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Advancing International Criminal Law

The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity

Micaela Frulli*

Abstract

The Appeals Chamber of the Special Court for Sierra Leone (SCSL) in Brima, Kamara and Kanu recognized that forced marriages may amount to crimes against humanity, falling under the sub-heading of 'other inhumane acts'. This decision is to be welcomed because the practice of forced marriage is not adequately described by existing categories of sexual crimes. As forced conjugality results in particular psychological and moral suffering for the victims, it is argued that this heinous practice may be more appropriately pursued as a separate crime, under a definition that describes the entirety and complexity of the criminal conduct. The SCSL decision may also be important for its impact on the activities of the International Criminal Court (ICC). The widespread practice of forced marriage presently features in all the situations being investigated by the ICC and the inclusion in the ICC Statute of the offence of forced marriage as a separate crime against humanity could be discussed during the Review Conference in 2009.

1. Introductory Remarks

The Appeals Chamber Judgment of the Special Court for Sierra Leone (SCSL) in *Brima, Kamara and Kanu*¹ is noteworthy primarily for two reasons. In this landmark decision, the Appeals Chamber upheld the Trial Chamber's decision to convict the appellants for the war crime of conscripting, enlisting and using children under the age of 15 years² to participate

* Lecturer in International Law, University of Florence. [micaela.frulli@unifi.it].

1 Judgment, *Brima, Kamara, and Kanu* (SCSL-04-16-T), Appeals Chamber, 22 February 2008.

2 On the customary nature of the crime of conscripting, enlisting and using children under the age of 15 years to participate in hostilities, see also the Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Hinga Norman* (SCSL-2004-14-AR72 E), Trial Chamber, 31 May 2004. For a comment see, A. Smith, 'Child Recruitment and the Special Court for Sierra Leone', 2 *Journal of International Criminal Justice* (2004) 1141–1153.

in hostilities.³ In addition more importantly for the purpose of this comment, the Appeals Chamber recognized for the first time in the history of international criminal tribunals, that forced marriage may amount to crimes against humanity under customary international law, fitting in the sub-category of ‘other inhumane acts’. These two aspects of the decision are important in the progressive development of international criminal law. However, as some commentators have already argued, in other respects, this decision is also a missed opportunity having failed to adequately dwell on some crucial legal issues raised by the case.⁴

This short comment will only discuss the legal findings concerning the characterization of forced marriage as a crime against humanity. Arguably this is the main contribution of this decision to the development of international criminal law and might have a bearing both on future cases of the International Criminal Court (ICC)⁵ as well as on the imminent revision of the ICC Statute itself, with a view of including a ‘new’ crime against humanity. In the case at hand, the Prosecution had charged the defendants with the practice of forced marriage under Article 2(i) of the SCSL Statute which provides for the sub-category of ‘other inhumane acts’ in the definition of crimes against humanity. The Trial Chamber dismissed the count finding that the charge was redundant as the trial judges argued that the Prosecutor was not able to prove that forced marriage is significantly different from the crime of sexual slavery. The Trial Chamber therefore held that there was no lacuna to be filled through the recognition of the separate crime of forced marriage.⁶

