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The Parameters of Enslavement and the Act of Forced Marriage

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Abstract

During several recent conflicts, such as the ones in Sierra Leone, Cambodia, Uganda and the Democratic Republic of Congo, women and girls – but sometimes also men and boys – were abducted and enslaved into so-called forced marriages. The Special Court for Sierra Leone issued several judgments in which it discussed the legal qualification of the act of forced marriage. In its most recent judgment, the trial judgment in the case against Charles Taylor, the Trial Chamber held that forced marriage amounts to sexual slavery. This article briefly discusses the relevant case law on forced marriage and examines the Trial Chamber's conclusion in the Charles Taylor Judgement that forced marriage is a form of sexual slavery. For this purpose, the definition of enslavement is analysed and the parameters of this crime are set out. Building on the reasoning of the Trial Chamber in the *Taylor* case, the article concludes that forced marriage does indeed amount to a slavery crime and is best qualified as the broader crime of enslavement.

Keywords

international criminal law; forced marriage; enslavement; sexual slavery; crimes against humanity

1. Introduction

During the civil war in Sierra Leone, thousands of women and girls were abducted by rebels, taken into the bush and forced to marry their captors. In these so-called bush marriages, women and girls were raped, drugged, abused, forced to work, forced to fight, forcibly impregnated and forced to give birth, or forced to abort their babies.² The Special Court for Sierra Leone (SCSL) was faced with the task of determining how this act of forced marriage ought to be legally qualified and

¹ The author's PhD research focuses on the criminalization of forced marriage under international criminal law and Dutch criminal law (i.e.m.m.haenen@tilburguniversity.edu).

² See *inter alia* Chris Coulter, *Bush Wives and Girls Soldiers. Women's Lives through War and Peace in Sierra Leone* (Cornell University Press, Ithaca, NY, 2009); Human Rights Watch, "We'll kill you if you cry" *Sexual Violence in the Sierra Leone Conflict* (2003), available online at <http://www.hrw.org/reports/2003/01/15/well-kill-you-if-you-cry> (visited 30 January 2013).

visibly struggled with this difficult issue. In its first judgement, in the case against the three former leaders of the Armed Forces Revolutionary Council (AFRC), the Trial Chamber of the SCSL held that these forced marriages amounted to sexual slavery.³ The Appeals Chamber reversed this conclusion and wrote legal history by holding that forced marriage is in fact a distinct and unique crime against humanity that can be qualified as an ‘other inhumane act’.⁴ Then, in its most recent judgement, in the case against Charles Taylor, the Trial Chamber went back to its initial point of view and considered that the forced marriages that took place during the civil war in Sierra Leone are a specific form of sexual slavery that is best described as ‘conjugal slavery’.⁵

This article examines whether forced marriage, which is restrictively defined as the forced conferral of marital status on a person against that person’s will (i.e. the act of forcing someone to enter into a conjugal(-like) association) can be qualified as a slavery crime. The crime against humanity of sexual slavery is a *specialis* of the general crime ‘enslavement’; consequently, an act will also have to satisfy the elements of this latter crime in order to amount to sexual slavery. Therefore, this article will analyse whether or not forced marriage amounts to enslavement as defined in the Rome Statute of the International Criminal Court. This question is relevant, seeing as forced marriages, comparable to the Sierra Leonean bush marriages, also took place on a large scale during several conflicts that are currently under investigation before the International Criminal Court, most notably the situations in Uganda and the Democratic Republic of Congo, which means that this Court will have to address the issue of forced marriage and its relation to enslavement in the near future.

This article will briefly describe the forced marriages that took place during the civil war in Sierra Leone⁶ and will discuss the relevant case law of the SCSL (Section 2). It will then, departing from the SCSL’s most recent judgement – the *Taylor* Trial Judgement – focus on the crime against humanity of enslavement and set out the parameters of this offence (Section 3). The article will subsequently use these parameters to determine to what extent the act of forced marriage can be qualified as enslavement. It will conclude with some lessons that can be learned

³ *Prosecutor v. Brima, Kamara and Kanu* (‘AFRC’), 20 June 2007, SCSL-04-16-T, Trial Chamber II (hereinafter AFRC Trial Judgement).

⁴ *Prosecutor v. Brima, Kamara and Kanu* (‘AFRC’), 22 February 2008, SCSL-04-16-A, Appeals Chamber (hereinafter AFRC Appeal Judgement). This conclusion was followed in the case against three former leaders of the Revolutionary United Front (RUF), see *Prosecutor v. Sesay, Kallon and Gbao* (‘RUF’), 2 March 2009, SCSL-04-15-T, Trial Chamber I (hereinafter RUF Trial Judgement); and *Prosecutor v. Sesay, Kallon and Gbao* (‘RUF’), 26 October 2009, SCSL-04-15-A, Appeals Chamber (hereinafter RUF Appeal Judgement).

⁵ *Prosecutor v. Charles Taylor*, 18 May 2012, SCSL-03-01-T, Trial Chamber II (hereinafter Taylor Trial Judgement).

⁶ For a detailed description, see Micaela Frulli, ‘Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a “New” Crime Against Humanity’, 6 *Journal of International Criminal Justice* (2008), 1033–1042.

from this exercise and in the ways in which other courts, such as the ICC in particular, can benefit from it (Section 4).

2. Bush Marriages and the Case Law of the SCSL

2.1. *Forced Marriages during the Civil War in Sierra Leone*

In 1991, civil war broke out in Sierra Leone. For over a decade, several rebel groups, most notably the RUF and AFRC, fought the government and tried to take over control of the country. In an atmosphere of extreme violence, the rebels abducted thousands of women and girls, and took them to their camps where they distributed the women among themselves and forced them to become their ‘bush wives’.⁷ Sometimes married to the very men they had witnessed brutalizing their relatives, the women and girls were often subjected to continued and inescapable rape: if they refused to allow their ‘husbands’ to have sexual intercourse with them, they were physically punished,⁸ sent to the front line,⁹ or simply held down by others, so that their ‘husbands’ could rape them.¹⁰ As a result of these rapes, many women became pregnant and were forced to give birth.¹¹ In case the father did not want the child, for example because he believed it would slow down the group, or in case the woman was already pregnant at the time she was abducted, the woman would be forced to undergo an abortion.¹² As ‘wives’, women were compelled to work for their husbands: they were forced to wash, cook and clean for them and to carry their looted possessions from one camp to another.¹³ In addition to this, some women were subjected to drug abuse and mutilations.¹⁴ Many also contracted STDs as a consequence of the frequent sexual abuse in the bush.¹⁵

⁷ A term that is used by the Sierra Leoneans to refer to these marriages (Coulter, *supra* note 2, pp. 100–101).

⁸ AFRC Trial Judgement, para. 1138.

⁹ RUF Trial Judgement, paras. 1413 and 1467.

¹⁰ RUF Trial Judgement, para. 1213.

