.[167] As the cases in Sierra Leone and Cambodia illustrate,[168] it is possible for a type of crime such as forced marriage or rape to contain significant elements of gender violence or to consist predominately of elements of non-gender violence.[169] Although gender relations were far from equal in Cambodia — with men being able to choose their wives on occasion but with women entirely unable to exercise such a choice — both men and women were victims of forced marriages.[170] Indeed, the Khmer Rouge exercised power over both parties.[171] In fact, the victims were often separated after the 'marriage' and sent to work in separate areas if this best suited the

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163 Only a separate charge of forced marriage would recognise the overall act rather than simply the individual elements of the crime: Frulli, above n 1, 1035–6.

164 See especially Sierra Leone Truth and Reconciliation Committee, above n 139; Doherty J in the *AFRC Trial* sets out the unique harm suffered by women due to the label 'wife': *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [16], [48], [51].

165 It is accepted, however, that it would be too simplistic to suggest the actual experiences of these women were dictated solely by gender roles. According to Pankhurst, wartime violence against women may be seen as a combination of many factors, with any of them taking precedent at any given time. Pankhurt suggests that rape, for example, may be seen as sexual violence, as a weapon of war, a way of providing reward for male soldiers, the inevitable consequences of the breakdown of social constraints, a consequence of already existing social norms assigning dominant positions to men and an expression of male trauma: Donna Pankhurst, 'Sexual Violence in War' in Laura J Shepherd (ed), *Gender Matters in Global Politics: A Feminist Introduction to International Relations* (Routledge, 2009) 148, 150–6. However, it is maintained that gender can be isolated as a predominant and unifying factor between these various instances of forced marriage. See generally Sen's discussion of the reductionism provided by the singular categorisation of identity: Sen, above n 93, xv–xvi, 1–3, 16–17, 20–1, 174–6, 178–9.

166 Jain, above n 76, 1025–6.

167 Ibid 1026.

168 The Extraordinary Chambers in the Courts of Cambodia ('ECCC') are investigating forced marriages during the Khmer Rouge regime: see, eg, *Prosecutor v Nuon (Order on Request for Investigative Action concerning Forced Marriages and Forced Sexual Relations)* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/19-09-2007-EC CC-OCIJ, 18 December 2009).

169 Jain, above n 76, 1025–6.

170 Ibid 1023–4, 1026.

171 Ibid 1024.

political and economic plans of the Khmer Rouge.[172] There was no immediate assumption that women undertook domestic duties although child bearing was expected.[173] Forced marriage was a part of state-sponsored terror designed to control the entire population — although there were racial as well as gender elements present, these were not predominant factors.[174] Thus, this type of forced marriage might be best characterised as a form of political violence.

In Sierra Leone, the men chose their 'wives' who were seen at best as 'prizes' or at worst as 'possessions' and the men themselves exercised direct power over the women.[175] The ownership of 'wife' by 'husband' was recognised also by others involved as 'bush wives' were isolated from attacks by other men once 'married'. Although forced marriage formed a part of the campaign of terror perpetrated by rebel groups against civilians, the control the rebel 'husband' had over his 'wife' was, in significant part, an expression of gender inequalities in Sierra Leone society as well as an expression of the conflict.[176] In Sierra Leone, it might be suggested that consent was not sought because of an underlying belief that women need not be asked to give consent — indeed, it might even be thought that women could not give consent as they were treated as minors in many cases under customary law.[177] When one contrasts the situations in Cambodia and Sierra Leone, there is a suggestion that gender played a central role in forced marriage in Sierra Leone.[178] In short, power inequalities between the genders and the social construction of the roles of men and women were key factors in the harm suffered in Sierra Leone — a situation largely absent in

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172 Ibid 1024–5.

173 Ibid.

174 For further information on forced marriage in Cambodia under the Khmer Rouge regime, see generally Beini Ye, 'Forced Marriages as Mirrors of Cambodian Conflict Transformation' (2011) 23 *Peace Review* 469; Peg LeVine, *Love and Dread in Cambodia: Weddings, Births, and Ritual Harm under the Khmer Rouge* (National University of Singapore Press, 2010).

175 Coulter, above n 26, 112–3.

176 See generally Sierra Leone Truth and Reconciliation Committee, above n 139, 102–8.

177 See Coulter, above n 26, 59. The pre-conflict *Constitution of Sierra Leone* was subject to exceptions for customary law: *Constitution of Sierra Leone 1978* ss 125(2)–(3), 156(1). In addition, a survey of violence in pre-conflict marriages in Sierra Leone

> found that 66.7% of 144 women surveyed … report being beaten by an intimate male partner and 50.7% report having ever been forced to have sexual intercourse; 76.6% of women report either forced sex or intimate partner violence. Circumcised women were most likely to report intimate partner violence and forced sexual intercourse.

See Ann L Coker and Donna L Richter, 'Violence against Women in Sierra Leone: Frequency and Correlates of Intimate Partner Violence and Forced Sexual Intercourse' (1998) 2(1) *African Journal of Reproductive Health* 61. Although it is not explicitly stated in the study circumcised women are also most likely to be from rural areas: see the evidence supplied for the House of Lords case *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 ('*Fornah*') which concerned a refugee application by a young woman from Sierra Leone who feared being subjected to female genital mutilation. Female genital mutilation was practiced in many rural areas in Sierra Leone against young girls: at 448. Commendably, the House of Lords took an entirely different approach. Lord Bingham and Baroness Hale focused on the fact that this human rights violation was committed only against women and assigned women to a perceived inferior position in society: at 428, 441, 461. Female genital mutilation, Lord Bingham further noted, did not define the group but was 'an extreme and very cruel expression of male dominance': at 440–1. This could also be said of forced marriage.

