

The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments

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Introduction

In March 2009, Trial Chamber I of the Special Court for Sierra Leone (SCSL) issued its judgment in *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, known as the Revolutionary United Front (RUF) case.¹ The SCSL rendered the appeals judgment a short time later on October 26, 2009.² The trial and appeals judgments in the RUF case were highly anticipated because the atrocities of the RUF were considered

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1. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment (Special Court for Sierra Leone, Trial Chamber I, Mar. 2, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215> [hereinafter RUF TJ]. The Special Court for Sierra Leone (SCSL) was created in 2002 pursuant to an agreement between the United Nations and the Government of Sierra Leone: 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.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>. The Statute of the Special Court for Sierra Leone (2000) is annexed to this Agreement, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> [hereinafter SCSL Statute].

2. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-A, Judgment (Special Court for Sierra Leone, Appeals Chamber, Oct. 26, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=CGgVJRfNF7M%3d&tabid=218> [hereinafter RUF AJ].

emblematic of the brutal, decade-long armed conflict in Sierra Leone.³ The RUF became known for, among other acts, gender-based crimes such as widespread rape, sexual slavery, and forced marriage.⁴ Therefore, it was not surprising when the SCSL's Prosecutor secured an indictment charging three members of the RUF with the following: one count of rape as a crime against humanity (count 6); one count of sexual slavery as a crime against humanity (count 7); one count of the crime against humanity of other inhumane acts (under which the act of forced marriage was considered) (count 8); and one count of outrages upon personal dignity as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (count 9).⁵ After a lengthy trial,⁶ the SCSL convicted the accused on all four counts due to their participation in a joint criminal enterprise.⁷ As a result, the RUF trial judgment brought the first-ever convictions in an international or internationalized tribunal for the crimes against humanity of sexual slavery and forced marriage (as an inhumane act), which the Appeals Chamber confirmed.⁸

3. The conflict began in March 1991 with the launch of an attack by the RUF. It officially ended in January 2002, when the President of Sierra Leone declared a final cessation of hostilities. RUF TJ, *supra* note 1, ¶¶ 12, 44.

4. See, e.g., Press Release, Human Rights Watch, Sierra Leone: Ruling in Revolutionary United Front Trial (Feb. 25, 2009), <http://reliefweb.int/rw/rwb.nsf/db900SID/LSGZ-7PLE84?OpenDocument>. “‘The Sierra Leone conflict was marked by unspeakable brutality and attacks against civilians committed by the RUF,’ said Corinne Dufka, Human Rights Watch’s senior researcher on West Africa. ‘The trial of RUF leaders for these crimes is vital for victims and for building respect for the rule of law in Sierra Leone.’” See also Human Rights Watch, “We’ll Kill You if You Cry”: *Sexual Violence in the Sierra Leone Conflict* 26–27 (2003), available at <http://www.hrw.org/en/reports/2003/01/15/well-kill-you-if-you-cry> [hereinafter Human Rights Watch, *Sexual Violence*].

5. Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, ¶ 60 (Special Court for Sierra Leone Aug. 2, 2006), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=ppr39WF8TnM%3d&tabid=105> [hereinafter RUF Indictment].

6. The RUF trial began in July 2004; closing arguments took place in August 2008. RUF AJ, *supra* note 2, ¶ 16. The Trial Chamber presented an oral judgment on February 25, 2009. Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Judgment Summary (Special Court for Sierra Leone, Trial Chamber I, Feb. 25, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=AoknUKBsH50%3d&tabid=215>. It issued its 824-page written judgment on March 2, 2009. RUF TJ, *supra* note 1.

7. RUF TJ, *supra* note 1, at Disposition, 678, 682, 685. Note that, for Gbao, Justice Boutet dissented and would not have found him guilty on these counts. Boutet’s dissent would find Gbao not guilty of all counts premised on the joint criminal enterprise mode of liability as pleaded by the Prosecutor. RUF TJ, *supra* note 1, Dissenting Opinion of Justice Pierre G. Boutet, ¶ 23. Note also that the Prosecutor proved the war crime of outrages upon personal dignity, (the ninth count overall and the fourth count included in the Sexual Violence Section of the RUF Indictment), using evidence also considered under the crimes against humanity of rape, sexual slavery, and forced marriage (inhumane acts). RUF Indictment, *supra* note 5, ¶ 60; RUF TJ, *supra* note 1, ¶¶ 1298–1301, 1302–06, 1307–09, 1474–75, 1583.

8. Press Release, Special Court for Sierra Leone Office of the Prosecutor, Special Court Prosecutor Hails RUF Convictions (Feb. 25, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=dupqs76CgyU%3d&tabid=196>; Press Release, Special Court for Sierra Leone Office of the Prosecutor, Prosecutor Welcomes Convictions in RUF Appeals Judgment (Oct. 26, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticketUGDfogLJQ%3d&tabid=196>.

The RUF trial and appeals judgments have garnered relatively limited attention within the international criminal law community. This article argues that more attention should be paid to these judgments' contributions to gender-sensitive interpretations of international crimes. Prior to the RUF judgments, the SCSL had a fairly mixed record in its treatment of gender-related crimes. In its first set of trial and appeals judgments, in *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, (known as the Armed Forced Revolutionary Council or AFRC case),⁹ the SCSL raised awareness of and provided important details about the prohibited acts of sexual slavery and forced marriage but did not enter any convictions for these crimes.¹⁰ In contrast, the Special Court's second trial judgment, in *Prosecutor v. Moinina Fofana and Allieu Kondewa* (known as the Civil Defence Forces case),¹¹ unfortunately contained almost no mention of gender-based violence because a majority of that Chamber's judges systematically excluded such evidence.¹² Although the Appeals Chamber properly criticized the majority's exclusion of this evidence on appeal, the Appeals Chamber declined to order a new trial in order to admit this evidence.¹³ By setting the most cohesive example of gender-sensitive legal and evidentiary analysis to date, the RUF trial and appeals judgments have helped to advance significantly the Special Court's jurisprudence on gender-sensitive justice.¹⁴

9. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Judgment (Special Court for Sierra Leone, Trial Chamber II, June 20, 2007), available at <http://www.scsl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106> [hereinafter AFRC TJ]; *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Judgment (Special Court for Sierra Leone, Appeals Chamber, Feb. 22, 2008), available at <http://www.scsl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx> [hereinafter AFRC AJ].

10. For an analysis of the AFRC judgments, see Valerie Oosterveld & Andrea Marlowe, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*; *Prosecutor v. Moinina Fofana & Allieu Kondewa*, 101 AM. J. INT'L L. 848 (2007); Valerie Oosterveld, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*; *Prosecutor v. Moinina Fofana & Allieu Kondewa*, 103 AM. J. INT'L L. 103 (2009) [hereinafter Oosterveld AJIL 2009]; Valerie Oosterveld, *The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice?*, 10 HUM. RTS. REV. 73 (2009) [hereinafter Oosterveld HRR 2009]; Valerie Oosterveld, *Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-based Crimes*, 17 AM. U.J. GENDER, SOC. POL'Y & L. 407 (2009) [hereinafter Oosterveld AUJSPL 2009]; Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?*, 45 CANADIAN Y.B. INT'L L. 131 (2007) [hereinafter Oosterveld CYBIL 2007].

11. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment (Special Court for Sierra Leone, Trial Chamber I, Aug. 2, 2007), available at <http://www.scsl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgement/tabid/175/Default.aspx> [hereinafter CDF TJ].

12. For critiques of the Civil Defence Forces case, see Oosterveld & Marlowe, *supra* note 10, at 853-57; Oosterveld AJIL 2009, *supra* note 10; Oosterveld HRR 2009, *supra* note 10; Oosterveld AUJSPL 2009, *supra* note 10; Oosterveld CYBIL 2007, *supra* note 10.

13. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgment ¶ 451 (Special Court for Sierra Leone Appeals Chamber May 28, 2008), available at <http://www.scsl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/AppealJudgement/tabid/194/Default.aspx>.