¹¹ Susan McKay and Dyan Mazurana, *Where are the girls? Girls in fighting forces in northern Uganda, Sierra Leone and Mozambique: their lives during and after war*, (International Centre for Human Rights and Democratic Development, Rights & Democracy, Montréal, 2004), p. 70; and Human Rights Watch, *supra* note 2, p. 40.

¹² McKay and Mazurana, *ibid.*, p. 69.

¹³ AFRC Appeal Judgement, paras. 190 and 192. Coulter, *supra* note 2, pp. 113 and 130, found that several of her informants, who were wives of rebel commanders, were not forced to do any domestic labour. On the contrary, their ‘husbands’ would not allow them to do so: their only ‘duty’ was to have sex with their husbands. They were, however, encouraged to become fighters (see also the testimony of a former wife of a colonel who did not have to do any household chores, AFRC Transcript 9 March 2005, pp. 57–58).

¹⁴ Human Rights Watch, *supra* note 2, p. 44; and AFRC Trial Judgement, para. 1095.

¹⁵ McKay and Mazurana, *supra* note 11, p. 62.

In the context of the forced marriages that took place during the civil war in Sierra Leone, a large number of criminal acts were committed. There has been a lot of discussion about the question of whether forced marriage should be conceptualized as a distinct crime against humanity, and, if so, whether or not it should encompass offences such as rape.¹⁶ In my opinion, forced marriage must be defined in a strict sense. It is best not to look at the entire body of facts that potentially surrounds a forced marriage (sexual violence, physical abuse, forced labour etc.), but to focus on the forced conferral of marital status *sec* and prosecute any crimes that are committed within this association separately for what they are, i.e. rape, forced pregnancy etc. Separately prosecuting crimes that were committed within a forced marriage puts proper emphasis on these distinct crimes. A very large part of existing crimes against humanity reflect what can happen within a forced marriage and therefore, these distinct acts do not need to be refitted in a new, inclusive crime of forced marriage. This article consequently abstracts from crimes that are committed under the veil of marriage and focuses on the question of whether the forced conferral of marital status *in itself* can be qualified as enslavement.

2.2. *The Case Law of the SCSL*¹⁷

2.2.1. *The AFRC and RUF Judgements*

In the case against three officials and senior members of the AFRC, forced marriage was charged as an ‘other inhumane act’. The Trial Chamber found that the forced marriages that took place during the civil war in Sierra Leone were completely subsumed under the crime of sexual slavery and saw no lacuna in the law that would necessitate a separate crime of forced marriage as an ‘other inhumane act.’¹⁸ In the view of the Chamber, the relationship between the perpetrator and the victim was one of ownership and involved the exercise of control over the victim’s sexuality, movements and labour. In the eyes of the Trial Chamber, the use of the term ‘wife’ by the rebels was an indication of their intent to exercise ownership over the victims and not an indication of their

¹⁶ See for example the judgements of the SCSL: in the *AFRC* Trial Judgement, the Trial Chamber held that forced marriage is not a unique crime, but that it is subsumed under the crime of sexual slavery. In the *AFRC* Appeal Judgement, the Appeals Chambers held that the act of forced marriages *is* in fact a new crime against humanity (an ‘other inhumane act’) that is distinct from crimes such as sexual slavery and enslavement. The *RUF* Trial and Appeal Judgements followed this reasoning. Then, in its most recent judgement, the *Taylor* Trial Judgement, the SCSL again held that forced marriage is not a distinct crime against humanity, but that it is a form of sexual slavery.

¹⁷ A total of four cases served before the Court: the *AFRC*, *CDF*, *RUF* and *Taylor* cases. In this article the *CDF* case is not analyzed because forced marriage was not discussed in the Judgements in that case.

¹⁸ *AFRC* Trial Judgement, paras. 704 and 713.

intent to assume a conjugal relationship with the victims, with mutual rights and obligations.¹⁹

The Appeals Chamber came to a different conclusion: it held that forced marriage *cannot* be subsumed under sexual slavery and that it is in fact *distinct* from (sexual) enslavement because it involves two additional elements: (1) a forced conjugal association that (2) is based on exclusivity.²⁰ The Appeals Chamber concluded that the perpetrators intended to impose a conjugal association rather than exercise ownership over their victims. The Chamber based this conclusion on the fact that the women were coerced to perform a variety of conjugal duties including regular sexual intercourse and forced domestic labour.²¹ In return, the rebel ‘husband’ was expected to give food, clothing and protection to his ‘wife’ – acts that were not required when a woman was used for sexual purposes only.²²

In the case against the former leaders of the RUF, forced marriage was charged in the same manner as in the *AFRC* case: as an ‘other inhumane act’. The Trial Chamber adopted the Appeals Chamber’s definition of forced marriage and convicted the accused for the other inhumane act of forced marriage. In addition, it found that the perpetrators of the forced marriages also exercised powers attaching to the right of ownership over their victims and thus *also* committed the crime of sexual slavery.²³ The Appeals Chamber did not deviate from this conclusion.²⁴

2.2.2. *The Taylor Judgement*

As opposed to the *AFRC* and *RUF* cases, the Indictment in the case against the former president of Liberia, Charles Taylor, did not contain a separate count of forced marriage.²⁵ The crime of sexual slavery was separately charged, however, and part of the evidence relating to charges of sexual slavery included extensive testimony by women and girls regarding the ‘bush marriages’.²⁶ Therefore, the Trial Chamber decided to address the issue of forced marriage in the context of

¹⁹ *AFRC* Trial Judgement, para. 711.

²⁰ *AFRC* Appeal Judgement, paras. 190–195.

²¹ Arguably, by classifying sexual intercourse and household tasks such as cooking and cleaning as conjugal *duties* instead of defining them as rape and forced labour respectively, the Appeals Chamber seems to have reinforced stereotypes of women’s roles in international jurisprudence, allowing them to perpetuate (see also Jennifer Gong-Gershowitz, ‘Forced Marriage: A “New” Crime Against Humanity?’, 8 *Northwestern Journal of International Human Rights* (2009), p. 60).

²² *AFRC* Appeal Judgement, paras. 190 and 192.

²³ *RUF* Trial Judgement, paras. 467, 1294, 1295 and 1581.

²⁴ *RUF* Appeal Judgement, esp. paras. 728–741.

²⁵ However, in the Opening Statement, the Prosecution did draw attention to the ‘bush wife’ phenomenon; see Prosecution Opening Statement, *Charles Taylor* (SCSL-03-01-T), Transcript, 4 June 2007, p. 304.

