

THE ISSUES FACED BY THE CRIME OF FORCED MARRIAGE UNDER INTERNATIONAL CRIMINAL LAW

I. Introduction

The last few decades have seen a welcome rise in the criminalization of gender and sex-based crimes. Crimes such as sexual slavery, enslavement and rape have been successfully prosecuted under international law. Yet, forced marriage has not been considered until 2008, when the Special Court of Sierra Leone (SCSL) formally recognized it as an international crime. Its landmark judgments regarded the 1991-2002 civil conflict, in which thousands of women were abducted and forced to marry their captors against their will. The victims assumed all of the obligations of a wife, whilst none of the rights. They were raped, beaten, tortured and forced to bear and rear the captors' children. Moreover, many of these 'wives' suffered from continuing stigmatization by families and communities thus affecting their ability to reintegrate and prolonging their trauma. Since the SCSL's ruling, no other criminal tribunal to date has successfully enforced and prosecuted perpetrators for committing forced marriage.¹ Furthermore, issues concerning, *inter alia*, its definition and characterization have arisen, making it difficult for the crime to develop further. Due to its underlying complexity, forced marriage has been ignored, or worse, dismissed by many scholars and legal practitioners. This lack of development is alarming considering there is evidence of forced marriage in Rwanda, Mozambique, Uganda, the DRC, and Cambodia.² This short paper seeks to identify a number of key questions and highlight some of the arguments jurists have been debating. The main objective will be to keep the discussion alive, hoping that it will somehow contribute to the crime's development under international criminal law.

II. Examples of Forced Marriage

Evidence of forced marriage can be found not only in Sierra Leone, but also in Rwanda, Mozambique, Uganda, the DRC, and Cambodia.³ Sierra Leone and Cambodia are the most notable examples, which also demonstrate how different the crime of forced marriage can be. Notably, whereas forced marriage's victims in Sierra Leone were exclusively women, in Cambodia it was a gender-neutral crime, which affected both sexes. Below I will provide with a short description of both examples.

During the Sierra Leone civil war in the 90s, members of the rebel factions abducted numerous women and girls and held them in their camps. The abductions were violent and later, the women were assigned to individual rebels, becoming bush wives. The victims were forced to submit sexually to their husbands and cook, clean, carry and bear their children. Only few had relationships formalized by a ceremony; the rest were simply given the label 'wife'. The relationships were often polygamous, with rebels having multiple wives. This label caused ongoing suffering for women,

¹ F. Nguyen, *Untangling Sex, Marriage, and Other Criminalities in Forced Marriage*, *Goettingen Journal of International Law* 6 (2014) 1, 13-45, p. 14

² N. Jain, 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution', *J. Int. Criminal Justice* (2008) 6 (5):1013-1032.

³ *Ibid.*

who were tainted by their association with the rebel forces and couldn't reintegrate in their communities.⁴

Significantly different from the Sierra Leone example, the Khmer Rouge Regime in the 70s appropriated the traditional practice of parents arranging a marriage by claiming the status of parent. It forced thousands of Cambodian men and women into marriages as part of their policy to destroy the family group while still maintaining population growth. Any individual who dared to resist the marriage was coerced by violent means.⁵

III. Definition of Forced Marriage

'Forced marriage' as a crime under international law is not listed in the Rome Statute of the International Criminal Court (ICC) or in the Statutes of other international criminal courts or tribunals and there is no agreed definition. Generally speaking, forced marriage refers to a range of conduct that can include armed groups or a state forcing one or both parties to enter into a de facto or de jure marriage. Such conduct can involve a number of crimes under international law, such as rape, sexual slavery, forced pregnancy, enslavement, torture, persecution and other inhumane acts.⁶

Despite the unclear definition, there is some jurisprudence on its legal characterisation as a crime under international law from the Special Court for Sierra Leone. The Court took a number of different approaches to the issue and, while its decisions are not binding on other courts, they may be persuasive. *In the Prosecutor v Brima, Kamara and Kanu* (AFRC case), the Trial Chamber considered forced marriage to be sexual slavery,⁷ which was then criticized by Justice Doherty in her dissenting opinion, where she considered it as a separate crime against humanity under 'other inhumane acts'. She deemed sexual slavery to be too narrow as the use of the label 'wife' along with the expectation that the woman carry out 'conjugal duties' caused prolonged mental, physical and moral suffering, as well as stigma among communities.⁸ The Appeals Chamber reversed the Trial Chamber's dismissal of the forced marriage charge, ruling that, contrary to the majority view of the trial chamber, forced marriage was distinct from the crime of sexual slavery under the category of "Other Inhumane Acts," which are recognized as crimes against humanity under customary international law.⁹ It stated that although sexual slavery and forced marriage shared a few elements (i.e. non-consensual sex and deprivation of liberty), forced marriage involved a perpetrator compelling a person by force or threat of force into a conjugal association and implied a relationship of exclusivity between 'husband' and 'wife'.¹⁰