14. See generally RUF TJ, *supra* note 1; RUF AJ, *supra* note 2.

Part I of the article examines how the RUF judgments addressed three specific prohibited acts: rape, sexual slavery, and forced marriage. With respect to rape, the Trial Chamber put on record the many ways in which the RUF used rape to bring the battlefield to women's and men's bodies.¹⁵ By doing so, the Trial Chamber reiterated and confirmed the findings of Sierra Leone's Truth and Reconciliation Commission.¹⁶ Yet the Trial Chamber's approach to the elements of the prohibited act of rape raise some potentially troubling questions about the inconsistency in approaches between the Special Court's two Trial Chambers. The Court's consideration of the crime against humanity of sexual slavery, which was only recently codified in international criminal law, demonstrates another positive step in the Court's development of its gender-sensitive jurisprudence.¹⁷ As the Special Court previously did in the AFRC case judgments, the RUF Trial Chamber confirmed the elements of the crime and the content of each of those elements for the prohibited act of sexual slavery.¹⁸ This confirmation has helped to build a unified legal understanding of the prohibited act. The act of forced marriage was explored for the first time in international criminal law in the Special Court's AFRC trial and appeals judgments.¹⁹ The RUF trial judgment provided even more detail on this newly-named form of inhumane treatment and found that the RUF used the term "wife" deliberately and strategically to enslave and psychologically manipulate civilian women and girls.²⁰

Part II turns to the RUF Trial Chamber's consideration of the war crime of committing acts of terrorism. In a significant analysis, the Trial Chamber described the role that gender-based crimes such as rape, sexual slavery, and forced marriage played in the RUF's ideology.²¹ The RUF used these crimes to systematically break down familial and social bonds in order to create an overarching atmosphere of submission, oppression, helplessness, insecurity, and lawlessness for the entire civilian population within the RUF-held territory.²² In other words, the Trial Chamber recognized that the war crime of committing acts of terrorism was inherently gendered in the Sierra Leone conflict.

15. RUF TJ, *supra* note 1, ¶ 1602.

16. Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Truth and Reconciliation*, Vol. 3, Chapter 3b, ¶¶ 283-98 (2004), available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf>. [hereinafter Sierra Leone TRC].

17. The Rome Statute of the International Criminal Court first codified the crime against humanity and war crime of sexual slavery. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), 37 I.L.M. 999, 1004, 1008, 1009 (entered into force July 1, 2002). For a description of this process, see Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 611-25 (2004) [hereinafter Oosterveld Sexual Slavery 2004].

18. RUF TJ, *supra* note 1, ¶¶ 158-63.

19. See AFRC TJ, *supra* note 9, ¶¶ 701-14; AFRC AJ, *supra* note 9, ¶¶ 187-203.

20. See RUF TJ, *supra* note 1, ¶ 1466.

21. See *id.* ¶¶ 1347-52.

22. See *id.*

Part III draws attention to the many ways in which the RUF judgments acknowledge the intersectionality of gender-based crimes. Specifically, the article notes how the judgments demonstrate that gender-based crimes often intersect with other crimes, including the crime against humanity of murder and the war crime of committing acts of terrorism. The judgments also illustrate how gender-based crimes, such as sexual slavery and forced marriage, can intersect with each other. Part IV concludes that the RUF judgments are notable additions to the annals of gender jurisprudence. In the Special Court's forthcoming judgment in the trial of the former President of Liberia, Charles Taylor, it will be important for the Court to build upon the RUF judgments' legal analysis. The *Taylor* judgment also presents opportunities for the Court to address questions left unanswered in the RUF discussions, for example, on the elements of rape. Additionally, the RUF judgments will undoubtedly be useful to the permanent International Criminal Court as it examines crimes of sexual violence in its cases.²³

I. Specific Prohibited Acts

A. Rape

The RUF trial judgment found that rape was widely committed during the armed conflict in Sierra Leone.²⁴ Among the warring groups, the RUF was notorious for its use of rape, including gang rape, rape with weapons and other instruments, and rape in public.²⁵ Rape became a specific tool of control and assertion of RUF power, as evidenced in the Trial Chamber's observation that "[t]he deliberate and concerted campaign to rape women constitutes an extension of the battlefield to the women's bodies."²⁶ The Chamber also reiterated the International Criminal Tribunal for the Former Yugoslavia's (ICTY) conclusion that "[r]ape is one of the worst sufferings a human being can inflict upon another."²⁷

23. The Prosecutor of the ICC has charged individuals with sexual violence in a number of cases. Two ongoing cases in which sexual violence charges have been considered at the confirmation of charges stage are: *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 339-54, 428-44 (Int'l Crim. Court Pre-Trial Chamber I Sept. 30, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (defendants charged with the crimes against humanity and war crimes of rape and sexual slavery) [hereinafter *Katanga & Chui Confirmation of Charges*]; *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Gombo, ¶¶ 159-88, 280-88 (Int'l Crim. Court Pre-Trial Chamber II June 15, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (defendant charged with the crime against humanity and war crime of rape).

24. See, e.g., RUF TJ, *supra* note 1, ¶¶ 1153, 1353-54.

25. See Human Rights Watch, *Sexual Violence*, *supra* note 4, at 26-28 (comparing the prevalence of rape and other acts of sexual violence committed by RUF forces to sexual violence committed by the Civil Defence Forces and the Sierra Leone Army forces).

26. RUF TJ, *supra* note 1, ¶ 1602.

27. *Id.* ¶ 144 (citing *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 655 (Int'l Crim. Trib. for the Former Yugoslavia Trial Chamber

In order to evaluate whether the Prosecutor proved that the three RUF accused were guilty of the crime against humanity of rape, the Trial Chamber began by setting out its understanding of the constituent elements of the prohibited act of rape:

- (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
- (iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
- (iv) The Accused knew or had reason to know that the victim did not consent.²⁸

The Trial Chamber established these elements by mixing existing international criminal justice approaches. This is perhaps not surprising, as there is no single, agreed-upon set of elements for the crime of rape under international criminal law;²⁹ rather, there are four approaches to defining the elements of rape. The *Akayesu* trial judgment in the International Criminal Tribunal for Rwanda (ICTR) was the first to delineate elements for the prohibited act of rape.³⁰ That judgment took a broad and conceptual approach, defining rape as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”³¹ A short time later, the ICTY developed a second approach in the

Feb. 22, 2001), available at <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [hereinafter *Kunarac TJ*].

28. RUF TJ, *supra* note 1, ¶ 145 (replicating the approach taken by the Trial Chamber in *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Transcript of Oral Rule 98 Decision, ¶¶ 21-22 (Special Court for Sierra Leone Trial Chamber I Oct. 25, 2006), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=XFkMHAERlnk%3d&tabid=156>. These elements are required in addition to the overarching elements required for all crimes against humanity. The transcript of the RUF Oral Rule 98 Decision does not include any explanation as to why the RUF Trial Chamber chose this particular approach to the elements of rape.

29. See, e.g., ANNE-MARIE L.M DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND ICTR 103 (2005) (discussing the negligible nature of early international legal efforts to arrive at a definition of rape).

30. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Trial Chamber Sept. 2, 1998), available at <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> [hereinafter *Akayesu TJ*].

31. *Id.* ¶ 598.

Furund_ija trial judgment.³² This approach adopted more specifically descriptive elements and required that the sexual penetration take place “by coercion or force or threat of force against the victim or a third person” as a final element.³³ In the 2001 *Kunarac* trial judgment, the ICTY surveyed national approaches to the crime of rape and decided to adopt the first portion of the *Furund_ija* approach to the actus reus of rape while changing the final portion of *Furund_ija* to focus on non-consent, rather than on coercion or force:

[T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.³⁴

Interestingly, while the ICTY Appeals Chamber upheld this consent-based focus within the rape elements, it highlighted the inherent coerciveness of wartime circumstances, noting that these circumstances will generally mean that “true consent will not be possible.”³⁵ While the practice has not been uniform, over time the *Kunarac* approach has prevailed in the ICTY and ICTR.³⁶ Additionally, Trial Chamber II of the Special Court for Sierra Leone followed the *Kunarac* approach in the 2007 AFRC trial judgment, albeit without explaining why it chose this particular approach.³⁷ The ICC’s Elements of Crimes document, described below, represents the fourth broad approach to formulating the elements of rape.³⁸

32. Prosecutor v. *Furund_ija*, Case No. IT-95-17/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Trial Chamber Dec. 10, 1998), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> [hereinafter *Furund_ija* TJ].

33. *Id.* ¶ 185.

34. *Kunarac* TJ, *supra* note 27, ¶ 460.

35. Prosecutor v. *Kunarac, Kovac & Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 130 (Int’l Crim. Trib. for the Former Yugoslavia Appeals Chamber June 12, 2002), available at <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> [hereinafter *Kunarac* AJ].

36. See, e.g., Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgment, ¶ 709 (Int’l Crim. Trib. for Rwanda Trial Chamber Jan. 22, 2004), available at <http://www.unict.org/Portals/0/Case/English/Kamuhanda/decisions/220104.pdf>; Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 345 (Int’l Crim. Trib. for Rwanda Trial Chamber May 15, 2003), available at <http://www.unict.org/Portals/0/Case/English/Semanza/decisions/index.pdf>; and Prosecutor v. *Kunarac, Kovac & Vukovic*, *supra* note 35, ¶ 128. Note that the ICTR’s Gacumbitsi appeals judgment similarly upheld non-consent as an element, but then brought in the idea of coercion: “The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible”: Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, ¶ 155 (Int’l Crim. Trib. For Rwanda Appeals Chamber July 7, 2006), available at http://www.unict.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement_appeals_070706.pdf. This was confirmed in Prosecutor v. Milutinovic et al., Case No. IT-05-87-T, Judgment, ¶ 200 (Int’l Crim. Trib. for the Former Yugoslavia Trial Chamber Feb. 26, 2009), available at <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf>.