- 3 This conclusion could have been an important precedent for the proceedings against Thomas Lubanga who was indicted by the ICC for the crime of conscripting and enlisting children under the age of 15 years. See Decision on Confirmation of Charges in the Indictment, *Lubanga Dyilo* (ICC-CPI-20070129-196-EN), Pre-Trial Chamber I, 29 January 2007. For a comment on this decision, see J. Morgan-Foster, ‘ICC Confirms Charges against DRC Militia Leader’, *ASIL Insights*, 9 March 2007, available at <http://asil.org/insights/2007/03/insights070309.html> (visited 3 October 2008). However, as widely reported, on 2 July 2008 a Trial Chamber of the ICC ordered the release of Thomas Lubanga. The Prosecution apparently had evidence in its possession that had not been seen by the Defence. The judges determined that this made a free and fair trial impossible. The accused will remain under custody of the ICC pending the final decision on the appeal filed by the Prosecution.
- 4 As it has been observed ‘The Appeals Judgment may represent a missed opportunity for the SCSL’s highest judicial organ. This perspective perceives that the Appeals Chamber failed to leave a clear imprint on significant legal issues that resonate beyond the SCSL’s courtrooms. For example, the Appeals Chamber (i) failed to assess the fair trial implications of its findings on JCE (Joint Criminal Enterprise) liability and forced marriage vis-à-vis the rights of the appellants to know the case against them; (ii) summarily dismissed the argument by Brima regarding the important doctrine of equality of arms; (iii) showed instrumentalist reasoning in deciding the ‘greatest responsibility’ question; and (iv) failed to flesh out the elements of the crime of conscripting, enlisting or using children in armed conflict, especially given their importance to the first case before the ICC’, C.C. Jalloh and J. Osei-Tutu, ‘Prosecutor v. Brima, Kamara, and Kanu: First Judgment from the Appeals Chamber of the Special Court for Sierra Leone’, *ASIL Insights*, 20 May 2008, available at <http://www.asil.org/insights080520.cfm> (visited 3 October 2008).
- 5 See *infra*, Part 4.
- 6 See Judgment, *Brima, Kamara, and Kanu* (SCSL-04-16-T), Trial Chamber II, 20 June 2007, §703 ss. *Contra* see the Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), appended to the judgment.

The Appeals Chamber reversed this decision, finding instead that the practice of forced marriage may amount to crimes against humanity under the sub-heading of 'other inhumane acts'. In their decision, the appeals judges, however, declined to enter new convictions.

2. The Need for Creating a New Sub-category of Crimes Against Humanity: The Specificity of Forced Marriage

In the past, it was quite difficult to prosecute those allegedly responsible for sexual and gender-based crimes (especially committed during an armed conflict) before national or international tribunals. More recently though, the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) delivered a number of precedent-setting rulings that recognized the existence of specific sexual and gender-related crimes amongst war crimes and crimes against humanity. The jurisprudence of these two ad hoc tribunals gave momentum to the evolution of substantive international criminal law. The case law of the two ad hoc Tribunals had a strong impact on the founding documents of the later ICC. Several of these crimes have been included amongst the definitions of war crimes and crimes against humanity in the Statute and in their further elaboration in the Elements of Crimes (EofC) accompanying the Statute.⁷ The Statute of the SCSL was drafted drawing both from ICTY and ICTR jurisprudence and from the ICC Statute.⁸

At present, there is therefore a variety of categories of sexual or gender-related crimes in international criminal law under which the criminal behaviour of alleged perpetrators may be pursued. It must also be noted that thanks to the case law of international criminal tribunals, some of the crimes that originated as gender-based can be considered to fall in non-sexual categories. By way of example, depending on the circumstances rape can amount to torture.⁹

In light of the many categories of crimes by which defendants may be charged for grave sexual or gender-related criminal acts, one may wonder whether forced marriage needs to be prosecuted as a separate crime. In the view of the Appeals Chamber, forced marriage should be seen as a separate crime because of the specificity of this practice in the context of the Sierra

⁷ *Ibid.*

⁸ See Art. 2, SCSLSt.: 'The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h) Persecution on political, racial, ethnic or religious grounds; i) Other inhuman acts'.

⁹ Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998, §§163–164: 'Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture'.

Leonean civil conflict.¹⁰ However, the question must be carefully considered as it would be a waste of judicial resources to introduce a new crime and to penalize a criminal conduct that could be prosecuted exactly in the same manner under an already existing category.

