UNEARTHING THE CUSTOMARY LAW FOUNDATIONS OF "FORCED MARRIAGES" DURING SIERRA LEONE'S CIVIL WAR: THE POSSIBLE IMPACT OF INTERNATIONAL CRIMINAL LAW ON CUSTOMARY MARRIAGE AND WOMEN'S RIGHTS IN POST-CONFLICT SIERRA LEONE

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[T]here was, in the olden days, marriage by capture. The Protectorate of Sierra Leone was, up to the turn of this century, the battle ground for tribal wars. Men saw in these wars an opportunity of winning wives for themselves. An attack upon a town or village resulted in the extermination of the male inhabitants and the capture of the women, who subsequently became the wives of their conquerors. No requirement was essential for the validity of such marriage other than a public declaration by the captor of his intention to cohabit with his captive followed by actual cohabitation. Such wife was, however, regarded as a slave . . . . Nowadays, there are no longer inter-tribal wars in the country and, with the abolition of slavery in 1928, this kind of marriage no longer exists."[1]

I.S., . . . abducted and gang raped by the West Side Boys from January to August 1999, explained how Commander "Blood" had initiated the "wife" selection process: "One of the commanders said he was going to

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[1] H. M. JOKO SMART, SIERRA LEONE CUSTOMARY LAW 28-29 (1983).

amputate all of us. But another commander, C.O. Blood, said 'Don't kill them, let's chose them as wives.' Then we were divided up. The one who seemed to be in charge, C.O. Blood, chose me. When he looked at me I was frightened. His pupils were huge—he was high on drugs. He took me to a house and told me to lie down on the ground. He said if I did not allow him to have sex, he would kill me."[2]

During the civil war that ravaged Sierra Leone from 1990 to 2001, thousands of women and girls were raped, abducted, and taken to Revolutionary United Front (RUF), West Side Boys, or Armed Forces Revolutionary Council (AFRC) rebel camps.[3] They were assigned to a man and, from that day forward, had to submit to him sexually and perform countless domestic tasks for him. This relationship between the rebels and their captives was commonly known as "forced marriage," with the captive women testifying that they were assigned to a "husband" or "rebel husband," and the rebel men referring to their captives as "wives" or "bush wives."[4] The type of marriage that was thought to have disappeared with the conclusion of inter-tribal wars and the abolition of slavery appeared to have returned to Sierra Leone from its past, invigorated and with new force.

In their articles about the conflict, reporters used the terms "wife," "husband," and "marriage"[5] in quotation marks. Quotation marks were also consistently used for those terms by investigators who reported on the "forced marriage" phenomenon occurring in different armed conflicts,[6]

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[2] HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT 45-46 (2003), *available at* http://hrw.org/reports/2003/ sierrale one/sierleon0103.pdf [hereinafter HRW REPORT].

[3] For a detailed account of the origins of the conflict, the hostilities that took place, and the acts of sexual violence perpetrated, see *id.*; *see also* PHYSICIANS FOR HUMAN RIGHTS, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE (2002), *available at* http://www.phrusa.org/research/sierra_leone/report.html [hereinafter PHR REPORT]; SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, WITNESS TO TRUTH (2004), *available at* http://www.trcsierraleone.org/ [hereinafter TRC REPORT].

[4] Testimony of victims. *See* HRW REPORT, *supra* note 2, at 28-45; PHR REPORT, *supra* note 3, at 63-81; 3b TRC REPORT, *supra* note 3, at 273.

[5] These terms always appear in quotation marks in the HRW REPORT, *supra* note 2, and in the PHR REPORT, *supra* note 3.

[6] *See* GRAÇA MACHEL, GOV'T OF CANADA, INT'L CONF. ON WAR-AFFECTED CHILDREN: THE IMPACT OF ARMED CONFLICT ON CHILDREN (2000), *available at* http://www.waraffectedchildren.gc.ca/machel-en.asp; Lisa Alfredson, *Sexual Exploitation of Child Soldiers: An Exploration and Analysis of Global Dimensions and Trends*, Dec. 2001, at 5, *available at* http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5RPBPA/$FILE/csus

clearly indicating their uneasiness, if not disbelief, in the appropriate use of familial labels to describe these relationships. In fact, these reporters stated on numerous occasions that the use of such matrimonial terminology to refer to the type of situation suffered by Sierra Leonean women was inappropriate: "[d]escribing this experience as a 'forced' marriage is a complete misrepresentation and distortion of a [girl's] experience";[7] "[t]he arrangement was sometimes referred to as 'forced marriages' and the women held as 'wives,' but these terms obfuscate the total lack of consent by the women and the coercive conditions under which they were held."[8]

This Article will explore the use (and misuse) of the word "marriage" to describe the relationship between rebels and their captured "wives," as well as its potential impact on the customary law of marriage. Part I sets forth the argument that the term "marriage" is a criminal misnomer that masked what, under international criminal law, was clearly a situation of sexual slavery. Part II examines the customary law of marriage in Sierra Leone to help explain why the word "marriage" may have been considered an appropriate label to describe the rebel-captive relationship. It uncovers the similarities between "forced marriages" and marriages under customary law, most significantly the possibility that sexual slavery may occur within customary law marriages.

To that end, Part III proposes that categorizing "forced marriages" as sexual slavery has a potentially transformative effect on the customary law of marriage. Recognition of the right of female sexual autonomy is essential in amending customary law so as to prevent a recurrence of "forced marriages" or the existence of sexual slavery within customary marriage. Established to prosecute crimes committed in Sierra Leone since November 30, 1996, the Special Court of Sierra Leone could use the language of sexual autonomy in defining sexual violence crimes by relying on existing international criminal law. As this Article discusses, the International Criminal Tribunal for the Former Yugoslavia has recognized a

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[7] Alfredson, *supra* note 6, at 5 (quoting MACHEL, *supra* note 6, ch. 2, para. 3) (quotation marks ommitted). Both authors discuss the "forced marriage" phenomenon in general, as it has occured in a number of conflicts.

[8] HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 56 (1996), *available at* http://www.hrw.org/reports/1996/Rwanda.htm (discussing the "forced marriages" that also prevailed during the Rwandan genocide) [hereinafter SHATTERED LIVES].

woman's right to sexual autonomy. Should the Special Court use similar reasoning in pending cases, it would create domestic precedent for the recognition of such a right. Its decisions could have a transformative effect not just on the laws of Sierra Leone, but on human rights discourse internationally.

Part IV examines the role that the Sierra Leone Truth and Reconciliation Commission had—and its Report continues to have—in initiating the movement for reform of traditional practices that violate women's rights. The Truth and Reconciliation Commission was in a privileged position to connect the sexual violence suffered by women during the conflict to their pre-conflict status and, in so doing, directly denounce violations of women's rights brought about by customary law. It played an essential role that was complementary to the Court's. The Article concludes with the observation that the power of international criminal law is not limited to its ability to shed light on customary practices that discriminate against women. It also has the potential to shape the law and/or instigate legal reform when considered or relied upon by transitional justice institutions such as the Special Court and the Truth and Reconciliation Commission. In this way, international criminal law may aid in the creation of equal status for Sierra Leonean women during times of peace and during times of conflict.

I. "FORCED MARRIAGE" DURING THE SIERRA LEONE CONFLICT: ITS TRUE NATURE UNCOVERED

A. A Marriage in Quotation Marks

A "forced marriage" during the Sierra Leone conflict would begin when rebels attacked a village, wreaking violent havoc.[9] The "future wife" would be utterly terrified, witnessing appalling atrocities committed against the women of her community:[10] the rebels would insert boiling oil and embers into the vagina of some victims;[11] amputate arms and hands;[12] pluck

[9] For a detailed account of the experiences of women and girls during the Sierra Leone conflict, see HRW REPORT, *supra* note 2, at 28-53, the PHR REPORT, *supra* note 3, at 63-81, and the 3b TRC REPORT, *supra* note 3, at 136-209, 258-322. These documents gather testimonies of victims of sexual violence during the conflict.

[10] 3b TRC REPORT, *supra* note 3, at 138.

[11] *Id.* at 271; HRW REPORT, *supra* note 2, at 33.

[12] 3b TRC REPORT, *supra* note 3, at 156-57, 274-75; HRW REPORT, *supra* note 2, at 35-36.

nursing infants from their mothers' arms, slice them in two, or toss them in the air;[13] cut open the bellies of pregnant women to confirm their bets on the sex of the unborn child.[14] Girls were brutally gang raped vaginally and anally.[15] They were often still virgins, only eleven or twelve years old.[16] In this psychologically devastating context, "marriage" would begin; a girl would be abducted and assigned to a combatant or commander.[17] Members of her family who tried to intervene would be killed.[18]

The new "wife" was forced to follow her "husband" to the rebel camp. H.K, a former rebels' abductee, reported to Human Rights Watch that she was completely at her "husband's" disposal sexually, made to do whatever he liked, whenever he liked: "He used to sex me twice every night. He made me take his penis in my mouth. I tried to refuse him but he always threatened to kill me."[19] The rebels, who generally exercised exclusivity over their "wives,"[20] made the decisions about their pregnancies. A rebel would force his "wife," under the threat of death, to abort a child she was expecting when he abducted her[21] or to keep a child if it was his.[22] In addition to the sexual aspect of life with a "rebel husband," the "wife" was forced to perform a vast array of domestic tasks—cooking, laundry,

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[13] 3b TRC REPORT, *supra* note 3, at 155; HRW REPORT, *supra* note 2, at 33.

[14] 3b TRC REPORT, *supra* note 3, at 154-56.

[15] *Id.* at 158, 270; HRW REPORT, *supra* note 2, at 28-29, 30.

[16] "Although the rebel forces raped indiscriminately irrespective of age, the rebels favored girls and young women whom they believed to be virgins. This was evident not only by their actions, but was also explicitly stated by them as they chose their victims." HRW REPORT, *supra* note 2, at 28.

[17] *Id.* at 42; 3b TRC REPORT, *supra* note 3, at 139-40, 164, 272.

[18] HRW REPORT, *supra* note 2, at 42; 3b TRC REPORT, *supra* note 3, at 271.

[19] HRW REPORT, *supra* note 2, at 44. Another former abductee of the RUF also testified to the TRC of her duties towards her "bush husband," that is, "to prepare food and to satisfy 'my bush husband' any time he needs me." 3b TRC REPORT, *supra* note 3, at 139.

[20] However, a woman remained vulnerable to sexual violence by other rebels, especially when her assigned "husband" was absent. *See* 3b TRC REPORT, *supra* note 3, at 164, 272-73; HRW REPORT, *supra* note 2, at 43.

[21] HRW REPORT, *supra* note 2, at 41.

[22] *Id.* at 40-41; 3b TRC REPORT, *supra* note 3, at 165.

cleaning, farming, and carrying looted items[23]—and was subjected to abuse. "Bush wives" were frequently beaten with sticks and guns, and at times, sexually tortured.[24] They were abandoned when their "husbands" got tired of them, or when they became too ill to meet their demands.[25]

How could they get out of their situation? Trying to flee meant risking their lives: "I wanted to run away, to escape, but there was no way. If you were caught trying to escape, you were killed or put in a box."[26] Running away from a rebel faction also meant risking capture by another.[27] The rebels made escape more difficult by carving the faction's letters—"RUF" or "AFRC"—onto the chests of their "wives."[28] Women who were caught by government forces and suspected of being rebels were often killed.[29] The obstacles to escaping also loomed heavily on another front: "In many instances, women—intimidated by their captors and the situation they were in—felt powerless to escape their lives of sexual slavery, and were advised by other female captives to tolerate the abuses, 'as it was war.'"[30] The rebels "perniciously instilled fear in their 'wives' by telling them that their families would not accept them back."[31] Indeed, "ex-wives" of rebels have experienced ostracism from their community and rejection from their former husbands.[32] What were the economic and social alternatives for these women if they did leave their "husband" who, at least, provided them

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[23] HRW REPORT, *supra* note 2, at 43; 3b TRC REPORT, *supra* note 3, at 139-40, 148, 164.

[24] HRW REPORT, *supra* note 2, at 34, 38, 44 (H.K. testified that her "husband" forced an umbrella into her vagina); 3b TRC REPORT, *supra* note 3, at 149, 273.

[25] HRW REPORT, *supra* note 2, at 43.

[26] PHR REPORT, *supra* note 3, at 70. The girls interviewed by the PHR REPORT do not specify what "put in a box" means. However, in the HRW REPORT, there are many accounts of girls having been "caged," or put in wooden cages, and at least one girl referred to such a cage as "the box." HRW REPORT, *supra* note 2, at 32. Punishment was harsh if the girls were recaptured. 3b TRC REPORT, *supra* note 3, at 142.

[27] HRW REPORT, *supra* note 2, at 42.

[28] *Id.* at 43-44; 3b TRC REPORT, *supra* note 3, at 142, 275.

[29] *Id.*

[30] HRW REPORT, *supra* note 2, at 43.

[31] *Id.* at 44.

[32] *See* 3b TRC REPORT, *supra* note 3, at 165-66, 197-99, 320.

with minimal protection and means of support?[33] "Numerous victims end up being commercial sex workers, selling their bodies for as little as U.S. 50¢."[34] After seeing their family decimated and becoming accustomed to their new life, some—particularly those who were abducted young and have had children fathered by a rebel—even came to consider their "rebel husband" as a surrogate family.[35] Those who stayed with their captors considered "themselves married . . . and believ[ed] that they [had] no choice but to remain with their husbands."[36] The number of "wives" who remain with their abductors today is unknown.[37]

Investigators into similar forms of sexual violence during armed conflict maintain that this situation is in no way one of marriage.[38] Gay McDougall, United Nations Special Rapporteur on the issue of systematic rape, sexual slavery, and slavery-like practices in armed conflict, states that "women [are] being repeatedly raped by soldiers under the guise of 'marriage.'"[39] Women forced to become such "wives" in Rwanda were described as being "in fact captives, looted possessions of the militiamen, held in sexual slavery."[40] This Article argues that the situation of abducted Sierra Leonean women was, and in some cases still is, one of sexual slavery, poorly veiled by the euphemism "marriage."[41] The Special Court

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[33] According to Human Rights Watch, the RUF rebels established "internal rules" to govern the behavior of the fighters and captives: "A rebel was expected to provide for his 'wives' and children during their captivity . . . . If a rebel reneged on his responsibility, then he could be put in a cell and beaten to death." HRW REPORT, *supra* note 2, at 45.

[34] *Id.*; *see also* 3b TRC REPORT, *supra* note 3, at 199-200, 313.

[35] HRW REPORT, *supra* note 2, at 44.

[36] PHR REPORT, *supra* note 3, at 76.

[37] HRW REPORT, *supra* note 2, at 44.

[38] *See supra* p. 552-53.

[39] Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, ¶ 10, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (*prepared by* Gay J. McDougall) [hereinafter *Contemporary Forms of Slavery*], *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/0/3d25270b5fa3ea998025665f0032f220?OpenDocument.

[40] SHATTERED LIVES, *supra* note 8, at 56.

[41] 3b TRC REPORT, *supra* note 3, at 164 (finding that "forced marriage" in Sierra Leone was a form of sexual slavery). For a more general discussion of "forced marriages" occurring in different armed conflicts as sexual slavery, see also *Contemporary Forms of*

for Sierra Leone,[42] under its statute, has jurisdiction over the crime of sexual slavery when it is committed as part of a widespread or systematic attack against a civilian population.[43] Many accused are now being charged with the crime against humanity of sexual slavery before the Special Court.[44] The Court is therefore in the best position to shed light on the true nature of "forced marriages."