⁴ M. Scharf, 'Forced marriage as a separate crime against humanity' in: Ed. C. Chernor Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and international criminal law*, Cambridge university press, 2014, p. 193

⁵ Transcultural Psychosocial Organization Cambodia, 'Like Ghost Changes Body: a study on the impact of forced marriage under the Khmer Rouge regime', October 2014, available at: https://kh.boell.org/sites/default/files/forced_marriage_study_report_tpo_october_2014.pdf

⁶ M. Scharf, p. 205

⁷ Ibid, para. 50-51

⁸ AFRC Justice Doherty, note 6, para. 48

⁹ J Gong-Gershowitz, 'Forced marriage: a new crime against humanity?' 2009, 8*Nw U J Intl. Hum. Rts.*, p.53

¹⁰ AFRC Appeals Judgment, para. 195

In the *Prosecutor v Sesay, Kallon and Gbao* (RUF case), the Trial Chamber didn't explicitly set out a specific set of elements defining forced marriage but detailed evidence that it considered as demonstrative of the crime.¹¹ It concluded that the use of the term 'wife' was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions as well as create stigma.¹² All the accused were found guilty by the Trial Chamber of 'other inhumane acts' under article 2(i) of the statute in the basis of charges relating to FM in addition to acts of physical violence. The findings were upheld on Appeal.¹³

IV. Main Issues and Arguments

A. Definition

i. What is the clear definition of 'forced conjugal association'?

It was hoped that the RUF judgment would clarify uncertainties left by the AFRC Appeals Chamber Judgment. However, no clear definition of 'forced conjugal association' was provided. The description of conduct to what occurred in Sierra Leone, rather than a working definition, will provide little instruction to other courts. The reference to 'conjugal duties', namely, sexual intercourse and domestic labour, mentioned in the SCSL cases was highly contextual and does not necessarily translate into other scenarios.¹⁴

B. Characterization

i. How should forced marriage be classified? What is the key focus of the crime: deprivation of liberty, exploitation, sexual violence or a combination of all three?

There is confusion as to how forced marriage should be classified under international criminal law. This has led scholars, courts, and legal practitioners to either subsume forced marriage under sexual slavery, ignore forced marriage in criminal indictments despite contrary evidence, or label it as an "other inhumane act" under crimes against humanity.

Scholars who argue for forced marriage to be recognized as a subcategory of sexual slavery note that usually, physical and sexual violence are dominant features compared to other conjugal duties.¹⁵ In contrast, those who criticize this position state that while a victim of sexual slavery is bound by her captor and her ability to restrain her movement, a victim of forced marriage is bound both her captor and by the bonds placed upon a married couple by religion, society, the state. They strongly believe that reflecting only the sexual elements is too narrow and fails to address other non-sexual

¹¹ RUF Trial Judgment, Para. 1293

¹² Ibid, Para. 1466

¹³ Ibid, para. 734,736

¹⁴ V. Oosterveld, 'Forced marriage and the Special Court for Sierra Leone: Legal advances and conceptual difficulties', *Intl. humanitarian legal studies* 2 (2001) 127-158, p. 145

¹⁵ J Gong-Gershowitz, 'Forced marriage: a new crime against humanity?' 2009, *8Nw U J Intl. Hum. Rts.*, p.54

elements of the crime.¹⁶ Additionally, while victims of sexual slavery encounter discrimination from their communities, they are still viewed with more sympathy than victims of forced marriage. The longer the victim is in a marriage with the perpetrator, the more difficult it will be for communities to separate her from the perpetrator, creating the perception that she collaborated with the enemy.¹⁷

Academics advocating for forced marriage to be viewed as the crime of enslavement claim that forced marriage is a descriptive rather than a legal phrase. Hence, it cannot legally encapsulate a bundle of acts or patterns of conduct. One author in particular notes that many of the acts referred to as forced marriage are also captured under international treaties on slavery. She also asserts that all of the evidence of the crime in Sierra Leone amount to patterns of female slavery as a whole: abduction, forced transportation, coerced conscription, repeated sexual assault, coerced breeding; domestic labour; psychological, physical, social and civic restrictions, and alienation from the family and community.¹⁸ Some agree that the compelling of a person by force or threat of force into a forced conjugal association resulting in great physical and mental injury could also be seen as an exercise of powers attaching to the right of ownership due to the complete loss of autonomy of the compelled 'spouse'. Nevertheless, it is often acknowledged that the label of enslavement might not fully capture the sort of stigmatization the SCSL identified in forced wives.¹⁹

ii. *Should forced marriage be placed under the 'other inhumane acts' box, or be recognized as a stand alone international crime?*