²⁶ See e.g., *Taylor* Transcript, 29 January 2009, p. 23862; *Taylor* Transcript, 20 October 2008, pp. 18678 and 18685–18686; and *Taylor* Transcript 5 March 2008, p. 5327.

the charges in the indictment.²⁷ The Trial Chamber departed from the conclusion in the previous three SCSL judgments and returned to the Court's initial (AFRC Trial Chamber) point of view: it considered that forced marriage is *not* a new crime, that it is *not* a distinct inhumane act, but that it is in fact a specific form of (sexual) slavery, which it termed 'conjugal slavery'.²⁸ Conjugal slavery does have certain specific characteristics, such as a forced conjugal association, exclusivity of the relationship and forced domestic work, but these characteristics do not require the conceptualization of a new crime: rather they are descriptive components that fall within the scope of (sexual) enslavement. The Trial Chamber made a comparison with specific forms of rape: gang-rape is a distinctive form of rape with distinctive features, yet it still falls within the scope of the crime of rape. Conjugal slavery is a distinctive form of (sexual) slavery, yet it still falls within the scope of the crime of (sexual) slavery.²⁹ The Trial Chamber further considered the term 'forced marriages' to be a wrong label for the ordeal the victims of these forced conjugal associations went through. What happened to the victims should be regarded as a form of conjugal enslavement: the perpetrators exercised powers attaching to the right of ownership over their 'bush wives' and imposed on them a deprivation of liberty. All forced acts that took place within these associations fall within the definition of enslavement.³⁰

The next section of this article builds upon the Trial Chamber's reasoning and sets out to find the parameters of the crime against humanity of enslavement, assessing whether forced marriage does indeed fall within the scope of this offence.

3. The Crime against Humanity of Enslavement

3.1. *The Definition of Enslavement: The Exercise of Powers Attaching to the Right of Ownership*

Enslavement is listed as a crime against humanity in the statutes of the International Military Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia, the SCSL, and ICC. The condemnation of slavery is also enshrined in a multitude of human rights instruments, including, but not limited to, the documents forming the International Bill of Human Rights, the European Convention on Human Rights and the African Charter on Human and People's

²⁷) *Taylor* Trial Judgement, para. 422.

²⁸) *Ibid.*, para. 427.

²⁹) *Taylor* Trial Judgement, paras. 429–430.

³⁰) *Ibid.*, paras. 425–427.

Rights. This section explores the question of whether forced marriage in itself – so defined as the forcible conferral of marital status upon a person against that person's will – constitutes an act of enslavement. In other words, does forcing someone to enter into a conjugal relationship *sec* constitute (an exercise of) a power attaching to the right of ownership over that person?

The crime of slavery³¹ was first defined in the 1926 Slavery Convention as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.³² As a crime against humanity, enslavement is codified in Article 7(1)(c) of the Rome Statute of the International Criminal Court (hereafter: Rome Statute). The definition is based on the definition of slavery as set out in the 1926 Slavery Convention. Pursuant to the second paragraph of Article 7 Rome Statute, enslavement means 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.'³³ The ICC Elements of Crimes stipulate that powers attaching to the right of ownership may be exercised 'such as by purchasing, selling, lending or bartering [...] a person or persons, or by imposing on them a similar deprivation of liberty.'³⁴ The words 'such as' and 'a similar deprivation of liberty' indicate that this enumeration is not exhaustive, but illustrative and open-ended.³⁵ A footnote illustrates that exacting forced labour or otherwise reducing a person to a servile status as defined in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956 Supplementary Slavery Convention) can, in some circumstances, constitute such a deprivation of liberty.³⁶ The 1956 Supplementary Slavery Convention

³¹ A distinction should be made between the international crime of slavery and the crime against humanity of enslavement. Slavery, which refers to the status or condition of a person who is enslaved is a crime in and of itself under general international law. It is criminalized in a series of treaties and its prohibition, dating back to the early nineteenth century has risen to the level of *ius cogens*. Enslavement, which refers to the act of reducing a person to slavery (Michael Cottier, 'Article 8 War Crimes para. 2(b)(xxvi)', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Munich, 2008) p. 442), is not an international crime in itself, but is listed as a crime against humanity in the statutes of a series of international criminal courts and tribunals, such as the ICTY, the SCSL and the ICC.

³² Article 1(1) 1926 Slavery Convention.

³³ Article 7(2)(c) Rome Statute.

³⁴ Article 7(1)(c), Elements of Crimes.

³⁵ Darryl Robinson, 'The elements of crimes against humanity', in Roy S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, NY, 2001) pp. 57–97, esp. 85.

³⁶ Footnote 11 Elements of Crimes: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.'

defines a person of servile status as someone who is in the condition or status that results from any of the institutions or practices mentioned in Article 1 of the Supplementary Convention. Article 1 lists a set of institutions and practices which are considered to be similar to slavery: debt bondage, serfdom, certain forms of forced marriage (see *infra* Section 4.1) and child exploitation. The Supplementary Slavery Convention recognizes that these forms of servitude do not necessarily amount to slavery by stipulating that these four specified servile statuses are to be abolished, ‘whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention’, so regardless of whether any powers attaching to the right of ownership are present in these listed practices.³⁷ Only when powers attaching to the right of ownership are present do the enumerated practices amount to slavery as defined in the 1926 Slavery Convention.³⁸ Therefore, even though it is generally accepted that the crime of enslavement as codified in the Rome Statute also encompasses contemporary forms of slavery as opposed to only referring to traditional chattel slavery,³⁹ the exercise of any or all of the powers attaching to the right of ownership remains the *sine qua non* of enslavement.⁴⁰

3.2. *The Parameters of Enslavement*

In order to answer the question of whether the act of forcing someone to marry constitutes (an exercise of) a power attaching to the right of ownership, the

³⁷ Jean Allain, *The Slavery Conventions* (Brill NV, Leiden, 2008) pp. 18–19.

³⁸ Some, such as Christopher K. Hall, ‘Article 7 crimes against humanity’, in Triffterer (ed.), *supra* note 31, pp. 193–194, have argued that the reference to the 1956 Supplementary Slavery Convention in the Elements of Crimes results in a broader definition of enslavement, because the Elements of Crimes, via the abovementioned footnote, includes lesser servitudes in the crime of enslavement, i.e. situations which are analogous to slavery, but in which powers attaching to the right of ownership are *not* exercised. This is not the case, however. The Rome Statute is very clear in this matter: enslavement encompasses *only* those situations in which powers attaching to the right of ownership are exercised in relation to a human being. Therefore, *only* when the forms of servitude listed in the Supplementary Slavery Convention entail such an exercise of powers attached to the right of ownership, can they amount to enslavement. Even if the Elements of Crimes could be read in a different light, it must be noted that the Elements of Crimes are non-binding, secondary legislation (Article 9(1) Rome Statute) which must be consistent with the Statute (Article 9(3) Rome Statute).

³⁹ Hall, *supra* note 38, p. 192. Traditionally, slavery referred to the practice of chattel slavery. ‘Chattel’ denotes to a form of movable property, thus, to be reduced to ‘chattel’ refers to being reduced to an object which is legally owned by another human being (*Prosecutor v. Dragoljub Kunarac et al.*, 12 June 2002, ICTY-96-23 and ICTY-96-23/1-A, Appeal Judgement, para. 117, hereinafter *Kunarac* Appeal Judgement). Chattel slavery therefore refers to ‘the legal capacity of an owner to treat a slave as an article of possession’ (*The Queen v. Tang*, 28 August 2008, High Court of Australia [2008] HCA 39, para. 27 (hereinafter HCA, *The Queen v. Tang*), emphasis added).