Slavery, *supra* note 39, ¶ 30 (noting that "[s]exual slavery also encompasses situations where women and girls are forced into 'marriage'"); Machel, *supra* note 6, ch. 2, paras. 1-3; Alfredson, *supra* note 6, at 5.

[42] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, *available at* http://www.specialcourt.org/documents/Agreement.htm. The agreement was made following S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000). *See generally* Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFR. HUM. RTS. L.J. 107 (2001).

[43] Statute of the Special Court for Sierra Leone, as amended Jan. 16, 2002, art. 2 (g), *available at* http://www.specialcourt.org/documents/Statute.html (Article 2 provides for crimes against humanity) [hereinafter Statute of the Special Court]. It is estimated that more than 200,000 women in Sierra Leone may have been affected by sexual violence during the conflict. PHR REPORT, *supra* note 3, at 3-4. Moreover, it has been found that "sexual violence and slavery . . . were part of the rebel forces' military strategy to dominate, humiliate and punish the civilian population." HRW REPORT, *supra* note 2, at 46; *see also* 3b TRC REPORT, *supra* note 3, at 171 ("Given the widespread nature of rape and sexual violence by the armed groups mentioned[,] . . . it is clear that there were deliberate policies systematically to target women and girls and systematically to rape and sexually violate them."). The author of this Article agrees with these reports that the acts of sexual violence perpetrated during the conflict were part of a widespread and systematic attack against the civilian population.

[44] Indictments of the AFRC, RUF, and Charles Taylor are available at the Special Court of Sierra Leone's website, http://www.sc-sl.org/ (last visited Apr. 20, 2006). In terms of sexual violence counts, these defendants have been indicted for crimes against humanity of (1) rape; (2) sexual slavery and any other form of sexual violence; and (3) other inhumane act (Charles Taylor not being charged with (3) above); and (4) for outrage upon personal dignity. RUF Trial, http://www.sc-sl.org/RUF.html (last visited Apr. 20, 2006); AFRC Trial, http://www.sc-sl.org/AFRC.html (last visited Apr. 20, 2006); Indictment of Charles Taylor, http://www.sc-sl.org/Taylor.html (last visited May 6, 2006). A count of "other inhumane act" was added to the AFRC and RUF indictments when they were amended in May 2004 so that "forced marriages" could be prosecuted as "inhumane act." *Id.* Acknowledging the prosecution's array of charges for the same underlying criminal acts, this Article argues that "forced marriages" may be categorized as the crime of sexual slavery. The TRC also found "forced marriages" to be a form of sexual slavery. *See supra* note 41. However, with both "sexual slavery and any other form of sexual violence" and "other inhumane act" counts being presented for adjudication, it remains to be seen how the Special Court will ultimately categorize "forced marriages" under its statute. In the AFRC case of *Prosecutor v. Alex Tamba Brima et. al*, Trial Chamber II of the Special Court was satisfied that there was

B. Sexual Slavery Unmasked

According to Barry, in a very broad sense, "[f]emale sexual slavery is present in all situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions, they can not [sic] get out; and where they are subject to sexual violence and exploitation."[45] The crime of sexual slavery appears for the very first time in the Rome Statute of the International Criminal Court,[46] where it is not defined. However, its elements are enumerated in the International Criminal Court's *Elements of Crimes*, which was designed for use as an interpretive guide by ICC judges.[47] Sexual slavery is also

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sufficient evidence upon which a trier of fact could find beyond a reasonable doubt that the accused were responsible for the crimes charged in the indictment. *Prosecutor v. Alex Tamba Brima et al*, Case No. SCSL-04-16-T, Decision on Defense Motions for Judgement of Acquittal Pursuant to Rule 98 (Mar. 31, 2006), *available at* http://www.sc-sl.org/AFRC-decisions.html (select the hyperlinks to all the documents pertaining to "SCSL-04-16-T"; although there are three separate hyperlinks to the opinion, the document is paginated consecutively from the first to the third hyperlink). As a result, the court dismissed the defense motions for acquittal. *Id.* at 97. However, in a separate concurring opinion, Judge Julia Sebutinde wrote that because "forced marriages" are sexual in nature, the accused could not be appropriately charged under the general crime of "other inhumane acts" for such "marriages." *Id.* ¶¶ 10-14, at 100-102. Instead, she argued that "forced marriages" should be dealt with under the other counts of the indictment. *Id.* ¶ 14, at 102. She remarked that "forced marriages" could qualify as "a form of sexual violence" and as a "form of sexual slavery," *id.*, which she argued were two different offenses improperly charged under the single count of "sexual slavery and any other form of sexual violence." *Id.* ¶ 6, at 99. She proposed that the count be amended so that the offenses are split into two separate counts – one for sexual violence and the other for sexual slavery. *Id.* ¶ 9, at 100. She recommended that the added count of "inhumane act" be struck out from the sexual violence counts, so that only one count of "other inhumane acts" remains in the indictment, dealing with non-sexual acts. *Id.* ¶ 14, at 102.

[45] KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 40 (1984) (emphasis omitted).

[46] Rome Statute of the International Criminal Court, art. 7, § 1(g), July 17, 1998, U.N. Doc A/CONF.183/9* (sexual slavery as a crime against humanity); *see also id.* art. 8, § 2(b)(xxii) (sexual slavery as a war crime in international conflict); art. 8, § 2(e)(vi) (as a war crime in internal conflict), *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

[47] Finalized draft text of the Elements of Crimes, U.N. Preparatory Comm'n for the Int'l Criminal Court, Nov. 2, 2000, U.N. Doc. PCNICC/2000/1/Add.2, *available at* http://www.un.org/law/icc/prepcomm/report/prepreport.htm (locate Section B, ¶ 2; then select the English PDF version of the document, labeled as "E," for the cited paginations herein) [hereinafter *Elements of Crimes*]. *Elements of Crimes* is an appendix to the Rome Statute. As specified in the Rome Statute, art. 9, "Elements of Crimes shall assist the Court in the interpretation and application of articles 6 [Genocide], 7 [War Crimes] and 8 [Crimes

listed as a crime against humanity in the Statute of the Special Court for Sierra Leone, but is not defined.[48] The Special Court has found the elements of the crime of sexual slavery under its statute to be similar to the elements of the crime against humanity of sexual slavery enumerated in the *Elements of Crimes*.[49] That the *Elements* could serve as persuasive authority for the Special Court is perhaps not surprising. The Rome Statute sets the norm in international criminal law, and, the Special Court's statute mirrors that of the Rome Statute regarding crimes of sexual violence.[50] There is currently no further case law on sexual slavery under either of these instruments.[51]

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against Humanity]." While sexual slavery can be prosecuted as either a crime against humanity or a war crime under the Rome Statute, the *Elements of Crimes* states that the crime shares two elements applicable to either category: (1) "The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty," and (2) "The perpetrator caused such person or persons to engage in one or more acts of a sexual nature." *Elements of Crimes*, art. 7, § 1(g)(2) at 17, art. 8, § 2(b) (xxii)(2) at 34, art. 8, § 2(e)(vi)(2) at 44.

[48] Statute of the Special Court, *supra* note 43, art. 2 (g). The Sierra Leonean Special Court's statute only gives the Court jurisdiction over sexual slavery as a crime against humanity

[49] *Prosecutor v. Alex Tamba Brima et al*, *supra* note 44, ¶ 109. The Trial Chamber II stated that the following elements define the crime of sexual slavery: "(1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. (3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population. (4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." However, the Trial Chamber did not elaborate on the contours of these elements.

[50] Article 2(g) gives the Special Court jurisdiction over the crimes against humanity of "[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," echoing the enumeration of those crimes in section 7 (1) (g) of the Rome Statute. Statute of the Special Court, *supra* note 43, art. 2 (g) *and* Rome Statute, *supra* note 46. *See also* Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J.INT'L L. 605, 626 (2004).

[51] It is noteworthy, nevertheless, that the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery found, in its judgment, which is advisory in nature, that the Japanese military and civilian authorities committed sexual slavery as a crime against humanity against women and girls in the context of the "comfort system" during World War II. The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa and the Gov't of Japan, Case No. PT-2000-I-T, 139-158 (Dec. 4, 2001), *available at* http://www1.jca.apc.org/vaww-net-japan/english/index.html, [hereinafter *Women's Tribunal for Japan's Military Sexual Slavery*].

Nonetheless, legal authors consistently view sexual slavery as a specific form or subcategory of enslavement, characterized by its sexual dimension.[52] Enslavement has been defined in the international jurisprudence, in *Prosecutor v. Kunarac*, as "the exercise of any or all of the powers attaching to the right of ownership over a person."[53] The indicators listed by the Trial Chamber to infer a situation of enslavement include "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, forced labour" and the buying, selling, or inheriting of a person or his or her labour or services.[54] This Article proposes that, by listing the crime of sexual slavery, the Statute for the Special Court and the Rome Statute specifically recognize cases in which slavery includes the specific factor of control of someone's sexuality, making such cases more visible and thus facilitating their prosecution.[55]

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[52] *See* MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 513 (2002); *Contemporary Forms of Slavery*, *supra* note 39, ¶ 30; Machteld Boot, *Article 7: Crimes against Humanity, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 142 (Otto Triffterer ed., 1999).

[53] Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 540 (Feb. 22, 2001) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [hereinafter *Kunarac – Trial*], *available at* http://www.un.org/icty/kunarac/trialc2/judgement/index.htm. Enslavement is similarly defined in the Rome Statute, *supra* note 46, art. 7, § 2(g), and the same wording is found in the *Elements of Crimes* for the crime of sexual slavery, *supra* note 47.

[54] *Kunarac – Trial, supra* note 53, ¶ 543. The Appeals Chamber affirmed the definition of enslavement and most of the indications of a situation of slavery (including control of sexuality), defined by the Trial Chamber in Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1A, Judgment in the Appeals Chamber, ¶ 116-19 (June 12, 2002) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [hereinafter *Kunarac – Appeal*], *available at* http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.htm. However, the Appeals Chamber did not consider it necessary to determine whether the particular aspect of the "mere ability to buy, sell, trade or inherit a person or his or her labours or services" was a necessary element of the crime since it was not the issue presented.

[55] *See* Brook Sari Moshan, Comment, *Women, War and Words: The Gender Component in the Permanent International Court's Definition of Crime against Humanity*, 22 FORDHAM INT'L L.J. 154, 181 (1998) (arguing that the enumeration of the crime of sexual slavery "ensures the conspicuity of the crime in the landscape of the Rome Statute, thus increasing the possibility that such crimes will be prosecuted"); *See also* Statute of the Special Court, *supra* note 43, art. 2(g); Oosterveld, *supra* note50.

Control of someone's sexuality may thus be considered the actus reus of the crime of sexual slavery,[56] or its "key indicator."[57] In the *Kunarac* case, the court found the accused guilty of enslaving the women they held captive in their apartments namely because they exercised control over the women's sexuality by extracting sexual favors from them at will. The rebels in the Sierra Leone conflict similarly exercised control over their "wives'" sexuality; these women had to submit, often under threat of violence, to all sexual contact desired by a sexual partner they did not choose. The rebels also exercised control over their reproductive faculties, ordering them to terminate pregnancy or forbidding them from doing so.

What makes these acts ones of *control* over the women's sexuality is that the women had no escape. They were captives or, as specified in the *Elements of Crimes*, they were deprived of their liberty.[58] The importance of not interpreting this deprivation of liberty in the narrow, physical sense of imprisonment was emphasized by some delegations during the negotiations of the *Elements of Crimes*:

> [T]he expression 'similar deprivation of liberty' does not exclude certain situations, which took place during the Rwandese and Bosnian conflicts, in which women, sexually abused, were not locked in a particular place and therefore were 'free to go,' but were in fact deprived of their liberty as they had nowhere else to go and feared for their lives.[59]

As McDougall stated:

> The mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery. . . . This is

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[56] *Women's Tribunal for Japan's Military Sexual Slavery*, *supra* note 56, ¶ 620, found that "the actus reus of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy." Thus, it considered that "control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership." *Id.*

[57] Oosterveld, *supra* note 50, at 605, 648.

[58] *Elements of Crimes*, *supra* note 44.

[59] Eve La Haye, *Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 183, 191-92 (Roy S. Lee ed., 2001) [hereinafter Lee, THE INTERNATIONAL CRIMINAL COURT].

> particularly true when the victim is in a combat zone during an armed conflict, whether internal or international in character.[60]

Thus, the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognized, in the *Kunarac* case, that the women were held captive in the apartments of the accused, even though the accused sometimes left the apartment door unlocked or gave the women the key: "[T]he girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured."[61] The Serb soldiers, well aware of this situation, exploited the vulnerability of the women, as did the rebels during the conflict in Sierra Leone.

The "wives," although not chained or confined, were captives. The rebels took deliberate measures to prevent them from escaping: they threatened the women with death if they tried to flee, carved the faction's initials onto their chests, and exercised pernicious psychological control over them by making them fear that their families would ostracize them. But the rebels, as in the *Kunarac* case, did not have much to fear by "leaving the door unlocked"; where could their "wives" go? With civil war ravaging the country, they would either be captured again or possibly subjected to even more appalling violence. Many of them had lost their families and had limited means of survival without this "husband," who at least offered some protection and support. The rebels took advantage of this overall situation, which made the women particularly vulnerable to subjugation.

The argument may be raised that these women consented to the arrangement; particularly those who "chose" to remain with their "husbands" after the conflict ended and were therefore no longer captives or deprived of their liberty. However, in *Kunarac*, the ICTY indicated that no one can consent to being enslaved.[62] The Appeals Chamber stated that lack

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[60] *Contemporary Forms of Slavery*, *supra* note 39, ¶ 29.

[61] *Kunarac – Trial*, *supra* note 49, ¶ 750.

[62] *Kunarac – Appeals Chamber*, *supra* note 54, ¶ 120. Oosterveld emphasizes that "[t]he fact that consent cannot serve as a defense to the crime of sexual slavery is another advance in international law." Oosterveld, *supra* note 50, at 640. As Oosterveld points out, a finding of the exercise of powers attaching to the right of ownership involves, by definition, a negation of consent. *See also* Comm'n on Human Rights, Sub-Comm'n on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Update to the Final Report*, 13, ¶ 51, U.N. Doc. E/CN.4/Sub.2/200/21 (June 6, 2000) (*prepared by* Gay J. McDougall), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/ (select the hyperlink to the Sub-Comm'n on the Promotion and Protection of Human Rights, then select

of consent is not an element of the crime of enslavement, and that, to the extent it might be relevant from an evidential point of view as going to the question of whether the Prosecutor has established that a power attaching to the right of ownership has been exercised, "circumstances which render it impossible to express consent may be sufficient to presume the absence of consent."[63] Those circumstances include "the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions."[64] If these factors, which were clearly present when the victims were abducted and throughout the conflict, persist after the conflict has ended, the women cannot have consented to staying with their "husbands." In such cases, given their limited socioeconomic options, the psychological pressures and the physical abuse from their "husbands," it is not implausible to believe that it would have been impossible for them to have given any real consent.