178 See Jain, above n 76, 1024–6.

Cambodia.[179] This suggests that forced marriage as a gender crime is a separate category of crime to forced marriage. It would be possible then to charge perpetrators with both forced marriage and, if relevant, forced marriage as a gender crime. Although there are concerns about fragmentation of international crimes,[180] there is precedent for charging the same basic conduct as separate crimes — for example, rape was charged as genocide and as a crime against humanity before the ICTY.[181] Forced marriage as a gender crime, then, would contain the same basic constitutive elements as forced marriage but with the added element that the conduct be connected in a significant way to the gender roles and power inequalities between the genders.

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179 This also challenges notions of marriage and the expected roles of men and women outside the context of Sierra Leone. It is troubling, for example, to find authors writing on Sierra Leone arguing that '[i]n a forced marriage, the perpetrator extracts the privileges normally expected within a marital relationship — sexual congress, labor, child bearing, child rearing, fidelity, obedience and more — from "wives"': Scharf and Mattler, above n 144, 19. This may merely have been an unfortunate turn of phrase but any marriage in which such features are expected (and given the requirement of obedience seem to be demandable) rather than given freely is problematic. Although beyond the scope of this article, it should be remembered that discussion of 'forced marriage' is dependent on defining the concept of 'marriage'.

180 For an overview of arguments concerning the fragmentation of international crimes, see generally International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006). See also Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849. As Hafner notes, an argument for regional specialised regimes is that tailored laws provide clearer precedent: at 859–60. This approach also allows the core elements and the context to be isolated so where gender is not the core conduct there is no need to charge the crime as a gender crime separately. For example, in *Kunarac*, it could be argued that gender was not the core conduct, but rather the context as it was seen as one of the aggravating circumstances of the crimes: *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [867]. Although it could be argued, for example, that we do not charge genocide differently depending on the specific circumstances, this objection could be countered by stating that for genocide the circumstances are always unique and different. However, there is a unifying requirement of the intentional killing and destruction of entire groups or members of a group: *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2. This requirement determines that the motive behind the crime is linked to the intention to wipe out the target group, whatever the other surrounding circumstances. For forced marriage, on the other hand, the circumstances can have a great impact on the underlying intention of the perpetrators, as the distinction between the circumstances in Cambodia and Sierra Leone demonstrates. There is also no concern here that this labeling of forced marriage as a gender crime — and as a separate crime — gives rise to new or separate obligations on states or non-state actors, as the prohibited conduct remains the same as forced marriage. It is possible to have two crimes that resemble each other in international law: see, eg, Jain, above n 76, 1029 (citations omitted):

> overlaps between crimes recognized under existing international law already exist, for example between the crimes against humanity of murder and extermination, or between the crimes against humanity and war crimes of torture and rape. While enslavement captured the profound deprivation of liberty characteristic of sexual slavery, it did not sufficiently emphasise the sexual violence vital to the crime.

181 For a discussion on this point, see Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778. It is beyond the scope of this article to further discuss the precedent of charging the same basic conduct as separate crimes but, as will be argued below, in other areas of international law the charging of gender crimes separately would dismantle many of the remaining barriers facing victims of gender violence seeking protection under international law.

This points towards the expressive function of labelling forced marriage as a gender crime to ensure that the central role of social constructions of gender is acknowledged. In labelling a crime as a gender crime, a causative claim as to the impact of constructions of gender norms and power relations is made out, which is absent in a gender-neutral characterisation. Thus, violence is not simply 'wrongs done to women' but is a product of 'the socially produced capacity for women to be wronged'.[182] Sharon Marcus, for example, argues for the adoption of the approach to gender violence that sees it as a language through which gender inequality is defined, expressed and, possibly contested in the future.[183] Marcus uses the term 'rape script' to refer to rape as a process made possible by gender inequality and that, in turn, scripts anew the terms of gender inequality. The content of the rape script is clearly variable and is determined by the '*gendered grammar of violence*, where grammar means the rules and structures which assign people to positions within a script'.[184] In relation to forced marriage, gender roles and inequalities were key in 'assign[ing] people to positions within the script'.[185] It was not purely, or even primarily, the conflict which assigned these positions but gender. Gender constructions rendered the positions of the parties not just as perpetrator and victim but as powerful and powerless and as captor and slave. To both parties, these positions were automatically reflected in the terms 'husband' and 'wife'. These roles were not determined by the political system, as in Cambodia, or by racial hatred culminating in genocide, as in the former Yugoslavia and Rwanda, but by the gender roles which are too widely assigned and assumed in Sierra Leone society.[186]

In adopting a gendered approach to analysing violence, the force and consequences of the gender stereotypes expressed in social norms that are expected of women and wives point towards a primary form of violence that may escalate in times of conflict but constitutes a form of violence in and of itself as well.[187] This broadens the notion of violence to include severe pressure imposed on individuals due to restrictive social norms; in the case of forced marriage, this includes practices expected of and inflicted on individuals which are justified due to the social construction of gender.[188] This provides a transposable example of gender-based violence which can inform interpretation and application in other areas of international law.

VI INTERACTION BETWEEN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL REFUGEE LAW

This section addresses the impact of international criminal law another area of international law — namely, international refugee law — which is a motivating

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182 Wendy Brown, 'Women's Studies Unbound: Revolution, Mourning and Politics' (2003) 9 *Parallax* 3, 11.

183 Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Judith Butler and Joan W Scott (eds), *Feminists Theorize the Political* (Routledge, 1992) 385, 387, 390–2, 400.