⁴⁰ Jean Allain, ‘The definition of slavery in international law’, 52 *Howard Law Journal* (2008–2009) p. 251.

parameters of the crime of enslavement need to be uncovered. As stated, the quintessence of enslavement is the exercise of powers attaching to the right of ownership. By exercising such powers, the perpetrator removes the victim's autonomy and agency.⁴¹ Individual personal autonomy is regarded as the essence of freedom, which means that enslavement is the 'antithesis of freedom'.⁴² The essence of the crime of enslavement is therefore the control and deprivation – the denial – of an individual's autonomy.⁴³ Or as the ICTY Appeals Chamber put it: the exercise of any or all of the powers attaching to the right of ownership results in a destruction of the victim's juridical personality.⁴⁴ Enslavement therefore focuses on oppression, on the dominion of one person over another human being.

The preparatory works of the 1926 Slavery Convention do not reveal what the drafters meant with the words 'any or all of the powers attaching to the right of ownership'.⁴⁵ This was also observed by the UN Secretary-General in a 1953 memorandum he wrote in preparation of the drafting of the 1956 Supplementary Slavery Convention.⁴⁶ The Secretary-General noted that the drafters of the 1926 Convention probably had in mind the notion of ownership over human beings inherent in the authority a master had over a slave in Roman law, the so-called *dominica potestas*.⁴⁷ Under Roman law, the legal right of ownership over a human being enabled the master to buy, possess, use and sell a slave, to force him to labour and to profit from this labour.⁴⁸ Modern day law, however, does not provide for the possibility of a legal right of ownership over a human being.⁴⁹ Therefore, the

⁴¹ Nina Tavakoli, 'A crime that offends the conscience of humanity: a proposal to reclassify trafficking in women as an international crime', 9 *International criminal law review* (2009) p. 89; and *Kunarac Appeal Judgement*, para. 117.

⁴² Judgement of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, 4 December 2001, para. 585; and Tavakoli, *supra* note 41, p. 97. See also HCA, *The Queen v. Tang*, paras. 25 and 149.

⁴³ Cottier, *supra* note 31, p. 443; and Tavakoli, *supra* note 41, pp. 85, 88 and 97.

⁴⁴ *Kunarac Appeal Judgement*, para. 117.

⁴⁵ Allain, 'The definition of slavery in international law', *supra* note 40, pp. 245 and 255; and Allain, *The Slavery Conventions*, *supra* note 37, pp. 57 and 67.

⁴⁶ Allain, 'The definition of slavery in international law', *ibid.*, pp. 254–255; and Allain, *The Slavery Conventions*, *ibid.*, p. 496.

⁴⁷ Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude, UN Doc. E/2357, 27 January 1953, cited in Allain, *The Slavery Conventions*, *ibid.*, p. 496.

⁴⁸ Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude, UN Doc. E/2357, 27 January 1953, cited in Allain, *The Slavery Conventions*, *ibid.*, p. 496; and Allain, 'The definition of slavery in international law', *supra* note 40, p. 257.

⁴⁹ Compare the judgment in the case *Siliadin v. France*, concerning the complaint of a girl who had been locked up in a house by a couple (Mr and Mrs B.) and exploited as a domestic worker for four years. In this case the European Court of Human Rights (ECtHR) noted that the definition of slavery as enshrined in the 1926 Slavery Convention refers to the 'classic' meaning of slavery as it was practised for centuries, i.e. chattel slavery. The Court concluded that even though the applicant had been deprived of her personal autonomy, 'the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an

law speaks in terms of *powers attaching to this right*.⁵⁰ In his memorandum, the Secretary-General itemised the following characteristics of powers attached to the right of ownership:

1. the individual of servile status may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.⁵¹

Whereas the *travaux préparatoires* of the 1926 Slavery Convention remain silent on the meaning of ‘powers attaching to the right of ownership’, the drafting history of the ICC Elements of Crimes does not. During the drafting process of the Elements of Crimes, several countries, the US in particular, were concerned that the element ‘exercising powers attached to the right of ownership’ would be too imprecise to satisfy the legality principle and therefore suggested the element be accompanied by a non-exhaustive, illustrative list of examples of how the right of ownership can be exercised.⁵² A discussion paper was then submitted in which it was suggested to include in the open-ended list the acts of purchasing and selling – which had been proposed by the US⁵³ – alongside acts of lending and bartering.^{54, 55} It was decided to also include in this list a clause referring to similar

“object”.’ (*Siliadin v. France*, 26 July 2005, ECtHR, appl. no. 73316/01, para. 122, emphasis added). This reasoning of the ECtHR restricts the definition of slavery, by implying that a right of legal ownership over a human being is required and exists, while clearly, it no longer does. However, see *Rantsev v. Cyprus and Russia*, 7 January 2010, ECtHR, appl. no. 25965/04, para. 280: ‘The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the *exercise of powers attaching to the right of ownership*’ (emphasis added).

⁵⁰ Allain, ‘The definition of slavery in international law’, *supra* note 40, p. 261.

⁵¹ Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude, UN Doc. E/2357, 27 January 1953, para. 36, cited in Allain, *The Slavery Conventions*, *supra* note 37, p. 497.

⁵² Valerie Oosterveld, ‘Sexual slavery and the International Criminal Court: advancing international law’, 25 *Michigan Journal of International Law* (2004) p. 631.

⁵³ *Proposal submitted by the United States of America: Draft elements of crimes. Addendum: IV. Article 7: Crimes against humanity*, Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/1999/DP.4/Add.1 (4 February 1999), p. 4.

⁵⁴ *Discussion paper proposed by the Coordinator*, Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/1999/WGEC/RT.6 (10 August 1999), p. 2. See also *Proposal submitted by Colombia*, Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/1999/WGEC/DP.43 (9 December 1999), para. 3.4: ‘It is proposed that the list contained

deprivations of liberty. A footnote, inserted at the instigation of Canada, seeks to clarify that ‘the deprivation of liberty should take into account actions not listed but which are also major indicia of the exercise of ownership under international law’.⁵⁶ Examples of such major indicia of ownership are exacting forced labour and reducing a person to one of the four servile statuses detailed in the 1956 Supplementary Slavery Convention (see *supra* section 3.1.). Delegates decided against including ‘recruitment’ and ‘abduction’ in the list of examples of powers attaching to the right of ownership as these acts do not describe directly an exercise of ownership over a person, but rather define the means of obtaining that person.⁵⁷

Guidance with regard to the element ‘powers attaching to the right of ownership’ and indicia of enslavement is also provided by four other sources: a 2000 report of the Special Rapporteur on the issue of systematic rape, sexual slavery and slavery-like practices during armed conflict, the case law of the ICTY, more specifically the *Kunarac* case, the 2002 judgement of the Women’s International War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery, and a 2008 judgement of the High Court of Australia.