Other indications of enslavement defined in the *Kunarac* case are also found in the "forced marriages" that prevailed in Sierra Leone. The ICTY considered the domestic tasks the Serb soldiers made their captives perform—cooking, washing, cleaning—as forced labor, an indication of enslavement.[65] The rebels also exacted forced labor from the "bush wives," who had to perform the same domestic chores, in addition to farming and carrying looted items. Another indication of enslavement is the use of force or subjection to cruel treatment and abuse.[66] The rebels, as previously indicated, commonly beat their "wives." An additional factor that may be

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the hyperlink to the "52nd Session;" Once selected, choose the hyperlink to "Reports," and then select the hyperlink "E/CN.4/Sub.2/200/21").

[63] *Kunarac – Appeals Chamber, supra* note 50, ¶ 120.

[64] *Kunarac – Trial, supra* note 53, ¶ 542.

[65] *Id.* ¶ 543; *Kunarac – Appeal, supra* note 54, ¶ 119 (considering forced labor as an indicia of enslavement). With respect to the charges of enslavement against Kunarac, the Trial Chamber accepted that the women had to perform household chores and were treated as property. *Kunarac – Trial, supra* note 53, ¶¶ 740, 742. The types of household chores performed were not specified. However, with respect to the charges of enslavement against Kovac, a co-defendant of Kunarac, the Trial Chamber found that the girls had to do "the household chores, the cooking and the cleaning," and that Kovac "made them cook for him, serve him and do the household chores for him." *Kunarac – Trial, supra* note 53, ¶¶ 751, 780. The testimony of victims was replete with examples of such domestic tasks. *See* Testimony of FWS 87, FWS 75 and A.S., *id.* ¶¶ 63, 188, 210.

[66] *Kunarac – Trial, supra* note 53, ¶ 543; *Kunarac – Appeal, supra* note 54.

considered, but that is not a requirement for enslavement, is the provision of a monetary consideration;[67] this factor, however, is absent from the "forced marriages" in Sierra Leone, as the bush wives were not acquired in exchange for monetary or other compensation.

Thus, the mask of marriage falls, and the true face of the situation, with features of sexual slavery, is revealed. One question, however, remains to be asked and is certainly worth analysis: why was the concept of marriage used to describe this situation? The type of marriage that prevailed during the conflict is clearly not the same as a civil marriage presided over by a civil status officer.[68] A "forced marriage" lacks two essential elements to be considered a valid marriage under customary law: the consent of the wife's family, and the payment of a consideration (the future husband's gift of property or money to the wife's family).[69] And yet, the term "marriage" was used by the victims in their testimonies. One victim reported that: "I was taken as a wife by a commander . . . . He raped me everyday. . . . *He said he didn't have a wife* so I cooked and washed for him."[70] Could it be that the captivity of women during the Sierra Leone conflict was understood and referred to by the victims and their aggressors as "marriage" because the women were required to fulfill a role similar to that of wives in times of

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[67] *Kunarac – Trial*, *supra* note 53, ¶ 542 ("The 'acquisition'" or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone.") Echoing the *Kunarac* trial court's reasoning, Valerie Oosterveld argues that the use of monetary compensation as a proxy for enslavement would be too restrictive an interpretation of the *Elements of Crimes*. Oosterveld, *supra* note 50. For example, although the first element of the crime of sexual slavery is the exercise of "any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty," *Elements of Crimes, supra* note 47, could suggest that a monetary element is required in the crime of sexual slavery, Oosterveld convincingly argues that the reference to a "similar deprivation of liberty" does not limit the evaluation of powers attaching to a right of ownership to actions with a commercial or pecuniary aspect. *Id.* at 642-43. Her conclusion flows from the wording and the negotiating history of the *Elements of Crimes*. *Id.* at 648.

[68] *See* Bankole Thompson, *Internal Conflicts in Marriage and Inheritance in Sierra Leone: Some Anachronisms*, 1 AFR. J. INT'L AND COMP. L. 392, 393 (1989).

[69] These two elements are essential for the validity of a marriage. SMART, *supra* note 1, at 74, 79. Smart states that "marriage with marriage consideration" is the most common of the different types of customary-law marriages in Sierra Leone, *id.* at 24, but that consideration is still provided in the other types of marriage, where it takes the form of a service, a present or token, etc. *Id.* at 29-30, 83-84.

[70] HRW REPORT, *supra* note 2, at 38 (emphasis added).

peace? Are there similarities between "forced marriage" during times of war and marriage during times of peace in Sierra Leone?

II. CUSTOMARY MARRIAGE IN SIERRA LEONE: THE EXPLOITATION OF WOMEN MASKED BY TRADITION

Customary law is . . . the centerpiece of African culture. Unfortunately, it is also the source of women's disempowerment.[71]

A. Foray into Customary Law

Customary law, which is unwritten, is recognized by the Constitution of Sierra Leone and is defined therein as "the rules of law by which customs are applicable to particular communities in Sierra Leone."[72] Applied in the provinces by the local courts, which are made up of elders

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[71] CORINNE A.A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION: TRADITIONAL PRACTICES HARMFUL TO WOMEN'S REPRODUCTIVE HEALTH IN SUB-SAHARAN AFRICA 181 (2002).

[72] CONSTITUTION, ch. XII, § 3 (1991) (Sierra Leone), *available at* http://www.statehouse-sl.org/constitution/constitution-xii.html. Chapter XII, *inter alia*, states:

(1) The laws of Sierra Leone shall comprise –
a. this Constitution
b. laws made by or under the authority of Parliament as established by this Constitution;
c. any orders, rules, regulations and other statutory instruments made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;
d. the existing law; and
e. *the common law.*

(2) The common law of Sierra Leone shall comprise the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the *rules of customary law* including those determined by the Superior Court of Judicature.

(3) For the purposes of this section the expression *"customary law" means the rules of law which by custom are applicable to particular communities in Sierra Leone.*

Id. (emphasis added). Although there are many different ethnic groups and/or tribes in Sierra Leone, *see* 3b TRC REPORT, *supra* note 3, at 85, 233 (stating there are seventeen ethnic groups), HRW REPORT, *supra* note 2, at 15 (stating there are sixteen ethnic groups), and Smart, *supra* note 1, at 1 (stating that there are twelve tribes within Sierra Leone), and the specifics of customary law may differ according to the region or tribe, the author examines here what appears to be the general characteristics that are found in the customary laws of these groups. SMART, *supra* note 1, at 1, 6.

and tribal chiefs, customary law governs the everyday lives of more than half of the population,[73] the majority of which is rural.[74] This Article will therefore focus on customary marriage, although it coexists in Sierra Leone with other types of marriage.[75]

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[73] The exact percentage of the population to which customary law applies varies depending on the source consulted. *See* HRW REPORT, *supra* note 2, at 16 (stating that "customary law governs at least 65 percent of the population"); 3b TRC REPORT, *supra* note 3, at 98 (stating that customary law "applies to the majority of the population"); AMNESTY INT'L, SIERRA LEONE: NO ONE TO TURN TO: WOMEN'S LACK OF ACCESS TO JUSTICE IN RURAL SIERRA LEONE 2 (2005), http://web.amnesty.org/library/pdf/AFR510112005ENGLISH/$File/AFR5101105.pdf [hereinafter AMNESTY INT'L, SIERRA LEONE PAPER] (stating that customary law is "recognized and relevant to 85% . . . of the local population," and explaining that this percentage is "found in numerous reports and . . . commonly quoted to Amnesty International as the percentage of people who live in the rural areas"); *see also* NIBOE THOMPSON, COMMONWEALTH HUMAN RIGHTS INITIATIVE, IN PURSUIT OF JUSTICE: A REPORT ON THE JUDICIARY IN SIERRA LEONE (2002), http://www.humanrightsinitiative.org/publications/ffm/sierra_leone_report.pdf ("Customary law, as opposed to English Common Law, applies to 85 per cent of the population living outside the Western Area and regulates matters of marriage, divorce, succession and land tenure in the provinces."); KLAUS DECKER, CAROLINE SAGE, & MILENA STEFANOVA, WORLD BANK, LAW OR JUSTICE: BUILDING EQUITABLE LEGAL INSTITUTIONS, http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law_or_Justice_Building_Equitable_Legal_Institutions.pdf ("In Sierra Leone, about 85 percent of the population falls under customary law."); LEILA CHIRAYATH, CAROLINE SAGE & MICHAEL WOOLCOCK, WORLD BANK, CUSTOMARY LAW AND POLICY REFORM: ENGAGING WITH THE PLURALITY OF JUSTICE SYSTEMS (2005), http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf ("In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law."). Thompson, *supra* note 68, at 394, wrote in 1989 that at least seventy-five percent of marriages in Sierra Leone were customary. The author is not aware of the present statistics with respect to the prevalence of customary marriages, but taking into account the large application of customary law to the population, this Article assumes that customary marriage is still a widely contracted type of union.

[74] HRW REPORT, *supra* note 2, at 16.

[75] "There are four types of marriage systems in Sierra Leone: Christian marriage; Civil Marriage; Mohamedan Marriage; and Customary Law marriage." 3b TRC REPORT, *supra* note 3, at 112 (citations omitted). Customary law, Islamic law, and general law (consisting of statutory law and common law) coexist in Sierra Leone. *See* HRW REPORT, *supra* note 2, at 15-16. This analysis of customary marriage is far from exhaustive: the sources on customary law in Sierra Leone are limited and the custom can really be understood only by being "on site." Smart, *supra* note 1, is the only general source written specifically on family customary law in Sierra Leone that the author has found. To supplement the lack of resources on Sierra Leone customary law, the author explored other sources on Africa—the elements discussed in this analysis being, first and foremost, basic elements of African customary law.

In customary law, marriage serves three main purposes: procreation,[76] the provision of domestic labor by the woman ("to take care of the matrimonial residence, do the domestic work, care for the children, and work for her husband as directed by him"),[77] and the creation of an alliance between two families. In fact, customary marriage has traditionally been considered the union of two families rather than two individuals.[78] While the consent of the wife's family is necessary for a valid marriage, that of the wife is not.[79] Customary marriage often takes place when girls are very young, as soon that they have developed breasts, started menstruating, and been initiated in women's secret society.[80] This initiation involves the traditional practice of female circumcision, believed to encourage virginity until marriage and faithfulness thereafter due to its diminishment of sexual pleasure.[81] In a society where remaining a virgin

[76] PACKER, *supra* note 71, at 43.

[77] SMART, *supra* note 1, at 105.

[78] *Id.* at 21-22; PACKER, *supra* note 71, at 43; SOUTH AFRICAN LAW COMMISSION, THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES 40 (1998), *available at* http://www.law.wits.ac.za/salc/reportcusto marriage.pdf [hereinafter "SALC"]. Although this is a South African study, it is relevant because it discusses African custom in general.

[79] SMART, *supra* note 1, at 62, 73-74; SALC, *supra* note 78, at 44-45, 72, 76.

[80] SMART, *supra* note 1, at 67; PACKER, *supra* note 67, at 25; 3b TRC REPORT, *supra* note 3, ch. 3, para. 84, at 103, ch. 4, para. 100, at 254; HRW REPORT, *supra* note 2, at 17. *See generally*, on early marriages, Inocenti Research Ctr., UNICEF, *Early Marriage*, 7 INOCENTI DIGEST 1 (2001), http://www.unicef.org/childrenandislam/downloads/early_marria ge_eng.pdf. [hereinafter "UNICEF"].

[81] SMART, *supra* note 1, at 43. Packer writes that "[t]here is a widespread belief that women are otherwise incapable of controlling their sexual urges. The operation therefore needs to be done to 'calm' a girl down and make her submissive." PACKER, *supra* note 71, at 21. Refusal of the practice might lead to social stigma. SMART, *supra* note 1, at 44. Sierra Leonean women justify their submission to this practice—which they themselves perpetuate despite all the harmful effects on their health—by saying that it is "for the sake of tradition." PACKER, *supra* note 71, at 23. Fifty-six percent of the women surveyed in a study conducted in Sierra Leone in 1998 said they submitted to the practice because of "tradition," twenty-three percent because of the need for social recognition, and eleven percent for religious reasons. *Id.* An estimated ninety percent of Sierra Leonean women undergo the operation. Esther M. Kisaakye, *Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price*, *in* HUMAN RIGHTS OF WOMEN: INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES 268, 271 (Wolfgang Benedek et al. eds., 2002). *See generally*, on female genital mutilation, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. [OHCHR], HARMFUL TRADITIONAL PRACTICES AFFECTING THE HEALTH OF WOMEN AND CHILDREN: FACT SHEET NO. 23 (1996), http://www.unhchr.ch/html/menu6/2/fs23.htm.

until marriage is a fundamental value, parents hasten to marry their daughters when they reach puberty in order to relieve themselves of the enormous responsibility of guarding their virginity.[82] Families may even coerce them into these marriages.[83] In many cases, girls are destined to a union to which they have not consented,[84] which might be termed a "forced marriage."[85] It would appear that the consent of the bride to be is being sought more and more in modern Sierra Leone,[86] which would make these unions more like arranged marriages in which the parties consent to the parents' choice.[87] Different factors, however, make it very difficult to determine whether the bride-to-be "consents" to the union, especially when she is only a child:

> Although the majority of women tacitly consent to these practices, *the reality remains that their option not to consent is essentially non-existent. This is particularly true in the case of female children. For instance, the ability of a young girl to refuse her parents' choice of husband or their decision that she undergo circumcision is often fictive.* Culturally, they lack the power to

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[82] Oluyemisi Bamgbose, *Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl*, 10 U. MIAMI INT'L & COMP. L.REV. 127, 131-32 (2001); UNICEF, *supra* note 80, at 6. Note, however, that the TRC REPORT, *supra* note 3, at 103, suggests that virginity no longer carries as much significance as it did in the past, especially in light of sexual violence women suffered during the conflict.

[83] 3b TRC REPORT, *supra* note 3, at 254.

[84] SMART, *supra* note 1, at 62, 74 (stating that "instances stil occur when young girls are given in marriage by their parents against the girls' will or consent" and that "marriage can still be negotiated for a daughter by her father without her consent"); *see also* U.N. Comm. of the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child : Sierra Leone*, paras. 24-25, U.N. doc. CRC/C/15/Add.116 (2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.116.En?OpenDocument ("The Committee [was] . . . concerned at the practice of arranging marriages—under customary law—for very young girls, in particular against the free will of the child" and made recommendations in order to avoid girls being "forced into marriage.").

[85] Ain O Salish Kendra & Shirkat Gah, INTERRIGHTS, *Information Gathering Exercise on Forced Marriage—Submission to the British Home Office's Group on Forced Marriage*, 2000 CIMEL/INTERRIGHTS ¶ 2, *available at* http://www.soas.ac.uk/honourcrimes/FMsubmission.htm [hereinafter "INTERRIGHTS"] ("Forced marriage—any marriage conducted without the valid consent of both parties—may involve coercion, mental abuse, emotional blackmail, and intense family or social pressure.").

[86] SMART, *supra* note 1, at 73-74; 3b TRC REPORT, *supra* note 3, at 103.

[87] INTERRIGHTS, *supra* note 85.

> decide and demand otherwise. If they do insist otherwise, domestic violence or ostracism may result. They have few, if any, meaningful alternatives to, or escape from, such severe results.[88]

Because they depend on their family and their ability to withhold their consent is severely limited by their sociocultural milieu, many girls in Sierra Leone clearly do not choose their sexual partner.