Many scholars disagree with the characterization given by the AFRC Appeals Chamber and believe that forced marriage should be a distinct enumerated category under 'crimes against humanity'. There is a widespread fear that putting it under the 'other inhumane acts' box diminishes its severity, especially in contrast with the other crimes such as rape, torture, and enslavement. The magnitude and duration of the abuse and multilayered brutality under the facade of marriage illustrates why this crime shouldn't be placed in the other inhumane acts box. Categorizing forced marriage as a standalone crime against humanity would draw a greater attention to the crime and help shift power dynamics, so the perpetrators, rather than the victims, are shamed and punished.²⁰

iii. *Should forced marriage be categorized as a gender-based crime or gender-neutral offence?*

¹⁶ M.O. Scharf, S. Mattler, 'Forced marriage: exploring the viability of the SCSL's new crime against humanity', case research paper series in legal studies, WP 05-35, 2005, p. 20

¹⁷ F. Nguyen, 'Untangling sex, marriage, and other criminalities in forced marriage'. *Goettingen Journal of International Law* 6(2014) 1, 13-45.

¹⁸ P. Viseurs Sellers, 'Wartime Female Slavery: Enslavement?' 44 (1) *Cornell Intl. Law J.* 115 (2011), p. 135

¹⁹ V. Oosterveld, 'Forced marriage and the Special Court for Sierra Leone: Legal advances and conceptual difficulties', *Intl. humanitarian legal studies* 2 (2001) 127-158, p. 152

²⁰ <http://ilg2.org/2013/08/14/the-issue-of-consent-clarifying-the-misunderstandings-between-forced-marriage-and-arranged-marriage/>

A ruling on this particular question would be instructive in cases such as the one in Cambodia.²¹ Feminist scholar Rachel Slater adopts Justice Doherty's approach (in AFRC trial, see above) and advocates for forced marriage to be considered as a gender-based crime. She claims that the term 'wife' automatically indicates a significant degree of control and ownership- at least in societies like Sierra Leone and Uganda. A gender approach acknowledges that the source of this ownership comes from the socially constructed roles. Thus, it acknowledges that although harm was often experienced through gender-neutral crimes such as sexual violence and enslavement, there was a specific gendered element in the label 'wife'. Additionally, Slater mentions that forced marriage in Sierra Leone also a secondary gender element as it intended to demonstrate that the men of the community failed in their 'masculine' duty to protect their own wives, daughters and mothers and sisters. The gender dimension of forced marriage in Sierra Leone is the element that ties together all of the disparate conducts that constitute this crime. Thus, forced marriage of the type experienced in Sierra Leone should be represented as a gender- based crime.²²

Whereas the crime in Sierra Leone was specifically gendered in nature, in Cambodia it was intrinsically different. In the latter case, both men and women were victims, making gender a secondary factor. Slater solves the issue suggesting to characterize it as a gender-based crime and add this option as a separate category to the crime of forced marriage. This way, it would be possible to charge perpetrators with both forced marriage, and, if relevant, forced marriage as a gender crime.²³

V. Conclusion

This paper sought to provide with an overview of the main legal questions facing the crime of forced marriage and the corresponding arguments. As it could be noted, forced marriage is undeniably a complicated subject. The multilayered acts of brutality frequently overlap with sexual slavery, enslavement, and rape. It can be either deeply gendered or a gender-neutral crime, depending on the situation. Moreover, its definition and characterization in the AFRC Appeals Judgment is so fraught with ambiguity that it adds little to advance the understanding of the crime. These factors can create significant confusion, which hampers the development of the crime of forced marriage under international criminal law. My only hope is that this paper will put forced marriage on the spotlight and stimulate a meaningful discussion among scholars and practitioners. Only by solving these issues, will international criminal law be able to create a powerful social weapon to combat forced marriage in any context.

²¹ James M. Clark, 'Forced marriage: the evolution of a new international criminal norm. available at: <https://www.abdn.ac.uk/law/documents/ForcedMarriage-theEvolutionofaNewInternationalCriminalNorm.pdf> p. 15

²² R. Slater, Gender violence or violence against women? the treatment of forced marriage in the special court of Sierra Leone, *Melbourne Journal of Intl. law* (13), p. 27

²³ *Ibid.* p. 27