In her 2000 report on contemporary forms of slavery, which is an update of the 1998 report on the same topic, the Special Rapporteur on the issue of systematic rape, sexual slavery and slavery-like practices during armed conflict adopted the definition of slavery as set forth by the 1926 Slavery Convention and held that powers attaching to the right of ownership include ‘sexual access through rape or other forms of sexual abuse.’ In her view, ‘limitations on autonomy and on the power to decide matters relating to one’s sexual activity and bodily integrity’ constitute the critical elements in the definition of slavery.⁵⁸ She considered that elements of sale, trade, purchase, abduction, detention, confinement, forced labour, forced sexual activity, and physical or sexual violence are indicia of slavery, even though they are not required for a claim of slavery.⁵⁹

in the first paragraph should be open, so as to cover any new form of slavery.’ It follows from the drafting history of the Rome Statute and the Elements of Crimes that an act does not need to have a commercial character in order to amount to slavery (see Lee 2001, p. 85; and Cottier, *supra* note 31, p. 443). The majority of delegations agreed that slavery does not require actions of a commercial or pecuniary nature seeing as it can also occur as a result of other methods, such as force and coercion (Oosterveld, *supra* note 52, pp. 631 and 643).

⁵⁵ These acts correspond to the first and fourth characteristic of powers attaching to the right of ownership itemised by the Secretary-General, i.e. purchase and transfer respectively.

⁵⁶ Oosterveld, *supra* note 52, p. 634. It was agreed that minor indicia of ownership ought not to be included in the list (Eve La Haye, ‘The elements of war crimes: Article 8(2)(b)(xxii)’, in Roy S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, NY, 2001) pp. 184–199, p. 191).

⁵⁷ La Haye, *supra* note 56, p. 191.

⁵⁸ *Systematic rape, sexual slavery and slavery-like practices during armed conflict, Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/2000/21, 6 June 2000, para. 8.

⁵⁹ *Ibid.*, para. 8.

The case against *Kunarac, Kovač and Vuković* concerned the (sexual) enslavement of a number of Muslim women by members of the military police of the Bosnian Serb Army. The Trial Chamber adopted the definition of enslavement as codified in the Rome Statute⁶⁰ and concluded that the following factors should be taken into consideration in determining whether enslavement was committed:

the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The [...] ability to buy, sell, trade or inherit a person or his or her labours or services [...] could be a relevant factor.⁶¹

The Appeals Chamber adopted the same definition of enslavement, confirmed the factors of enslavement identified by the Trial Chamber and stated that the question of whether a particular phenomenon constitutes a form of enslavement will depend on the operation of these indicia.⁶²

The Women's International War Crimes Tribunal discussed instances of sexual slavery committed by the Japanese military and delivered its judgement in 2001. In the judgement, the Tribunal listed several indicia of enslavement which can assist in determining whether the status or condition of being enslaved exists: involuntary procurement (e.g. by force, coercion, purchase or exchange), treatment as disposable property (e.g. using, selling or disposing of a person), restriction of fundamental rights and basic liberties (such as freedom of movement), absence of consent, forced labour, and discriminatory treatment.⁶³

The parameters of the crime of slavery were further clarified in a 2008 judgement of the High Court of Australia.⁶⁴ This judgement concerns the upholding of a conviction of a brothel owner in Melbourne of slavery offences. Five women recruited from Thailand worked for this brothel owner, known as Wei Tang, and each owned her a substantial debt (approximately 45,000 Australian Dollars), which consisted of transportation and accommodation costs, and the amount of money paid to 'purchase' the women. The women were required to work six nights a week and for each customer, 50 Australian Dollars was subtracted from their debt. Tang was in possession of their passports and return flight tickets.⁶⁵

⁶⁰ *Prosecutor v. Dragoljub Kunarac et al.*, 22 February 2001, (ICTY-96-23-T and ICTY-96-23/1-T), Trial Judgement, para. 539 (hereinafter *Kunarac* Trial Judgement). The Appeals Chamber agrees; see *Kunarac* Appeal Judgement, para. 117.

⁶¹ *Kunarac* Trial Judgement, para. 543 (citations omitted).

⁶² *Kunarac* Appeal Judgement, para. 119.

⁶³ Judgement of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, 4 December 2001, paras. 640–661.

⁶⁴ Jean Allain, 'Case notes: R v. Tang. Clarifying the definition of "slavery" in international law', 10 *Melbourne Journal of International Law* (2009) p. 246.

⁶⁵ HCA, *The Queen v Tang*, paras. 6–10, 12 and 16.

The crime of slavery is codified in Article 270.1 and 270.3(1)(a) of the Australian Criminal Code. The definition of the crime bears a close resemblance to the definition of slavery detailed in the 1926 Slavery Convention, the main element being the exercise of any of the powers attaching to the right of ownership.⁶⁶ In the case against Tang, the judges of the High Court sought to identify the kinds of power that typically attach to ownership. The Judgement confirmed the examples of powers attaching to the right of ownership listed by the UN Secretary-General in his 1953 Memorandum.⁶⁷ The majority of the High Court also deemed the factors put forth by the ICTY Trial Chamber and the Appeals Chamber in the *Kunarac* case relevant to the interpretation of slavery but considered that some of these factors, such as control of physical environment and control of movement, ‘involve questions of degree’.⁶⁸ The High Court gave the example of a normal employer-employee relationship: it is generally accepted that an employer has some degree of control over the movements or the work environment of his employees. The High Court thus recognized that these powers may also attach to legitimate relationships, and that therefore, not every manifestation of a power attaching to the right of ownership will result in slavery. According to the majority of the High Court, the relevant powers are those of the kind that attach to the right of ownership if the legal status of slavery were possible.⁶⁹

The Judgement also dealt with the question of how to distinguish between slavery on the one hand, and harsh and exploitative conditions of labour on the other hand:

The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services. The answer, however, is not to be found in the need for reflection by an accused person upon the source of the powers that are being exercised. Indeed, it is probably only in a rare case that there would be any evidence of such consideration.⁷⁰

In the following section, the parameters detailed above are applied to the act of forced marriage to determine whether it amounts to the crime of enslavement.

⁶⁶) Article 270.1 Australian Criminal Code Act 1995: ‘For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.’

⁶⁷) HCA, *The Queen v. Tang*, para. 26.

⁶⁸) *Ibid.*, paras. 32 and 35.

⁶⁹) *Ibid.*, para. 32. Another example of a legitimate relationship in which powers attaching to the right of ownership are exercised is the relationship between parents and their children (Rachel Harris, ‘Modern-day slavery in Australia: *The Queen v Wei Tang*’, (Paper presented at the 13th Annual Public Law Weekend, National Museum of Australia, Canberra, 1 November 2008) Australian National University, p. 5).

⁷⁰) HCA, *The Queen v. Tang*, para. 44.