Control over female sexuality extends into marriage. Domestic violence is socially accepted: under customary law, the man has the right to beat his wife if she "misbehaves."[89] The concept of marital rape does not exist in customary law,[90] and women have a duty to submit to their husband's sexual desires, with a few exceptions.[91] In early marriages, where the man is usually much older and dominant, sexual relations are often forced relations: "in many (but not necessarily all) cases of early marriages, girls are coerced by their spouses into having sex and lack the social and physical power to refuse."[92] These early sexual relations mean early pregnancies, even though the girl is not physically mature and thus not ready to carry a child, especially not repeatedly. The negative repercussions

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[88] PACKER, *supra* note 71, at 76 (emphasis added). In the same vein, see SALC, *supra* note 78, at 45, 47-48; UNICEF, *supra* note 80, at 8.

[89] SMART, *supra* note 1, at 108-09, 124; 3b TRC REPORT, *supra* note 3, at 105; PHR Report, *supra* note 3, at 55 (noting that "60% of women [surveyed by Physicians for Human Rights] expressed the view that a man has the right to beat his wife if she disobeys"); *see also* PACKER, *supra* note 71, at 31 (observing that domestic violence is socially condoned in sub-saharan Africa).

[90] There are actually no laws in Sierra Leone relating to marital rape. 3b TRC REPORT, *supra* note 3, at 112, 120; HRW REPORT, *supra* note 2, at 20, 24.

[91] SMART, *supra* note 1, at 101 ("A wife must never refuse her husband sexual intercourse unless she has a reasonable cause. The categories of reasonable cause are: serious illness which renders the wife physically incapable of having sexual intercourse; menstruation, suckling a very young child before the prescribed period for weaning; intercourse during the daytime or in the bush and, among the tribal muslims, the feast of Ramadan.") (citation omitted). More than sixty percent of the Sierra Leonean women recently surveyed "expressed the view that . . . it is a wife's duty/obligation to have sex with her husband even if she does not want to." PHR REPORT, *supra* note 3, at 55.

[92] PACKER, *supra* note 71, at 67. 3b TRC REPORT, *supra* note 3, at 254 (emphasizing that "when a child or adolescent is compelled to marry at a young age and she refuses to consent to sexual relations or is too young to consent, such marriages may result in sexual violence").

on the physical health of these girls range from growing problems to complications during childbirth and death.[93]

Control over female sexuality is often justified by the payment of a consideration, i.e., the husband's gift of property to his future wife's family, which is the second condition for a valid marriage under customary law.[94] Men "argue that if they paid [bridewealth], they should have full power over their wives."[95] On this assumption, "husbands may claim the right to chastise their wives and to demand sexual favors at will, or the power to make decisions in matters such as adopting birth-control measures."[96] With the payment of consideration, there is an implicit expectation that the women will bear children.[97] Some authors see consideration as a transfer of rights over the reproductive and productive abilities of the woman,[98] or go so far as to maintain that it is used to purchase the woman and her reproductive faculties (to "buy a womb");[99] others see it as compensation to the woman's family for the loss of their daughter, a tribute to their dignity, and a stabilizing factor for the marriage.[100] It has also been argued that this African practice has changed and become corrupted in a capitalistic context where the goods traditionally offered for marriage consideration—food,

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[93] For an analysis of the harmful effects of early pregnancy on the health of girls, see Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS 256, 257-59 (Julie Stone Peters & Andrea Wolper eds., 1995); UNICEF, *supra* note 80, at 10-11.

[94] Smart, *supra* note 1, at 84. Traditionally, the wife's family was given animals, food, and clothing. *Id.* at 80. However, the wife's family can waive payment of marriage consideration. *Id.* at 83.

[95] SALC, *supra* note 78, at 93.

[96] *Id.* at 94.

[97] PACKER, *supra* note 71, at 40.

[98] *See, e.g.*, *id.* at 40; Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J. L. & FAM. 314, 364 (1993).

[99] *See, e.g.*, Naa-Adjeley Adjetey, *Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U.L. REV. 1351, 1359 (1995); Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS, *supra* note 93, at 135, 139. *But see* SMART, *supra* note 1, at 78-79.

[100] As discussed in Kisaakye, *supra* note 76, at 280-281; SALC, *supra* note 78, at 50.

clothes, and cattle—have been mainly replaced by money.[101] Many families see the bridewealth as an opportunity to acquire capital, so they request enormous considerations and may force the daughter to "consent" to the most profitable marriage.[102] "The outcome of such phenomena is that some men virtually claim that they own their spouses, just as a man would claim a piece of furniture as his own."[103]

The consideration can be seen as binding the women to the union:

> [Bridewealth] has a concrete effect on women's rights and freedoms only in the way that it may bind them to unwanted marriages. If a wife seeks divorce, her family is theoretically obliged to return the [bridewealth], and rather than do so, they may force her to put up with an unhappy relationship.[104]

In Sierra Leone, depending on the tribe, there are no, or very few, recognized reasons (such as impotence or persistent cruelty) for which a wife may divorce her husband without an obligation to refund the marriage payments.[105] By contrast, the consideration will be refundable when a man requests a divorce for reasons as varied as his wife's repeated disobedience, persistent laziness in performing household tasks, and noncooperation with

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[101] *See* Patrick Iroegbu, *Marrying Wealth, Marrying Money: Repositioning Igbo Women and Men*, *in* CHANGING GENDERS IN INTERCULTURAL PERSPECTIVES 103, 110-13 (Barbara Saunders & Marie-Claire Foblets eds., 2002) (analyzing "the impact of cash economy" in Nigeria); SALC, *supra* note 78, at 51-52; PACKER, *supra* note 71, at 40 (citing a publication concerning brideprice in Kenya). Smart, *supra* note 1, at 80, notes that in Sierra Leone, though many of the traditional goods are still given as part of the marriage consideration, the main portion is now paid in money.

[102] THE LAWYER'S CENTRE FOR LEGAL ASSISTANCE, UNEQUAL RIGHTS: DISCRIMINATING LAWS AGAINST WOMEN IN SIERRA LEONE 29 (2005), http://www.lawcla.org/Publications/unequalrights.pdf. ("[I]n some instances girls are married off early so the poverty-stricken parents receive a substantial sum of money.")

[103] Packer, *supra* note 71, at 112 (quoting Emmanuel G. Bello, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 194 HAGUE RECUEIL DE COURS, 9-268, 154 (1985)). Emmanuel Bello served as a Commissioner to the African Commission, and discussed in this article the fact that some families force their girls into marriage in return for money.

[104] SALC, *supra* note 78 at 54-55; in the same vein, *see* Adjetey, *supra* note 99, at 1359 ("Married women are . . . trapped within restrictive marriages unless the brideprice can be returned.").

[105] SMART, *supra* note 1, at 158-60.

co-wives.[106] In many cases, the family is simply unable to pay back the consideration.[107] Divorce is thus rendered difficult for a woman to obtain under customary law.

This foray into customary law, albeit brief, enables us to answer the question asked at the outset: why was the concept of "marriage" used to refer to the type of union that prevailed between rebels and their captives during the conflict in Sierra Leone?

B. Marriage—An Institution of Sexual Slavery?

In light of the information reported, it can be asserted that "bush wives" during the conflict were required to perform the same functions as wives under customary law: to carry out all the domestic tasks and be sexually submissive. Thus, "bush wives" played the traditional role of wives to the combatants, but under extreme circumstances.[108] This foray into customary law provides some troubling observations: some of the characteristics of "forced marriage" during the conflict are also found in customary marriage. As previously indicated, the Special Court for Sierra Leone could find these characteristics, in the context of "forced marriage," as constituting the crime of sexual slavery.[109] The primary characteristic common to both types of marriage is control over the woman's sexuality. In customary marriage, which is often early marriage, the girl may be bound to a sexual partner who is not of her choosing; her parents indicate to her, when she has barely reached puberty, the man they want her to marry, thus exercising authority that she cannot oppose. In somes cases, families may even coerce her into marriage. Control over sexuality is found particularly within customary marriage, as the woman has a duty to bear children for the man, who has paid a consideration. Further, she must submit to him sexually without exception, as the concept of marital rape does not exist. Moreover, early marriages often result in forced sexual relations.

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[106] Many different reasons for divorce can be invoked. *Id.* at 149-58.

[107] HRW REPORT, *supra* note 2, at 18; LAWCLA, *supra* note 102, at 29 ("[A]t times women cannot leave unhappy or abusive relationships just because their parents are unable to repay the dowry.") (citation omitted); Adjetey, *supra* note 99, at 1359.

[108] For a similar observation, see also TRC REPORT, *supra* note 3, at 164. The author arrived at this conclusion independently of the TRC REPORT; however, it is significant that Sierra Leonean citizens have recognized this possibility as well. For a discussion of the composition of the TRC, *see infra* note 246.

[109] See *supra* Section I.B. for an analysis of the criteria for sexual slavery and their application to "forced marriage" in the context of the conflict.

What makes this situation one of veritable control over the woman's sexuality is that she cannot change her situation unless she goes to great lengths. Divorce is difficult to obtain, and is often an illusion if her family cannot or will not pay back the consideration they received when she married. She could be considered a captive of the marriage. In a broader sense, what deprives her of her freedom to change her situation are the social dictates and cultural norms that comprise tradition. This proves to be a formidable barrier because "there is no social safety net on which to fall back should they choose to break with tradition."[110] If she rejects the sexual partner imposed by her parents, refuses sexual relations during marriage, uses birth control, ends sexual relations with her partner by obtaining a divorce, or otherwise questions her condition and tradition, she will face ostracism from her community.[111] In a sociocultural context with so few alternatives for women, it is difficult to contend that they ever freely consented to their servile condition:

> The women interviewed in the study thus expressed their wishes (for themselves as well as their daughters) not to be violated sexually or otherwise by their husbands or anybody else, and not to be subjected to abuse or violence. However, many of them also expressed that they were aware that they would not be able to fulfill these wishes in light of the scope of choices available to them. When the cards were down, they would consistently choose to subject their lives and their bodies to harmful socio-cultural norms and practices for the sake of the benefits loyalty to these norms would bring. . . . In fact, what women consider an acceptable trade-off depends on their real alternatives and their negotiating power. *The limits of these choices are the limits of their freedom* . . . .[112]

In addition to control over the woman's sexuality in a context of "captivity" in the broad sense, there are arguably other indications of a situation of enslavement within customary marriage: the use of force, subjection to cruel treatment and abuse (domestic violence being a socially accepted

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[110] PACKER, *supra* note 71, at 75.

[111] *See* Florence Butwega, *The Challenge of Promoting Women's Rights in African Countries*, *in* OURS BY RIGHT – WOMEN'S RIGHTS AS HUMAN RIGHTS 40 (Joanna Kerr ed., 1993) ("Individual women face the danger of social isolation. One common problem is ostracization—a woman who takes her husband to court, for battering her for example, will be shunned by her community, including the women.").

[112] PACKER, *supra* note 71, at 138-39 (emphasis added).

practice), and monetary compensation (the consideration). The provision of money or other compensation, although not a requirement, is indicative of a situation of enslavement.[113] Consequently, an argument could be made that the payment of marriage consideration is an indicia of the exercise of ownership over someone. As some authors maintain, consideration constitutes the purchase of a woman and her productive and reproductive capabilities.[114] The *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* of 1956 provides that "[a]ny institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration or in kind to her parents" creates a servile condition.[115] Could the experience of sexual slavery be concealed by the concept of customary marriage in Sierra Leone in the same way that it was masked by that of "forced marriage" in the context of the conflict? Indeed, "[s]lavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves[.]. . . Involuntary servitude, even if tempered by humane treatment, is still slavery."[116] Nmehielle, in discussing the prohibition of all forms of slavery in Article 5 of the *African Charter on Human and Peoples' Rights*,[117] suggests that "other areas of concern are forced marriages in exchange for dowry [and] marital servitude[.]"[118] Equating customary marriage with sexual slavery would certainly be an overgeneralization. In the first place, it would be problematic because customary marriage is not concretely a single institution with uniform procedures and effects; rather, the expression can

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[113] See discussion, *supra*, Section I.B.

[114] David Weissbrodt & Anti-Slavery International, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery*, ¶ 53, U.N. Doc. E/CN.4/Sub2 /2000/3 (2000), http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.3.En?OpenDocument. Weissbrodt considers forced marriage and the sale of women as practices akin to slavery.

[115] Sept. 7, 1956, 266 U.N.T.S. 3 (*upheld by* Sierra Leone on Mar. 13, 1962), art. 1(c)(i) & 7(b)(D), *available at* http://www.ohchr.org/english/law/pdf/slavetrade.pdf.

[116] *Kunarac – Appeal*, *supra* note 54, ¶ 123 (internal citations and quotations omitted).

[117] African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59, ***available at*** http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols /Banjul%20Charter.pdf [hereinafter African Charter].

[118] V.O.O. NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 89 (2001).

best be understood in terms of its distinctive features.[119] A case-by-case study would surely reveal that not all women in customary marriages are sexual slaves. It is nevertheless the case that customary law tolerates many features or practices that, when put together in certain marriages, take the shape of sexual slavery. It is this Article's position that when a girl enters into a marriage with such features—i.e., she is forced into an early marriage where forced sexual relations are likely, beatings are to be considered normal, and divorce is an impossibility—she may be considered a sexual slave. Although such characteristics (which do not necessarily embrace all instances of sexual slavery) might well not be found in all marriages under customary law, they are certainly a reality for many girls in Sierra Leone.

The foregoing analysis thus leads to the disturbing conclusion that customary marriage in Sierra Leone might be considered an institution of sexual slavery. Barry openly denounces the family as an institution of sexual slavery not only tolerated by patriarchal societies, but well protected from any criticism because it is presented as culturally specific:

> *The family as an institution of sexual slavery* and one that *cultivates preconditions* to slavery is a condition for women throughout the world, in every patriarchal order. Many women's common experience of female sexual slavery across the cultures is *doubly protected* from exposure: first, it is *hidden in the privacy of the home* and second, it is *justified and protected as culturally specific* and therefore a culturally unique practice.[120]

Barry's assertions recently proved to be incredibly well-founded in the area of international criminal law.

C. Rome Statute Negotiations and Sexual Slavery in Marriage

The Rome Statute negotiations reveal that several states feared some of their traditional and religious practices related to the family would be characterized as sexual slavery. When discussing the inclusion of sexual slavery as a crime against humanity in the statute, "[t]hese States feared that the law of crimes against humanity was too ambiguous and might be used by activist judges not simply to deal with atrocities but as a tool of 'social

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[119] Smart, *supra* note 1, at 21, uses this expression to refer "to all marriages celebrated and recognised as valid under any system of customary law in force in Sierra Leone. It must be understood that in any one customary law, there may be several different types of valid customary-law [sic] marriages."