A number of factors tip the scale in favour of the need of introducing the new sub-category of forced marriage as a crime against humanity. First, forced marriage, as described not only by the victims but also by numerous experts who were asked to give their opinion on this practice, is a *multi-layered crime*. It may involve rape, sexual slavery, forced pregnancy, forced domestic labour, that taken individually may all amount to crimes against humanity. However, the practice of forced marriage as it was extensively carried out in Sierra Leone is not fully described by any of the single crimes enumerated in the SCSL Statute. Forced marriage is more than the sum of its components.¹¹

More specifically, forced marriage may be distinguished from sexual slavery, the category where it was subsumed by the Trial Chamber. Sexual slavery was first recognized as a separate crime against humanity in 1998, when it was inserted in the ICC Statute. In fact, the drafters considered that sexual slavery differed from other crimes already existing such as enslavement and enforced prostitution and they deemed that sexual slavery represented more than the sum of its constitutive elements.¹² There is actually no other case law on sexual slavery — this case against the Armed Forces Revolutionary Council (AFRC) before the SCSL being the first one to deal with this count — that could help to better refine the contours of this crime.¹³ The judges of the Trial Chamber made reference to the ICC EofC,¹⁴ that contain a very detailed elaboration of the crime of sexual slavery. According to the EofC, leaving aside the elements in common to all crimes against humanity sexual slavery occurs where “The perpetrator exercised any or all of the powers attaching to the

10 The Appeals Chamber found relevant differences between forced marriage and sexual slavery and concluded that: ‘(. . .) in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim’, see Appeals Chamber Judgment, *supra* note 1, §183.

11 A previous reference to forced marriage was made by the ICTY that, however, listed the offence as a possible form of sexual violence. See, Judgment, *Kvočka et al.* (IT-98-30/1-T), Trial Chamber, 2 November 2001, §180, footnote 343.

12 For a detailed description and analysis of this process during the ICC Statute negotiations see V. Oosterveld, ‘Sexual Slavery and the International Criminal Court: Advancing International Law’, 25 *Michigan Journal of International Law* (2004) 616–625.

13 Actually the only existing judgment dealing with sexual slavery is the one delivered on 4 December 2001 by the Women’s International War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery, a Peoples’ Tribunal that condemned the World War II Japanese system of ‘Comfort Women’. The Tribunal was composed by Judge Gabrielle Kirk McDonald (Presiding), Judge Carmen Argibay, Judge Christine Chinkin and Judge Willy Mutunga. The judgment is available at <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgment.pdf> (visited 3 October 2008).

14 The crimes of sexual slavery is not defined in the SCSL Statute, however, the trial judges made explicit reference to the ICC EofC, see SCSL, Trial Chamber Judgment, *supra* note 6, §§708–709.

right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty' and 'caused such person or persons to engage in one or more acts of a sexual nature'. However, the elements of crime of sexual slavery does not include the imposition of marital status inflicted on the so-called 'bush-wives', whereas at close scrutiny the element of 'forced conjugality' — which implies the expectation of a whole variety of sexual and non-sexual tasks to be performed — actually seems to be the distinctive feature of this heinous criminal conduct.¹⁵ In addition, it must be stressed that forced marriage represents a vilification of a highly symbolic social and religious institution, as attested by the fact that even when committed as a single act it has been repeatedly condemned as a human rights violation and is prohibited by many relevant human rights instruments.¹⁶

For all these reasons, *forced marriage involves specific elements of psychological and moral suffering*, not 'only' of sexual exploitation or abuse, and it seems appropriate that it is pursued as a separate crime, under a definition that describes the entirety and complexity of the criminal conduct.

In this respect, the Appeals Chamber of the SCSL rose to the challenge of moving forward international criminal law for it considered and refined the definition of forced marriage reaching the conclusion to class it as a discrete crime. This development seems to be all the more appropriate, in light of the fact that the practice of forced marriage has reportedly been carried out on a widespread basis — that is to say in very similar terms to those of Sierra Leone — in many other countries.¹⁷

3. The 'New' Crime of Forced Marriage and the Principle of Legality

As universally recognized, an individual may not be prosecuted for acts that were not characterized as crimes at the time when they were committed.