4. Is Forced Marriage a Form of Enslavement?

4.1. *Powers Attaching to the Right of Ownership*

The act of making someone enter into a conjugal association is not an exercise of a power attached to the right of ownership. From the above, the following powers attaching to the right of ownership can be distilled. First, acts which are linked with transfer and procurement of an individual: purchase, exchange, trade, sale, loan and barter. Second, acts which are linked to the ability to exploit an individual: exacting forced labour (without commensurate compensation) and/or forced sexual activity, as a result of the absolute control someone has over another. Finally, powers attaching to the right of ownership may also be manifest in those cases in which the condition of slavery cannot be terminated by the will of the enslaved or when this condition is inheritable.⁷¹ When any of these powers are exercised, the crime of enslavement comes to the fore.

The act of forcing someone to enter into a conjugal relationship is not part of this list. Powers attaching to the right of ownership refer to powers that would, when exercised over a thing, be considered as evidence of ownership. For example, possession – which is a power attached to the right of ownership – of a pencil amounts to ownership of that pencil; possession of a human being would also amount to a right of ownership, but for the fact that ownership of a human being is illegal under modern day law.⁷² So in the case of enslavement, the relevant powers are those of the kind that attach to the right of ownership were the legal status of slavery possible.⁷³ The power to marry someone (against their will) is not such a power. Although forcing someone to marry can be seen as exercising control over an individual's autonomy, as a form of denying someone freedom of choice, that particular act *an sich* would not be serious enough to amount to slavery.⁷⁴ Enslavement refers to the dominion over a human being⁷⁵ and

⁷¹ However, these two characteristics (i.e. the inheritability of the condition of slavery and the inability of the enslaved person to terminate his enslavement) do not seem to be *exercises* of powers attached to the right of ownership; they are not active acts, but rather passive occurrences. Therefore, perhaps, they are better qualified as indicia of ownership. Allain, however, is convinced that these acts describe a manifestation of the exercise of a power attached to the right of ownership (Jean Allain, 'The definition of "slavery" in general international law and the crime of enslavement within the Rome Statute', speech given at the Guest Lecture Series of the Office of the Prosecutor of the ICC, 26 April 2007, p. 15 (available at <<http://lawvideolibrary.com/docs/iccpaper.pdf>>, last accessed 30 January 2013).

⁷² Jean Allain, 'The Parameters of "Enslavement" in International Criminal Law', Paper presented at the International Symposium of the Research Centre for International Criminal Law and International Humanitarian Law of the China University of Political Science and Law (25–26 April 2009), p. 3.

⁷³ HCA, *The Queen v. Tang*, para. 32.

⁷⁴ At least not in all instances.

⁷⁵ HCA, *The Queen v. Tang*, paras. 142 and 149.

as – correctly – stated by the Chief Justice of the High Court of Australia in the case of Tang: ‘It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention.’⁷⁶ The crime of enslavement would be rendered meaningless when it is interpreted in such a broad manner as to encompass all exploitative social injustices or human rights violations.⁷⁷ The sole act of forcing someone to enter into a conjugal association is a serious violation of human rights and, depending on the circumstances, can have severe consequences for the victim. It is not, however, on par with enslavement: the conferral of a marital status *in itself* is not (an exercise of) a power attaching to the right of ownership and therefore does not constitute enslavement.

Nevertheless, powers attaching to the right of ownership may be exercised at the time of entering into the marriage. The 1956 Supplementary Slavery Convention establishes a link between slavery and certain practices of forced marriage, by regarding similar to slavery any institution or practice whereby:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.⁷⁸

The three situations refer to acts of sale, transfer and inheritance, three acts which constitute powers attaching to the right of ownership and in those cases in which a forced marriage is accompanied by the exercise of such powers, the act can be qualified as enslavement. In the words of Allain, ‘only when a perpetrator ... reduces a person to ... servile marriage ... to such an extent that, in such circumstances, the action degenerates into the exercise of any or all of the powers attaching to the right of ownership’⁷⁹ will the act constitute enslavement. If an individual is sold for the purpose of marriage, this amounts to enslavement, the relevant power attaching to the right of ownership being the sale, not the conferral of the marital status.⁸⁰ The same goes for widow inheritance: if a

⁷⁶ *Ibid.*, para. 32. Repeated by Justice Kirby in his concurring judgement (*see ibid.*, paras. 112 and 117).

⁷⁷ Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Pattern* (AltaMira Press, Walnut Creek (CA), 2003), pp. xiii and 453; and UNHCHR, *Abolishing Slavery and its Contemporary Forms*, report prepared by David Weissbrodt and Anti-Slavery International, New York 2002, p. 4.

⁷⁸ Article 1(c) Supplementary Slavery Convention.

⁷⁹ Allain, ‘Parameters’, *supra* note 72, p. 19.

⁸⁰ However, not every practice of dowry or bride price can be regarded as a slavery-like practice.

woman has no right or real possibility to refuse, the transfer of a widow, as though she were chattel, to her deceased husband's brother constitutes an exercise of a power attached to the right of ownership. The practices listed in the 1956 Supplementary Slavery Convention therefore constitute enslavement because powers attached to the right of ownership are exercised in the course of the forced marriage (in order to establish the marital union). The conferral of marital status itself is, as stated, not (an exercise of) a power attaching to the right of ownership.

4.2. *Indicia of Enslavement*

A forced marriage may, however, constitute an indicium of enslavement. In addition to clarifying the parameters of powers attaching to the right of ownership, case law and doctrine have also brought forth a selection of factors that function as a guide to determining whether a person was enslaved or not. Depending on the circumstances and the degree to which these indicia were present, the manifestation of either of these factors could be an indication that someone was enslaved. These factors, based for the greater part on the indicia of ownership listed by the ICTY Trial Chamber in the *Kunarac* case, include the control of someone's movement and physical environment, psychological control, the restriction or control of an individual's autonomy, measures taken to prevent or deter escape, (threat of) force or coercion, abduction, duration, assertion of exclusivity, subjection to cruel treatment and abuse, and control of sexuality. In this sense, a forced marriage in the strict sense can be an indicium of enslavement, seeing as the act of marriage is surrounded by (threat of) force and coercion and constitutes a restriction of an individual's autonomy.