37. AFRC TJ, *supra* note 9, ¶ 693. The SCSL’s Appeals Chamber did not address the elements of the prohibited act of rape in the AFRC appeals judgment.

38. For a detailed analysis of these four approaches see DE BROUWER, *supra* note 29, at 103–37. For an argument in favour of the *Akayesu* approach, see Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L.

The RUF Trial Chamber's first two elements of rape—the actus reus of the prohibited act³⁹—come from the ICC's elements of crime for rape,⁴⁰ with the inconsequential change of the ICC's word "perpetrator" to the Trial Chamber's preferred term "accused."⁴¹ According to the Trial Chamber, the first element defines the type of invasion of the body required to constitute the offence of rape, and includes genital, anal, or oral penetration, as well as penetration by something other than a sexual organ, (such as an object).⁴² The Trial Chamber adopted the ICC's broad, gender-neutral formulation in this element in order to capture the rape of both women and men.⁴³

The second element "refers to the circumstances which would render the sexual act in the first element criminal," or in other words, "those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act."⁴⁴ The Trial Chamber noted that the "[f]orce or threat of force provides clear evidence of non-consent," but this kind of evidence is not required to prove the second element.⁴⁵ The Chamber also noted, citing jurisprudence of the ICTY, that the circumstances prevailing in cases in which crimes against humanity or war crimes are charged "will be almost universally coercive."⁴⁶ The last part of the element is meant to capture situations where, "even in the absence of force or coercion, a person cannot be said to have genuinely consented to the act," due to age, illness, disability, or being under the influence of some substance.⁴⁷ Regarding these two actus reus elements, the Trial Chamber also observed—as did Trial Chamber II in the AFRC judgment—that "the very specific circumstances of an armed conflict where rapes on a large scale are alleged to have occurred, coupled with the social stigma which is borne by victims of rape in certain societies" may require reliance on circumstantial evidence.⁴⁸

940 (2006). The contrary argument is summarized in CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 255-56 (2d ed. 2010).

39. RUF TJ, *supra* note 1, ¶¶ 147-48.

40. Elements of Crimes of the International Criminal Court, 2000, ICC-ASP/1/3, U.N. Doc. PCNICC/2000/1/Add.2 (2000), arts. 7(1)(g)-1, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-1 [hereinafter ICC Elements of Crimes].

41. Another inconsequential change included the deletion of certain commas from the ICC's second element. Additionally, the SCSL did not replicate the ICC's footnote after the term "genuine consent" in its elements, but the SCSL referred to the content of that footnote in a footnote. RUF TJ, *supra* note 1, at 51 n.293; ICC Elements of Crimes, *supra* note 39, at art. 7(1) (g)-1.

42. RUF TJ, *supra* note 1, ¶ 146.

43. *Id.* (citing ICC Elements of Crime, *supra* note 40, at 141 n.50).

44. *Id.* ¶ 147.

45. *Id.* The SCSL made the same observation in the AFRC TJ, *supra* note 9, ¶ 694. Both cite the Kunarac AJ, *supra* note 35, ¶ 129.

46. RUF TJ, *supra* note 1, ¶ 147 (citing Kunarac AJ, *supra* note 35, ¶ 130). The AFRC TJ made the same observation. *Supra* note 9, ¶ 694.

47. RUF TJ, *supra* note 1, ¶ 148.

48. *Id.* ¶ 149. Trial Chamber II made the same observations in the AFRC TJ, *supra* note 9, ¶ 695. Both Trial Chambers followed the standard approach found in the ICTY and ICTR cases, which reiterate these points. *See, e.g.*, Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B-A, Judgment, ¶ 49 (Int'l Crim. Trib. for Rwanda, Appeals Chamber,

The Trial Chamber did not take the third and fourth elements—focused on intent and consent—from the ICC’s elements.⁴⁹ These mens rea elements require proof that “the invasion was intentional and that it was done in the knowledge that the victim was not consenting.”⁵⁰ This move away from reliance on the ICC approach, which does not include an element of non-consent,⁵¹ to inclusion of an element of consent is somewhat surprising. In the ICC negotiations on the elements of the crime, the ICC focused on forms of coercion, as opposed to non-consent, because the Court believed that “non-consent is not an element of the crime of rape when coercive circumstances are involved.”⁵² By explicitly including an element related to the accused’s knowledge of non-consent, the RUF Trial Chamber has rejected the ICC approach in favor of the *Kunarac* non-consent approach.

The non-consent element in *Kunarac* has opened a debate within the international criminal law community.⁵³ Some argue that rape and other forms of sexual violence qualifying as genocide, crimes against humanity, or war crimes occur under inherently coercive circumstances, which negate any possibility of genuine consent.⁵⁴ As MacKinnon explains,

May 21, 2007), available at http://www.unictr.org/Portals/0/Case/English/Muhimana/judgement/070521_apl_judgement.pdf.

49. See ICC Elements of Crimes, *supra* note 40 (absence of intent and consent).

50. RUF TJ, *supra* note 1, at ¶ 150. The Trial Chamber also drew attention to Rule 96 in the Court’s Rules of Procedure and Evidence which states: “In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;
- (ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of sexual nature of the prior or subsequent conduct of a victim or witness. *Id.* ¶ 151.

51. See ICC Elements of Crimes, *supra* note 40 (absence of element of non-consent).

52. 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* 184, 189 (Roy S. Lee ed., 2001).

53. See, e.g., MacKinnon, *supra* note 38; Karen Engle, *Feminism and its Dis(Content)s: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778 (2005); Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625 (2000-01); Kirsten Campbell, *The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia*, 1 INT’L J. TRANSITIONAL JUST. 411 (2007); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).

54. Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT’L L. 121, 130 (2007). “A widespread or systematic attack against a civilian population generates highly coercive circumstances.” Thus, “[a]ny sexual act that is so related to the overall context will therefore occur under coercive circumstances that rule out the possibility of genuine consent.” *Id.* at 130. See

“emphasis on nonconsent as definitive of rape views the crime fundamentally as a deprivation of sexual freedom, a denial of individual self-acting,” whereas “[e]mphasis on coercion as definitive . . . sees rape fundamentally as a crime of inequality, whether of physical or other force, status, or relation.”⁵⁵ They conclude that, at most, consent should be treated as an affirmative defence that may be raised in exceptional cases.⁵⁶ In response, others posit that presumed coercion “essentially makes consensual sexual relationships legally impossible, in some sets of circumstances” and could lead to convictions of those who could otherwise prove consent.⁵⁷ To both arguments, Campbell responds that debates concerning consent fail to address “the more problematic issue of the nature of the harm itself, namely, whether the harm is the coercive or the sexual aspect of the assault.”⁵⁸

Thus, it is certainly controversial for the RUF Trial Chamber to add an element involving the accused’s knowledge of non-consent to the ICC’s *actus reus* elements. It is interesting, however, to note that the Trial Chamber seems to have adopted an assumption of non-consent to rape, at least with respect to the invasion of Freetown in 1999: “an atmosphere of extreme violence prevailed during the attack on the Freetown peninsula, noting the lootings, burnings, amputations and killings that occurred simultaneously,” creating circumstances in which “the individuals who were forced to have intercourse were incapable of genuine consent.”⁵⁹ The Trial Chamber used a similar analysis with respect to other gender-based crimes, finding that genuine consent to sexual slavery and forced marriage was not possible, given the context of a hostile and coercive war environment.⁶⁰ The difference is that the prohibited acts of sexual slavery and forced marriage do not contain specific elements of non-consent, as do the rape elements articulated by the RUF and AFRC Trial Chambers.⁶¹

The SCSL’s Appeals Chamber did not comment in either the AFRC or the RUF appeals on the correct elements for the prohibited act of rape, and therefore it is unclear whether a prevailing approach to defining rape exists within the Special Court. It is indeed curious that the AFRC trial judgment⁶² did not explain why it adopted the *Kunarac* approach on the ele-

also DE BROUWER, *supra* note 29, at 120-24; *Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict*, ¶ 25, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998).

55. MacKinnon, *supra* note 38, at 941.

56. Schomburg & Peterson, *supra* note 54, at 139.

57. Engle, *supra* note 53, at 804. See also Halley et al., *supra* note 53, at 381.

58. Campbell, *supra* note 53, at 418.

59. RUF TJ, *supra* note 1, ¶ 1577.

60. *Id.* ¶¶ 1466, 1470-72, 1581. Inherent within the very concept of slavery is the negation of consent. See, e.g., RUF AJ, *supra* note 2, ¶ 734.

61. RUF TJ, *supra* note 1, ¶¶ 145 (elements of rape), 158 (elements of sexual slavery), 168 (elements of inhumane acts); AFRC TJ, *supra* note 9, ¶¶ 693 (elements of rape), 708 (elements of sexual slavery), 698 (elements of inhumane acts).