184 Ibid 392 (emphasis in original).

185 Ibid.

186 See generally Toy-Cronin, above n 27.

187 See Jain, above n 76, 1018. See also Scharf and Mattler, above n 144, 3–5.

188 See, eg, Jain, above n 76, 1018.

concern for the arguments put forward by this article. It has been noted that 'there is a close link between the development of international refugee law and international criminal law with respect to gendered aspects of persecution'.[189] The cross-pollination between international refugee law and international criminal law can be seen in the *Rome Statute*'s definition of 'persecution', where international refugee law provides further guidance on its interpretation in the context of international criminal law.[190] In reverse, international criminal law offers important elucidation of key concepts in international refugee law and provides equally important notes of caution in taking the cross-pollination too far.[191] The case of *Kunarac* from the ICTY will be briefly examined to determine the extent to which international criminal law can be said to influence international refugee law. This case acted as the catalyst for significant progress in recognising victims of sexual violence as refugees under international law and stifled the growth of the category of gender persecution.[192] The post-*Kunarac* jurisprudence on gender persecution, it is argued, warns against adopting a gender-neutral interpretation of forced marriage in Sierra Leone and demonstrates the importance of formally acknowledging and explaining gender elements in international criminal trials.[193] Thus, failure to label forced marriage of the type experienced by women in Sierra Leone as a separate crime and one which is gendered would result in another missed opportunity for jurisprudential progress on gender persecution under international law to provide adequate protection for female refugees.

A Kunarac *and Gender-Neutral Crimes*

The problems for other areas of international law, specifically international refugee law, in adopting a gender-neutral term such as enslavement can be seen when one examines refugee cases concerning sexual violence as a form of persecution following the ICTY case of *Kunarac*.[194] In *Kunarac*, three male defendants were convicted of the mass rape and enslavement of Muslim women during the conflict in Bosnia and Herzegovina.[195] This built upon the precedent that rape could be an act of genocide set by the ICTR in *Prosecutor v Akayesu*[196] and represented the first prosecutions and convictions of rape as a crime against humanity. In recognising rape as a weapon of war, *Kunarac* marked a radical transformation in international law.

The classification of rape as a crime against humanity had a considerable influence on the jurisprudence of refugee law and, in particular, the central term

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189 Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 51.

190 Ibid 51–2; *Rome Statute* art 7(2)(g).

191 Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 51–2.

192 Sellers, 'Wartime Female Slavery', above n 32, 125–6.

193 Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 84–5. See also Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) 145.

194 *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001).

195 Ibid.

196 (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).

'persecution' in the definition in art 1A(2) of the *Refugee Convention*.[197] Initial reactions to *Kunarac* hailed it as a victory for feminist jurisprudence,[198] in particular, as a challenge to the private/public dichotomy that had previously seemed so entrenched in international law.[199] The definition of 'refugee' contained in the *Refugee Convention* requires, amongst other elements, that the refugee fears or has been a victim of persecution on *Refugee Convention* grounds — specifically due to the refugee's political opinion, religion, race, ethnicity or membership of a particular social group; these grounds often seems to require a clear public element.[200] The public/private divide often, if not invariably, served to place activities of women and violence against women in the *apolitical* private sphere.[201] This has the effect that '[i]n an international society peopled by States, women are analytically invisible because they belong to the State's sphere of personal autonomy'.[202]

Since the ICTY characterised rape as a crime against humanity in *Kunarac* it has been accepted that rape, in and of itself, is conduct amounting to persecution.[203] To this extent, *Kunarac* has resulted in great progress for international refugee law by challenging this public/private divide. Yet *Kunarac* has not dismantled this divide entirely and, indeed, it could be said to have reinforced this dichotomy by relying heavily on the circumstances of war and genocide to 'bring the private into the public'.[204] The mixed legacy of the approach taken by the ICTY in *Kunarac* has rendered it the subject of much debate, particularly amongst feminist scholars.[205] Some feminists, in particular Catherine MacKinnon, argue persuasively that the approach taken was valid because the most significant factor of rapes in Bosnia was their part in the genocide against non-Serbs; thus, the extreme nature of these rapes as genocide

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197 The *Refugee Convention* art 1A(2) defines a refugee as someone who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality [or habitual residence if stateless] and is unable or, owing to such fear, is unwilling … to [return] …

198 Debra Bergoffen, 'February 22, 2001: Towards a Politics of the Vulnerable Body' (2003) 18 *Hypatia* 116, 117–20.

199 Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 70.

200 *Refugee Convention* art 2. Throughout the 1980s and 1990s, when female refugees first began to put forward cases where the persecutory treatment was of a sexual nature, applications for refugee status by rape victims were routinely denied on the basis that rape constituted private violence and, as such, could never constitute persecution, see especially *Campos-Guardado v INS*, 809 F 2d 285 (5th Cir, 1987). However, the issue of the motive for the rape continues to be raised in some cases with the argument that rapes can still be personal ('because she is a woman') rather than political, racially or religiously motivated: see, eg, MacKinnon, 'On Torture', above n 132.

201 Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243, 264; Edwards, 'The "Feminizing" of Torture', above n 81, 356–7; Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 70.

202 Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293, 295.

203 *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001).

204 Ibid.

205 See Engle, above n 181.

committed by the Serbian military forces should be emphasised.[206] Yet other feminists cautioned against overplaying the exceptionalism of 'mass rape' as genocide, arguing that rape as genocide would set too high a threshold that might erase less exceptional forms of violence against women.[207] Of particular note here is the argument that 'rape and genocide are separate atrocities' and that eliding them means that international condemnation would be confined to particular facts and circumstances.[208] A similar concern could be expressed about equating forced marriage and enslavement or forced marriage and terrorism in Sierra Leone. Thus, this suggests that forced marriage as a gender crime ought to be a separate crime under international law.