15 The so called 'bush wives' were abducted, assigned to a combatant and forced to follow him to the rebel camp. They must be completely at their 'husbands' disposal both sexually and in performing a variety of domestic tasks such as cooking, washing, cleaning, carrying looted items. They were expected to be loyal and faithful to their 'husbands', and to keep and raise their children. Nonetheless, they were often abandoned when the captors got tired of them. The fact of being abandoned could also worsen their situation because the majority of 'ex-wives' were rejected by their communities and found themselves with no means of survival for them and their children. For extensive and detailed reports on the practice of forced marriages see Physicians for Human Rights (with the assistance on the United Nations Mission in Sierra Leone), 'War-Related Sexual Violence in Sierra Leone', Report, 2002, available at www.physiciansforhumanrights.org (visited 3 October 2008); Human Rights Watch, 'We'll Kill You if You Cry': *Sexual Violence in the Sierra Leone Conflict*, Report, January 2003, available at www.hrw.org (visited 3 October 2008). See also the *Final report of the Sierra Leone Truth and Reconciliation Commission*, Report, 2007, at www.trcsierraleone.org (visited 3 October 2008).

16 See *infra*, Part 3.

17 See *infra*, Part 4.

The principle of legality, also expressed by the Latin formula *nullum crimen sine lege*, guards the defendant against this.¹⁸ However, national and international courts are entitled to elaborate on existing rules and to refine them by way of legal construction. This is true in particular for international criminal law, which is to a large extent judge-made law.

In the case at hand, forced marriage was considered as a crime against humanity falling in the ‘other inhumane acts’ category. Such a sub-category has been always inserted in the Statutes of international criminal tribunals¹⁹ with the main purpose of ensuring the possibility to prosecute forms of crimes against humanity not explicitly spelled out.²⁰ This category was originally drafted as a residual one and consistently remained vague.²¹ However, recent ICTY case law shed some light on the possible means to interpret the type of conduct which may fall under ‘other inhuman acts’. In particular, in *Kupreskić* the Trial Chamber found that useful parameters for interpretation may be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights (UDHR) of 1948 and the two United Nations Covenants on Human Rights of 1966. With reference to those standards (and to those contained in other numerous human rights instruments), the ICTY found that ‘it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.’²² In addition, the crimes must be as serious as the other crimes provided in the category of crimes against humanity. The comparable gravity may be ascertained through the *eiusdem generis* rule. Such an interpretation is also confirmed by the wording of the ICC Statute that prescribes ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.’²³ Finally, the crime must satisfy the general elements of crimes against humanity, that is to say, it must have been committed in the framework of a widespread or systematic attack against the civilian population and with knowledge of the attack on the part of the perpetrator. In sum, the evaluation of the type of criminal conduct

18 For an extensive analysis of the principle of legality of crimes and its articulations, see A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford University Press, 2008), 36 *et seq.* In particular, the principle of non-retroactivity requires that criminal rules only cover acts performed before they were enacted.

19 See Art. 6(c) of the Statute of the Nuremberg International Military Tribunal.

20 Judgment, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, §152: ‘The crime of inhumane acts is a residual clause for serious acts which are not otherwise enumerated in Article 5 but which require proof of the same chapeau elements’.

21 Judgment, *Kupreskić* (IT-95-16), Trial Chamber, 14 January 2000, §563; see also Judgment, *Kordić and Cerkez* (IT-95-14/2), Appeals Chamber, 17 December 2004, §117.

22 *Kupreskić*, *supra* note 21, §566.

23 See Art. 7 ICCSt. See also Judgment, *Vasiljević* (IT-98-32), Appeals Chamber, 25 February 2004, §165: ‘To assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.’

that may be classed amongst 'other inhumane acts' must be done on a case-by-case basis.²⁴

According to these legal standards, forced marriage should undoubtedly be included in the 'other inhumane acts' category. First, forced marriage is prohibited by many relevant human rights instruments. One may note Article 16 of the UDHR,²⁵ and Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR) which provides 'No marriage shall be entered into without the free and full consent of the intending spouses'. The most comprehensive rule forbidding forced marriage is contained in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁶ A similar rule is inserted in regional human rights conventions. According to these various treaties, the single act of forcing someone into a marriage relationship is a serious violation of her (or his) fundamental rights. Obviously, these instruments express forced marriage as a violation of human rights and not as a criminal offence. However, it must be stressed that forced marriage is considered to be a crime today in many national systems.²⁷ In addition, forced marriage committed in the context of an armed conflict and on a massive scale, has already been taken into consideration and repeatedly condemned by various human rights bodies.²⁸