62. Nor did the AFRC explain in its related Rule 98 decision why it adopted the *Kunarac* approach on the elements of rape while following the ICC approach for the

ments for rape while it decided to follow the ICC approach on the elements for another crime (sexual slavery).⁶³ It is also curious that the RUF trial judgment did not explain why it departed from the approach on the elements for rape that the AFRC case first used.⁶⁴

This inconsistency is problematic for the SCSL because it could cause difficulties for the SCSL's ongoing trial of Charles Taylor. Taylor has been charged with responsibility for the crime against humanity of rape.⁶⁵ Therefore, the *Taylor* trial judgment, expected in mid-2011, will need to address the elements of the crime of rape.⁶⁶ It is unfortunate that the prosecution and defence do not have one settled set of SCSL-specific rape elements upon which to base their cases.

A comparison of the two sets of elements reveals that the RUF approach is somewhat wider— and therefore more inclusive— than the AFRC approach.⁶⁷ Both sets of elements provide for vaginal, anal, and oral penetration of the victim, however slight, by the perpetrator. However, the RUF approach also covers scenarios where a male victim is forced to use his penis for vaginal, anal, or oral penetration of a male or female perpetrator.⁶⁸ This is a noteworthy addition from the point of view of gender-sensitivity, one which seems to tip the balance in favor of adopting the RUF *actus reus*. Additionally, while the AFRC approach does cover the use of objects to penetrate victims, the AFRC approach is not as clear as the RUF approach as to whether the word “object” includes any part of the body other than the penis, such as a finger.⁶⁹ This important legal clarification

crime of sexual slavery. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 106 (Special Court for Sierra Leone, Trial Chamber II, Mar. 31, 2006).

63. AFRC TJ, *supra* note 9, ¶ 708.

64. There are no references in the RUF TJ, even in the footnotes, to the AFRC Trial Judgment's approach to rape. While different Trial Chambers decided the AFRC and RUF trial judgments, and one Trial Chamber does not bind the other, one would expect some cross-referencing between Trial Chambers in a Court focused on the prosecution of only four separate cases.

65. *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment, Count 4 (Special Court for Sierra Leone May 29, 2007), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107> [hereinafter *Taylor Indictment*].

66. The elements of the act of rape were not addressed in *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Transcript of Oral Rule 98 Decision (Special Court for Sierra Leone May 4, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=Gt0Wz4egOV0%3d&tabid=160>.

67. RUF TJ, *supra* note 1, ¶ 145; AFRC TJ, *supra* note 9, ¶ 693.

68. RUF TJ, *supra* note 1, ¶ 145. This is why the first element says, “The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body . . . of the Accused with a sexual organ. . . .” The author participated in the negotiations to draft these words in the ICC's Elements of Crime, and the inclusion of the reference to penetration of the perpetrator was deliberate. As summarized by Eve La Haye, *supra* note 52, at 188, “Being penetrated or being forced to penetrate a body with a sexual organ will amount to rape.”

69. In addition, the RUF approach differs from the AFRC approach in that the RUF approach sets out various circumstances in which penetration can occur: through force, threat of force, coercion, taking advantage of a coercive environment, or by taking advantage of a person incapable of giving genuine consent. RUF TJ, *supra* note 1, ¶ 145. The

favors the use of the RUF approach.

A second way in which the RUF approach is potentially broader than the AFRC approach is its articulation of the mens rea elements. The mens rea element of the AFRC Trial Chamber is “the intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”⁷⁰ The mens rea element of the RUF Trial Chamber is that “the Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and the Accused knew or had reason to know that the victim did not consent.”⁷¹ Both approaches require proof from the Prosecutor of intent to effect the penetration and knowledge of non-consent. However, the additional phrase in the RUF approach—“or acted in the reasonable knowledge that this was likely to occur”—also appears to create a broader mens rea standard which makes the element somewhat easier for the Prosecutor to prove. Ultimately, whether or not a substantive difference exists between the Prosecution’s ability to prove the AFRC and RUF approaches will depend on the extent to which the general principles of mens rea are understood to already include forms of indirect intent and recklessness, as well as how the phrase “had reason to know” is interpreted. If the term “had reason to know” in relation to non-consent is an objective standard, then a significant difference likely does exist between the two approaches. The RUF Trial Chamber did not address these issues with respect to its rape elements.

Trial Chamber II, the same Trial Chamber that decided the AFRC case, will issue the *Taylor* judgment. Whatever approach the Trial Chamber takes to the rape elements in the *Taylor* judgment, it should explain why it prefers that articulation of the elements. If the Trial Chamber chooses not to follow the RUF’s more clearly articulated elements,⁷² which, from the point of view of the principle of legality, are more favorable, its justificatory burden will be greater. The Trial Chamber’s legal analysis thus implicitly needs to address the possible differences between the AFRC and RUF mens rea approaches. Similarly, if the Appeals Chamber could opine, in any *Taylor* appeal, on the elements of rape, this could provide institution-wide clarity, albeit at the closure of the tribunal. The SCSL’s residual mechanism, which will be established to address post-closure issues, would likely welcome this clarity.⁷³ A clarification would also contribute to the ongoing

AFRC approach does not provide this guidance directly in the elements, but does in its elaboration on the meaning of the elements. AFRC TJ, *supra* note 9, ¶ 694.

70. AFRC TJ, *supra* note 9, ¶ 693.

71. RUF TJ, *supra* note 1, ¶ 145.

72. The *Taylor* trial is being held in front of Trial Chamber II, the same Chamber that decided the AFRC TJ (and therefore chose to follow the *Kunarac* elements). See AFRC TJ, *supra* note 9, ¶¶ 693–94.

73. The Special Court for Sierra Leone is scheduled to close in 2012. After its closure, there are a number of ongoing legal and practical obligations that a residual mechanism will continue to handle. For example, the residual mechanism will be tasked with post-closure continuation of witness protection, oversight of those accused serving sentences, and tracking of reports regarding the remaining fugitive, Johnny Paul Koroma. While Koroma is believed to be dead, if he is caught alive and turned over to the residual mechanism, then it is possible that the mechanism would transfer his case to a domestic

discussion within the international criminal law community on the elements of crime for the prohibited act of rape.

B. Sexual Slavery

The RUF trial judgment represents the first-ever international convictions for the crime against humanity of sexual slavery and of forced marriage (as an inhumane act).⁷⁴ Therefore, in the years to come, it will be viewed, along with the accompanying appeals judgment, as a milestone in international criminal jurisprudence. The International Criminal Court has charged individuals with the crime against humanity of sexual slavery,⁷⁵ and therefore the ICC will certainly examine the RUF judgments' groundbreaking convictions and the accompanying legal reasoning.

The RUF Trial Chamber began its analysis of sexual slavery by noting that the inclusion of this prohibited act, first in the Rome Statute of the ICC and then in the SCSL's own Statute, simply codified actions that were already criminal.⁷⁶ This codification was "designed to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate, and instill fear in victims, their families, and communities during armed conflict."⁷⁷

The Trial Chamber identified the elements of crimes of sexual slavery as:

- (i) The Accused 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;
- (ii) The Accused caused such a person or persons to engage in one or more acts of a sexual nature; and
- (iii) The Accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.⁷⁸

The first two elements replicate those found in the ICC's Elements of

jurisdiction. The residual mechanism would monitor the trial and appeal, and the domestic jurisdiction would likely find previous SCSL caselaw to be persuasive (including with respect to the charges relating to sexual violence). For more information on residual issues, see President of the Special Court for Sierra Leone, *Sixth Annual Report: June 2008-May 2009*, 50-51 (2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=%2fu13lqaO5D0%3d&tabid=176>.

74. The ICTY's *Kunarac* trial judgment imposed convictions for the crime against humanity of enslavement, proven using evidence of sexual violence. *Kunarac* TJ, *supra* note 27, ¶ 542. However, in the RUF trial judgment, the Special Court for Sierra Leone entered the first conviction by an international or internationalized criminal tribunal for the specifically-named crime against humanity of sexual slavery.

75. See, e.g., *Katanga & Chui Confirmation of Charges*, *supra* note 23, ¶¶ 340, 428.

76. RUF TJ, *supra* note 1, ¶¶ 154-56.

77. *Id.* ¶ 156.

78. *Id.* ¶ 158.