4.3. *Resulting in Enslavement*

A forced marriage can *result* in enslavement (i.e. in an exercise of powers attaching to the right of ownership by virtue of the conjugal association, e.g. in case of wife ownership). As is clearly demonstrated by the forced marriages that took place during the conflict in Sierra Leone, a forced marriage can very well lead to the exercise of powers attaching to the right of ownership.⁸¹ Forced marriage may, for example, result in sexual exploitation and/or domestic

⁸¹ In this regard, it is recognized that both a marriage that was entered into under duress, as well as a marriage that was contracted with the free and full consent of both spouses can (eventually) lead to the enslavement of one (or both) of the spouses. Although it may be presumed that a marriage that was entered into voluntarily and results in the enslavement of one of the spouses, can no longer be said to be truly voluntary.

servitude.⁸² In fact, a marriage can result in all of the abovementioned indicia. Indeed, in the Sierra Leonean bush marriages, all indicia of enslavement were present to a certain extent: abducted women and girls were given to rebels as wives without the possibility to refuse. Their movements were closely monitored, many were confined to the rebel compound or their husband's house and could only leave the premises after they had obtained permission. The husbands not only controlled their wives' movements, they also controlled their sexuality: a bush wife was not allowed to have sexual intercourse with anyone but her husband on pain of severe punishment. In addition, the wives were forced to work for their husbands: labour that included portering, cooking, cleaning and washing. The bush wives had to obey their husbands' demands and were often subjected to abuse and cruel treatment. The men treated their wives as their personal property,⁸³ and could dispose of them as they saw fit. It has even been argued that the rebels used the terms 'marriage' and 'wife' as a means to express their control over the women. The deliberate and strategic use of this terminology worked two ways: on the one hand it was a way to openly stake a claim, to express to other rebels that a particular woman belonged to a particular man and demonstrate the permanence of the association. On the other hand, the use of the word 'wife' served to psychologically manipulate the abducted women.⁸⁴ In the words of the SCSL Trial Chamber: 'the use of the term 'wife' by the rebels was deliberate and strategic, with the aim of *enslaving* and psychologically manipulating the women and with the purpose of treating them like *possessions*.'⁸⁵

When a marriage results in the treatment of a person as chattel, this situation can be qualified as enslavement.⁸⁶ In the words of Parrot and Cummings,

⁸² *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, Gulnara Shahinian, UN Doc. A/HRC/15/20, 28 June 2010, para. 43. Parrot and Cummings argue that marital rape amounts to sexual slavery or sexual servitude (Andrea Parrot and Nina Cummings, *Sexual enslavement of girls and women worldwide* (Praeger Publishers, Westport (CT), 2008) pp. 63, 66 and 69–70).

⁸³ Compare *Kunarac* Trial Judgement, para. 728 (and 738): 'the girls were treated as personal property of the accused *Kunarac* and DP 6, they had to do household chores and they had to obey all demands.'

⁸⁴ *Prosecutor v. Brima, Kamara and Kanu* ('AFRC'), (SCSL-04-16-T), 'Expert Report on the phenomenon of 'forced marriage' in the context of the conflict in Sierra Leone and, more specifically, in the context of the trials against the RUF and AFRC accused only, annexed to Prosecution filing of Expert Report pursuant to Rule 94(bis) and decision on Prosecution request for leave to call an additional witness', 8 August 2005, pp. 15–16.

⁸⁵ RUF Trial Judgement, para. 1466 (emphasis added).

⁸⁶ *Amnesty International, Preliminary comments concerning the elements of war crimes other than grave breaches of the Geneva Conventions provided for the second prepcom* (26 July to 13 August 1999), Preparatory Commission for the International Criminal Court, p. 11, available online at www.iccnw.org/documents/AIPreliminaryCommentsJuly99.pdf (visited 30 January 2013); and UN Commission on Human Rights, *Contemporary forms of slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict. Final report submitted by Ms. Gay J. McDougall, Special rapporteur*, E/CN.4/Sub.2/1998/13, 22 June 1998, paras. 8 and 30.

when one or both of the spouses 'has no agency, cannot leave, cannot refuse, and is often obligated to have sex on demand, it [the marriage; IH] is a form of sexual slavery'.⁸⁷

Traditionally, a marriage is meant to bring about an association, a bond between two (or more, depending on the culture) people that establishes certain mutual rights and obligations. In many societies, marriage was or is used as a means to regulate sexual activity and formalize relationships. Again traditionally, in many cultures and societies, marriage constitutes (or used to constitute) the main basis of (starting) a family. A marriage results in a specific social/civil status, namely that of being 'wed', and because of the formality of a marriage, it also has consequences extending beyond the wedding, meaning that it also influences a person's social/civil status after the marriage, i.e. someone is qualified as a widow or widower, or divorcee. Therefore, it is valid to say that a marriage, by its very nature, is aimed establishing a certain degree of permanence. When a marriage results in slavery or slavery-like practices, this can have severe consequences for the victim because of the existence of conjugality. A marriage binds two people together in the eyes of the outside world, through social and cultural mores:⁸⁸ because of the conjugality, the victim is bound to the perpetrator both intrinsically and extrinsically, which can make it more difficult to exit the slavery situation. This is especially the case in societies in which divorce is difficult, whether as a result of institutionalized gender inequality or as a result of social mores.

The fact that a (forced) marriage can result in slavery is corroborated by remarks made by a group of Arab states during the negotiations on the ICC Elements of Crimes. This group of states submitted a proposal in which they sought to limit the crime of enslavement (and sexual slavery) by adding a third element so that the offence would not extend to certain cultural practices: 'Powers attaching to the right of ownership do not include rights, duties and obligations incident to marriage between a man and a women.'⁸⁹ These states thought that the law on crimes against humanity was too ambiguous and feared that it might be used 'by activist judges not simply to deal with atrocities but as a tool of "social engineering."⁹⁰ Some Arab states, whose laws made divorce more difficult for women than

⁸⁷) Parrot and Cummings, *supra* note 82, pp. 57–58; and Judgement of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, 4 December 2001, para. 644: 'Once the women were not free to leave, free to dictate the nature and terms of their services, or free to refuse services, they were enslaved.'

⁸⁸) Michael P. Scharf and Suzanne Mattler, 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity', 1:2 *Case Research Paper Series in Legal Studies* (2005) p. 9.

⁸⁹) Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and the United Arab Emirates concerning the elements of crimes against humanity (UN Doc. PCNICC/1999/WGEC/DP. 39).

⁹⁰) Robinson, *supra* note 35, p. 65.

for men or whose laws reduced married women's legal authority to act, feared that without a cultural exemption, these practices could amount to (sexual) slavery. The proposal was not widely supported, especially because most delegates found it inappropriate to include culturally specific exemptions in a document that was to reflect a basic law for all humanity. Moreover, many delegates believed this exemption could set an undesirable precedent that could also negatively impact human rights law.⁹¹ The exemption was therefore not included.

These examples illustrate that someone can exercise powers attaching to the right of ownership *by virtue of* a conjugal association.⁹² This is the case when husband-wife relationship becomes a master-slave relationship. The marriage, in the broad sense (i.e. not the mere conferral of marital status), then constitutes enslavement.

4.5. *A Means to Enslave*

The fact that a marriage can result in slavery and that powers attaching to the right of ownership can be exercised by virtue of a conjugal association implies that forced marriage can also be used as a means to enslave people.⁹³ It is reiterated that the drafters of the ICC Elements of Crimes decided against including in the definition of enslavement acts that only describe the means of obtaining a person – such as recruitment – rather than (also) define directly an exercise of a power attaching to the ownership over that person.⁹⁴ In this sense, forced marriage can also be a means of obtaining control over a person. In Sierra Leone, for example, bush marriages were used as a way to establish a system of individualized enslavement. By calling a woman 'wife', a rebel would gain exclusive access to her sexuality and labour. The term 'wife' was used by rebels to enslave the women, to openly stake their claim of possession. So the rebels exercised powers attaching to the right of ownership by virtue of the forced conjugal associations.