[120] BARRY, *supra* note 45, at 178 (emphasis added).

engineering.'" [121] For example, a "group of Arab States" was concerned that certain laws, such as those that "made obtaining a divorce more difficult for women than for men," would "amount[] to a crime against humanity of 'sexual slavery' or 'imprisonment.' They recognized that such laws and norms were not well-regarded by others and might be seen in some cases as raising human rights issues, but they did not believe that they amounted to crimes against humanity."[122]

A crime against humanity can, in fact, be committed in times of peace.[123] Any of the acts listed in Article 7 of the Rome Statute can constitute such a crime "when committed as part of a widespread or systematic attack directed against any civil population, with knowledge of the attack,"[124] this attack being "pursuant to or in furtherance of a State or organizational policy to commit such attack."[125] Could a state's tolerance of customary practices violating women's rights be seen as a policy "by omission?" Acording to Robinson, "[t]he underlying concern of the delegations advocating cultural references was that Western judges would apply an expansionist interpretation of crimes against humanity . . . They feared the law of crimes against humanity would be used to 'Europeanize the world.'"[126] On the basis of this fear, the states sought to protect their traditional family-related norms by ensuring that these practices did not come within the scope of international criminal law. Specifically, the Arab states sought to limit the crime of enslavement by specifying in the

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[121] Darryl Robinson, *The Context of Crimes against Humanity*, *in* Lee, THE INTERNATIONAL CRIMINAL COURT, *supra* note 59, at 65. The states interested in these issues included the "United Arab Emirates and Bahrain on one hand, and Canada, Switzerland, and Lichtenstein on the other hand, with the U.S. working to bring these delegations toward a common agreement." *Id.* at 68 n.30. However, "several delegations, such as Egypt, Sudan, Turkey, China, India and Indonesia, continued to strongly oppose the new suggestions for compromise." *Id.* at 69.

[122] *Id.* at 65.

[123] BOOT, *supra* note 52, at 477; Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, *in* INTERNATIONAL CRIMINAL COURT–THE MAKING OF THE ROME STATUTE 79, 92-93 (Roy S. Lee ed., 2002) [hereinafter MAKING OF THE ROME STATUTE]. These authors trace the evolution of international law through various international instruments, and through this international jurisprudence, to explain why Article 7 of the Rome Statute does not require any connection with an armed conflict.

[124] Rome Statute, *supra* note 46, art. 7, § 1.

[125] *Id.*, art. 7, § 2(a).

[126] Robinson, *supra* note 121, at 69.

Elements of Crimes[127] that "[p]owers attaching to ownership does not include rights, duties and obligations incident to marriage between a man and a woman or between parent and child."[128] They also sought to limit the crime of sexual slavery by specifying that "[p]owers attaching to ownership do not include rights, duties and obligations incident to marriage between a man and a woman."[129] It was then proposed that "family matters"[130] be excluded from crimes against humanity, and that a more restrictive exemption be included "to the effect that 'acquiescence in the long standing cultural or religious norms concerning family matters' would not suffice to satisfy the policy element."[131] However, for the rest of the international community, such exemptions introducing the concept of cultural relativity in international criminal law were unacceptable, as crimes against humanity are intended to be universal by definition.[132] The parties finally agreed to indicate in the *Elements* that crimes against humanity must be strictly construed,[133] and that, for a state to have a policy to commit an attack

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[127] *Elements of Crimes*, *supra* note 47. It should be borne in mind that *Elements of Crimes* assists the Court in the interpretation of genocide, war crimes, and crimes against humanity.

[128] *Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity*, Preparatory Comm'n for the Int'l Criminal Court, Working Group on Elements of Crimes, art. 7(1)(c), U.N. Doc. PCNICC/1999/WGEC/DP.39 (1999), *available at* http://documents.un.org (Select "simple search," and insert "PCNICC/1999/WGEC/DP.39" in the "Symbol" item. Once entered, select the hyperlink to the English document version) [hereinafter *Arab States' Proposal*]. *See also* Robinson, *supra* note 121, at 65.

[129] *Arab States' Proposal*, *supra* note 128, art. 7 (1) (g) (2). *See also* La Haye, *supra* note 59, at 191. Regarding rape, the objecting states also sought to specify that "[n]othing in these elements shall affect natural and legal marital sexual relations in accordance with religious principles or cultural norms in different national laws." *Arab States' Proposal*, *supra* note 128, art. 7(1)(g)(1). *See also* La Haye, *supra* note 59, at 188.

[130] Robinson, *supra* note 121, at 66.

[131] *Id.*

[132] *Id.* at 69.

[133] *Elements of Crimes*, *supra* note 47, art. 7, Introduction, at 9 ("Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.").

against a civilian population, it must actively promote or encourage such an attack.[134] A policy that can be inferred only on the basis of the fact that the State abstains from any action—except under exceptional circumstances—is difficult to prove.[135] Some authors maintain that the restrictive language of the *Elements* is contrary to the definition of crimes against humanity given in the Rome Statute, which seems broad enough to allow for a policy by inaction.[136] It can, however, be submitted that several states agreed to be party to the Rome Statute because they were assured that the definition of crimes against humanity would not be widely used or construed to eradicate their tolerated customary norms and practices that potentially violate human rights, and that the International Criminal Court, "intended as a criminal court, would [not] transform itself into a body dealing with all kinds of human rights issues."[137]

The Special Court for Sierra Leone, like the International Criminal Court, has jurisdiction over the crime of sexual slavery as a crime against humanity.[138] Although the Statute for the Special Court does not explicitly require armed conflict or state policy to be behind the attack,[139] the Court is focusing on acts of sexual violence, including sexual slavery, that were perpetrated during the conflict. However, it is not on the court's agenda to review those customary marriages that harbor the acts of sexual slavery. The Special Court for Sierra Leone, like the ICC, exists to punish the most serious crimes of concern to the international community, thus demonstrating that some conduct is unacceptable to the entire international

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[134] *Id.* art. 7, § 1(a)(3).

[135] *Id.* art. 7 n.6 ("A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organization action.")

[136] BOOT, *supra* note 52, at 484.

[137] Robinson, *supra* note 121, at 70.

[138] Statute of the Special Court, *supra* note 43, art. 2(g).

[139] *Id.* The Statute of the Special Court only specifies that the crimes listed in art. 2 (crimes against humanity) must have been committed "as part of a widespread or systematic attack against any civilian population." The Special Court Trial Chamber II, reviewing international jurisprudence, canvassed what were the elements of crimes against humanity pursuant to section 2 of its Statute. *See* Prosecutor v. Alex Tamba Brima et al, *supra* note 44, ¶¶ 40-42.

community.[140] If traditional practices were to fall within the international criminal law by means of a broad interpretation of what constitutes a "crime against humanity," particularly the concepts of attack against a population and of state policy, one can wonder whether state parties to the Rome Statute—especially those who objected to criminalization of state inaction to certain customary practices— would see the ICC as a tool of social engineering. As one European delegate stated, "the Court was 'created to deal with the most serious international crimes, not as a panacea for all ills' and the Court 'must maintain its focus on only the most serious international crimes if it is to maintain its credibility and stature.'"[141]

Nonetheless, by creating so much debate around the definition of crimes against humanity, and by fearing that the definition would be so broad as to reach some of their traditional practices, those states raised a lot of dust that is not about to settle. They implicitly recognized that many of these practices violate women's rights, as exemplified by their quick anticipation of the argument that women may be, in some customary law scenarios, sexual slaves within marriage. More importantly, however, their resistance made it so that the statute did not represent any real threat to their customs regarding marriage, despite such a possibility. These observations are very disquieting. As Ray notes, "[i]nternational human rights law through a war crimes tribunal addresses only one moment during entire lives of sex discrimination and sexual terrorism . . . . [It] ignores each incident of sexual terrorism until a soldier representing a state violates women's rights during time of 'war.'"[142]

Does this mean that the fabric of traditional practices violating women's rights are not jeopardized by the international criminal law's recognition of such acts of sexual violence as crimes? In other words, if it is true that customary marriage and the "forced marriage" that prevailed during the Sierra Leone conflict share certain characteristics, and if these characteristics were found by the Special Court for Sierra Leone as

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[140] Cherie Booth, *Prospects and Issues for the International Criminal Court: Lessons from Yugoslavia and Rwanda, in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 157, 178 (Philippe Sands ed., 2003). The preamble of the Rome Statute, *supra* note 46, is also revealing in that it specifies that the ICC has "jurisdiction over the most serious crimes affecting the international community as a whole."

[141] Robinson, *supra* note 121, at 70.

[142] Amy E. Ray, *Gender-Based Terrorism in the Former Yugoslavia*, 46 AM. U. L. REV. 793, 830 (1997).

constituting a crime of sexual slavery in the case of "forced marriage," would such characteristics of customary marriage be completely protected from any criticism?

III. CHARACTERIZATION OF "FORCED MARRIAGE" AS A CRIME OF SEXUAL VIOLENCE BY INTERNATIONAL CRIMINAL JUSTICE—THE IMPACT ON CUSTOMARY MARRIAGE IN SIERRA LEONE

A. The Transforming Power of the Concept of Autonomy

> Rape as a tactic of war is a sexual abuse that targets female sexuality, even though its primary purpose is not to control female sexuality. By contrast, forced child marriage, while not a sexual act, is in large part perpetuated in order to prevent girls from engaging in premarital sex. *Both of these abuses should be denounced as human rights violations that compromise women's sexual autonomy . . . .*[143]

While the primary purpose of "forced marriage" in the Sierra Leone conflict may have been to terrorize the civilian population for strategic military ends, control over female sexuality was, as previously indicated, one of its prominent characteristics. It is also a prominent characteristic of customary marriage. The young age of the girl when married, the payment of a consideration perceived as giving the man "rights" over the woman, and the non-existence of the concept of marital rape all form part of the framework of customary marriage and serve to ensure control over female sexuality. For Adjetey, these norms violate the reproductive autonomy of women and their ability to make decisions "on whether or not to have sex, whether to have children, how many children to have and the spacing of her births, whether to use contraception and the type of contraception, and whether to carry a pregnancy to term."[144] In a broader sense, this Article submits that they violate the sexual autonomy of women—"the ability of women to make decisions about when, how and with whom to conduct their sexual lives . . . [and] to control their bodies,"[145] as well as "the freedom to determine one's own experiences, to choose how and with whom one

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[143] Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 226 (1995) (emphasis added).

[144] Adjetey, *supra* note 99, at 1352.

[145] Lai & Ralph, *supra* note 143, at 201.

expresses oneself sexually."[146] In short, the control over female sexuality that is characteristic of the sexual slavery in both "forced marriage" and customary marriage violates the sexual autonomy of women. In identifying "forced marriage" as as a form of sexual slavery, such criminalization could have repercussions, although indirect, on customary practices that similarly violate women's sexual autonomy.

Autonomy is, more broadly, the ability to exercise self-determination, to choose one's life.[147] The concept "derives from the legal and societal recognition that each person should make moral, social and political choices, especially those choices that define the self."[148] It must be developed in positive terms so as to emphasize people's ability to achieve their life plan.[149] The notion of autonomy has undeniable transforming power. As Nedelsky explains, autonomy is inseparable from the overall social context of experiences and relations: "Autonomy is a capacity that exists only in the context of social relations that support it and only in conjunction with the internal sense of being autonomous . . . . [S]ubordination and powerlessness are incompatible with autonomy."[150] The achievement of autonomy for women necessarily implies a social context from which oppression and subordination have been eliminated, i.e., a redefinition of and a change in the status of women in patriarchal societies.

For these reasons, Coomaraswamy considers autonomy a central principle that must be used as a guide in examining customary norms and cultural practices:

> Pursuing the principle of autonomy would imply removing those aspects of customary and religious law and practice that prevent women from being in a position to make decisions about their

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[146] Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J. L. & JURIS. 47, 52 (1998).

[147] J.H. Bogart, *Reconsidering Rape: Rethinking Conceptual Foundations of Rape Law*, 8 CAN. J.L. & JURIS. 159, 167 (1995).

[148] THOMAS M. FRANCK, THE EMPOWERED SELF 82 (1999) (citing James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 30-31 (1995)).

[149] Lacey, *supra* note 146, at 69.

[150] Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 25, 36 (1989).

> lives. In some ways, the concept is related to choice, but the principle of autonomy recognizes social, economic and political constraints and attempts to maximize women's power within those realities. In addition, the term autonomy recognizes that it is not only choice in an abstract political sense but choice in terms of economic and social reality that matters. For this reason, the concept of autonomy is also concerned with economic and social rights of women as a way of ensuring meaningful choice in everyday life.[151]

Sexual autonomy is an essential component of this concept of autonomy: "Having control over who touches one's body and how lies at the core of human dignity and autonomy."[152] According to Lai and Ralph, the concept of sexual autonomy, which would make it possible to question several aspects of customary marriage, must be conveyed through human rights discourse:

> To ensure women's sexual autonomy, it will first be necessary to change perceptions about women's "proper" role. Central to this transformation is the emergence of a broad-based recognition, grounded in human rights principles, that women are entitled to control their own bodies. Despite its limitations, human rights discourse has tremendous normative influence that could and should be brought to bear on the promotion and protection of women's sexual autonomy.[153]

For the past decade, women's rights advocates have tried to persuade the international community to recognize women's right to sexual autonomy through sexual rights.[154] "Sexual rights include the individual's right to have control over and to decide freely in matters related to her or his sexuality,"[155] and concerns "the international recognition of the rights of

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[151] Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 509-10 (2002) [hereinafter Coomaraswamy, *Identity Within*].

[152] R. v. Ewanchuk, [1999] S.C.R. 330, ¶ 28 (Can.).

[153] Lai & Ralph, *supra* note 143, at 225.

[154] *See generally* Susana T. Fried & Ilana Landsberg-Lewis, *Sexual Rights: From Concept to Strategy*, *in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 91 (Kelly D. Askin & Dorean Koenig eds., 2001).

[155] Yasmin Tambiah, *Sexuality and Human Rights*, *in* FROM BASIC NEEDS TO BASIC RIGHTS 372 (Margaret A. Sculer ed., 1995).

women over their bodies and their sexuality."[156] Sexual rights include the right to choose one's sexual partner without discrimination, the right to choose to be sexually active or not, the right for two partners to have freely consenting sexual relations and to marry of their own free will, and the right to sexuality independent of procreation.[157] The World Conference on Human Rights in Vienna (1993), where women's rights were finally recognized as human rights,[158] represents the starting point of this movement. However, the concepts of sexual rights and autonomy were not included in the declarations and action programs of the International Conference on Population and Development in Cairo (1994) and the World Conference on Women in Beijing (1995).[159] This omission was a result of fierce opposition from the Vatican and other conservative States.[160] Despite the fact that the language used in these documents tends toward the notion of autonomy,[161] nowhere are the terms "autonomy" and "sexual rights"

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[156] Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community*, *in* DEBATING HUMAN RIGHTS 181 (Peter Van Ness ed., 1999) (citing Tambiah, *supra* note 155, at 372) [hereinafter Coomaraswamy, *Women's Rights as Human Rights*].

[157] HEALTH, EMPOWERMENT, RIGHTS AND ACCOUNTABILITY (HERA), HERA ACTION SHEETS (1998), *available at* http:www.iwhc.org/docuploads/HERAactionsheets.pdf..

[158] World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993) ("The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights.").

[159] Coomaraswamy, *Women's Rights as Human Rights*, *supra* note 156, at 181 (stating that the term "'sexual rights' was included in the draft [Beijing] Platform for Action . . . [but] omitted from the final version, an omission indicating the controversial nature of this suggestion").

[160] For a detailed account of the Vatican's position during these negotiations, see Yasmin Abdullah, *The Holy See at UN Conferences: State or Church?*, 96 COLUM. L. REV. 1835 (1996).