Following the characterisation of rape as torture and as a part of a larger genocidal campaign, rape was immediately recognised as 'persecution' under international refugee law.[209] Yet, when men act 'in their own home', this is considered 'private violence'.[210] Consequently, these acts persist and remain unchanged by the recognition of rape and other forms of sexual violence as *capable* of being within the definition of 'persecution'. The particular problem of always classifying sexual violence as private violence was certainly addressed by

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206 MacKinnon, 'Rape, Genocide, and Women's Human Rights', above n 81. MacKinnon's concern is that this emphasis (on coercive circumstances) led to rape perpetrated by non-Serbs being overlooked in the postwar criminal process. Similar concerns have been expressed in connection with the ICTR prosecutions of rape as genocide, in *Prosecutor v Kajelijeli*, the dissenting judgment noted that 'rape and sexual violence were exclusively perpetrated against Tutsi women (of which only some cases were reported to us) and were committed on grounds of their ethnicity': *Prosecutor v Kajelijeli (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-98-44A-T, 1 December 2003) [97] (Judge Ramaroson). See also Buss, 'Rethinking "Rape as a Weapon of War"', above n 88, 159: Although Buss notes that there is considerable evidence of rape of Hutu women as well, this could not be charged as genocide:

> The rape of Hutu women could only be prosecuted as a crime against humanity if it could be shown the rape of the Hutu woman constituted or was part of the attack against the Tutsi population … Under art 4 of the *ICTR Statute*, rape of Hutu women could be prosecuted as a war crime, though this is generally seen as a less significant category of crime than genocide or crimes against humanity.

207 See especially Copelon, 'Surfacing Gender', above n 201, 245–8.

208 Ibid 246. Although rape was charged separately as a crime against humanity and a method of genocide, the context of armed conflict is a key element to both crimes. Although armed conflict is not a necessary element to label a conduct a crime against humanity, the requirement that such a crime is part of a widespread or systematic attack is easily satisfied by the armed conflict context and is thus a short cut to moving individual instances of violence into the realm of international law. This presents a problem for victims of similar conduct outside of an armed conflict if the wider conflict is seen as of primary importance in rendering the conduct of international relevance: see at 257.

209 Deborah E Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133, 140–3. See also the guidelines issued following the Tribunal's establishment and recognition of rape as a crime during the Yugoslav and Rwandan conflicts: Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applications: Guidelines on Gender Issues for Decision Makers* (July 1996) 16–17; UK Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) 5, 16–19, 31–2; Phyllis Coven, 'Immigration and Naturalization Service Gender Guidelines Considerations for Asylum Officers Adjudicating Asylum Claims from Women' (1995) 7 *International Journal of Refugee Law* 700, 703, 707–8; Immigration and Refugee Board, 'Guidelines Issued by the Chairperson pursuant to Section 65(3) of the *Immigration Act*: Women Refugee Claimants Fearing Gender-Related Persecution' (1993) 5 *International Journal of Refugee Law* 278, 285.

210 MacKinnon, 'On Torture', above n 132, 26–7. See also Roberts, above n 97, 160–8.

Kunarac and was further emphasised in the cases before the SCSL.[211] However, the approach taken of explaining rape as a method of torture creates considerable problems in addressing sexual violence and other forms of violence against women outside of a recognised conflict. This points towards the importance of clearly identifying the gender elements of crimes, where applicable, rather than seeking to tie the crimes to gender-neutral terms such as torture or enslavement.

Following *Kunarac* and building on the ICTR, the approach has been to label sexual or domestic violence as 'cruel, inhuman or degrading treatment' amounting to torture as recognised in international law under the *Geneva Conventions* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*').[212] It is noteworthy that international law has chosen to link rape predominately with torture rather than classifying it as its own form of cruel, inhuman or degrading treatment.[213] Whilst linking rape to torture rightly recognises the seriousness of the act, it might also be said to perpetuate the view that only sexual violence with a clear public element is of international concern and that other violence remains in the realm of domestic law. This is not an inevitable result of labelling rape as torture, rather this result is due to the prevailing interpretations of torture under international law such as in the UN *CAT* which still contains a requirement that

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211 *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [430]–[431], [567]–[569]; *AFRC Trial* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [210]–[222].

212 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

213 This is not to argue that it cannot be both but rather that international refugee law through the *UNHCR Gender Guidelines* and *Kunarac* has chosen to focus on rape as torture. A similar definition of rape as torture was put forward by the ICTR in the *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998), where the Trial Chamber stated at [687]:

> Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

However, the *Semanza Trial* rejected a requirement of state participation or acquiescence stating that 'outside the framework of the *Convention against Torture*, the "public official" requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity': *Prosecutor v Semanza (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-97-20-T, 15 May 2003) 342 ('*Semanza Trial*'). It is disappointing that the *Kunarac* approach of linking rape to torture has been the more influential, particularly in refugee law; Ellie Smith, 'A Legal Analysis of Rape as Torture in the International and Regional (Non-European) Fora' in Michael Peel (ed), *Rape as a Method of Torture* (Medical Foundation for the Care of Victims of Torture, 2004) 167. The *Akayesu Trial* approach not only removes the requirement of state or military involvement but also contained a clear statement that coercive circumstances need not include force but that threats and intimidation might be sufficient. This moves us a step away from a general requirement of an armed conflict or wider violent context such as genocide (although, of course, this was a requirement for the prosecutions before the ICTR): see *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [579].

the act is committed by public officials.[214] Although other definitions and interpretations that do not require state involvement are available,

> [v]ery few cases have raised rape or other forms of sexual violence, and only an exceptional case has sought redress for harm outside state custody or by non-state actors, in spite of favourable commentary and jurisprudence on these forms of torture in recent years.[215]

The impact of rape framed as a method of torture focuses on two key areas which are not of great value to refugee law and arguably fail to represent the totality of the crime of rape — namely, rape is portrayed as a weapon of war and as a form of torture connected to sexuality, rather than gender.[216] This characterisation of rape makes it relevant to international law specifically only *during* armed conflicts.