Important in this regard is that customary law in some countries recognizes the practice of wife ownership, which means a husband has complete control over his wife.⁹⁵ If marriage results in wife ownership, a marriage is the necessary act to

⁹¹ Oosterveld, *supra* note 52, pp. 636–637; and Robinson, *supra* note 35, p. 65.

⁹² See also RUF Trial Judgement, para. 1463.

⁹³ Voluntary marriage can also be used as a means to enslave. This can be the case in so-called lover boy practices: men seduce vulnerable girls and women, sometimes marrying them, and then force them into prostitution.

⁹⁴ La Haye, *supra* note 56, p. 191. Purchasing a person, for example, is a means of obtaining a person, however, it also constitutes an exercise attaching to the right of ownership, as opposed to abduction and recruitment, which are means of obtaining only.

⁹⁵ Amnesty International, *Uganda: 'Breaking God's commands': the destruction of childhood by the Lord's Resistance Army*, AFR 59/001/1997, 16 September 1997, p. 19; and T. Barton and

enslave someone. The ‘ownership’ over a woman or girl is transferred from her father to her husband by the act of marriage.⁹⁶ In these cases, marriage, forced or not, is used as a means to enslave someone.

5. Conclusions

As stated in the introduction, in at least three of the situations that are currently before the ICC, forced marriages occurred on a large scale: the Democratic Republic of Congo,⁹⁷ the Sudanese region Darfur⁹⁸ and the northern districts of Uganda. Seeing as there is evidence that indicates that rebel leaders orchestrated the abduction of young girls for the purpose of forcibly marrying them to fighters, the ICC will in the future need to address the phenomenon of forced marriages and its relation to the crime against humanity of (sexual) enslavement. The forced marriages that took place in these conflicts, especially in Congo and Uganda, bear a great resemblance to the bush marriages in Sierra Leone. Rebel groups such as the Ugandan Lord’s Resistance Army (LRA) abducted women and girls and forced them into relationships referred to as ‘marriages’ with fighters. Within these marriages, the girls were treated as slaves.⁹⁹ As regards the internal organization of the LRA, Chief Prosecutor Luis Moreno-Ocampo, in his Statement on the Uganda arrest warrants, referred to the abduction, distribution and use of girls as ‘wives’, stating that the LRA corrupted language to cover their criminal acts by using the word ‘wife’, whereas these girls were, in the view of the Prosecution, used as (sex) slaves.¹⁰⁰

With regard to the situation in Congo, Germain Katanga (alleged commander of the *Force de résistance patriotique en Ituri* (FRPI)) and Mathieu Ngudjolo Chui (alleged former leader of the *Front des nationalistes et intégrationnistes* (FNI)) are both charged with sexual slavery and rape as war crimes and crimes against

G. Wamai, *Equity and vulnerability: A situation analysis of women, adolescents, and children in Uganda, 1994* (Uganda National Council for Children, Kampala, 1994) p. 140.

⁹⁶ Compare the ancient Roman tradition of *cum manu* marriages: women ceased to be under the authority of their fathers (*patria potestas*) when they married. Upon marriage, a woman came under the autocratic power of her husband. In a *sine manu* marriage, the woman remained under the legal control of her father, even after marriage (Linda Stone, *Kinship and gender. An introduction* (Westview Press, Boulder, 2000) p. 208).

⁹⁷ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum Mission to the Democratic Republic of the Congo*, UN Doc. A/HRC/7/6/Add.4, 28 February 2008, para. 21.

⁹⁸ See e.g., Darfur Consortium, *Abductions, sexual slavery and forced labour in Darfur*, 2009.

⁹⁹ Jeannie Annan et al., *The state of female youth in Northern Uganda: findings from the Survey of War-Affected Youth (SWAY) Phase II*, April 2008, p. 42; and Khristopher Carlson and Dyan Mazurana, *Forced marriage within the Lord’s Resistance Army, Uganda* (Feinstein International Center, Tufts University, Medford, MA, May 2008) p. 21.

¹⁰⁰ Statement by the Chief Prosecutor on the Uganda Arrest Warrants, 14 October 2005, p. 5.

humanity.¹⁰¹ In his submission of the public version of the document containing the charges, the Prosecutor alleged that there is evidence that during an attack on a village called Bogoro, women were raped and then taken to military camps, where some of them were given as ‘wives’ to their captors.¹⁰² During the confirmation hearing which was held before Pre-Trial Chamber I from 27 June 2008 until 16 July 2008, the Prosecution reiterated that forcibly marrying abducted women to their rapists was common practice within the FRPI and the FNI.¹⁰³

In this article, it was argued that the conferral of marital status is *in itself* not (an exercise of) a power attaching to the right of ownership and therefore does not constitute enslavement. However, as is evidenced by the situation in Sierra Leone, (forced) marriage can very well *result* in (sexual) enslavement or slavery-like practices. Therefore, the SCSL Trial Chamber was correct in its judgement in the case against *Taylor* by holding that ‘the nomenclature of “marriage” (cannot be considered; IH) to be helpful in describing what happened to the victims of this forced conjugal association.’¹⁰⁴ Forced marriage is not a new crime with additional elements. The forced character of the conjugal association is a specific characteristic of this act, but this feature does not require the conceptualization of a new crime.¹⁰⁵ It was not the fact that the women were forced to ‘marry’ the perpetrators, it was the fact that they were treated as slaves, reduced to chattel, that makes these bush marriages atrocious. As ‘bush wives’, women and girls had no right to self-determination; they were under complete control of their husbands. However, abducted girls and women who were not given to individual rebels as ‘wives’ were treated in the same manner: as slaves. Therefore, it is the *result* of these bush marriages, i.e. (sexual) enslavement that international courts and tribunals should focus on, and not on the label ‘wife’ or ‘marriage’.

¹⁰¹ *Prosecutor v. Katanga and Ngudjolo Chui*, 30 September 2008, ICC-01/04-01/07, Decision on the confirmation of charges.

¹⁰² *Prosecutor v. Katanga and Ngudjolo Chui*, 24 April 2008, ICC-01/01-01/07, Prosecution’s submission of public version of document containing the charges, para. 89.

¹⁰³ *Prosecutor v. Katanga and Ngudjolo Chui*, 4 July 2008, ICC-01/04-01/07-T-43, Confirmation of Charges Hearing, p. 64, lines 9–11. See also pp. 19, 22, 23 and 25–27.

¹⁰⁴ *Prosecutor v. Charles Taylor*, 18 May 2012, SCSL-03-01-T, Trial Judgement, para. 426.

¹⁰⁵ *Ibid.*, para. 430.