[161] This, at least, is the opinion of Coomaraswamy, who has argued that "the inclusion of the paragraph [96 in the Beijing Platform], even in this truncated form, and its accompanying vision of sexual autonomy and freedom of choice, are important developments in international human rights discourse." Coomaraswamy, *Women's Rights as Human Rights*, *supra* note 156, at 181-82 (discussing World Conference on Women, Sept. 15, 1995, *Beijing Declaration and Platform for Action*, ¶ 96, U.N. Doc. A/Conf. 177/20 ("[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the

used. Although these instruments have significant persuasive value and are used for lobbying at the local level, they are not binding for the party states.[162]

While human rights discourse does not presently reflect a consensus from the international community on the concept of sexual autonomy that would enable us to question several facets of customary marriage, women's right to sexual autonomy seems to be emerging in international criminal law.

B. Sexual Autonomy and the Power of Normative Discourse in International Criminal Law

As a result of pressure from civil groups advocating women's rights, the Rome Statute lists for the first time a range of crimes of sexual violence under war crimes and crimes against humanity, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[163] Although these provisions do not make the right to autonomy a distinct, legally protected interest, they can be seen as a springboard, in both case law and legal writings, for those who wish to promote the ideal. In fact, giving a court jurisdiction over a crime of sexual violence enables it to elaborate on the essence of such crime and perhaps even generate progressive normative discourse that legal writing could then take further.

Discourse on sexual autonomy has emerged in international criminal law with the reformulation, in the *Kunarac* decision, of elements of the crime of rape previously defined in the *Furundzija* case:[164]

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person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences."))

[162] Abdullah, *supra* note 160, at 1841.

[163] See Rome Statute, *supra* note 46, and accompanying text for a discussion of the relevant articles. Booth, *supra* note 140, at 166, writes that "[t]he inclusion of these gender provisions in the Rome Statute clearly did not occur in a vacuum. The fact that the Statute is progressive with regard to women's issues is in no small measure due to the struggle of civil society and the women's human rights movement, including in the Rome negotiations." For a description of the proactive role played by feminist activists during the Rome Statute negotiations, see Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 65 (1999).

[164] Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgement (Dec. 10, 1998), http://www.un.org/icty/furundzija/trialc2/judgement/index.htm. The ICTY found Furundzija, the local commander of the Croatian defence council, guilty as a co-perpetrator of torture and of aiding and abetting the perpetration of "outrage on personal dignity," including rape

> The matters identified in the *Furundzija* definition—force, threat of force or coercion—are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that *the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy.*[165]

The ICTY, in the *Kunarac* decision, further stated that "[s]exual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant."[166] Consent "must be . . . given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."[167] According to the Trial Chamber, the threat or use of force is only an indication of a violation of autonomy and not a mandatory condition for the crime of rape.[168]

Boon affirms that

> the ICTY has now given sexual autonomy a distinct formulation warranting protection under international law. This interest is not premised on a showing of force, because it is cast from the perspective of the individual victim, the autonomous agent, the woman who can and should choose when and how to engage in sexual and reproductive acts.[169]

Making the link with the Rome Statute, she adds that "[t]he *Kunarac* decision makes explicit what the ICC Statute suggests: that sexual autonomy is intrinsically connected to human dignity and bodily

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against a Muslim woman. In *Furundzija*, the ICTY held that the objective elements of rape were sexual penetration by coercion or force or threat of force. *Id.* ¶ 185. The Trial Chamber in *Kunarac* stressed that the terms coercion, force or threat of force were not to be interpreted narrowly, *Kunarac-Trial*, *supra* note 53, ¶ 459, and that the elements of the crime of rape were sexual penetration without the consent of the victim: "Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances." *Id.* ¶ 460.

[165] *Kunarac – Trial*, *supra* note 53, ¶ 440.

[166] *Id.* ¶ 457.

[167] *Id.* ¶ 460.

[168] Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 COLUM. HUM. RTS L. REV. 625, 675 (2001).

[169] *Id.*

integrity."[170] In fact, the concept of sexual autonomy can be discerned behind several of the crimes listed in the Rome Statute, namely the crime of forced pregnancy[171] and particularly the crime of sexual slavery: "Implicit in the definition of slavery are notions concerning limitations on autonomy, freedom of movement and power to decide matters relating to one's sexual activity."[172] After emphasizing that the Rome Statute negotiations "had become a critical—and one of the only—fora in which to advance or restrain the notions of female dignity, autonomy, and consent,"[173] Boon boldly writes:

> The ICC provisions . . . highlight the gender component of sexual violence . . . and they mark how women's rights are human rights. They also demonstrate that *the principles of human dignity and autonomy are central to the international legal order and to democracy, and that they function in times of peace as in war, regardless of gender, regardless of circumstances. The ICC is the first international instrument to provide a legal framework in which women's autonomy and consent can be articulated, assessed, and promoted.*[174]

It goes without saying that the embryo of women's rights, namely that of autonomy, has found in international criminal law a chrysalis in which to develop. The Statute of the Special Court for Sierra Leone, like the Rome Statute, gives a court jurisdiction over the specific crime of sexual slavery. Thus, the Special Court, by condemning the sexual slavery ("forced marriage") that prevailed during the conflict, is able to elaborate on the definition of this crime. It could, like the ICTY in the *Kunarac* decision, choose to use the language of autonomy, and thus articulate and promote

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[170] *Id.*

[171] *Id.*at 665-66. The value of autonomy conveyed therein was so threatening that some states feared the crime would be construed so as to create a right to abortion, which could eventually question their internal law. These states insisted that the following limitation be included in the definition of the crime of forced pregnancy the Rome Statute: "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy." Rome Statute, *supra* note 46 , art. 7 (2) (f). For a detailed report on the debate of the crime of forced pregnancy during the Rome Statute negotiations, see also Cate Steains, *Gender Issues*, *in* MAKING OF THE ROME STATUTE, *supra* note 123, at 357.

[172] *Contemporary Forms of Slavery*, *supra* note 39, ¶ 29 (citations omitted).

[173] Boon, *supra* note 168, at 640.

[174] *Id.* at 673 (emphasis added).

that value, by emphasizing the fact that the crime of sexual slavery condemns control over female sexuality as a violation of female sexual autonomy.[175] Such a definition of sexual slavery, which would certainly not be confined to the area of criminal law, could fuel human rights discourse by serving as the basis for a consensus on the concept of autonomy by the international community, or even influence case law at the national level. International criminal law would be a medium for the promotion of the right to autonomy that forms the essential basis of any examination of customary norms aimed at redefining the status of women in patriarchal societies.

This resourceful means of promoting women's right to sexual autonomy by using "developing language" in international criminal law is certainly to be hailed: "[W]e must have a language that adequately captures our highest goals, in terms that reflect both the individual and the social dimensions of human beings."[176] However, the concept of autonomy is thought to be "integrally linked to concepts of freedom and choice that underpin what is loosely called a western epistemology,"[177] an epistemology developed during the Age of Enlightenment. In light of the Rome Statute negotiations, it is doubtful that all the party states agreed on the recognition of such a right to autonomy for women.[178] As a result, if the ICC (or, as relevant to this Article, the Special Court for Sierra Leone) started to discuss the socially transforming concept of sexual autonomy, it could risk being perceived merely as a puppet of a Western feminist group or as a dreadful tool of social engineering.[179] Detractors may argue that the

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[175] This is the approach taken by the Women's Tribunal for Japan's Military Sexual Slavery, *supra* note 56, ¶ 620: "We find that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy." It is important to note that the language of autonomy remains applicable to the other crimes of sexual violence listed in the Rome Statute.

[176] Nedelsky, *supra* note 150, at 37.

[177] Coomaraswamy, *Identity Within*, *supra* note 151, at 510.

[178] See *supra* Section II.C. for the cautious, conservative position of several delegations as reflected, in particular, in the negotiations on crimes against humanity. *See also* Boon, *supra* note 168, for the turbulent debates on the definition of the crime of forced pregnancy.

[179] The Rome Statute requires that women judges and judges with legal expertise on specific issues, including violence against women, be appointed. Rome Statute, *supra* note 46, art. 36, § 8(a)(iii), art. 36, § 8(b). The fear was even expressed that "women judges, particularly women who have attempted to redress human rights violations against women, cannot be impartial because they are predisposed to promote a feminist agenda, and therefore

inclusion of women's rights as part of the court's jurisprudence would tax the institution's legitimacy and jeopardize its much needed function as a tribunal that renders punishment for crimes repugnant to humanity as a whole. The ICC or the Special Court have, in fact, the potential to become forums for the definition of women's rights that would be ahead of international human rights discourse, with the curious result that women would have rights recognized in times of war that were non-existent, or in the embryonic stage, in times of peace. It is within this curious result that the role of the Truth and Reconciliation Commission is examined. As this Article discusses, the Commission had an important complementary role to that of the Court because its mandate allowed it not only to examine sexual violence perpetrated against women during the conflict, but also to evaluate women's status pre-conflict. The TRC constituted an authoritative forum to directly denounce violations of women's rights brought about by customary law relating to marriage and has laid the foundation for such potential changes to customary law through its recommendations to the Sierra Leone government.

IV. THE TRUTH AND RECONCILIATION COMMISSION AND THE OPPORTUNITY TO INITIATE INTERNAL DISCOURSE TO CHANGE THE CUSTOM

A. Establishing a Link with the Past: Violations of Women's Rights from One Type of Marriage to Another

The Truth and Reconciliation Commission (TRC) for Sierra Leone was an independent body provided for by the Lomé Peace Agreement of July 7, 1999, and established by an act of the Parliament of Sierra Leone on February 10, 2000.[180] It presented its final report to Sierra Leone's President

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should be recused from adjudicating any case involving crimes against women." Booth, *supra* note 140, at 174. To the author, this fear seems to be clearly exaggerated.

[180] Truth and Reconciliation Commission Act 2000, *available at* http://www.sierra-leone.org/trcact2000.html [hereinafter TRC Act]. For a detailed analysis of the nature and role of the TRC and the Special Court for Sierra Leone, see Laura R. Hall & Nahal Kazemi, *Prospect for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287 (2003); Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS.& DEV. L.J. 139 (2003). *Cf.* HRW Report, *supra* note 2, at 61-66.

and to the United Nations Security Council in October 2004.[181] Its mandate was:

> [T]o create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[182]

One aspect of this mandate is particularly pertinent here: preventing a repetition of the violations and abuses suffered. This aspect necessarily required the TRC to investigate and report on the causes and nature of the human rights violations perpetrated during the conflict and of the context in which these abuses took place.[183] The TRC was mandated to give "special attention to the subject of sexual abuses and to the experiences of children within the armed conflict."[184] This Article proposes that an environment, during times of peace, that is characterized by the subordination and vulnerability of women and girls is conducive to the proliferation of crimes of sexual violence during an armed conflict. Human Rights Watch, describing the "forced marriage" that prevailed during the conflict, maintains that "[t]his assertion by men of their power over women is deeply imbedded in societal attitudes in Sierra Leone."[185] The situation of captivity and sexual exploitation of women by rebels, referred to as "forced marriage," is an extreme reflection of the exploitation some Sierra Leonean women experience in customary marriage. As this Article has argued, customary marriage, like "forced marriage," may conceal the reality of

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[181] Marian Samu, *Truth and Reconciliation Commission Presents Report*, U.S. STATE DEP'T, Oct. 5, 2004, http://www.statehouse-sl.org/trc-fin-rep-oct5.html; Press Release, Final Report on Ten-Year Sierra Leone Conflict Published; Seeks to Set Out Historical Record, Offer Guidance for Future, ECOSOC/6140, GA/10287, SC/8227 (Oct. 27, 2004), *available at* http://www.un.org/News/Press/docs/2004/ecosoc6140.doc.htm. The TRC Act provides that the President must "dissolve the Commission by notice in a statutory instrument not later than three months after the submission of the Commission's Report." TRC Act, *supra* note 180, § 9.

[182] TRC Act, *supra* note 180, § 6(1).

[183] *Id.* § 6(2)(a)(1).

[184] *Id.* § 6(2)(b).

[185] HRW REPORT, *supra* note 2, at 73.

sexual slavery during times of peace. In order to prevent a repetition of these abuses, the TRC had to prepare the ground for the seeds of change by exploring the relationship between the women's rights violations that prevailed before the conflict and those that were widespread and systematic during it. As Reynolds astutely remarks:

> Viewing sexual violence in war as an extension of its incidence in peacetime will create a parallel struggle to advance its eradication during both times. Identifying why sexual violence remains a too frequent occurrence in war builds a nexus with peacetime sexual violence: this would increase awareness of how to confront the attitudes and images that perpetuate violence against women.[186]

The TRC was therefore in a privileged position, on the one hand, to denounce the violations of women's rights that prevailed in the context of "forced marriage" during the conflict and, on the other hand, to analyze customary marriage and elucidate the fact that some aspects of it led to the same violations. If it is true that customary marriage may at times legalize situations that are the equivalent of sexual slavery, then there are numerous provisions prohibiting slavery in international instruments that are being violated by the practice of customary marriage.[187] While there can be little doubt that a case by case study would reveal that not all women in a customary marriage are in a situation of sexual slavery, many of the rights guaranteed to women are affected by certain aspects of customary marriage: for example, *inter alia*, a woman's right to freely choose her husband;[188] her right to education (which is jeopardized by early marriage);[189] the

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[186] Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601, 604 (1998); *see also* Catherine A. MacKinnon, *Rape, Genocide and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994) (establishing a correlation between the perpetration of rape in times of war and peace).

[187] *See also, e.g.*, Slavery Convention, art. 2(b), Sept. 25, 1926, amended by Protocol of Dec. 7, 1953, 212 U.N.T.S. 17 (signed by Sierra Leone on Mar. 13, 1962); International Covenant on Civil and Political Rights, art. 8, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by Sierra Leone on Nov. 3, 1996) [hereinafter the *ICCPR*]; African Charter, *supra* note 117, art. 5. Authorities also maintain that slavery constitutes a crime of jus cogens. *See, e.g.*, *Contemporary Forms of Slavery*, *supra* note 39, ¶ 28.

[188] Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180, UN Doc. A/34/46 (1979), art. 16, § 1(b) (ratified by Sierra Leone on Dec. 11, 1988) [hereinafter Women's Convention]; ICCPR, *supra* note 187, art. 23, § 2.

[189] Women's Convention, *supra* note 188, art. 10; Convention on the Rights of the Child, art. 28, GA Res. 44/25, UN Doc. A/44/49 (Nov. 20, 1989) (ratified by Sierra Leone on June 18, 1990) [hereinafter Convention on the Child]; African Charter, *supra* note 117,

inviolability of her body (incompatible with the non-recognition of marital rape and the tolerance of domestic violence);[190] her right to health;[191] and her right to life (early pregnancies often lead to complications that can cause death).[192] Ideally, for the reasons outlined in Part III, any person's control over women's sexuality ought also to be denounced as a violation of their right to autonomy. Accordingly, it was these violations of women's rights in times of peace, which clearly reflect the discrimination suffered by Sierra Leonean women and their inferior status within Sierra Leonean society, which paved the way for the occurrence of "forced marriage" during the conflict, a situation clearly characterized by a repetition of these violations.

While it is true that these violations are perpetrated in a familial or private context, without direct state involvement, as An-Naïm writes, "every state has the responsibility to remove any inconsistency between international human rights law binding on it, on the one hand, and religious and customary laws operating within the territory of that state, on the other."[193] This responsibility to ensure that customs are consistent with human rights standards is very real for Sierra Leone, as the country ratified the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) without reservation.[194] Article 16 of the

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art. 17; African Charter on the Rights and Welfare of the Child, art. 11, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990) (signed by Sierra Leone on April 14, 1992) [hereinafter African Charter on the Child].