24 With respect to the ICC Statute, the appropriate element to include this 'new crime' would indeed be Art. 7(1)(k) (other inhumane acts of a similar character intentionally causing . . .) and not Art. 7(1)(g) ('any other form of sexual violence of comparable gravity') precisely because forced marriage includes both sexual and non-sexual elements.

25 Art. 16 provides '(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

26 According to the CEDAW Committee, forced marriage, itself a form of violence against women, further engenders gender-based violence, and may 'justify gender-based violence as a form of protection or control of women'. This violence deprives women (and girls) of their equal enjoyment, exercise and knowledge of their human rights and fundamental freedoms, and keeps them in subordinate roles. See *General Recommendation No. 19*, §11.

27 For an updated overview on national legislation, see the Report of the Secretary-General, *Forced marriage of the girl child*, submitted to the Commission on the Status of Women of ECOSOC, UN Doc. E/CN.6/2008/4, 5 December 2007. See also in this issue, the paper by N. Jain (Part 3).

28 See for instance the following reports: *Contemporary Forms of Slavery. Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final report submitted by Gay J. McDougall, Special Rapporteur, UN Commission of Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998; *Contemporary Forms of Slavery. Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Update to the final report submitted by Gay J. McDougall, Special Rapporteur, UN Commission of Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/2000/21, 6 June 2000; *Report of the Special Rapporteur on violence against women, its causes and consequences*, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45, UN Doc. E/CN.4/2001/73, 23 January 2001; *Report of the Special Rapporteur on violence against women, its causes and consequences*, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution and 2001/49, UN Doc. E/CN.4/2002/83, 31 January

Moreover, the gravity of forced marriage as carried out in the context of the Sierra Leone civil conflict is analogous to that of other crimes against humanity committed in the same circumstances. As mentioned above, the constitutive elements of forced marriage as perpetrated in Sierra Leone amount *per se* to crimes against humanity, that is to say that the seriousness of the crime may be assessed beyond any doubt. It must also be underlined that a factor to be evaluated when assessing the gravity of the crimes is also the age of the victim and the effects of the crimes on the victim. Unfortunately, the victims of forced marriage are too often very young girls whose physical and moral suffering is unbearable.²⁹ Another aspect to be taken into account when assessing the gravity of this practice is that forced marriage is a continuous offence, lasting until the 'husband' gets tired of his 'wife' meaning that the situation may endure for several years.³⁰

Finally, the crime of forced marriage meets the requirements of accessibility and foreseeability that have been developed in the jurisprudence of the European Court of Human Rights (ECHR) to evaluate if criminal rules are in keeping with the principle of non-retroactivity of the law. As noted above, forced marriage as a crime against humanity consists of multiple elements that could individually amount to crimes against humanity. One may therefore assume that the alleged perpetrators knew that their conduct was criminal and should expect to be prosecuted. At the very least it would be incongruous that the perpetrator of one or more of these acts expects not to be prosecuted because they were carried out under the guise of 'marriage'.

The above conclusion on non-retroactivity should not undermine the importance of prosecuting forced marriage as a separate crime, since its most typical feature, precisely the imposition of forced conjugality, distinguishes it from other conducts that are 'only' sexual crimes.

2002; *Report of the High Commissioner of Human Rights*, UN Doc. E/CN.4/Sub.2/2002/28, 18 July 2002.

29 See the *Forced marriage of the girl child*, *supra* note 27.

30 Some scholars proposed the draft elements of the crime of forced marriage, that could be the following ones: '1. The perpetrator attached the right of marriage to one or more persons without the individual's consent by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature, and/or forced domestic labor, child bearing, or child rearing; 3. The perpetrator makes it so that the individual is unable to dissolve the marriage; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.', see M.P. Scharf and S. Mattler, 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity', Case Research Paper Series in Legal Studies, Working Paper 05-35, October 2005, at 21.