Crimes document,⁷⁹ with the slight change of the ICC's word "perpetrator" to the term "accused." The AFRC Trial Chamber also took this approach.⁸⁰ However, neither the RUF nor the AFRC Trial Chambers adopted the ICC's original footnote explaining the breadth of the term "deprivation of liberty."⁸¹

The RUF Trial Chamber elaborated on the meaning of the *actus reus* elements, which include a slavery element (that the accused exercised any or all of the powers attaching to the right of ownership over a person or persons) and a sexual element (that the enslavement involved sexual acts).⁸² Specifically, the Trial Chamber noted that the list of actions that reflect the exercise of a power of ownership is not exhaustive, and the Chamber adopted the list of indicia of enslavement from the ICTY's *Kunarac* trial judgment: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."⁸³ The Trial Chamber gave an example from Sierra Leone that would also fall within these indicia, in which an individual gave drugs to his forced "wife" in order to further exercise control over the victim.⁸⁴ Additionally, the Trial Chamber defined "similar deprivation of liberty" to include situations in which victims were not "physically confined, but were otherwise unable to leave as they would have nowhere else to go and feared for their lives."⁸⁵ The Trial Chamber also stated that "[t]he duration of the enslavement is not an element of the crime, although it may be relevant in determining the quality of the relationship."⁸⁶

The Trial Chamber did not break much new ground with these observations. The AFRC trial judgment had earlier found that the powers of ownership listed in the first element are non-exhaustive, consent or free will of the victim is absent under conditions of enslavement, and owner-

79. ICC Elements of Crimes, *supra* note 40, at arts. 7(1)(g)2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2.

80. AFRC TJ, *supra* note 9, ¶ 708. It is unclear why the AFRC Trial Chamber chose to follow the ICC's elements for sexual slavery but not its elements for rape. It is understandable that the Trial Chamber would follow the ICC's elements for sexual slavery for two reasons: first, the ICC's Elements on Sexual Slavery are the only such elements codified in international criminal law; and second, the Special Court for Sierra Leone's Statute included sexual slavery due to the inclusion of this prohibited act in the Rome Statute of the ICC.

81. The ICC's Elements include this footnote following the phrase "similar deprivation of liberty" in the first element: "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children." ICC Elements of Crimes, *supra* note 40, at 13 n.18, 34 n.53, 44 n.65.

82. RUF TJ, *supra* note 1, ¶ 159.

83. *Id.* ¶ 160 (citing *Kunarac* TJ, *supra* note 27, ¶ 543).

84. RUF TJ, *supra* note 1, ¶ 1463.

85. *Id.* ¶ 161.

86. *Id.* ¶ 163.

ship may cover situations where individuals are not physically confined but may remain in the control of their captors because they have nowhere else to go and fear for their lives.⁸⁷ The AFRC trial judgment also noted that payment or exchange is not required to establish the exercise of ownership,⁸⁸ nor does ownership require confinement to a particular place.⁸⁹ However, when considered together, both the AFRC and RUF trial findings help to solidify international criminal law with respect to this recently-codified prohibited act.

Unlike the previously discussed elements of rape, the RUF's sexual slavery *mens rea* element closely tracks the standard the AFRC judges adopted in their trial judgment. Under the RUF Trial Chamber approach, the *mens rea* element is satisfied if "[t]he Accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur."⁹⁰ Similarly, the AFRC Trial Chamber required that "[t]he perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur" in order to meet the element of *mens rea*.⁹¹ This is a positive development, and provides another example of how the discussion of sexual slavery in both cases has helped to elaborate the law in a unified manner.

The RUF Trial Chamber directly addressed the issue of consent as it relates to sexual slavery. The Trial Chamber emphasized "that the lack of consent of the victim to the enslavement or to the sexual acts is not an element to be proved by the Prosecution, although whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership."⁹² It also subscribed to the view, originally expressed by the ICTY, that "circumstances which render it impossible to express consent may be sufficient to presume the absence of consent."⁹³ The Trial Chamber viewed the environment in RUF-controlled parts of Sierra Leone as one in which genuine consent was not possible, characterizing the environment as "violent, hostile and coercive" and full of "uncertainty and subjugation" for women and girls abducted and made into sexual slaves or "wives."⁹⁴ The SCSL echoed this view in the AFRC trial judgment, where the Trial Chamber stated that "[t]he consent or free will of the victim is absent under conditions of enslavement."⁹⁵

87. See AFRC TJ, *supra* note 9, ¶ 709.

88. This settles a debate that arose during the ICC negotiations as to whether payment or exchange is a necessary element of sexual slavery. See Oosterveld HRR 2009, *supra* note 10, at 81; Oosterveld Sexual Slavery 2004, *supra* note 17 at 630-31, 642-43.

89. AFRC TJ, *supra* note 9, ¶ 709.

90. RUF TJ, *supra* note 1, ¶ 158.

91. AFRC TJ, *supra* note 9, ¶ 708.

92. RUF TJ, *supra* note 1, ¶ 163.

93. *Id.* (citing Kunarac AJ, *supra* note 35, ¶ 120).

94. RUF TJ, *supra* note 1, ¶¶ 1466, 1470-71. See also *id.* ¶ 1581, where the atmosphere of extreme violence and terror provided evidence that the perpetrators had knowledge that the women did not consent.

95. AFRC TJ, *supra* note 9, ¶ 709.

One of the RUF accused, Sesay, challenged this explicit exclusion of a non-consent element, arguing on appeal that the Trial Chamber had erred by creating an incorrect presumption of absence of genuine consent.⁹⁶ The Appeals Chamber disagreed, noting that consent to sexual slavery (and forced marriage) is impossible and, therefore, is not a relevant consideration.⁹⁷ The Appeals Chamber also stated that captivity alone can vitiate consent,⁹⁸ but it noted that, in any event, the Trial Chamber had correctly found, rather than presumed, an absence of consent.⁹⁹ It is worth noting that the Trial Chamber felt compelled to indicate findings of non-consent, even though non-consent is not an element of proof.¹⁰⁰

In sum, the RUF Trial Chamber did not significantly expand the earlier findings of the AFRC Trial Chamber with respect to the *actus reus* or *mens rea* elements of sexual slavery. However, by adopting an approach similar to that of the AFRC Trial Chamber and by securing the first international conviction for sexual slavery, the RUF trial judgment assisted in solidifying international law on this relatively undeveloped prohibited act. Again, this development will provide assistance in the *Taylor* trial judgment, as Taylor is also charged with the crime against humanity of sexual slavery.¹⁰¹

C. Forced Marriage (as an Inhumane Act)

The prohibited act of forced marriage is not explicitly listed in the Statute of the SCSL.¹⁰² Therefore, the Prosecutor charged forced marriage as a crime against humanity under the category of “other inhumane acts.”¹⁰³ Other international criminal tribunals, as well as the SCSL’s Appeals Chamber, have recognized a wide range of acts as inhumane, including forcible transfer, sexual and physical violence perpetrated upon dead bodies, forced undressing and public marching of women, forcing women to perform exercises naked, forced disappearances, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.¹⁰⁴ The requisite elements for proving an inhumane act are the following:

- (i) The occurrence of an act or omission that inflicts great suffering or serious injury to body, or to mental or physical health;
- (ii) The act or omission is sufficiently similar in gravity [to the other crimes against humanity listed in the SCSL’s Statute];

96. See RUF AJ, *supra* note 2, ¶¶ 729-730.

97. See *id.* ¶¶ 734, 736.

98. See *id.* ¶ 736 (recalling Furund_ija TJ, *supra* note 32, ¶ 271).

99. See RUF AJ, *supra* note 2, ¶¶ 734, 737.

100. See, e.g., RUF TJ, *supra* note 1, ¶¶ 1470, 1581.

101. Taylor Indictment, *supra* note 65, at 4 (Count 5).

102. SCSL Statute, *supra* note 1, at arts. 2-5.

103. RUF Indictment, *supra* note 5, ¶ 60 (Count 8).

104. The AFRC AJ summarizes the international case law well. *Supra* note 9, ¶ 184 and associated footnotes.

- (iii) The Accused was aware of the factual circumstances that established the character of the gravity of the act; and
- (iv) The Accused, at the time of the act or omission, had the intention to commit the inhumane act or acted in the knowledge that this would likely occur.¹⁰⁵

In this instance, the Trial Chamber's task was to evaluate forced marriage under the elements for inhumane acts, and thus it did not set out elements specifically defining forced marriage.