[190] African Charter, *supra* note 117, art. 4.

[191] Convention on the Child, *supra* note 189, art. 24 § 1; African Charter, *supra* note 117, art. 16; African Charter on the Child, *supra* note 189, art. 14.

[192] *ICCPR*, *supra* note 187, art. 6; Convention on the Child, *supra* note 189, art. 6, § 1; African Charter, *supra* note 117, art. 4; African Charter on the Child, *supra* note 189, art. 5.

[193] Abdullahi A. An-Naïm, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167 (Rebecca J. Cook ed., 1994) [hereinafter An-Naïm, *State Responsibility*].

[194] Women's Convention, *supra* note 188. Note also that the Convention on the Child, *supra* note 189, art. 24, § 3 states: "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." Moreover, the African Charter on the Child states that:

States . . . shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and

Women's Convention provides for the direct responsibility of the party states to take all necessary measures to eliminate discrimination against women in all matters relating to marriage and family relations, and article 2(f) reads as follows:

> 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:
>
> (f) *To take all appropriate measures*, including legislation, *to modify* or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women [195]

Article 5 (a) elaborates on the nature of this responsibility by stipulating that the party states take all appropriate measures:

> *To modify the social and cultural patterns of conduct* of men and women with a view to achieving the elimination of prejudices and *customary and all other practices* which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.[196]

Customary marriage masks a range of women's rights violations in the form of discrimination, if not a situation of sexual slavery. Although the Constitution of Sierra Leone prohibits any discrimination based on sex in its "laws" (the custom being expressly recognized as "law"),[197] it expressly tolerates discrimination in the area where it is most likely to occur: the family.[198] Since family law is largely customary, this means that Sierra

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(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

African Charter on the Child, *supra* note 189, art. 21, § 1.

[195] Women's Convention, *supra* note 188.

[196] *Id.*

[197] NATIONAL CONSTITUTION OF SIERRA LEONE (1991) ch. XII, § 2 ("The common law of Sierra Leone shall comprise the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the *rules of customary law* including those determined by the Superior Court of Judicature.") (emphasis added).

[198] *Id.* ch. III § 27. Although subsection 1 of section 27 prohibits any law that is "discriminatory either of itself or in its effect," subsection 4 states that such an anti-discrimination principle "shall not apply to any law so far as that law makes provision . . .

Leone, through its Constitution, explicitly violates its responsibility under the Women's Convention to eliminate all discrimination from its customary law,[199] particularly its responsibility to eliminate all discrimination in matters relating to marriage and family relations.[200] In the words of Cook, "[i]f a State facilitates, conditions, accommodates, tolerates, justifies, or excuses private denials of women's rights . . . the State will bear responsibility. The State will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct, or discipline such private acts through its own executive, legislative or judicial organs."[201]

Did the TRC take advantage of the "prevention" component of its mandate so as to establish a link between customary marriage and the phenomenon of "forced marriage" during the conflict? The TRC found that during the conflict, women and girls, singled out by perpetrators for some of the most brutal violations of human rights recorded in any conflict, were forced into sexual slavery.[202] Children between the ages of ten and fourteen were specifically targeted for sexual slavery, as well as for rape and forced recruitment.[203] The TRC later identified the "forced marriage" or "bush wife" phenomenon as a form of sexual slavery.[204] The TRC also carefully

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with respect of adoption, *marriage*, divorce, burial, devolution of property on death or other interests of personal law." *Id.* (emphasis added).

[199] Women's Convention, *supra* note 188, arts. 2(f), 5(a).

[200] *Id.* art. 16.

[201] Rebecca J. Cook, *State Accountability Under the Women's Convention*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 193, at 229. For further support, see PACKER, *supra* note 71, at 49-53.

[202] TRC REPORT, *supra* note 3, at 28. The TRC did not establish criminal guilt for the violations committed during the conflict as this is the mandate of the Special Court of Sierra Leone. The Commission underlined that it made factual findings in relation to responsibility and accountability, using a standard of proof "more akin to the preponderance or balance of probabilities." 2 TRC REPORT, *supra* note 3, at 26.

[203] *Id.* at 28, 35.

[204] 3b TRC REPORT, *supra* note 3, at 164.

Forced 'marriage' is a form of sexual slavery as is the detention of women in 'rape camps' or any circumstances under which women are subjected repeatedly to rape or the threat of rape or any other sexual violence. In Sierra Leone, as well as in many other conflicts, women and girls were given as 'wives' to commanders and combatants. These sexual slaves are widely referred to as 'bush wives.' When 'forced marriage' involves forced sex or the inability to control sexual access or exercise sexual autonomy, which, by definition, forced marriage

studied the status of women and children before the war, as well as the national laws impacting them.[205] It found that before, during, and after the conflict, women and girls in Sierra Leone were subjected to structural discrimination by practice, custom, and law; such discrimination pervaded in the social, political, and economic public setting as well as in the family.[206] The TRC argued that the application of customary and statutory laws to women and girls, especially in the field of personal law, was discriminatory and did not adequately protect them against violence.[207] The TRC emphasized that "[s]tructural and cultural discrimination, early marriage and other harmful traditional practices impede the access of women to education and economic advancement."[208]

In fact, the TRC emphasized the prevalence of the practice of early marriages under customary law,[209] observing that

> [t]he abductions and use of young girls and women as bush wives and sex slaves by armed groups during the war could be attributed to the traditional beliefs that governed this issue prior to the war. Some of the armed groups did not consider it an aberration to rape young women or use them as sex slaves.[210]

The Commission also found that the culture of domestic violence, especially in traditional societies, partially explains the brutality

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almost always does, it constitutes sexual slavery, as recognised by the Special Rapporteur for Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict.

3b *Id.* at 131 (citation omitted).

[205] *Id.* at 92-121 (with respect to women); 238-42, 247-57 (with respect to children). Subjects explored include education, health, politics, economic and socio-cultural factors, legal status, marriage, divorce, property (land ownership, inheritance), sex, rape and sexual violence, and domestic violence.

[206] 2 *Id.* at 106. The TRC notes that women comprise the largest category of persons without formal education and illiteracy rates stand at eighty-nine percent for the rural female population, *id.*, and remain excluded and marginalised in the management of economic and political affairs in Sierra Leone, *id.* at 105.

[207] *Id.* at 106.

[208] *Id.*

[209] 3b *Id.* at 103, 254.

[210] *Id.* at 103.

experienced by women during the conflict period.[211] It cited a 1998 report from Freetown that concluded: "It is perhaps not surprising that a culture that has spawned such apparently high rates of war-related sexual violence, also suffers from high rates of domestic partner abuse."[212] Further, the Commission, dealing with the question of why women became such a specific target of the war, made the following revealing remark:

> Prior to the war, the status of women in Sierra Leone at almost every level was low. Their low status meant that issues concerning women and women themselves were not of paramount importance in society. Consequently, *it was easy for armed combatants to treat women with disdain and appropriate a sense of ownership of women's bodies to themselves, as they probably were wont to do, albeit to a lesser extent, in peacetime.* The patriarchal hegemony that had existed in Sierra Leone continued and worsened during the conflict, evolving in the most macabre manner. The cultural concept that a woman was "owned" by a man played itself out in many of the violations that women suffered during the conflict.[213]

The Commission never denounced customary marriage as a possible arena of sexual slavery. It did not expressly link customary marriage to the "forced marriage" that prevailed during the conflict. However, the above-cited passages of the Report, though scattered and brief, can be viewed as clearly linking the violence suffered by the women during the conflict with the inferior status of the women, the practice of early marriage, the concept of "ownership" of a woman by a man, and the prevalence of domestic violence before the conflict. Moreover, the Commission listed all of the international instruments to which Sierra Leone is a signatory and

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[211] *Id.* at 108.

[212] *Id.* at 108 (citing A.L. Coker & D.L. Richter, *Violence Against Women in Sierra Leone: Frequency and Correlates of Intimate Partner Violence and Forced Sexual Intercourse*, 2 AFR. J. OF REPROD. HEALTH 61, 65 (1998)). Moreover, the TRC noted its agreement with scholars that have argued that the extreme violence that women suffer during conflict does not arise solely out of the conditions of war, but is directly linked to the violence that exists in women's lives during peacetime in the society in question. *Id.* at 106 ("'Because so much of this persecution goes largely unpunished, violence against women comes to be an accepted norm, one which escalates during conflict as violence in general increases.'") (quoting ELIZABETH REHN & ELLEN JOHNSON SIRLEAF, WOMEN, WAR AND PEACE : THE INDEPENDENT EXPERTS' ASSESMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING 11 (2002)).

[213] *Id.* at 170 (emphasis added).

enumerated the human rights protected by those instruments.[214] Discriminatory customary laws, namely in the area of marriage, were denounced as "a challenge for the enjoyment of women's rights, their advancement in the family and contribution to the political, economic, and social development in Sierra Leone."[215] The Commission noted that the practice of early marriage "negatively [impacts] young girls by affecting [their] full development, particularly in terms of education, economic autonomy, and physical and psychological health."[216] Further, the Commission found that early marriage poses "a major challenge to the government of Sierra Leone"[217] and is "in clear contravention of international law to which the government of Sierra Leone is [a] signatory."[218] The Commission emphasized that under customary law, early marriage and the fact that the bride's consent is not required "contradict basic human rights."[219] Noting that the State has not yet taken the necessary steps to eradicate the structural inequality against women pervading Sierra Leonean society,[220] the Commission stressed the "urgent need to review national law with a view to ensuring that the government of Sierra Leone fulfills its obligations in terms of international law."[221] Finally, it suggested that "[w]hile it is commendable that Sierra Leone has undertaken the obligations by ratifying or acceding to all seven of the principal United Nations human rights treaties, and several of the other international human rights instruments, this would seem to be little more than a mere formality, if we are to judge by its failure to submit reports."[222]

The TRC's efforts to denounce the violations of Sierra Leonean women's and girls' rights brought about by certain aspects of customary marriage, and to point out the failure of Sierra Leone to fulfill its international obligations, must be applauded. The Commission was perhaps

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[214] *Id.* at 122-29, 243-46.

[215] *Id.* at 111.

[216] *Id.* at 254.

[217] *Id.* at 254.

[218] *Id.*

[219] 2 *Id.* at 137.

[220] *Id.* at 169.

[221] 3b *Id.* at 243.

[222] 2 *Id.* at 139.

one of the only forums where these violations could be articulated and denounced.[223] Moreover, making appropriate recommendations to the government of Sierra Leone gave the TRC an opportunity to take advantage of its potential to initiate internal discourse to change customs and "address the plight of women and girls at the highest levels. For example, giving effect to the provisions of CEDAW and to other international human rights instruments, which provide inspiration and the impetus to improve the quality of life for women and children, would be a tremendously symbolic step."[224]

B. Preparing for the Future: The Opportunity to Initiate Internal Discourse to Change Customs

The TRC was given the task of making recommendations concerning reforms and measures, whether legal, political, administrative, or otherwise needed to achieve its objective, which includes preventing the repetition of the violations and abuses suffered.[225] The TRC Act directs that those recommendations be "faithfully and timeously" implemented,[226] and provides for the establishment of a "follow-up Committee" which is to report on government compliance with the recommendations of the Commission. [227] The TRC was consequently in a privileged position not

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[223] *See* An-Naïm, *State Responsibility*, *supra* note 193, at 169 ("[T]here are serious questions about who is going to raise the issue of the state's failure to comply with its treaty obligations, where, and how. Unlike commercial and other treaties where the states parties would usually have the motivation and resources to raise and pursue the issue of failure to comply in appropriate fora, state self-interest is normally lacking in relation to human rights treaties. Although there are some enforcement mechanisms for human rights treaties, this aspect of international law remains extremely underdeveloped.") *See also* LAWCLA, *supra* note 102. The LAWCLA report is the result of extensive research by a public interest Sierra Leone human rights centre dealing with the discriminatory provisions against women in Sierra Leone statutes and proposing reforms to uplift the status of women. *See also* AMNESTY INT'L, SIERRA LEONE PAPER, *supra* note 73.

[224] 3b TRC REPORT, *supra* note 3, at 229.

[225] TRC Act, *supra* note 180, § 15. The Commission divided its recommendations into three categories: "imperative" ("ought to be implemented immediately"), "work towards" ("the Government is expected to put in place the building blocks to make the ultimate fulfilment of the recommendation possible"), and "seriously consider" ("the Government is expected to thoroughly evaluate the recommendation, [but] is under no obligation to implement the recommendation"). 2 TRC REPORT, *supra* note 3, at 119-20.

[226] TRC Act, *supra* note 180, § 17.

[227] *Id.* § 18.

only to "denounce," but also to remind, the government of Sierra Leone of its responsibility to make customary law, namely relating to marriage, comply with its international obligations, which the TRC has managed to accomplish.

The Commission recommended that the Government take steps to immediately implement its obligations under the CEDAW.[228] The Commission found it imperative that the government, *inter alia*, repeal "all statutory and customary laws that discriminate against women."[229] To accomplish this objective, the Commission recommended that the government repeal those sections of the Constitution that exempt certain areas of the law, including marriage and divorce, from protection against discrimination, [230] as well as abolish all "practices which discriminate against women in the realm of inheritance, land ownership, marriage, [and] divorce."[231] Moreover, the Commission imperatively recommended that the government make it criminal to "permit, authorise and assist in the marriage of children under 18 years of age." [232] In fact, the Commission recommended that legislation be enacted abolishing the practice of early marriage, and that a minimum age of eighteen for marriage be established.[233] The Commission also requested that the government work towards "the enactment of specific legislation to address domestic violence," including the crime of marital rape.[234] Lastly, it recommended

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[228] 2 TRC REPORT, *supra* note 3, at 172.

[229] *Id.*

[230] *Id.*, at 138, 172.

[231] *Id.* at 172.

[232] *Id.* at 178; *see also* Women's Convention, *supra* note 188, art. 16, § 2, which specifies the obligation of the states to set a minimum age for marriage. Art. 21, § 2 of the African Charter on the Child, *supra* note 189, states that "[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory." This minimum age is in conformity with the *Convention on the Child*, *supra* note 189, art. 1, according to which a child is defined as an individual under the age of eighteen.

[233] 2 TRC REPORT, *supra* note 3, at 178.