4. The Possible Influence of the SCSL Appeals Decision in *Brima* on the ICC

Rape and sexual slavery feature in all situations in which the ICC has currently opened an investigation: the insurgency in Uganda, the conflict in Darfur, the failed military coup in the Central African Republic and the fighting in the Democratic Republic of Congo. More precisely, in all these cases, there are reports of an extensive practice of girls forced into marriages with combatants.

The practice of forced marriage was well documented also during the civil conflict and the genocide in Rwanda in 1994, but the crime was not included in the ICTR Statute. While the ICTR gave an important contribution to the definition of sexual and gender-based crimes, it did not prosecute forced marriages as such. The suggestion to charge forced marriage as a crime of sexual violence and to amend the ICTR Statute was, however, already put forward by some scholars.³¹

The more recent SCSL Appeals judgment delivered in *Brima* which recognized forced marriage as a crime against humanity might influence the cases now before the ICC. In March 2008, Radhika Coomaraswamy, UN Special Representative for Children and Armed Conflict, presented a written submission,³² as *amicus curiae*, to the ICC judges advising them on how to interpret the charges against Thomas Lubanga, head of the Union of Congolese Patriots, indicted by the ICC. She recommended that the crime of using children to 'participate actively' in hostilities should be understood to include the sexual violence suffered by girls forced to join Lubanga's militia (arguably these girls were forced to become 'bush-wives').³³ In addition, as mentioned above, forced marriages have been extensively carried out by the Lord's Resistance Army in

31 M.S. Karla, 'Forced Marriage. Rwanda's Secret Revealed', 7 *University of California Davis Journal of International Law and Policy* (2001) 198–222.

32 These submissions were requested by the Trial Chamber: see Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber, 18 February 2008, available on the website of the ICC under the *Lubanga Dyilo* case file [www.icc-cpi.int (visited 3 October 2008)].

33 'The exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus. The definition of child soldier auxiliary to the Cape Town Principles recognized that 'child soldier' includes girls recruited for sexual purposes and for forced marriage.' See §24 of the Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence, 18 March 2008, available on the website of the ICC under the *Lubanga Dyilo* case file [www.icc-cpi.int (visited 3 October 2008)]. On the evolution of the *Lubanga Dyilo* case see *supra*, footnote 3.

Uganda³⁴ and similar practices are reported in the Central African Republic and in Darfur.³⁵

In 2009, the UN Secretary-General of the United Nations is to convene the first Review Conference of the Rome Statute that will consider possible amendments to the Statute itself. While the programme of the Review Conference has not been set it is highly likely that the crime of aggression will constitute one of the main issues on the agenda. The Rome Conference recommended in 1998 the possible consideration of terrorism and drug crimes and these issues will also be extensively debated at the Review Conference. However, it is also possible that some other amendments such as the insertion of the crime of forced marriage amongst crimes against humanity could be considered. This would be the crucial step to allow the ICC to formally prosecute forced marriage as a discrete crime, as the gravity of this practice suggests, in order to adequately punish those responsible.³⁶

34 See K. Carlson and D. Mazurana, *Forced Marriage within the Lord's Resistance Army, Uganda*, Report, Feinstein International Centre, Tufts University, May 2008, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/AMMF-7F3D3A?OpenDocument> (visited 3 October 2008).

35 See the reports available from the Office of the Special Representative of the Secretary-General for Children and Armed Conflict at <http://www.un.org/children/conflict/english/home6.html> (visited 3 October 2008).

36 Finally, it should also be noted that the UN Security Council recently adopted a resolution condemning rape and all forms of sexual violence against women. In paragraph 1 of the Resolution, the Council: '*Stresses* that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, *affirms* in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security, and *expresses its readiness*, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence', UN Doc. S/RES 1820, 19 June 2008.