The Trial Chamber did, however, explain its understanding of forced marriage throughout the judgment: women and girls (some as young as ten)¹⁰⁶ forced into conjugal relationships with RUF soldiers, especially commanders, expected to have sex on demand, maintain an exclusive sexual relationship, show loyalty to their "husbands," do domestic chores such as cooking and housework, carry the husband's possessions when he was deployed, bear children, and otherwise do what their husbands instructed.¹⁰⁷ Some women and girls were abducted,¹⁰⁸ while others were forced into "marriage" "by means of threats, intimidation, manipulation, and other forms of duress which were predicated on the victims' fear and their desperate situation."¹⁰⁹ The rebels did not care whether the "wives" already had legitimate husbands.¹¹⁰ The "wives" were unable to leave their "husbands" for fear of violent retribution from the RUF or other warring parties who viewed the "wives" as RUF property.¹¹¹ Some RUF "husbands" had multiple "wives."¹¹² The "husbands" were aware of the power they held over their "wives" and knew that the wives were not consenting to the marriage or to the performance of conjugal "duties."¹¹³

The harm stemming from forced marriage is not limited to the physical and psychological effects of serving as a "wife" (for example injuries caused by rape); forced marriage carries with it "a lasting social stigma which hampers [the victim's] recovery and reintegration into society."¹¹⁴ Former RUF "wives" lived – and still live – in shame and fear of returning to their communities after the end of the conflict.¹¹⁵ Forced marriage is a continuing crime.¹¹⁶ The crime was also "so widespread throughout the Sierra Leone conflict that the concept of women being 'taken as wives' was

105. RUF TJ, *supra* note 1, ¶ 168. The first three elements are based on language adapted from the ICC's Elements for "other inhumane acts." ICC Elements of Crimes, *supra* note 40, at art. 7(1)(k).

106. RUF TJ, *supra* note 1, ¶ 1553.

107. *Id.* ¶¶ 460, 1154-55, 1211-13, 1293, 1295, 1413, 1460, 1472.

108. *See, e.g., id.* ¶¶ 1154 and 1409-10.

109. *Id.* ¶ 1468.

110. *Id.* ¶ 1412.

111. *Id.* ¶¶ 1293, 1460.

112. *Id.* ¶ 1411.

113. *Id.* ¶ 1293.

114. *Id.* ¶ 1296.

115. *Id.* ¶ 1351.

116. *Id.* ¶ 983 n.1915.

well-known and understood.”¹¹⁷

Interestingly, the Trial Chamber found that “the use of the term ‘wife’ by the rebels was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions.”¹¹⁸ Thus, forced marriage not only provided the RUF fighters with ongoing sexual access to women and household caregiving from women, it also played a central part in establishing a system of overarching control over the civilian population. For this reason, both sexual slavery and forced marriage played important roles in proving the war crime of committing acts of terrorism, as is explored in detail below.

Although the RUF trial judgment represented the first convictions for the crime against humanity of forced marriage as an inhumane act, the AFRC trial and appeals judgments explored the act of forced marriage in some detail – and for the first time in international criminal jurisprudence.¹¹⁹ The AFRC trial judgment, especially the separate concurring opinion of Justice Sebutinde and the partially dissenting opinion of Justice Doherty, provided important details about the practice of forced marriage in AFRC-controlled territory, details largely reflected and expanded upon in the RUF summary above.¹²⁰

The AFRC appeals judgment, in turn, contributed a definition of forced marriage: “a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.”¹²¹ “[U]nlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife,’ which could lead to disciplinary consequences for breach of this exclusive relationship.”¹²² The AFRC case did not result in the first convictions for forced marriage because the Trial Chamber dismissed the charge as being subsumed entirely by the crime against humanity of sexual slavery; in other words, the Trial Chamber characterized forced marriage as a sexual crime.¹²³ The Appeals Chamber overturned both the dismissal of the forced marriage count and the characterization of forced marriage as the same as sexual slavery.¹²⁴ Although the Appeals Chamber recognized that the accused were responsible for forced marriage as an inhumane act, it declined to enter fresh convictions.¹²⁵

117. *Id.* ¶ 1295.

118. *Id.* ¶ 1466.

119. See AFRC TJ, *supra* note 9, ¶ 701; AFRC AJ, *supra* note 9, ¶¶ 184, 186, 186 n.284, 187.

120. *Id.* ¶ 711, ¶¶ 13–16 (Sebutinde, J., concurring), ¶¶ 16–57 (Doherty, J., dissenting in part).

121. AFRC AJ, *supra* note 9, ¶ 195. The RUF AJ also endorsed this approach. RUF AJ, *supra* note 2, ¶ 735.

122. AFRC AJ, *supra* note 9, ¶ 195.

123. AFRC TJ, *supra* note 9, ¶ 713.

124. AFRC AJ, *supra* note 9, ¶ 195, 201–03.

125. *Id.* ¶ 202.

The AFRC trial and appeals judgments discussed the peacetime situation of Sierra Leonean women and girls. Prior to the conflict, traditional or customary marriage practice included arranged marriages.¹²⁶ These marriages were arranged by parents or family and included “the consent and participation of both parents and families” (though not necessarily of the woman or girl being married); religious or traditional ceremonies also accompanied these peacetime arranged marriages.¹²⁷ The RUF trial judgment alluded to this discussion of peacetime arranged marriage. In response to the RUF accuseds’ argument that captured and abducted women and girls “willingly consented to the alleged marriages and sexual relationships,”¹²⁸ the Trial Chamber specifically answered that “parental and family consent to the so-called marriages of these sexually enslaved and abused women was conspicuously absent.”¹²⁹ Although this observation is correct and is meant to provide a contrast between peacetime arranged marriages and wartime forced marriages, the observation is also highly problematic, as the central focus should remain on the victim “wife” and her lack of choice.¹³⁰

In the RUF trial, the accused Sesay attempted to use the AFRC trial and appeals judgments to his advantage. He argued that the Prosecutor had characterized forced marriage as a sexual crime when adding it as a count in the RUF indictment, just as the Prosecutor had done in the AFRC indictment.¹³¹ Then, Sesay argued, the Prosecutor later changed his characterization of forced marriage to an act that was not predominantly sexual in nature.¹³² Thus, Sesay argued that the defence was misled as to the material elements of the “forced marriage” charge, and that this defect was

126. *See id.* ¶ 127.

127. AFRC TJ, *supra* note 9, ¶ 11 (Sebutinde, J., concurring).

128. RUF TJ, *supra* note 1, ¶ 1469.

129. *Id.* ¶ 1469.

130. Copelon makes a similar point in reference to the ICTR’s jurisprudence on genocide and gender-based violence: “rape and sexual violence are understood as instruments of genocide based primarily on the physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community. To emphasize the reproductive impact on the community would threaten once again to reduce women to being simply the vehicles of the continuity of the targeted population. It would also tend toward a biological as opposed to socially constructed view of the identity as the value intended to be protected by the concept of genocide.” Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 McGill L. J. 217, 228 (2000). The peacetime practice of arranged marriage brings with it its own human rights concerns. Karine Belair, *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*, 15 COLUM. J. GENDER & L. 551, 566-76 (2006).

131. RUF TJ, *supra* note 1, ¶ 466. *See also* AFRC AJ, *supra* note 9, ¶¶ 181, 187-92. The court chided the Prosecutor for misleading the Trial Chamber as to the characterization of forced marriage because, in the indictment, the Prosecutor classified forced marriage under the heading of ‘Sexual Violence’ when the act contains both sexual (for example, rape) and non-sexual (for example, forced domestic duties, forced childbirth, and childrearing) aspects.

132. RUF TJ, *supra* note 1, ¶ 466.

not cured.¹³³ The Trial Chamber responded that, while the SCSL's Appeals Chamber had noted the confusion the Prosecutor caused by including the count relating to forced marriage under the "sexual violence" section of the indictment, the indictment is not required to plead the legal characterization of the crime, as long as the indictment adequately pleads the material facts underlying the offence.¹³⁴ Because the Prosecutor sufficiently pleaded the material facts relating to forced marriage in the indictment, the Trial Chamber rejected Sesay's argument.¹³⁵

The RUF trial and appeals judgments' consideration of forced marriage is valuable from both a substantive and a procedural perspective. Along with the details provided in the AFRC trial and appeals judgments, the consideration of forced marriage in the RUF judgments provides useful legal contours to the act. The Extraordinary Chambers in the Courts of Cambodia, which have charged forced marriage as a crime against humanity,¹³⁶ may find the SCSL's consideration of forced marriage useful. The International Criminal Court should also find the SCSL's consideration of forced marriage to be relevant to at least one current case in which forced marriage activity is alleged but not charged.¹³⁷ Moreover, while the ICC Statute does not contain a specifically-named crime against humanity of forced marriage, in the future, the ICC's Prosecutor may choose to charge individuals with this act through the category of "inhumane acts," as was done in the SCSL.

II. Acts of Terrorism

Thus far this article has outlined how the RUF judgments have addressed the prohibited acts of rape, sexual slavery and forced marriage, yet perhaps even more important for the SCSL's jurisprudential legacy with respect to gender-based crimes is how the RUF judgments have characterized these acts. The Trial Chamber explained that the gender-based violence that occurred in RUF-held territory was not random; rather, it was intimately linked to the larger goals and strategies of the RUF. These

133. *Id.*

134. *Id.* ¶ 467.

135. *Id.*

136. The Extraordinary Chambers in the Courts of Cambodia (ECCC) are conducting investigations into forced marriages during the Khmer Rouge regime. Prosecutor v. Nuon Chea, Ieng Sary, Ieng Thirith & Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations (Extraordinary Chambers in the Courts of Cambodia, Dec. 18, 2009), available at http://www.eccc.gov.kh/english/cabinet/courtDoc/491/D268_2_EN.pdf. Although the AFRC and RUF trial and appeals judgments describe and analyze forced marriages of women and girls and the ECCC is considering forced marriage of both men and women, the definition and examples are likely transferrable.