The fact that the sexual violence had taken place during an armed conflict was of considerable importance to the ICTY in their convictions in *Kunarac*, as it provided the authority to the ICTY to charge the defendants.[217] As noted above, the approach was not to focus on the individual cases but on the coercive circumstances created by ethnic strife and armed conflict, with the effect that where the ICTY determined that sexual intercourse had taken place, consent was presumed not to have been given.[218] Thus, although the *mens rea* of rape continued to include knowledge that the act occurred without the consent of the victim, after the Appeals Chamber had labelled the circumstances as 'inherently

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214 See, eg, Andrew Byrnes, 'The *Convention against Torture*' in Kelly D Askin and Dorean M Koenig (eds), *Women and International Human Rights Law* (Transnational Publishers, 2000) vol 2, 183, 183–4, 187, 189; Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 85, 85–6; Edwards, 'The "Feminizing" of Torture', above n 81, 349–50, 371; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 7 (which provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] consent to medical or scientific experimentation'). Although usually used to address torture within state custody, art 7 does not positively require that the act be perpetrated or ordered by a state agent and the Office of the High Commission for Human Rights has urged that it be interpreted in a non-discriminatory way: see Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992) [2], [13]; Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the* Covenant, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [8]. However, the *ICCPR* is not the primary instrument used in international criminal law but is instead used when litigating torture as a human rights violation.

215 Edwards, 'The "Feminizing" of Torture', above n 81, 355. See also Robert McCorquodale and Rebacca La Forgia, 'Taking Off the Blindfolds: Torture by Non-State Actors' (2001) 2 *Human Rights Law Review* 189, 209–10.

216 The *SCSL Statute* does not require a nexus to armed conflict in its definition of crimes against humanity: at art 2. Similarly, the *ICTR Statute* and *Rome Statute* also do not require this nexus: *ICTR Statute* art 3; *Rome Statute* art 7. However, this nexus is required at the ICTY: see *ICTY Statute* art 5.

217 *ICTY Statute* art 1; *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [430]–[431], [567]–[569].

218 *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [461]–[464], [567]–[569].

coercive', the issue of consent was not addressed.[219] The unfortunate effect of the *Kunarac* approach to sexual violence was to suggest that the motive for the attack must be demonstrably linked to, or — as in the case of refugee law — must be in circumstances analogous to an international crime, such as genocide, to bring this within the scope of international concern. Although motive is not an element of the crime of rape, in international refugee law, the victim herself is putting forward the argument for rape as 'persecution' in order to satisfy art 1A(2) of the *Refugee Convention*.[220] In international refugee law, the focus is not on prosecuting the perpetrator or the elements of rape as a crime but on rape as an international crime, in contradistinction to rape as a domestic crime.[221] The refugee is seeking to demonstrate — and, indeed, must do so in order to receive refugee status — that the conduct amounts to persecution and is not just a crime that can be addressed by domestic law.[222]

This requirement has the practical effect that, in order to bring conduct within the scope of art 1A(2) of the *Refugee Convention*, it is necessary by implication to demonstrate that the motive for the conduct is one that renders it *international* and not national, such as those enumerated in art 1A(2): 'race, nationality, ethnicity, religion or membership of a particular social group'. Constructing rape as a crime against humanity requires a link to systematic and widespread violence even if the rape itself is an isolated instance.[223] Similarly, constructing rape as genocide requires that the instances of rape be linked to genocide.[224] Thus, facets of the crime that are not elements of criminal conduct but instead form part of the wider context that renders the crime to be of international concern, often become conflated with the elements of the crime when the former is transposed to other areas of international law. This presents not only a confusing picture but also one where gender — as it has not been recognised as a defining element — appears not to play a central role in rendering the conduct to be of international concern.

The implication of this for other areas of international law does not necessarily concern international criminal law but, as noted above, international criminal law sets precedent for other areas of international and domestic law as it is perceived to single out the conduct which amongst the plethora of criminal conduct is capable of constituting an international crime.[225] Thus, the acknowledgment of rape as an international crime was conducive to the 'moving' of rape into the category of conduct capable of constituting an

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219 See generally Engle, above n 181, 804.

220 *Refugee Convention* art 1A(2).

221 Anker, above n 209, 141, 143.

222 *Refugee Convention* art 1A(2).

223 Copelon, 'Surfacing Gender', above n 201, 257; Engle, above n 181, 798; Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 56, 68.

224 *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [731]–[734].

225 Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 80–1; Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *California Law Review* 323, 326.

international crime *depending on the circumstances*.[226] *Kunarac* appeared to unintentionally establish a requirement for the motive of the crime to be such that it 'moved' the crime from the domestic arena to the international.[227] Prosecutors in *Kunarac* were not concerned with motive as it is not an element of the crime of rape and the circumstances of genocide were proven separately. However, the implication of the compound 'rape as genocide' seems to have been taken by many when interpreting refugee law in relation to a claim for refugee status, where rape is the conduct amounting to persecution to require the victim to show a similarly non-personal motive which would 'allow' the violence to be treated as public rather than private.[228] The focus on the genocidal circumstances and, by implication, the motive of the perpetrator, seemed to suggest to many post-*Kunarac* interpreters of international refugee law that gender alone — which could be separated from individual sexual desire — did not constitute a non-personal motive.[229] For the *Kunarac* prosecutors, the need to demonstrate motive was set aside, as in the context of genocide, motive can be assumed similarly to the coercive circumstances that allow the presumption of non-consent.[230] However, this did nothing to prevent the public/private dichotomy from being applied to claim that rapes committed outside of the context of genocide remain private violence and outside the protective scope of international law.[231]

This approach is clearly practical and justifiable in ensuring successful prosecutions where sexual violence is rife but precise evidence is scarce; however, this approach can be problematic for setting a precedent in addressing sexual violence more generally.[232] The presumption of motive and non-consent are not carried outside of this context. Thus, the burden of proof remains on the women seeking international protection, particularly in refugee law where a link to a *Refugee Convention* ground is required. Female refugees have faced considerable problems in establishing gender as a non-personal motive that would 'move' the private violence into the public sphere and they have been

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226 See Hannah Pearce, 'An Examination of the International Understanding of Rape and the Significance of Labeling it Torture' (2003) 14 *International Journal of Refugee Law* 534, 556.