[234] *Id.* at 170; 3b *Id.* at 112. The criminalization of marital rape could follow the South African example, where "Section 5 of the Prevention of Family Violence Act 133 of 1993 outlawed marital rape . . . and [Section] 1(2) makes the Act applicable to customary marriages and cohabitations." SALC, *supra* note 78, at 94 n.48.

that the government establish a Human Rights Commission to "serve as both a watchdog and a visible route through which people can access their rights."[235]

These recommendations, if implemented, have the power to change the face of customary marriage. Such change may occur soon, as a Law Reform Commission has been working on harmonizing Sierra Leone laws with its international obligations.[236] Nonetheless, although legislative reforms set the objectives to be achieved, they are certainly not sufficient to change deeply-rooted practices. As An-Naïm says, "the only viable and acceptable way of changing religious and customary laws is by transforming popular beliefs and attitudes, and thereby changing common practice."[237] People must therefore be convinced that changing customs is

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[235] 2 TRC REPORT, *supra* note 3, at 136-37. The TRC notes that "the Lomé Peace Accord required the establishment of an 'autonomous quasi-judicial National Human Rights Commission' within 90 days after the signing of the Accord. Such a Commission is still not in place." *Id.* (citation omitted). The powers and mandate of the Human Rights Commission should accord with guidelines set out in the U.N. Principles relating to the Status of National Institutions, known as the Paris Principles, endorsed by the U.N. General Assembly in 1993. *Id.*

[236] In Sierra Leone, a Law Reform Commission "reviews the laws both statutory and others, to reform[,] develop, consolidate, and codify" proposed changes to the law, as well as to propose changes of its own. AMNESTY INT'L, SIERRA LEONE PAPER, *supra* note 73, at 2 n.4. Amnesty International, WITNESS, Campaign for Good Governance (CGG), Conflict Management and Development Associates (CMDA), Centre for Democracy and Human Rights (CDHR), and the Sierra Leone Bar Association emphasized that "[t]he current draft laws on marriage, succession, sexual offences and inheritance, soon to be presented by the Law Officer's Department . . . must be passed into law immediately by Parliament and there must be a clear commitment from Government to their timely implementation." Amnesty Int'l, *Sierra Leone Government Urged to Implement the Recommendations of the Truth and Reconciliation Commission (TRC)*, AI Index 51/012/2005, Nov. 29, 2005, *available at* http://web.amnesty.org/library/Index/ENGAFR510122005?open&of=ENG-SLE. The United States ambassador to Sierra Leone also expressed his looking forward to the passage of the new legislation proposed by the Law Reform Commission. Thomas N. Hull, U.S. Embassador to Sierra Leone, American National Day Reception Remarks, Feb. 17, 2006, http://freetown.usembassy.gov/sp021707.html. To date, however, the author is unaware of what the reformed laws actually contain, although it is apparent from these sources that they will address issues regarding women's equality before the law. *See also* Abu Solomon Tarawallie, *Sierra Leone: African Union Workshop On Governance And Human Rights*, THE INDEPENDENT (S. Afr.), Feb. 24, 2006, at 2, *available at* http://fr.allafrica.com/stories/200602240136.html (reporting that Mr. Momodu Koroma, the minister of Foreign Affairs and International Cooperation of Sierra Leone, "told participants that the Law Reform Commission of Sierra Leone was reviewing laws relating to violence against women and children")

[237] An-Naïm, *State Responsibility*, *supra* note 193, at 178.

valid and useful.[238] According to Packer, "if Africans are to have a sense of moral obligation to uphold a law banning child marriages, they must believe that a law is needed, for which they must first be convinced that the practice is 'wrong.'"[239]

The Women's Convention clearly specifies the state's direct responsibility to work toward changing attitudes: it must "take all appropriate measures" and "modify the social and cultural patterns of conduct of men and women" in order to change customs that discriminate against women and perpetuate the idea of their inferiority. It is vital for the state to help raise women's awareness of their rights through the educational programs it supports, as "the strength of a people's determination to insist on the protection of their human rights is proportionate to their belief that those rights are essential for their human existence."[240] Once women have a greater awareness of their rights, they will be in a practical position to exercise them. For this, awareness must be raised among the key actors in the communities: leaders, chiefs, and elders, as well as the police and the judiciary.[241] Packer emphasizes that "[l]egislation . . . will . . . remain ineffective without popular support, and popular support will not be gained without more local initiatives and the input of key opinion leaders."[242] Men are often overlooked, yet fathers, husbands, and sons have enormous potential in ensuring that the winds of change are blowing. What if men refused from now on to take a child for a wife?

The TRC seized the opportunity it was given to make necessary recommendations to the government of Sierra Leone regarding its direct responsibility to work towards changing the custom to redefine the status of

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[238] *Id.* at 176.

[239] PACKER, *supra* note 71, at 153. For Packer, the legislation is only one facet, and not a priority, of the process of change: "[I]f the power and attitudinal relationship between African men and women does not change, such a [legal] revolution will have a limited impact." *Id.* at 155.

[240] Abdullahi A. An-Naïm, *Expanding Legal Protection of Human Rights in African Contexts*, *in* HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 1, 8 (Abdullahi A. An-Naïm ed., 2003)

[241] *See* PACKER, *supra* note 71, at 156. These actors play a key role in the eradication of traditional practices. For example, what can a girl who refuses to marry and seeks assistance from the police do if the police send her home, telling her to solve such a "private" problem with her family? *Id.* at 151.

[242] *Id.* at 174.

women. In fact, it recommended that the Government, through the Law Reform Commission, begin a national dialogue on reform of customary law with special emphasis on the rights of women and children.[243] The TRC recommended that this process commence with a consultation of the principal people concerned, such as women and peasant farmers at the chiefdom level.[244] It identified the ultimate aim as bringing customary law into line with CEDAW and the Convention on the Rights of the Child.[245] The Commission's strength lies in the fact that it has a majority membership that is comprised of citizens of Sierra Leone who have an intimate familiarity with the nation, in addition to the fact that three of the commissioners are women.[246] The opinion was expressed that "the individual chosen for the Sierra Leone TRC inspire confidence" and that "the religious background of some commissioners, as well as experience in the region and in other conflicts, may add to their credibility with the public."[247] The female commissioners' experience with, and commitment to, addressing women's issues were also underlined.[248] Moreover, the TRC

[243] TRC REPORT, *supra* note 3, at 138.

[244] *Id.*

[245] *Id.* The TRC recommended that the government work towards eventually codifying this reformed customary law.

[246] Truth and Reconciliation Commission – Professional Staff and Commissioners, http://www.sierra-leone.org/trc-biographies.html (last visited Apr. 20, 2006). The TRC is comprised of four Sierra Leonean commissioners: Reverend Dr. Joseph Humper, Chairperson (bishop of the United Methodist Church), Justice Laura Marcus-Jones, Deputy Chair (retired judge of the High Court), Professor John Kamara (former principal of Njala University College), and Mr. Sylvanus Torto (Institute of Public Administration and Management, University of Sierra Leone). The three international commissioners are Ms. Yasmin Sooka (former commissioner of South Africa's TRC, now Director of the Foundation for Human Rights in South Africa), Ms. Ajaaratou Satang Jow (former Minister of Education in The Gambia), and Professor William Schabas (Director of the Irish Center for Human Rights, National University of Ireland). With respect to the selection of Commissioners, see TRC Act, *supra* note 180, § 3; 1 TRC REPORT, *supra* note 3, at 53.

[247] Hall & Kazemi, *supra* note 180, at 293.

[248] Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS.J. 85, 93 (2005). Nowrojee noted the diversity of views and experience among the commissioners, as "some commissioners had previously worked on women's rights issues while others held traditional views on women's role in society and had no previous exposure to or experience in dealing with sexual violence victims." *Id.* She recognized Commissioner Jow's previous work with women's nongovernmental groups in Gambia and Commissioner Sooka's help in organizing the gender hearings of the South African TRC.

established direct dialogue with the victims of sexual crimes perpetrated during the conflict and their aggressors, giving each group a chance to express themselves: "Unlike the SC, the TRC can give a voice to the ordinary people of Sierra Leone, providing them with a necessary link to the processes of international justice."[249] These individuals are, it must be remembered, the mothers, wives, fathers, and husbands of post-war Sierra Leone.

An-Naïm believes that "there is no substitute for internal discourse for transforming attitudes and perceptions. It is primarily the task of internal actors, supported and encouraged by external allies, to promote and sustain the necessary degree of official commitment and popular political support for a program for changing . . . laws."[250] It is of crucial importance that internal discourse comes to question customary law: exclusively external involvement in this respect could be perceived as emblematic of imperialistic or neo-colonial values and may thus doom the initiative to failure.[251] The TRC is a local forum that is part of the internal Sierra Leonean and African process of changing attitudes. Its discussions and recommendations are a spark that will hopefully ignite internal discussion, especially at this time when the country is reorganizing and the people are still suffering from a decade of atrocities. This process of changing attitudes would benefit by support from external actors,[252] particularly capital donations from members of the international community who would support the concrete initiatives chosen by the government to change these customs.[253] Help could include, for example, support of public education programs about the law.[254]

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[249] *Id.* at 300.

[250] An-Naïm, *State Responsibility*, *supra* note 193, at 184.

[251] *Id.* at 176.

[252] *Id.* at 179 ("[E]xternal actors should support and encourage indigenous actors who are engaging in internal discourse to legitimize and effectuate a particular human right. However, external actors must not, in any way, attempt or appear to dictate the terms of internal discourse or pre-empt its conclusions.").

[253] Hall & Kazemi, *supra* note 180, at 299. Sierra Leone being one of the poorest countries in the world, Hall and Kazemi note that the TRC itself was forced to rely on foreign donations to develop its potential.

[254] The TRC recommended the development of a compulsory program of human rights education in schools at the primary, secondary, and higher levels of education to address this issue. It emphasized that public education about the law is one of the most effective means of creating a culture of rights, and called upon the international community

A change in Sierra Leonean customs may prove more than justified. Chanock has long studied the evolution of customary law, or rather the official version of customary law in African countries that were former British colonies. He concludes that the version of customary law condoning the subordination of women is, in fact, a rigid, biased "invention" that imposed worse treatment for women than in pre-colonial times.

> [T]he customary law that has been accepted is the result, in the former British colonies, of a congruence of interests between male elders and British administrators. More fundamentally it stems from the ways in which the defensive response by elements in African societies to the disruptive changes of the twentieth century led them to try to erect and emphasize particular forms of family, marriage, duty, right and obligation. The new economy, and the consequent needs for new controls over domestic labour, and new rights over family property, provided a customary law tailored to the needs of some, in a situation that was anything but customary.[255]

In light of this, asking an African state to adjust this version of customary law to the human rights standards provided for in international instruments should not be perceived as an attack on its value system. This rigid version of customary law must be reinterpreted.

Armstrong sees customary law as a potential means of conveying a new view of women, and not as an obstacle to the improvement of women's rights:

> There is another version of customary law, which may be labelled the 'living law' which reflects the real life experience of people on a day-to-day basis. This body of law is rich, varied and flexible; it changes in response to changing conditions . . . [t]he

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to support the introduction into Sierra Leone of "Street Law," a program involving law students in the participatory teaching of law to the general public at the community level. 2 TRC REPORT, *supra* note 3, at 134-35. The TRC also recommended the establishment of educational programmes to counter attitudes and norms that lead to the oppression of women. *Id.* at 67.

[255] Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L J.L. & FAM. 72, 85-86 (1989).

> dynamism of the living law is a potential force in the improvement of women's rights.[256]

Therefore, African customary law is living, dynamic, evolving, and changing.[257] Change is moreover a fundamental characteristic of tradition, since by definition, "tradition never reaches definitive form, but is rather, in the present, a series of interactive statements of information."[258] Customary law may therefore be progressively questioned and reinterpreted so that it can be brought into line with international human rights standards, and the foundations for a new status for women in Sierra Leone can be established. The TRC Report has set this transformation in motion.

V. CONCLUSION

During the Second World War, women, primarily Korean, were detained in facilities guarded by the Japanese army; every day, they were forced to provide sexual favors to many soldiers. These slaves of the Japanese army, euphemistically called "comfort women," were forgotten for more than half a century.[259] The Statute of the Special Court for Sierra Leone, like the Rome Statute, expressly names the crime of sexual slavery for the first time. As the situation of "forced marriage" that prevailed during the Sierra Leone conflict is being examined by the Special Court, we can be confident that the sexual slaves of the rebels in Sierra Leone will not be forgotten behind the euphemism of "bush wives."

By specifically naming a range of crimes of sexual violence, the Statute of the Special Court for Sierra Leone, like the Rome Statute, gives these crimes more visibility, increasing the likelihood that they will be remembered and that those responsible will be punished. But it is not only the visibility of the crimes in conflict that will be increased; it is also the

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[256] Armstrong, *supra* note 98, at 362-63.

[257] *See* Nmehielle, *supra* note 118, at 135; Abdullahi A. An-Naïm & Jeffrey Hammond, *Cultural Transformation and Human Rights in African Societies*, *in* CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 1, 13 (Abdullahi A. An-Naïm ed., 2002).

[258] H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 19 (2000). "In the language of modern information theory, a tradition will always include a great deal of noise, not essential for understanding the primary message of the tradition." *Id.* at 14. Glenn sees tradition as a conceptual "bran-tub," or "a conglomeration of data," in which information is constantly being "massaged." *Id.* at 12, 14.

[259] *See* Susan Jenkins Vanderweert, *Seeking Justice for "Comfort" Women*, 27 N.C.J. INT'L. L. & COM. REG. 141, 145 (2001).

visibility of the same crimes in times of peace. The express naming of the crime of sexual slavery facilitates reevaluation of customary marriage in Sierra Leone since, as this Article has argued, it shares characteristics with "forced marriages." The international community's criminalization of acts that violate a woman's sexual autonomy during times of armed conflict thus provides the language and law necessary to label as crimes acts that are violative of women's sexual autonomy but tolerated domestically, for example, under customary law. It therefore has a "magnifying effect" on customary practices during times of peace and whether those customary practices lay the foundation for crimes perpetrated against women during war. If international criminal law thus serves to stimulate reflection on the need to bring those practices to the state's attention, and on the best ways to eradicate those practices, it will have greatly contributed to the advancement of women's rights on a national level that may not have occurred "but for" the international condemnation of these types of crimes against humanity or war crimes.

However, the power of international criminal justice to eradicate traditional practices involving elements of sexual slavery is limited. In addition to the practical difficulties inherent in characterizing a customary practice as a crime against humanity, there is the considerable challenge of ensuring that international criminal justice maintains its credibility and does not become a tool of social engineering. Nonetheless, the Special Court's recognition of women's right to sexual autonomy, a central concept to an examination of customary norms aimed at a redefinition of the status of women in patriarchal societies, could have a transformative effect not just on Sierra Leone's laws, by creating a domestic precedent for the recognition of such a right, but also on human rights discourse internationally, by serving as the basis for a consensus on the concept of sexual autonomy for the international community.

Meanwhile, at a more concrete level, the TRC was probably the best forum to begin the harmonization of national law with international law through its recommendations to the government of Sierra Leone. Because of its mandate, it was in a privileged position to explore the relationship between the women's rights violations that prevailed before the conflict and those that were widespread and systematic during the conflict, and, in so doing, directly dealt with customary law. The TRC identified "forced marriage" as a form of sexual slavery. It did not go as far as to find that sexual slavery could take place in the framework of customary marriage, violating women's sexual autonomy. However, the TRC denounced the violations of women's and girls' rights brought about by certain aspects of customary marriage and pointed out Sierra Leone's

failure to comply with its international obligations in this regard. The TRC's recommendations to the government of Sierra Leone, aimed at bringing customary law into line with its human rights obligations, have the potential to set the tone of national discourse aimed at changing the custom. Its legitimacy was based, *inter alia*, on its membership being comprised of mostly Sierra Leonean citizens and was solidified by its establishment of a direct dialogue with victims, other parties to the conflict, and the various components of civil society. The recommendations of the Commission, which stemmed from domestic considerations and concerns, might consequently be perceived as representative of Sierra Leone's evolving mentalities rather than emblematic of imperialistically imposed values. The TRC Report, in conjunction with the much-awaited judgments of the Special Court, will address Sierra Leonean women's plight before, during, and after the conflict. Any potential reform that results from their work must be recognized as a remarkably positive illustration of two transitional justice institutions working side by side to achieve gender justice in Sierra Leone.