137. In the confirmation of charges hearing for Katanga and Ngudjolo Chui, the Prosecutor successfully introduced evidence of forced marriage to establish substantial grounds for believing that civilian women were subjected to sexual slavery. Katanga and Chui, Confirmation of Charges, *supra* note 23, ¶¶353-54 (introducing evidence from civilian women from Bogoro who were captured, raped, and bore children by their captors).

gendered “acts were not intended merely for personal satisfaction or a means of sexual gratification for the fighter.”¹³⁸ They were intended to terrorize.

In the RUF trial judgment, the Trial Chamber described the role that gender-based crimes played in the RUF’s ideology. First, the Chamber observed that “sexual violence was rampantly committed against the civilian population in an atmosphere in which violence, oppression and lawlessness prevailed.”¹³⁹ The RUF created that atmosphere and, within that atmosphere, adopted a “calculated and concerted pattern . . . to use sexual violence as a weapon of terror.”¹⁴⁰ This pattern consisted of “perverse methods of sexual violence against women and men of all ages,” including “brutal gang rapes, the insertion of various objects into victims’ genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees.”¹⁴¹ It also included the routine capture and abduction of women of all ages, regardless of their existing marital status, who were then forced into prolonged, exclusive conjugal relationships with rebels as “wives.”¹⁴²

Second, the Trial Chamber found that this gender-based violence “effectively disempowered the civilian population and had a direct effect of instilling fear on entire communities.”¹⁴³ The “savage nature” of this violence “demonstrates that these acts were committed with the specific intent of spreading fear amongst the civilian population as a whole, in order to break the will of the population and ensure their submission to AFRC/RUF control.”¹⁴⁴ To ensure such submission, the RUF fighters “not only abused, debased and isolated the individual victim,” but “deliberately destroyed the existing family nucleus” by relying on the stigma associated with sexual violence in Sierra Leonean society to ensure that “[v]ictims of sexual violence were ostracised, husbands left their wives, and daughters and young girls were unable to marry within their community.”¹⁴⁵ In so doing, the RUF reinforced terror and helplessness by demonstrating that the male members of the civilian community “were unable to protect their own wives, daughters, mothers, and sisters.”¹⁴⁶ In turn, this destruction of family nuclei undermined “the cultural values and relationships which held the societies together.”¹⁴⁷ With these actions, the RUF fighters intended to inflict physical and psychological injury on the entire civilian population¹⁴⁸ by “perpetuating a constant threat of insecurity that per-

138. RUF TJ, *supra* note 1, ¶ 1348.

139. *Id.* ¶ 1347.

140. *Id.*

141. *Id.* (footnotes omitted).

142. *Id.* ¶ 1351.

143. *Id.* ¶ 1348. *See also id.* ¶ 1351 (referring to the pattern of sexual enslavement as a “deliberate system intended to spread terror”).

144. *Id.* ¶ 1348.

145. *Id.* ¶ 1349. *See also id.* (referring to the RUF’s “calculated consequences” of sexual violence).

146. *Id.* ¶ 1350.

147. *Id.* ¶ 1349.

148. *Id.*

vaded daily life and afflicted both women and men.”¹⁴⁹

The Trial Chamber concluded its analysis by finding that “rape, sexual slavery, ‘forced marriages’ and outrages on personal dignity, when committed against a civilian population with the specific intent to terrorise, amount to an act of terror.”¹⁵⁰ The Chamber also found that the evidence showed that members of the AFRC/RUF regularly committed these acts “as part of a campaign to terrorise the civilian population of Sierra Leone.”¹⁵¹ The Appeals Chamber upheld this finding.¹⁵²

The Trial Chamber’s analysis not only identifies gender-based violence as a crucial tool in creating an atmosphere of terror, but also demonstrates the importance of viewing the prohibited acts both within and outside the confines of the specifically-named prohibited act. In other words, the Prosecutor proved that rape, sexual slavery, and forced marriages occurred and successfully linked the RUF accused to these acts. In so doing, the Prosecutor and Trial Chamber “surfaced”¹⁵³ these acts as very serious crimes that occurred during the Sierra Leonean armed conflict. Additionally, the Prosecutor and Trial Chamber reflected on the effect of those “surfaced” crimes on the entire civilian population and found that the crimes were absolutely central to terrorizing that population. By doing both – looking closely at individual acts and looking more widely at patterns and overarching effects – the Prosecutor and Trial Chamber more deeply explained the actual role and consequence of gender-based violence than if they had only examined the individual acts.

One other result of this “pattern and effects” analysis is that the SCSL made the role of gender-based violence directed against men somewhat more visible in the RUF judgments than in its other judgments.¹⁵⁴ While the Prosecutor restricted the pleading of the specific counts related to sexual violence to such violence directed against women,¹⁵⁵ the Court found

149. *Id.* ¶ 1350. The Trial Chamber included a footnote to this sentence indicating that “the Prosecution restricted its pleading of sexual violence in the Indictment to crimes against women.” *Id.* n.2519.

150. *Id.* ¶ 1352.

151. *Id.* The Trial Chamber then held that the Prosecution proved beyond a reasonable doubt the charges related to the war crime of committing acts of terrorism in relation to sexual violence and forced marriage. *Id.* ¶ 1356. In contrast, the AFRC Trial Chamber found that “the primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs . . . even where sexual slavery occurred simultaneously with other acts of violence.” AFRC TJ, *supra* note 9, ¶ 1459. The RUF approach, which takes an overarching and more nuanced view of the patterns and effects of sexual violence, is the preferable approach.

152. RUF AJ, *supra* note 2, ¶ 990.

153. Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S LJ. 243, 247 (1994).

154. The Trial Chamber also noted instances of sexual violence directed against men in the Civil Defence Forces case, but did not overtly recognize this evidence as falling within a larger context of terror. CDF TJ, *supra* note 11, ¶¶ 496, 520.

155. RUF TJ, *supra* note 1, n.2519. These counts were: the crime against humanity of rape, the crime against humanity of sexual slavery, the crime against humanity of other

that this defect was cured,¹⁵⁶ and therefore, the Court was able to consider evidence of gender-based violence directed against men in evaluating the war crime of committing acts of terror. The RUF case contained substantial evidence of gender-based violence—which included, but was not limited to, sexual violence—directed against men and boys.¹⁵⁷ For example, in Tomandu, the RUF divided the civilians into groups of men and women. The men were told to remove their shirts, and a rebel carved “RUF” into their backs and arms.¹⁵⁸ In Bomboafuidu, male and female civilian captives were paired up and ordered to have sex with each other, and the rebels slit the sexual organs of both male and female captives.¹⁵⁹ In Sawao and Penduma, the rapes of multiple women were committed alongside the killing or limb amputation of men.¹⁶⁰ In Kenema Town, rebels urinated on witness TF1-129 when he lay, beaten, in the trunk of a van,¹⁶¹ and he was forced to undress and stand in a corner of a building overnight.¹⁶² More generally, the Trial Chamber noted that the RUF especially recruited and used young boys as soldiers because of their loyalty to the movement, ability to effectively conduct espionage and other hazardous activities, and their lack of fear in killing human beings.¹⁶³ Additionally, the Chamber recognized the harm caused by the RUF fighters forcing a husband to watch the rape and subsequent death of his wife.¹⁶⁴ This wider lens on the role and effects of gender-based violence directed against men and boys is welcome, as such violence has previously been marginalized in international criminal jurisprudence.¹⁶⁵ However, the RUF consideration of gender-based violence directed against men and boys represents only the beginnings of such an analysis; the *Taylor* judgment will hopefully go forward with this analysis in a more concerted fashion. In sum, the RUF trial judgment made noteworthy inroads into demonstrating that a seemingly gender-neutral crime – like the war crime of committing acts of terrorism – can, in fact, be inherently gendered. In doing so, the RUF judgment sets an important precedent for gendered “pattern and effects” analysis, which should assist the *Taylor* judgment and, in the future, the International Criminal Court.

inhumane acts, and the war crime of outrages upon personal dignity. RUF Indictment, *supra* note 5, ¶¶ 54–60.

156. RUF TJ, *supra* note 1, ¶¶ 1304, 1308. This discussion occurred in the section focused on the war crime of outrages upon personal dignity, but it seems to apply more widely.

157. See, e.g., *id.* ¶¶ 1194, 1207, 1208, 1210.

158. *Id.* ¶ 1210.

159. *Id.* ¶¶ 1207, 1208, 1307.

160. *Id.* ¶ 1354.

161. *Id.* ¶ 1051.

162. *Id.* ¶ 1067.

163. *Id.* ¶ 1616.