227 Engle, above n 181, 791–3.

228 Pearce, above n 226, 557.

229 The notion that rape is only ever connected with sexual desire can be challenged. Although this is beyond the scope of this article, it is worth noting that

> even in non-political situations where the attack is directed towards a randomly selected individual, the primary motivation is likely to be either power or anger: 'rape, then, is a pseudo-sexual act … concerned much more with status … [and] control … than with sensual pleasure or sexual satisfaction'.

Ibid 540 (citations omitted).

230 *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [433]–[435], [461]–[464].

231 The same assumption could arguably be adopted in relation to the pervasive gender inequalities and roles in Sierra Leone, with the conflict providing circumstances for the application of the non-consent paradigm but with gender replacing genocide as the context for presuming underlying motivation.

232 Aside from the arguments present above, this approach has also been criticised for failing to recognise the agency of women even during armed conflicts: see, eg, Debra B Bergoffen, 'From Genocide to Justice: Women's Bodies as a Legal Writing Pad' (2006) 32 *Feminist Studies* 11, 27–9.

unable to rely on *Kunarac* to dismantle the public/private divide entirely, as had initially been predicted.[233] This is not to say that the ICTY needed to label the sexual violence experienced by women during the Yugoslavian conflict as gender violence; quite the reverse, it can be said that the context of genocide clearly predominates there. However, a clear statement as to why this was *not* primarily gender violence but violence against women may have provided a clearer understanding on how gender violence as a separate category may be used in subsequent cases and in other areas of international law.[234]

Contrasting violence against women in former Yugoslavia and gender violence in Sierra Leone, *Kunarac* might be said to represent 'international criminal law's hierarchy of harm [which] elevates crimes committed as part of a plan or pattern across political groups'[235] above less organised forms of violence. Whilst this might be seen as a justifiable by-product of the focus of international criminal law, it is important to recognise that the position of a wrongdoing in international criminal law's 'hierarchy of harm' also dictates the legal force or recognition of harms in other areas of international law and domestic law.[236] Indeed, the desire to move gender crimes 'up the hierarchy of harm' might be said to be the motive behind attempts to link these crimes to gender-neutral crimes already recognised in the hierarchy.[237] However, whilst these links might have the effect of establishing a gender crime in international criminal law as a gendered form of an already recognised crime, they do little to establish the harm, in and of itself, as an international wrong. The 'hierarchy of harm' is, then,

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233 Siobhán Mullally, 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?' (2011) 60 *International & Comparative Law Quarterly* 459, 459, 470–9; Lindsay M Harris, 'Untold Stories: Gender-Related Persecution and Asylum in South Africa' (2009) 15 *Michigan Journal of Gender & Law* 291, 310–21.

234 This is not to say that there was not a significant gendered element to violence in Yugoslavia; there was clear evidence that the *type* of violence suffered by both women and men was heavily influenced by gender — including the rape of women and man and the castration of men — but this must be seen in the context of genocide which was of primary importance in the victim's exposure to violence: see generally Oosterveld, 'Gender, Persecution, and the International Criminal Court', above n 6, 60–2. This contrasts with the situation in Sierra Leone, discussed above.

235 Jaya Ramji-Nogales, 'Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law' (2011) 11 *International Criminal Law Review* 463, 464. See also Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, 1997) 288–9; Dubravka Žarkov, *The Body of War: Media, Ethnicity, and Gender in the Break-Up of Yugoslavia* (Duke University Press, 2007); Doris E Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25 *Windsor Yearbook of Access to Justice* 3. See also Bellows and Miguel, above n 180, 6 (citations omitted) concerning the lack of an ethnic element in Sierra Leone. This is in contrast to the situation in Yugoslavia:

> neither ethnic nor religious divisions played a central role in the conflict. The RUF rebels, who were responsible for an estimated 70% of all documented human rights violations during the conflict, targeted people from every ethnic group, and statistical analysis of these violations shows that no ethnic group was disproportionately represented among RUF victims, and there is no evidence that civilian abuse was worse when the armed faction and the community were predominantly from different ethnic groups.

236 See Ramji-Nogales, above n 235, 468–71.

237 Ibid.

left relatively unchallenged by such tactics, presenting considerable problems to other areas of international law such as international refugee law.[238]

The hierarchy could perhaps be effectively challenged if international criminal law provided a clear explanation of which acts of violence have been transformed into crimes against humanity, war crimes or genocide by scale or by forming part of, and by being taken during, armed conflict and/or ethnic cleansing and the reasons for the transformation. This allows legal principles to be extrapolated from the judgments and transposed into other areas of international law, to label actions as 'international wrongs' that can be litigated outside of international criminal law as human rights violations or, in the case of international refugee law, as conduct constituting persecution. Thus this article has sought to establish forced marriage as criminal conduct and a gender crime independent of the conflict context. To do so would place forced marriage as a gender crime higher in the hierarchy of harm *without* first requiring the establishment of a link to a gender-neutral crime or to a broader conflict.

The same approach might have been taken to recognising rape within international law. Rape ought to be established as a serious violation of human rights and a crime capable of attracting international legal concern without linking it to torture. Rape is a recognised crime and a grave breach of an individual's human rights.[239] Thus, the extra layer of legal analogy — linking it to torture — seems unnecessary. This suggests that the primary right violated by the act is the victim's right to be free from torture, which obscures the gender element of the crime. Seeking to 'feminise' gender-neutral crimes by adding gender violence against women to gender-neutral crimes runs the risk of

> playing into the male-gendered international system by seeking to raise the profile of violence against women through equating the seriousness of the harm with male conceptions of torture, rather than as grave human rights violations in their own right.[240]

This, combined with the notion of inherently coercive circumstances created by conflict, creates a characterisation of rape as a crime which does not allow much room for gender elements and does not allow for progress to be made in international criminal law to be transposed into refugee law.

Despite early promise, *Kunarac* did not provide a basis for international protection to be awarded to refugees against sexual violence as it appeared to be limited to cases where racial or political motive could be demonstrated by linking to the situation in former Yugoslavia.[241] The lack of real judicial exploration of the significance, if any, of gender roles in the violence against women being prosecuted in *Kunarac* meant that it could only be used to establish

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238 See generally Thomas Spikerboer, *Gender and Refugee Status* (Ashgate, 2000).

239 MacKinnon, 'Rape, Genocide and Women's Human Rights', above n 81, 5–6.

240 Edwards, 'The "Feminizing" of Torture', above n 81, 379.

241 Buss, 'Performing Legal Order', above n 7, 415, 421–2; Jennifer Green et al, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) 5 *Hastings Women's Law Journal* 171, 173, 178, 183–5, 194–8; Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425, 426–32, 437–41. For an account of the progress of international refugee law in addressing gender violence, see generally Anker, above n 209.

rape as a serious enough violence to constitute persecution.[242] However, it could not be used by analogy to establish other forms of violence against women, such as domestic violence as a crime in international criminal law.[243] A violation of the right to be free from torture does not suggest anything particular as to the impact of gender roles in shaping the behaviour and views of the perpetrators, victims and indeed society more generally. Therefore, it might be preferable to characterise rape and sexual violence as a very specific sort of outrage against personal dignity.

The concept of personal dignity would allow for the acknowledgment of gender elements to the extent that they are significant. This would be similar to the gender approach that should be taken with regard to forced marriage as it could allow for twofold harms — the rape itself and gender persecution. The conception of rape as torture adopted in *Kunarac* failed to recognise the possibility of a significant gendered element of the crime; that is, it failed to acknowledge the distinction between the times when a woman is targeted as a woman — or a man is targeted as a man — and when she is targeted because she is a woman — or he is targeted because he is a man.[244] If rape is viewed as a method of torture, it is often assumed that the victim has been targeted for reasons other than gender and that the only gender element is the form of torture, which might arguably be said to be dictated by the victim's sex.[245] For decades, this assumption was transferred to international refugee law with little or no challenge arguably until the British case of *Fornah v Secretary of State for the Home Department*.[246] The view of violence against women as persecution stagnated with the picture presented in *Kunarac*, which required victims to show a clear political, racial, religious or ethnic motive for the violence.[247] A victim was not able to refer to her identity as a woman to constitute membership in a particular social group, as gender roles had not been acknowledged as a relevant factor in determining if violence against women was to be brought within the scope of international law.[248]

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242 Gender was only viewed in terms of an aggravating circumstance in relation to the crimes committed in *Kunarac*: *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [867].

243 Copelon, 'Gender Crimes as War Crimes', above n 83, 239.

244 Engle, above n 181, 802, 806, 810, 813, 815; *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001)[553]–[557].

245 See Pearce, above n 226, 539–42. See also Edwards, 'Violence against Women', above n 193, 213; Clare McGlynn, 'Rape as "Torture"? Catherine MacKinnon and Questions of Feminist Strategy' (2008) 16 *Feminist Legal Studies* 71, 71.

246 [2007] 1 AC 412, 459. *Fornah* overturned the Court of Appeal's denial of refugee status, which had relied on the fact that, within Sierra Leone, female genital mutilation is 'clearly accepted and/or regarded … as traditional and part of the cultural life of its society': *Fornah v Secretary of State for the Home Department* [2005] 1 WLR 3773, 3787–8.

247 This is implied from the focus on the ethnically informed nature of the crimes committed in *Kunarac*: *Kunarac* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [16]–[18], [577], [592], [654], [669].

248 This is implied from the fact that gender was only viewed as one of the aggravating circumstances in relation to the crimes committed in *Kunarac*: ibid [867]. See also Engle, above n 181, 815.

What does this tell us about the advocated approach to be taken with regard to forced marriage in relation to the women of Sierra Leone? It warns against viewing forced marriage as enslavement or sexual slavery. If a gender-neutral term is applied, we risk falling into a similar trap of implying that the method of enslavement was impacted by the sex of the victim but that the crime itself was essentially gender-neutral. Why does this matter? It matters on two levels: first, in terms of adequately reflecting the experiences of the specific victims; and secondly, it influences the type of precedent created by international criminal law and the type of impact the prosecution can have on other areas of international law — specifically, international refugee law. If the charges accurately reflect the situation and experiences, international criminal law has performed its function and the ICTY might be said to have accurately characterised the rape of Muslim women during the Yugoslavian conflict as genocide. However, though this was not an inaccurate characterisation, the by-product was a confused picture that relied too heavily on the conflict situation to bypass problems created by the public/private divide instead of facing this conceptual confusion directly. In order to prevent a similar stagnation of progress to that which followed *Kunarac*, in terms of gender persecution, an approach to forced marriage which is foregrounded by gender has been strongly advocated in this article. In this manner, international criminal law can provide a transposable interpretative guide to addressing gender persecution under other branches of international law, such as international refugee law, and accurately reflect the situation and experiences of the 'bush wives' in Sierra Leone.

The different approaches taken by the ICTY and SCSL also remind us that it is important to separate these forms of violence to ensure that gender does not collapse into sexuality. Whilst violence may be linked to the victim's sex, or be sexual in character, it is also important to acknowledge that in many cases sexual violence is more accurately described as a part of, or a consequence of, gendered societal norms and roles that ascribe certain roles to women and allow certain behaviour of men. This often forms and provides the context for the acts of sexual violence from which female refugees have suffered or fled. Just as a forced marriage in Sierra Leone can be distinguished from forced marriage in Cambodia by the presence or absence of gender roles as significant background factors, it may also be distinguished from the violence against women seen in the former Yugoslavia and Rwanda, where the predominant — although by no means sole — background was the wider violence and genocide.