164. *Id.* ¶ 1347.

165. This aspect has been ignored for too long. See Sandesh Sivakumaran’s plea for more attention in *Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict*, 92 INT’L REV. RED CROSS 259, 276–77 (2010). See also Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EURO. J. INT’L L. 253 (2007).

III. Intersectionality

The ICTY and ICTR have both recognized that gender-based crimes can intersect with other acts prohibited under the international crimes of genocide, crimes against humanity, and war crimes. For example, the ICTR's *Akayesu* trial judgment held that rape could be considered to cause serious bodily or mental harm to the group and, therefore, could be a constituent aspect of genocide.¹⁶⁶ Additionally, the *Akayesu* judgment noted the close connection between sexual violence directed against Tutsi women and killing.¹⁶⁷ In *Kunarac*, the ICTY's Appeals Chamber stated that sexual violence amounts to torture (whether charged as a crime against humanity or war crime) because sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental.¹⁶⁸ In the ICTY's *Tadić* trial judgment, sexual mutilation and forced performance of male-on-male oral sex intersected with other mistreatment, all of which the ICTY categorized as the crime against humanity of inhumane acts.¹⁶⁹ In the *Niyitegeka* trial judgment, the ICTR found the accused responsible for the castration, killing, and decapitation of a man; the ICTR also categorized these intersected acts as the crime against humanity of inhumane acts.¹⁷⁰

The RUF trial judgment similarly reiterated the fact that the crime against humanity and war crime of rape often intersected with other crimes during the Sierra Leonean conflict. For example, the RUF regularly raped women who were forced to carry loads in the Guinea Highway area of Koidu in 1998.¹⁷¹ In Sawao, rape was accompanied by abduction, forced portering, beating with sticks and gun butts, and sexual mutilation.¹⁷² In Penduma, public gang rape was used alongside forced separation from family and murder.¹⁷³ In Bumpah, rape happened alongside forced nudity and public humiliation: a rebel ordered a captured civilian couple to have sexual intercourse in front of other captured civilians and then forced the man's daughter to wash her father's penis.¹⁷⁴ In Bomboafuidu, the RUF rebels forced captured civilians to undress and have sex with one another and then sexually mutilated the captives.¹⁷⁵

In another example of intersectionality, the Trial Chamber considered instances of sexual slavery and forced marriage to be intertwined within RUF-controlled territory, and therefore, the Trial Chamber analyzed the

166. *Akayesu* TJ, *supra* note 30, ¶¶ 688, 731.

167. *Id.* ¶ 733.

168. *Kunarac* AJ, *supra* note 35, ¶ 150.

169. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 206 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

170. *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶¶ 459-67 (International Criminal Tribunal for Rwanda, Trial Judgment, May 16, 2003), available at <http://www.unict.org/Portals/0/Case/English/Niyitegeka/judgement/index.pdf>.

171. RUF TJ, *supra* note 1, ¶ 1153.

172. *Id.* ¶¶ 1180-85.

173. *Id.* ¶¶ 1191-95.

174. *Id.* ¶ 1205.

175. *Id.* ¶¶ 1207-08.

supporting evidence together.¹⁷⁶ In this author's view, by considering sexual slavery and forced marriage together, the Trial Chamber better recognized the actual context of the Sierra Leonean conflict, in which victims were often subjected to both prohibited acts, or the sexual slavery and forced marriage occurred in the same time and place but against different women and girls.¹⁷⁷ The Trial Chamber explained how the crime against humanity of sexual slavery intersected with forced marriage: "it was common practice for [RUF] rebels to keep captured women subject to their control as sex slaves and to force conjugal relationships on women who unwillingly became their 'wives.'"¹⁷⁸ The RUF Trial Chamber found, in certain areas of Sierra Leone, a "consistent pattern of conduct"¹⁷⁹ in which perpetrators intended to subject women to both sexual slavery and forced marriage.¹⁸⁰

Why is recognition of intersectionality of—and among—gender-based crimes important? First, in the context of Sierra Leone, it reaffirms the findings of the Sierra Leone Truth and Reconciliation Commission. The Commission documented a wide range of abuses against men, women, boys, and girls. With respect to girls and women, for example, the Commission explained that acts such as abduction, forced recruitment, bodily mutilation, detention, forced displacement, forced labour, assaults and beatings, torture, forced drugging, killing, amputation, and forced cannibalism often intersected with acts such as the disembowelment of pregnant women, rape, sexual slavery, and other forms of sexual abuse.¹⁸¹ Second, exploration of intersectionality better captures the diverse nature of gendered harms in an armed conflict.¹⁸² The analysis of the war crime of

176. *Id.* ¶¶ 1291-97, 1459-73, 1581.

177. Of course, this approach could also be critiqued for potentially blurring the lines between the two acts. This happened in the AFRC trial to such an extent that a majority of the Trial Chamber incorrectly dismissed the forced marriage charge as being completely subsumed by the sexual slavery charge. AFRC AJ, *supra* note 9, ¶ 195. A related concern is that the evidence supporting a conviction for each act must be clear, and consideration of sexual slavery and forced marriage together might make it unclear as to which evidence supported which conviction. In this author's view, this was not necessarily a problem within the trial judgment. While the Trial Chamber did tend to alternate between discussions of sexual slavery and forced marriage, in the end the evidence in support of each charge appeared to be clear.

178. RUF TJ, *supra* note 1, ¶ 1465.

179. *Id.* ¶ 1293.

180. *Id.* ¶¶ 1294-96. Similarly, for joint findings of sexual slavery and forced marriage, *see id.* ¶¶ 1461, 1463. "The Chamber further finds that Superman exercised the rights of ownership over TF1-093 by virtue of this exclusive conjugal relationship with the victim." *id.* ¶ 1463.

181. Sierra Leone TRC, *supra* note 16, ¶¶ 208-317.

182. Several reasons account for this. First, there is a tendency for crimes of sexual violence directed against women to be "treated as of secondary importance." Copelon, *supra* note 130, at 234. Thus, an intersectional understanding of the crimes brings to the forefront and reinforces the fact that these crimes are of primary importance. This can make a difference in the penalty imposed and, outside of the context of the international or internationalized criminal tribunal, can affect the larger cultural understanding of violence against women. *Id.* Second, the naming of sexual violence within a particular category "determines the nature of the harm that the court recognizes." Campbell, *supra* note 53, at 425. Thus, intersectionality allows gender-based violence (and not

committing acts of terrorism is, at its heart, an intersectional analysis. By first examining evidence concerning rape, sexual slavery, and forced marriage and then constructing a picture of the overall patterns and effects of these acts, the Trial Chamber more fully captured the ways in which the RUF terrorized Sierra Leonean civilians.¹⁸³

Conclusion

The Special Court for Sierra Leone's most recent judgments—those in the RUF case—have not been widely examined within international criminal law circles. This article argues that the RUF trial and appeals judgments contain important jurisprudence on gender issues that requires a closer look. This article began by examining how the RUF Trial and Appeals Chambers analyzed the crimes against humanity of rape, sexual slavery, and forced marriage. While the trial judgment explained how the RUF used rape to bring the battlefield to women's and men's bodies, the Trial and Appeals Chambers missed opportunities to clarify the elements of crimes for rape. In contrast, the trial and appeals judgments helped to solidify the elements of crime for and interpretation of sexual slavery. For forced marriage, the RUF judgments provided useful detail on this inhumane act and explained its role within the RUF's ideology.

Arguably, the most important contribution of the RUF judgments to gender-sensitive jurisprudence came in the Trial Chamber's analysis of the seemingly gender-neutral war crime of committing acts of terrorism. Here, the Trial Chamber undertook a nuanced, gender-sensitive, and intersectional analysis, which revealed the central role that rape, sexual slavery, and forced marriage played in the RUF's assertion of brutal, violent control over the civilian population of Sierra Leone.

The RUF trial and appeals judgments will serve as important guidance for the discussion of the rape and sexual slavery charges in the Special Court's final trial judgment in the case of Charles Taylor. The *Taylor* judgment will be able to answer some questions—for example, regarding the elements of crime for rape—that the RUF judgment did not. Similarly, surely the ICC will consider the RUF judgments in its present and future cases involving gender-based violence. It would be a most fitting legacy if all of the international and internationalized criminal tribunals applied the RUF's example of intersectional “pattern and effects” analysis when addressing all seemingly gender-neutral crimes.

only sexual violence) to be named in a number of ways. Finally, to paraphrase MacKinnon, *supra* note 38, at 944, intersectionality recognizes in law what rape (or sexual slavery or forced marriage, for example) was in life: a constituent act of genocide, a form of torture, a form of terror. It is closer to the actual reality—the totality—of what the victim experienced.

183. The patterns of gender-based violence also helped prove both the systematic and widespread aspects of the overarching elements of crimes against humanity. RUF TJ, *supra* note 1, ¶¶ 956, 959, 962.