One lesson from the SCSL ought to be that 'seemingly gender-neutral crimes may include gendered elements'.[249] It is argued here that this lesson may be learnt even if forced marriage is labelled as a gender-neutral crime but the price of doing so would be too high. First, it would result in continued confusion between gendered and gender-neutral harms, which could be more effectively addressed by determining whether gender constitutes the predominant factor in the harm before labelling the harm 'gendered' or 'gender-neutral'. It may be the case that gender-neutral crimes, such as forced labour and enslavement, did contain gendered elements. But forced marriage does not merely 'include

[249] Valerie Oosterveld, 'Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes' (2009) 17 *American University Journal of Gender, Social Policy & the Law* 407, 413.

gendered elements'; it is predominantly a gender crime containing other gender-neutral elements. Labelling the crime as such would demonstrate the context of armed conflict in a way which does not automatically render gender a secondary factor.

Secondly, forced marriage as a gender-neutral crime — even with acknowledgment of gender elements — would not combat the continued low position of gender violence on international law's hierarchy of harm. It would still suggest a need to link gender violence to another gender-neutral form of violence before it attracts international concern. The recognition of forced marriage as a gender crime sends a clear signal that gender crimes are relevant to international law, whether the gender crime occurs in a domestic relationship or not. The public/private divide then becomes increasingly untenable and this would constitute real progress for victims of gender violence, combating the notion of private violence which *Kunarac* was unable to achieve.

This model of gender violence can be applied in order to assess whether specific instances of violence against women can fall within the concept of persecution under international law. It suggests that international refugee law must pay more attention to gender crimes and that the public/private dichotomy has no role to play in determining the relevance of violence in the international sphere. If we label the crime of forced marriage in Sierra Leone as a gender crime, we have precedent for recognising the treatment of women within the domestic realm as internationally relevant violence. It also sets a precedent for recognising the force of societal norms that allow, condone or justify violence against women. If forced marriage is a separate crime based on the exertion of control and ownership over a victim solely due to their gender, albeit experienced through a range of constitutive elements — some highly gendered and others gender-neutral — then we have a case for saying that international refugee law must recognise victims of similar exertions of control and ownership as victims of persecution. It can be argued that the view of women as possessions, as identified as a central element of the crime of forced marriage, also undergirds other forms of violence against women — in particular female genital mutilation, domestic violence and rape.

VII CONCLUSION

If gender violence were properly recognised throughout international law then perhaps international criminal law would not be required to do so much work in expressing normative standards — rather, international criminal law could focus solely on its primary role of holding individuals responsible for international wrongs. If gender violence were addressed consistently in international law, perhaps we would not need to concern ourselves with whether a crime is labelled as 'gendered' or not. Perhaps then it would be sufficient that the crime is being exposed and punished and the individual victims were given a chance to be recognised. However, at present we cannot say that gender violence is recognised or addressed widely enough as it remains a massive problem that is reflected in applications for refugee status by victims of domestic violence, rape, sexual violence or even forced marriage. For these present and future victims, it is vital that forced marriage of the type experienced by women in Sierra Leone during the conflict is highlighted as gender violence. Only then can women

experiencing analytically similar violence be able to demand international protection against an internationally relevant wrong. Prosecutions in these cases make a clear statement about the position of gender violence as an international wrong and as violence capable of giving rise to claims in other areas of international law.

Prosecutions also reflect the reality of the experiences of victims in Sierra Leone. The victims of 'bush marriages' were subjected to many individual acts — some of which might be described as torture, enslavement, rape and sexual violence. However, these acts did not simply aggregate to make a composite crime of forced marriage. Forced marriage represents something beyond the constitutive elements — namely it was informed by, and in itself informs, gender constructions in a society where — before, during and after the conflict — women were viewed as possessions rather than rights-holders were widespread. This underlying presumption of inferiority and ownership that 'produced capacity for women to be wronged' cannot be conveyed or acknowledged in gender-neutral terms.[250] The danger of seeking to do so is demonstrated in the post-*Kunarac* jurisprudence in international refugee law.[251]

The aim of this article has been to highlight this danger in the hope that this will be considered when characterising forced marriage before the SCSL and in interpreting the crime of forced marriage in analogous situations. For this reason, it has been advocated that forced marriage be charged as a separate and distinct crime. Forced marriage as a gender crime, then, would contain the same basic constitutive elements but with the added element that the conduct be connected in a significant way to the gender roles and power inequalities between the genders. This would send a clear and unequivocal statement that gender crimes are, in and of themselves, capable of forming internationally relevant criminal conduct and that gender can be of more relevance than a mere marginal contextual element of other international crimes.

Whilst there are strong arguments for intersectionality,[252] it can also cause confusion due to the acts of the particular crimes becoming conflated. Forced marriage need not be charged as a form of terrorism and rape need not be charged as a form of torture to reconstruct the totality of the experiences of the victims; this is also not the only route to give these crimes recognition. Whilst remaining quite separate, forced marriage can be charged alongside other crimes to build up a composite picture of the violence, whilst subsequently allowing the individual crimes to be addressed independently. This article has argued that forced marriage in Sierra Leone offers an opportunity to recognise wrongs done to women as international crimes because they are women with no significant additional political, racial, religious or ethnic element. There continues to be a fundamental confusion in international law between violence against women and gender violence. Forced marriage in Sierra Leone — when contrasted with forced marriage in Cambodia and with violence against women perpetrated as part of a genocidal campaign in former Yugoslavia and Rwanda — offers a clear picture of gender violence, perpetrated due to the impact of gender roles and

250 Brown, above n 182, 11.

251 See, eg, Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone', above n 41.

252 Ibid 72–4.

inequalities. This 'very cruel expression of male dominance'[253] ought to be recognised in those terms to provide a transposable concept of gender violence. Recognition of this 'male dominance' could result from the prosecutions before the SCSL living up to their promise to take positive steps in addressing gender violence in a way prosecutions before the ICTY and ICTR failed to deliver.

253 *Fornah* [2007] 1 AC 412, 441.